12th ICN ANNUAL CONFERENCE

SPECIAL PROJECT

Working with Courts and Judges

Warsaw, April 2013

Introduction

The role of the judiciary in developing, enforcing and interpreting competition law around the globe is significant. Judges have a tremendous influence on the shape of competition policy as they are entitled to review and change decisions issued by competition authorities (hereinafter "authorities").

For that reason in 2011 the ICN Steering Group decided to initiate a project the aim of which would be to analyse the state of relations between judges and national competition authorities and identify the areas of tension. The Polish Competition Authority (the Office of Competition and Consumer Protection, UOKiK) volunteered to lead the "*Working with courts and judges*" project and to present it at the 12th ICN Annual Conference as the host's special project. The initial phase of the project, which was concluded by the approval of the *High Level Issue Paper* by the ICN membership at the 11th ICN Annual Conference, was co-led with the Chilean Competition Tribunal.

As the second step, an extensive questionnaire was prepared and circulated to the ICN members. The submitted responses provided information about procedures used when a competition decision is being appealed. The input provided valuable information about courts and judges dealing with competition cases as well as about legal systems in different jurisdictions. Participants of the survey also described how they draft decisions and how they defend cases in courtrooms. Special attention was paid to the use of economic evidence. Moreover, authorities were asked to indicate the problematic areas when communicating with judges.

The purpose of the document is to provide an overview of the judicial review process and the range of tools and methods that are used by the ICN Members to improve their standing with the judiciary and promote competition rules. This document was drafted in order to share worldwide approaches to dialogue with the judiciary. The paper does not recommend one approach over another. Rather it is meant to serve as a reference for competition authorities looking to advance their current approaches.

The document is comprised of two parts. The purpose of the first one, the Executive Summary, is to present in a nutshell three main issues, i.e. decision drafting techniques; economic evidence; and dialogue with courts and judges - as well as to put forward some questions to be addressed during the 12th ICN Annual Conference in Warsaw this year. The second one, the Collective Summary, contains collected and processed responses from the 46 National Competition Authorities taking part in the survey.

UOKiK would like to express its gratitude to all ICN Members that provided responses or input to the project. We would like to address special thanks to the drafting team for their excellent work and great effort.

The “Working with Courts and Judges Project” will be discussed during the first day of the 12th ICN Conference in Warsaw. Hopefully the results of the discussions will determine how we may further address this important issue and find effective ways in which competition authorities can apply such knowledge to their daily cooperation with the judiciary.

Thank you and we look forward to welcoming you to Warsaw!

Working with Courts and Judges
SPECIAL PROJECT FOR 12th ICN ANNUAL CONFERENCE

EXECUTIVE SUMMARY

I. Drafting and presenting authority's decision

Who drafts the decisions

In nearly all of the jurisdictions participating in the survey, decisions are drafted in teams comprised of lawyers and economists. In some jurisdictions, the composition of teams is fixed, whereas in others they are formed on a case-by-case basis. Teams are also often supported by other employees of the competition authority, for example sector or field specific employees who either were, or were not involved with the initial investigation and drafting of the statement of objections.

In some jurisdictions a number of alternative methods are used for drafting decisions, for example rather than all drafting the decision together, one member may take the lead with input from other members, or each member may be responsible for a certain field, such as legal argumentation, economics or financial decisions. In one authority, although initially the case handlers/competition experts drafted the decision, decisions are now principally drafted by a specialized drafting team. The reason for establishing this drafting team was the need to simplify the process and create decisions which were more understandable for the general public.

In some jurisdictions, decisions are drafted by the ultimate decision makers. For example, at one authority, the decision is drafted by one of the commissioners, with significant consultation with and input from other commissioners. The commissioner assigned to draft the opinion often relies on assistance from one or more attorneys in the Office of General Counsel and/or from the commissioner's own office.

There are generally two forms of surveillance within most competition authorities. The first is carried out by the management team, starting with the project manager, with the director being finally

responsible for the decision, and ending with the board. The second is generally some form of internal or external review and devil's advocate process carries out by colleagues and/or external consultants.

In other jurisdictions, the case team takes the lead in decision drafting. One authority details a drafting process which many other responding authorities also institute. This process may be loosely explained as follows: decisions (and other internal/external documents) are drafted by case teams, comprised of one or several case handlers (generally a mix of economists and lawyers) these are then reviewed by case managers/team leaders/rapporteurs and (where possible) supported by a case secretary. The case team is responsible for the comprehensive research of the facts and their accurate rendition in the decision/work product. The case team is also responsible for the timely implementation of all procedural steps.

The work of the case team is often then coordinated by a case manager who provides advice and guidance when needed especially by assisting with identifying the key issues and setting the line of the case. The case manager also ensures liaison with the upper echelons of the authority - with participation from the case team when necessary. Where these documents originate in the competition department, the case teams are often also supported by the authority's Legal Service and Chief Economist's team.

The departmental head generally provides support by: contributing know-how during the initial assessment phase; ensuring soundness and consistency during the case assessment phase; and supporting the case team in its presentation of the case to the board/chairperson/commissioner and assisting with communication (and where necessary communicating with) external stakeholders.

During the drafting of a decision, management generally checks to ensure that the key issues have been properly outlined and analyzed, that the decision is coherent and consistent with past decisions and the authority's own goals and precedents have been correctly followed.

The second form of scrutiny, as outlined above, generally involves some form of internal debate and may also include external advice. Decisions are, for example, often analysed by specialized lawyers and economists from outside the case team in order to review the relevant facts and key underlying evidence. Such analysis also serves to highlight to the case team and the relevant decision maker(s) the legal and/or economic risks associated with the proposed course of action. It may also serve to

increase the readability of the decisions. In some instances, authorities may seek advice from external counsel for these matters.

Nearly all participants of the survey confirmed that the employees responsible for drafting the decisions are provided with trainings on the legal and economic developments. The trainings may take very different forms, for example some authorities have regular internal trainings, either run by their own staff, or by external specialists; while others also provide external trainings, either through professional institutions, or by sending their staff on exchange to better established authorities.

In one jurisdiction, officials even have to pass an exam which tests whether they have continued to educate themselves and kept abreast of developments in the field. This test must be taken every six years in order to retain their job.

Who are decisions drafted for

Decisions are drafted in order to remedy the challenged anticompetitive conduct consistent with the authorities' goals, in most cases this is to ensure healthy competition and resultant benefits for consumers. To achieve this goal, decisions need to be coherent, transparent and precise, clearly stating legal and economic arguments that serve as the basis for the decision.

In all responding jurisdictions, the authority decision is subject to challenge. Naturally, in order to be of use, such decisions must stand up in court. Competition authorities generally consider how a judge is likely to respond to a decision when drafting their pieces. In order to stand up in court, authorities consider language, legal requirements, precedents and previous experience. Competition authorities generally explain in some detail the facts considered, the evidence relied on and the legal and economic analysis the conclusions are based on, always keeping in mind that each decision adds to the already existing legal precedent and serves as a deterrent to prevent others from violating the antitrust laws.

While all authorities consider precedents relevant to the case, one jurisdiction commented that it is also useful to pay particularly close attention to the previous rulings of the specific judge likely to hear the decision. In this way, one can improve on the areas where the judge had ruled against the authority in the past. These approaches require a careful analysis of previous decisions.

In order to learn from past experience, the Legal Department of at least one authority writes a synopsis of the judgment and an accompanying legal opinion on every judgment issued by the

national courts. This is also done for important judgments of the regional courts. These legal opinions focus on the lessons to be learned from each judgment, which are then distributed among the officials of the authority. Moreover, every year some authorities analyse all case law of the foregoing year to compare and contrast the verdicts and to signal any new or emerging trends or topics. These efforts have resulted in a clear insight into the level of judicial review with a focus on what judges find important. This makes it easier to decide on a case by case strategy in order to moist effectively influence and convince judges.

Another authority mentions that greater coordination both internally (between different units of the organization) and externally (with the State Bar) has improved decision-making and its defense at trial. However, an even greater coordination with the State Bar can improve the current situation.

Although probably not possible in all jurisdictions, one authority sometimes organizes informal meetings with judges who have scrutinized its past decisions and discuss these decisions in detail. These meetings provide both parties with a great opportunity to exchange views and experiences. This authority also invites judges to participate in its conferences, which enables judges to improve both their knowledge of competition law and economic-based knowledge.

Language used

The vast majority of the competition authorities taking part in the survey answered that their decisions are drafted in a language that can be understood by non-specialists. Most authorities are conscious of their position vis-à-vis the general public and their decisions are therefore guided by clarity and are thus more readily accessible to non-specialists. In this way, authorities are fulfilling their goals of utilizing the economic or judicial analysis and potential advocacy contained in its decisions to further the spread of healthy competition.

Within some authorities cooperation between either the case team and the legal service, or the drafters and other specialists within the authority, provides an extra level of scrutiny in order to guarantee that the economic and legal analysis are drafted in a way that is comprehensible for non-specialists.

An interesting solution when technical language seems practically unavoidable is to describe the economic or judicial reasoning in accessible language, with the more technical aspects reserved for an appendix, such as already occurs in at least one jurisdiction.

It is interesting to note that only one authority actually has a "Best practices for expert opinions", which also includes guidance on how to present the facts and analysis, including the tip that expert opinions must be comprehensible to a non economist audience. While another jurisdiction maintains an internal glossary of specialized terms which non-economists may find difficult or inaccessible and suggests that these be explained or a plainer alternative used in the final decisions.

At the same time, as one authority notes, naturally precision and accuracy should never be sacrificed in favor of accessibility to non-experts.

Electronic templates and Checklists

More than two thirds of respondents to the survey indicated that they either use electronic templates and/or have internal guidelines on drafting decisions. In most cases, it depends on the type of case and therefore the type of decision. However, in many cases guidance on economic elements is not included. Many countries naturally use previous decisions and the improvements on them as templates for new decisions.

For reasons of legal certainty, clarity, precision, protocol or uniformity, in most jurisdictions, decisions must comply with formal rules. To that end some of the larger authorities utilize manuals of procedures which provide guidance on the different steps of competition procedures as well as Modules, Checklists and Templates to be used during the drafting phase. Some authorities complement this with substantive guidelines on specific economic issues, such as horizontal merger guidelines.

In quite a few countries templates contain the different titles and subtitles of the different parts of the decisions. This is a helpful way to structure the decisions. In one jurisdiction, the authority provides templates for economic models which might be useful once the market has been defined.

Guidance for the setting of fines

In most jurisdictions participating in the survey regulations on the setting of fines exist. Some authorities noted that formal guidance (i.e. ministerial guidelines) may be supplemented by internal guidelines on the specific methods of calculation. Ministerial guidance may include general criteria, on which to base the fine, such as the seriousness of the infringement; importance of the harm done to the economy; the duration of the offence; the economic situation of the relevant market and/or firms involved; recidivism and other aggravating – or mitigating circumstances; and role in the

offence. Quite a few jurisdictions mentioned their fining guidelines as an excellent tool which helps them to draft decisions. One authority noted that its notice on the method of setting fines is so transparent that it allows for a step by step tracking of the fining process. While not all authorities possess such guidelines, many newer authorities are in the process of drafting these.

The authorities that do possess such guidelines generally noted that while the method of calculation is often stipulated, there is no guidance on presenting those methods in the decisions. In fact, only one authority stated that it does have a manual (Best practices for expert economic opinions) which includes guidance on how to present facts and analysis.

One responding authority withdrew its policy statement on fines finding the practical effect was to create an overly restrictive view of the authority's options for equitable remedies. The authority relies instead on existing case law to guide its use of disgorgement and restitution remedies, and evaluates the unique circumstances of each case through that framework.

Economic evidence

All authorities report that they rely, to some extent, on economic evidence. Its use is driven by pragmatic rather than legal factors: in most jurisdictions there is no legal obligation to rely on economic evidence in all cases. Economic models and empirical analyses are used to properly substantiate competition authorities' positions. The usefulness of economic evidence varies, depending on the context. It is likely to be most relevant for merger and abuse of dominance cases, or – in general – for restrictions whose effect (as opposed to object) is to restrict competition. It is especially useful where analysis of market conditions and likely effects of undertakings' behavior is decisive for the final judgment and a lack of proper economic evidence could undermine authorities' conclusions. The decisions which are ultimately drafted using economic evidence to describe the actual effects on the market as a result of anticompetitive conduct naturally lend themselves better for use in civil actions. *Per se* infringements (e.g. cartels), on the other hand, may be less demanding in terms of economic evidence.

Most authorities indicate that economic evidence is admissible on general grounds. Just as in the case of other types of evidence, some restrictions may apply to the type of permissible evidence due to the need to ensure its reliability. In particular, admissibility of expert economic evidence in court proceedings may be subject to various tests, aiming to exclude irrelevant or unreliable expert testimony. The most comprehensive test used by the judiciary incorporates the so called *Daubert* criteria, which take into consideration whether: i) the expert's knowledge will be helpful for the court

to decide the case; ii) the expert's testimony is based on sufficient facts or data and is the product of reliable principles and methods; and iii) whether these have reliably been applied to the facts of the case. Similar criteria may also be used by authorities in their administrative proceedings. However, to date only a few authorities have issued guidelines outlining best practices in presenting economic evidence, aimed at ensuring that evidence presented by the parties to the proceedings maintains appropriate methodological standards and is presented in a way that allows it to be easily understood and verified by courts. A small number of authorities is in the process of preparing such guidelines. Other arrangements used to ensure that economic evidence is properly explained include i)internal review of draft documents; ii) integrating internal economic experts with case teams; and iii) ensuring that a manageable number of cases where advanced economic evidence is used exists. These factors, especially when taken together, help to make sure that the economic reasoning is properly explained to the courts. In one jurisdiction, specialized competition inspectors check for the admissibility of economic evidence contained by any report, these specialists are distinct from those assigned to the investigation team.

The internal economic experts of most authorities may also participate in the judicial review process. They may appear before courts (for example, if the parties to the proceedings submit economic evidence to support their positions, the economic experts will often be called upon to help refute this evidence), however a majority of cases do not require their presence. It is much more common for internal economists to participate in the preparations for the hearings, helping prepare the case or defense and coaching lawyers on pertinent economic issues. There are, however, authorities, whose economic experts neither participate in the judicial review process, nor assist with the drafting of the litigious side of the case, as they are prohibited from doing so.

Most authorities do not rely on external economic experts, though many of them retain the possibility of calling on them. The reasons for not appointing external experts, as indicated by some authorities, may be budget constraints on the one hand and/or sufficient in-house expertise on the other. External economic experts may be called on if they possess specific expertise in the industry under investigation or if particular empirical research is required for the investigation. Interestingly, one of the authorities does routinely hire such experts to testify at trial.

The courts seem to take a similar approach – even though in most jurisdictions they may appoint economic experts, they use this possibility sparingly. Although a substantial number of jurisdictions exists where courts do not appoint economic experts at all.

Improving the quality of decisions

As it was mentioned above, generally there two forms of scrutiny, the first one is carried out by the management team and the second is generally some form of internal or external review. Following completion of the first draft of a decision, internal peer reviews are regularly used in order to play devil's advocate, as the drafters may otherwise not have enough distance from their own piece. One authority stated that this is done in a very structured way, and experience has shown that the quality of decisions has improved in the process.

Another way in which (at least) one authority increases the quality of its decisions is to take case handlers responsible for the investigation of anticompetitive conduct and for drafting the decisions to court hearings. The intention is that this will give them a better idea of the kinds of questions a judge will ask, allowing them to better anticipate those questions during their investigations and when drafting their decisions.

One authority retains a senior research officer specialized in legal arguments and procedural law issues who reviews all of the authorities' proposed fining decisions in order to check for consistency. The authority notes that this has improved consistency considerably.

One authority mentions that it has taken to including more graphs, charts and figures in the decision, for example to show the relationship among market participants. In another jurisdiction, greater coordination both internally (between different units) and externally (with the judiciary) has improved not only decision making and drafting, but also defense at trial.

Many authorities monitor all competition related decisions which affect their jurisdiction, in particular by analyzing the decision with an eye to the wider implication for the decisional practice of the authority. Anything of note is then included either in lunch time debates, at regular team meetings and/ or, where appropriate, in guidance material.

II. Dialogue with courts and judges

Types of interaction

Interaction between authorities and courts and judges may be either formal or informal. Informal interaction takes place in the context of conferences, seminars and trainings, as well as on a bilateral

basis. Institutional interaction takes place in the context of the review/amendment of competition law or in the context of a civil trial.

In the majority of jurisdictions, judges partake both in public and private conferences/ trainings/seminars devoted to competition. These events may be held at various levels: national, regional or international. The judges may participate either as speakers or as attendees. Sometimes they prefer the status of observers in order to preserve their independence. One authority indicated that only judges belonging to a specialized competition court are invited to take part in such events.

Some authorities indicated that judges in their countries attend conferences infrequently or do not attend at all. The main reasons for such abstinence are lack of time, lack of resources, no specific budget for training, relatively low number of competition cases to justify attendance, insufficient command of the English language, a lack of interest in broadening knowledge of competition issues, and/ or a perceived need to preserve independence.

In some jurisdictions, interaction between authorities and courts may also occur in the process of a judge's education. For example, one competition authority has arranged for the addition of a competition law course for federal judges in their National Magistracy School.

In some other jurisdictions there is no direct interaction in the context of bilateral or roundtable discussions between courts and authorities regarding either the enforcement of the law or its review. This may again be caused by the desire to safeguard the independence of the judiciary. In the countries where the direct dialogue does occur, it generally takes the form of informal meetings organized to discuss past decisions and exchange experience, or to discuss common managerial aspects regarding procedure, such as the inflow of new cases and current matters in upcoming cases. For example, the president of one of the authorities visits the presidents of the courts involved in order to raise awareness of the specific issues related to competition cases.

With regard to discussions concerning law enforcement and review, institutional interaction between authorities and courts is foreseen in less than half of the jurisdictions. In the instances where it does occur, the discussions may take place on a bilateral basis (direct discussions, joint seminars) or in the framework of public consultations addressed specifically to the judiciary or to a broader range of recipients (and even the public at large).

In a few jurisdictions, there are no provisions providing for specific cooperation between courts and competition authorities. When such cooperation is foreseen, it often relates to consultation by the courts with the authorities in cases where the authority is not a party to the proceedings.

In some jurisdictions, the courts are obliged to provide authorities with adopted judgments. Furthermore, they may address requests for information, documents, factual or legal clarifications or even conduct an investigation and file a report with the authorities. Interestingly, while in one jurisdiction a court must give the authority the opportunity of being heard, in another, the court has the duty to refer the case to the authority for an expert report.

Amicus Curiae

The majority of respondents indicated that the authorities have the right to submit their opinion/an *amicus curiae* brief to the courts either on the authority's own initiative or at the court's request. The responses received indicated that *amicus curiae* briefs help the courts to better understand both generic competition issues and matters affecting competition in specific industries. One of the specific circumstances that has led competition authorities to submit *amicus curiae* briefs is the risk of incoherence in the application of the competition provisions. One authority indicated that, subject to the court's permission, it may present an oral opinion.

III. Sources of tension identified in the relationships between authorities and courts

Many respondents indicated that authorities and courts do interact in various forms and on multiple occasions and that this interaction does not raise any specific issues. In some jurisdictions, the relationship is benefited by the fact that the courts are specialized to deal with competition cases.

Appeal Procedures

However, some authorities did state that the above mentioned reluctance of judges to participate in trainings negatively affects the cooperation between authorities and courts and judges. Another form of tension stems from the appeal procedure. For example: courts reviewing the authority's decisions have the tendency to review the case anew without giving sufficient consideration to what the authority has decided, moreover, they sometimes lack sufficient understanding of the economic context in complex cases. Authorities may therefore feel that the courts are more focused on the formal rather than the substantial aspects of the case. In these cases, it may occur that the courts reduce fines without providing a clear reasoning for doing so.

Leniency Issues

Another cause for tension identified by some authorities, was the requirement to transmit information on request of civil and criminal courts. This obligation is sometimes problematic as it may have a chilling effect on leniency applications, especially when disclosure of information from on-going cases is related to criminal proceedings.

IV. Conclusion

The outcome of the survey conducted within the project proves that the scale of problematic tensions between authorities and the judiciary is not as significant as might have been initially expected. However, it should be kept in mind that the findings only reflect the situation in the countries that responded to the questionnaire (one third of the ICN members).

In general, it should be underlined that there is a high awareness of the need to maintain good relations with courts. At the same time in many jurisdictions judges do not deny the necessity to talk about competition law with the authorities responsible for its enforcement. Results of the survey provide an interesting catalogue of possible interactions between authorities and the judiciary. Moreover, they provide insight into authorities' experience with respect to the usage of economic evidence, decision drafting processes and presenting an authority's views in the courtroom.

According to the original concept of *"Working with courts and judges"* the project will be continued after the 2013 ICN Annual Conference by the Advocacy Working Group. The material gathered so far indicates possible directions in which this exercise may develop in the future. We hope that the plenary and break-out conference sessions will provide even more food for thought.

The Polish Competition Authority, as organizer of this Special Project, counts on fruitful discussions during the Conference. We encourage you to get acquainted with the Collective Summary of responses in order to obtain a better view of the specifics of cooperation between courts, judges and authorities. The summary is roughly divided into the topics specific to the break-out sessions to be held on 24th April 2013.

For the purpose of preparation to the *"Working with courts and judges"* sessions we are presenting a number of questions which may serve as food for thought and good starting points for the debates:

- *How far should cooperation between authorities and courts go? How close is too close – are there methods of cooperation that should be perceived as inappropriate?*
- *Taking into consideration the perceived need for separation of powers, should there be a limit to the cooperation between authorities and courts?*
- *Are some kinds of dialogue between authorities and courts that are more efficient than others?*
- *What methods and techniques should be used to effectively explain complex competition issues to judges – how do parties get the message across?*
- *What actions can your competition authority take to promote the knowledge of competition law and economics among the judiciary? How to help judges understand economic issues? How to help economists understand legal issues?*
- *What types of economic evidence have been persuasive in court? What types of evidence was rejected by the courts?*
- *Keeping in mind the increasing "economization" of competition law should courts already think to create special economic divisions?*
- *What should be the limits on judicial review and how free should the judges be to disagree with the competition agencies and set aside their determinations?*

APPENDIX

Working with Courts and Judges Project

Summary of responses collected

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I. GENERAL ISSUES

1. The appeal procedure

1.1. *Administrative and prosecutorial system*

In most of the countries participating in the survey competition proceedings are performed according to rules of **administrative system.** That mainly, but not exclusively, concerns countries with civil law system: BELGIUM, BRAZIL, BULGARIA, COLOMBIA, CROATIA, CYPRUS, CZECH REPUBLIC, FRANCE, GERMANY, GREECE, THE NETHERLANDS, HUNGARY, ITALY, JAPAN, LATVIA, MAURITIUS, NORWAY, PAKISTAN, POLAND, PORTUGAL, ROMANIA, RUSSIA, SLOVAKIA, SPAIN, SWITZERLAND, TAIWAN. TURKEY, the UK. The EUROPEAN UNION competition enforcement system is also one where the EUROPEAN COMMISSION investigates and decides the case by administrative decision.

In THE NETHERLANDS, besides the administrative procedure, provisions of the Dutch Competition Act: Article 6 on anti-competitive agreements (similar to Article 101 TFEU) and Article 24 on unilateral conduct (similar to Article 102 TFEU), can also be applied in civil-law procedures (so-called civil enforcement of Dutch competition law). There are approximately 30 of these procedures a year, which are mainly concerned with the application of the Dutch Competition Act in vertical trade cases. Recently, follow-on damages claims are also subject to the review of a civil judge, but this is much less common. In MAURITIUS, in cases where a person against whom a decision has been taken fails to implement that decision, enforcement should be made through the courts. In NORWAY instead of making a decision in the case, the Competition Authority may choose to report an infringement to the police. The police may fine companies and/or physical persons. If the decision by the police is not accepted, the Public Prosecutor (the police) has to bring the case before a court. The police may also charge persons, and the court may decide on imprisonment. In Japan, the Japan Fair Trade Commission JFTC can issue the administrative order (the cease and desist order or surcharge payment order) to an enterprise for its anticompetitive behavior by without any proceeding in the court.

In numerous countries competition law procedure has **double nature – administrative and prosecutorial,** depending on subject of the proceeding. For example in DENMARK and FINLAND Competition Authorities may take enforcement decisions, while financial fines can be imposed only by courts. In ZAMBIA and ZIMBABWE if a matter is of criminal nature it is not proceeded by Competition Authorities, if the case has civil nature it is decided by CAs. In ISRAEL violations of the law may be subject to criminal prosecution at the District Court. In addition, the Israel Antitrust Authority's ("IAA") General Director has been recently empowered to impose administrative sanctions (fines) for violations of the law. In the U.S.,two federal agencies, the Federal Trade Commission (FTC or Commission) and the US Department of Justice (DOJ), share responsibility for enforcing the federal antitrust laws. The FTC is an administrative body that uses an administrative system. In addition, both the FTC and the DOJ may bring civil lawsuits in a federal district court to enjoin and seek remedies for anticompetitive behavior. The DOJ also may prosecute criminal cases in court to punish perpetrators of certain types of anticompetitive practices. State governments, private companies, and individuals also may bring civil antitrust cases in state and federal courts. In all of these cases, only the courts may issue final decisions that impose sanctions or remedies. In KENYA, the Competition Act also provides for both systems. Section 38 provides for administrative system in which the Authority may at any time during or after an investigation into an alleged infringement enter into a settlement agreement with the company concerned. This agreement may include an award of damages to the complainant or any amount proposed as a pecuniary penalty. Section 77 gives the Authority right of appeal to the High court against any decision of the Tribunal.

In PAPUA NEW GUINEA if a matter is of a criminal nature, the competition agency is empowered to prosecute right away in some cases but in other cases, it either seeks the consent of the Office of the Public Prosecutor to prosecute or the Commission can conduct the prosecution itself after consent is given. But if the case is of a civil nature, then the Commission can institute civil proceedings seeking remedies for contraventions of the competition law. Such remedies can be pecuniary penalties, injunctions, damages, divestiture of assets or shares.

BARBADOS, CANADA, CHILE, FIJI, NEW ZEALAND, SWEDEN have **prosecutorial system**. In SWEDEN the general principle is that the Swedish Competition Authority must bring an action before a court in order to impose fines on a company. It may, however, order a company to pay a fine if the Authority considers that the material circumstances regarding the infringement are clear and the company consents to the order. A special procedure is foreseen in NEW ZEALAND's law. As an alternative to, or in conjunction with, court proceedings the Commerce Commission can seek a 'cease and desist' order to restrain anticompetitive conduct or to require a person to do something to restore competition in the market. Cease and desist orders are not made by the Commerce Commission itself. After conducting an investigation into the alleged conduct, the Commerce Commission must apply to a Cease and Desist Commissioner who is specially appointed for the sole purpose of hearing cease and desist applications. The Commissioner must act independently of the Commission in making these orders. A cease and desist order is deemed to be a determination of the Commerce Commission that is subject to appeal to the courts. Cease and desist orders can be made if: on the face of the evidence there is a prima facie case of conduct that breaches the Commerce Act, and it is necessary to act urgently to prevent serious loss or damage to a particular person or consumers, and in the interests of the public. Cease and desist orders have not been widely used. Only one cease and desist order has been sought since the regime was introduced in 2001 and the parties reached a settlement which removed the need for the order.

1.2. *Instances of judicial review*

According to the answers submitted by the countries participating in the survey there might be 1 to 3 instances of judicial review.

BELGIUM, BRAZIL, BULGARIA, CYPRUS, CZECH REPUBLIC, DENMARK, FINLAND, GREECE, THE NETHERLANDS, ITALY, JAPAN[1], KENYA, LATVIA, MAURITIUS, POLAND, PORTUGAL, ROMANIA, SWITZERLAND, SLOVAKIA, SPAIN, the U.S., TAIWAN, TURKEY and ZIMBABWE are jurisdiction where the rule of **two instance** appeal is in force.

There are two instances in DENMARK but different courts are involved, depending on nature of the case. Administrative decisions can be appealed to the Danish Maritime and Commercial Court, further appeal can be heard in the Supreme Court. Prosecutorial decisions are reviewed first by the High Court. Any further appeal cannot proceed to the Supreme Court unless the parties are granted leave to appeal by the Danish Appeals Permission Board. Leave to appeal is only granted if the case is of fundamental importance.

Decisions of GERMAN Bundeskartellamt can be appealed in two instances (Higher Regional Court in Düsseldorf and then the Federal Court of Justice in Karlsruhe). In the case of fines proceedings, the situation differs. If an order of the Bundeskartellamt imposing a fine in an antitrust or cartel case is appealed against, the Bundeskartellamt first examines whether the order must be changed or revoked (intermediate proceedings). If the Bundeskartellamt decides not to change its decision and the complaints are substantiated, the authority then transfers the file to the public prosecutor. Upon review, the Düsseldorf public prosecutor's office will submit the case to the Düsseldorf Higher

[1] In Japan, Administrative hearing procedure is adopted. The enterprises who are dissatisfied with the orders issued by the JFTC cannot appeal to the court directly. After the hearing procedures as internal procedure of the JFTC, the enterprises can appeal to the Tokyo High Court asking for revocation of the JFTC' decision.

Regional Court and assume the function of prosecuting authority. The Bundeskartellamt`s fines decision is transformed into the writ of prosecution. As such, it is not subject to review as a decision. The Bundeskartellamt is represented at all hearings, both in court and at the public prosecutor's office. The procedural law in these appeal cases is complemented by the German Code of Criminal Procedure (Strafprozessordnung). The procedural rights and safeguards for the companies are thus more or less equivalent to those applied in criminal law.

In ITALY apart from regular procedure in the decisions' review, the interested parties may challenge the Competition Authority (ICA) decision by filing an extraordinary appeal to the President of the Republic within 120 days from the date of notification, as provided by Section 8 of Presidential Decree n. 1199 of November 24th 1971. It is worth noting that if, on the one hand, the extraordinary appeal allows for a longer term for the interested parties to challenge the ICA's decision, on the other hand, it deprives them of the possibility of appealing the judgment before a higher court.

In FRANCE it is different for antitrust matters and merger control. In the first case the decisions issued by the Competition Authority may be challenged within one month from their notification before the Paris Court of Appeal, which has exclusive jurisdiction to assess actions brought against Autorité's decisions. The Paris Court of appeal has a full power of review on facts and points of law. An action against the judgment of the Paris Court of Appeal on points of law may be brought within one month from its notification before the Judicial Supreme Court, the Cour de cassation. In case the Cour de cassation annuls in full or in part the judgment of the Court of appeal, it remands the case to it, with another composition. For mergers there is only one instance: the decisions issued by the Autorité may be challenged before the Administrative Supreme Court, the Conseil d'Etat, which may review them on facts and points of law. Its decision is final.

In the U.S. legal system. FTC administrative decisions can be appealed to one of the 12 regional U.S. Courts of Appeal. Antitrust cases filed in federal court by the FTC, DOJ, a state government, or private parties are tried and decided by a federal district court. The losing party has the right to appeal a final district court decision to the U.S. Court of Appeals in the circuit in which the district court is located. The losing party in the Court of Appeals may ask the Supreme Court to review a Court of Appeals decision. In criminal antitrust cases brought by the DOJ,, the defendant may appeal a guilty verdict, but the DOJ may not appeal if a defendant is found not guilty.

In CANADA the judicial appeals process varies for Reviewable Matters, Criminal Matters and Misleading Representation Matters. (a) Reviewable Matters: Competition Tribunal orders (whether final, interlocutory or interim) may be appealed by either party to the Federal Court of Appeal as if they were final judgments of the Federal Court; however, questions of fact may only be appealed with leave from the Federal Court of Appeal. Decisions may be further appealed, with leave, to the Supreme Court of Canada. (b) Criminal Matters: Decisions rendered by criminal courts are subject to the ordinary criminal appellate procedure set out in Canada's *Criminal Code*. In particular, decisions made by provincial courts of criminal jurisdiction can be appealed to the provincial appellate courts and then to the Supreme Court of Canada. Similarly, decisions made by the Federal Court can be appealed to the Federal Court of Appeal and then to the Supreme Court of Canada. Appeals on factual questions may only be brought with leave from the relevant appellate court. Moreover, leave is generally required for all appeals to the Supreme Court of Canada. In this regard, it is worth noting that leave is granted infrequently by the Supreme Court of Canada, with the Court hearing only approximately 90 cases per year. To obtain leave, cases must raise significant public or legal issues of national importance. (c) Misleading Representation Matters: The procedure for appealing decisions or orders made in respect of Misleading Advertising Matters varies according to the forum of the challenged decision. In particular: Appeals from Competition Tribunal or Federal Court orders (or decisions declining to grant an order) may be brought in the Federal Court of Appeal and then in the Supreme Court of Canada. Appeals from orders issued by provincial superior courts may be appealed to provincial appellate courts and then to the Supreme Court of Canada.

In SWEDEN **one** instance appeal is possible if the fine is decided by court. **Two instances are possible** to appeal against a fine order issued by the Swedish Competition Authority.

Three instances of judicial review are foreseen for CAs' decisions from BARBADOS, FIJI, HUNGARY, NEW ZEALAND, NORWAY, the UK, ZAMBIA. In RUSSIA there might be even **four** instances.

Only one instance of appeal is possible for the parties dissatisfied by decisions issued in CHILE, PAKISTAN, PAPUA NEW GUINEA[2]. In PAKISTAN in case of decisions made by single member or officer of CCP, an appeal may be submitted to the Appellate Bench of CCP within thirty days of the Order. In case the Order is passed by two or more Members of the CCP or the Appellate Bench of the CCP, an appeal can be filed before the Competition Appellate Tribunal against such Order within sixty days of the communication of the Order. In case a person is aggrieved by an order made by the Competition Appellate Tribunal, appeal may be preferred to the Supreme Court of Pakistan within sixty days from the dated of the Order.

In ISRAEL judgments of the Antitrust Tribunal or the District Court (in criminal cases) may be appealed to the Supreme Court. There are some types of administrative decisions which are subject to direct review by the High Court of Justice (at the Supreme Court).

In COLOMBIA there is **no possible appeal**, but legislation of the country provides an action of nullity and reinstatement of rights, which gives 2 possible instances to carry out the process: The first will be a first instance court "juzgados administrativos" or "tribunal daministrativo" (administrative judges) and the second instance will be a Superior Court "Consejo de Estado".

The longest standing appellate system is in U.S. It has been functioning for over 100 years, JAPAN introduced its system in 1947, EUROPEAN UNION – 1952, GERMANY - 1958, NEW ZEALAND-1986, SPAIN – 1989, GREECE – 1991. In the remaining countries the systems are relatively new, having mainly been established in the last 10 years, in many cases this is because the competition authorities and related legislation have only been in existence for 10 years. In HUNGARY[3], PORTUGAL, TAIWAN and TURKEY they have been recently changed.

1.3. *Courts and judges dealing with competition cases*

BARBADOS, BRAZIL, BULGARIA, CYPRUS, CROATIA, CZECH REPUBLIC, DENMARK, EUROPEAN UNION, FIJI, GREECE, HUNGARY, JAPAN, KENYA, LATVIA, MAURITIUS, NEW ZEALAND, NORWAY, PAPUA NEW GUINEA, POLAND, ROMANIA, RUSSIA, SLOVAKIA, SPAIN, TAIWAN, the U.S. and ZIMBABWE replied that there are **no specialized courts** for reviewing competition cases. However, in courts of many of those countries there are **chambers dedicated to administrative and commercial cases, including competition matters.** For example in BULGARIA the judges in the Supreme Administrative Court are divided into compartments. Competition matters are reviewed by only one unit that also reviews cases of other regulators. In ITALY and JAPAN special courts do not formally exist but there are specific chambers dealing with competition cases either exclusively or with other regulatory cases concerning the litigation of public administration. In PAPUA NEW GUINEA there is a commercial track in the National Court that deals specifically with complaints of a business or commercial nature under which competition cases are dealt with.

[2] However, in Papua New Guinea an aggrieved party can ask for leave to apply for judicial review in the National Court. Upon a successful leave application, then the judicial review proceedings continue. The aggrieved party can further appeal to the Supreme Court if it is not satisfied with the decision of the National Court. The Supreme Court is the final court of appeal/review.

3 Although the appellate system has not been changed on the merits in Hungary recently, a new organisational system has been introduced regarding to the court structure. As from 1 January 2013, administrative and labour courts are operating on the basis of the organisational system of the previous labour courts, as first instance courts for reviewing decisions of the GVH.

In GREECE the Greek Competition Law (article 33) provides for the creation (via Presidential Decree) of specialist chambers in the Athens Administrative Court of Appeal for the review of competition cases. Such a presidential decree has not yet been issued and thus competition cases may still be judged by any of the general chambers of the Court. In practice, however, all appeals are judged by four specific chambers of the Athens Administrative Court of Appeal, a system which essentially allows judges serving those chambers to specialize in competition law.

In TURKEY until the amendment (June 5, 2012) of Article 55 of the Competition Act, a special division of Council of State dealt with competition cases. Chamber No. 13 was in charge of hearing the files related to the Competition Act. Along with the competition cases, the Chamber is also responsible for cases related with telecommunications law, capital markets law, banking law, privatization law, etc. With the amendment of June 5, 2012, suits against administrative sanctions of the Competition Board shall be filed before the administrative courts. Administrative courts, like the Chamber No 13 of the Council of State, are not limited to dealing with only matters of competition law, they deal also with other areas.

In THE NETHERLANDS the District Court of Rotterdam is an ordinary court whose Administrative Chamber has been granted exclusive jurisdiction to rule economic administrative law. The Appeals Tribunal, meanwhile, is an administrative high court with jurisdiction in administrative decisions relating to specific rules and regulations for trade and industry. Both courts have developed considerable expertise in competition law over the years, making them specialised courts.

BELGIUM, CANADA, COLOMBIA, CHILE, FINLAND, GERMANY, ISRAEL, PAKISTAN, PORTUGAL, SWEDEN, SWITZERLAND, the UK, and ZAMBIA are the countries where **special courts/chambers exist**. In GERMANY and SWEDEN appeals in competition cases are dealt with by specialized courts/chambers in both instances. In other countries only first instance of cases' review is performed by specialized bodies, however the second instance very often also presents a certain level of specialization. For example in the UK at the Court of Appeal (the second instance of review), there is not a separate set of judges specifically for competition cases, but appeals are heard by the Civil Division and it is open to the Court of Appeal to include on the panel of judges a judge with competition experience, and they often seek to do so. In Chile review of the TDLC´s (specialized court) decisions is carried out by the Third Chamber of the Supreme Court. The Third Chamber of the Supreme Court does not only review TDLC´s decisions, but also decide on a range of administrative and constitutional issues.

In FRANCE the situation is regulated **differently for different types of procedures.** For antitrust matters there is chamber 5-7 in the Paris Court of Appeal specifically dedicated to economic regulation litigation from the telecom, financial and post sectoral regulators and from the Autorité. It is currently comprised of three judges. Within the Cour de cassation, the commercial chamber is competent to review judgments delivered by the Paris Court of Appeal. It has jurisdiction on all aspects of commercial law. For merger control the litigation section of the Conseil d'Etat deals with the actions brought against decisions issued by the Autorité. It is competent for all administrative law. The litigation section of the Conseil d'Etat is subdivided into 10 subsections which are each composed of 15 members. Three subsections intervene particularly in economic regulation; the third of there subsections is in charge of reviewing merger control decisions.

In GERMANY the courts are **dedicated exclusively to competition matters**. In the other countries the courts deal with administrative (including sector regulators) and constitutional issues, intellectual property and consumer protection law. For example in BELGIUM the Chamber of the Court of Appeal of Brussels hears the appeals against decisions by the sector regulators for telecom, postal services, electricity and gas, and by the Benelux Office for trademarks.

In CHILE the TDLC is a court composed of five judges (named Ministros): a lawyer who presides and four professionals, two of whom must be lawyers, and the other two economists or with postgraduate studies in economics. The Chairman of the TDLC must be a lawyer with a **prominent**

professional or academic background in competition, economic or commercial matters and must have, at least, 10 years of professional experience. In fact, both the TDLC judges and professional staff are specialized in competition law.

In most of the countries participating in the survey (BARBADOS, BELGIUM, BRAZIL, BULGARIA, COLOMBIA, CYPRUS, CZECH REPUBLIC, DENMARK, FIJI, FRANCE, GERMANY, GREECE, THE NETHERLANDS, HUNGARY, ITALY, KENYA, LATVIA, NEW ZEALAND, NORWAY, PAPUA NEW GUINEA, PORTUGAL, SLOVAKIA, SPAIN, SWITZERLAND, TAIWAN, TURKEY, the U.S., ZIMBABWE and also in the EU Court of Justice) judges **neither specialize in competition nor necessarily have an economic background**.

They gain experience by dealing with competition matters. In BRAZIL since 2008, Economic Law is part of the content of the public exam to become a judge. In FRANCE judges at the Conseil d'Etat, which decides appeals in merger cases, receive **initial training** in law and economics. In BARBADOS as there is no specialist court or other system available the judges apparently are not required to have specialized knowledge. However there have been initiatives aimed at educating the judges in this specialized area. In recent times it appears that the judiciary is keen to delegate cases to judges who may have some knowledge or interest in such specialist areas.

Training on competition/economic issues is provided to judges in BULGARIA, CZECH REPUBLIC, FRANCE, GERMANY, THE NETHERLANDS, MAURITIUS, PAKISTAN, PORTUGAL, ROMANIA, SPAIN, SWEDEN, SWITZERLAND, the UK and ZAMBIA. In some of the countries it is a **continuous practice**, e.g. in THE NETHERLANDS the District Court of Rotterdam has established an Expert Centre for Financial and Economic Law, which organizes courses and training for judges (from Rotterdam or other courts) on the legal and economic issues related to competition law. In ROMANIA judges are obliged by law to attend training sessions, workshops organized by Superior Council of Magistrature, including on competition issues. Judges are also offered the chance to develop their expertise through practice. It is important to add that before the Romania's accession to the EU, the judges were involved in different activities within the Twinning Projects where Competition Council was beneficiary. Those activities consisted of seminars, roundtables and study visits at the European Commission, the competition authorities of Germany and Italy, and also at the European Court of Justice. It can be said therefore that those activities contributed to a better understanding of the specific concepts and principles related to competition law and European jurisprudence. In order to develop competition law knowledge among the judiciary, the RCC, in partnership with the Bucharest Law University set up the Center for studies in competition law. The Center provides training for law students and incentives for the promotion of scientific research in competition law. In SPAIN the Judicial School, under the General Council of the Judiciary, undertakes a training plan for Spanish judges, since 2003 which includes, among other courses of action, Legal-Economic Studies.

In others countries trainings are **occasiona**l, e.g. in LATVIA in Latvian Judicial Training Centre, in 2009 and 2010 there was project "Baltic judicial training on competition law. Similarities and differences in law" implemented by the EUROPEAN COMMISSION and SFL under which the workshops was led also by the staff of Competition Council.

Very often **the number of judges deciding in competition cases depends on the instance the case is dealt in or on the complexity of it**. Usually judgments are issued by a panel of judges/judges and experts. Competition cases in first instance can be handled by a **single judge** in BARBADOS, CANADA (criminal courts, both the provincial and federal level) COLOMBIA, DENMARK (prosecutorial decisions, district court), FINLAND (Market Court in some situations), HUNGARY, KENYA, NORWAY, PAPUA NEW GUINEA, POLAND, PORTUGAL, ROMANIA, the U.S.

In most of the countries panels consist **exclusively of judges**. Yet, is also possible to nominate **external experts (expert witnesses).**

In FINLAND and the UK competition law cases in the first instance of appeal are decided by **judges together with experts** in competition, business, economics, and financial affairs. In the U.S. at the

district court level the judge often resolves both factual and legal issues in civil competition cases, but in criminal cases brought by the DOJ, a jury (a panel of six to twelve lay jurors) issue a verdict. Members of the jury are selected randomly from the entire voting population, without regard for any special expertise. In NEW ZEALAND the court's expertise can be supplemented by the addition of a 'lay member'. When the High Court hears an appeal of a Determination of the Commerce Commission (as opposed to when the Commerce Commission brings proceedings against a party for a contravention of the Commerce Act) there must be at least one lay member present to constitute a sitting of the High Court. In other cases, the High Court, on its own discretion or on the application of one of the parties, may appoint lay members to assist the Court. Lay members are appointed by the Governor General and are chosen for their knowledge or experience in industry, commerce, economics, law or accountancy. In CANADA the Competition Tribunal is comprise of up to six judicial and up to eight other (lay) members. Judicial members are judges of the Federal Court, a court of record with a limited mandate to apply federal legislation, who have been appointed by the Governor in Council (Government) on recommendation by the Minister of Justice. Lay members are appointed by the Government after mandatory consultation with an Advisory Council[4]. **Lay members provide expertise based on their individual backgrounds in economics, business, accounting, marketing and other relevant fields**[5]. In ISRAEL Competition cases are decided by a panel of court members (3 people): a judge and two public representatives. The Minister of Justice is in charge of the appointment of the public representatives, of which at least three are representative of consumer organizations, three are representatives of economic organizations and no more than a third are state employees.

1.4. *Case-law*

In most of the countries participating in the project, judges deciding in competition cases refer to existing case law.

In Europe there is a prevalence of civil law systems, where case-law in principle is not binding. However, in practice courts **follow judgments of the Court of Justice of the European Union** and of higher courts in their countries. Such was indicated by: BELGIUM, BULGARIA, CROATIA, CYPRUS, DENMARK, FINLAND, FRANCE, GREECE, THE NETHERLANDS, HUNGARY, ITALY, LATVIA, NORWAY, PORTUGAL, ROMANIA, SLOVAKIA, SPAIN, SWEDEN. According to answers submitted by those countries this group is not homogenous in terms of obligations to interpret the law in the light of previous judgments of the Court of Justice. E.g. in BELGIUM the Court of appeal of Brussels deciding the appeals is **not bound** to interpret competition law by reference to a body of case law, but the ruling in the judgments of the General Court and the Court of Justice of the EU are generally followed, as are judgments by higher courts in other EU Member States interpreting the EU competition law. Whereas in FRANCE case-law constitutes a **source of law** and originates either from the Cour de cassation, the Conseil d'Etat or from the Court of Justice of the EU, when they apply the EU law concurrently with national law.

[4] The Governor in Council may establish an advisory council to advise the Minister with respect to appointments of lay members. This council is to be composed of not more than ten members who are knowledgeable in economics, industry, commerce or public affairs and may include, without restricting the generality of the foregoing, individuals chosen from business communities, the legal community, consumer groups and labour. Once an advisory council has been established, consultations with it are mandatory.

[5] The Competition Tribunal currently requires lay members to possess: a post graduate degree in industrial organization economics, business, commerce or finance **or** a professional qualification in business, accounting or law **or** extensive business related experience as a senior corporate executive, senior academic or senior public servant **and** an understanding of economics, markets and financial statements.

The EUROPEAN COMMISSION provided an answer, in which it is indicated that the Court of Justice of the European Union is not bound by its own decisions. This being said, decisions of the Court are often regarded as establishing law that should be applied in later disputes[6]. Moreover, the Court regularly refers to its previous case law as a reference for interpreting competition law ("as this court has consistently held" and "it is well established case law that").

In the CZECH REPUBLIC there is a possibility to refer to **the case law which comes from practice** of administrative courts. However, the judge is not obliged to refer to the case-law during the decision process. In GERMANY the established case law of the Federal Court of Justice forms an **important focal point and guidance** in interpreting the law, judges may deviate from preceding case law in individual cases.

BRAZIL, CHILE, POLAND, RUSSIA, SWITZERLAND, TAIWAN, TURKEY and ZIMBABWE are states where the judiciary **uses its own previous experiences** when dealing with competition issues as reference for case interpretation, although these are mainly civil law countries. CANADA and SWITZERLAND indicated that the judiciary is bound to apply its own case-law. In ISRAEL the District Court and Antitrust Tribunal are bound by the precedents of the Supreme Court. It is common for the District Court and Antitrust Tribunal to cite previous decisions by other instances.

In KENYA, MAURITIUS, NEW ZEALAND, PAPUA NEW GUINEA, the U.S., the UK and ZAMBIA the courts are bound to apply and interpret competition law with reference to **a body of case law as there are common law or hybrid law systems.** E.g. in MAURITIUS there is mixture of French and English law. Decisions taken by English and French Courts create binding **precedence**. Some of these countries do not yet have enough of their own experience, therefore they must seek guidance in other judiciaries' experience. E.g. in ZAMBIA there are few cases on competition law and thus the bulk of the jurisprudence is from the English Common law legal system, which Zambia is bound to follow by virtue of the principle of *stare decisis*. Therefore, the Competition & Consumer Protection Commission makes these cases available to the court in the form of submissions.

Some countries indicated that judges refer to decisions made by courts in **other but similar jurisdictions**. E.g. in PAPUA NEW GUINEA courts are expected to interpret competition law by reference to a body of case law, primarily in the local jurisdiction (which at this stage does not have enough of its own experience) and then in similar jurisdictions such as AUSTRALIA, NEW ZEALAND, ENGLAND. Decisions from AUSTRALIAN courts are viewed as persuasive by NEW ZEALAND courts because of the similarities between the AUSTRALIAN and NEW ZEALAND competition legislation. Decisions from the US.. and the EUROPEAN COMMISSION courts, on the other hand, are not readily transferable to NEW ZEALAND because of the differences between their competition legislation and the Commerce Act, although they remain instructive. Also in BARBADOS it is presumed that there will be a heavy reliance on the EU law, the U.S. law and relevant case law from other common law jurisdictions where jurisprudence has been developed. In PAKISTAN although it is not binding on the Appellate Authority, the Appellate Bench of CCP, the Competition Appellate Tribunal and the Supreme Court do take into account the case-law of **mature foreign jurisdictions** in the domain of Competition Law which *inter alia* include the case laws from the U.S. and the E.U.

In FIJI and COLOMBIA judges **do not refer to case-law**.

2. The scope of review

2.1. *Aspects of review*

In the majority of the jurisdictions participating in the survey, courts can review cases on **both** factual and legal aspects. That is the case for: BARBADOS, BELGIUM, BRAZIL, BULGARIA, CHILE, COLOMBIA, CROATIA, CZECH REPUBLIC, DENMARK, EUROPEAN COMMMISSION, FIJI, FINLAND, FRANCE,

[6] See, for example, Case 283/81 CILFIT v Ministry of Health [1982] ECR 3415.

GERMANY, GREECE, THE NETHERLANDS, HUNGARY, ISRAEL, JAPAN, KENYA, LATVIA, MAURITIUS, NEW ZEALAND, NORWAY, PAPUA NEW GUINEA, PAKISTAN, POLAND, PORTUGAL, ROMANIA, RUSSIA, SPAIN, SWEDEN, SWITZERLAND, TAIWAN, TURKEY, ZAMBIA.

In some of these countries **only first instance appeals are based on both aspects.** In the courts of second instance only legal aspects are reconsidered. Such a situation was indicated in responses submitted by BULGARIA, CYPRUS, the EUROPEAN UNION, FRANCE, GERMANY, PORTUGAL, SPAIN, SWITZERLAND and TAIWAN. Moreover, in GERMANY **the Federal Court of Justice (the second instance) may refer the case back to the Higher Regional Court (first instance) if the facts should be reassessed or complemented.** In HUNGARY **the judge will only refer back cases when any of the conditions of Article 339/B of Act III of 1952 on the Code of Civil Procedure on the lawfulness of the GVH's decision are not met.** These conditions are preserved when the administrative body has properly investigated all the circumstances of the case, observed the procedural rules, the aspects of discretion can be determined and the reasoning of the decision enables an evaluation of the reasonability of the discretion applied to the evidence.

In SLOVAKIA, according to the Code of Civil Procedure, courts are empowered to propose and weigh new evidence as well as modify the sanction that was imposed by an administrative body. The courts tend to review the whole decision on both the facts and law.

In JAPAN courts review cases on both aspects, however Article 80 of the Anti-Monopoly Act ("AMA") refers to a "substantial evidence" test, that is **findings of fact made by the JFTC shall, if established by substantial evidence, be binding upon the court in regard to the suit.** In addition, Article 81 of the AMA also stipulates that **an enterprise can submit new evidence** to the court only in cases where the JFTC failed to adopt the evidence without justifiable grounds or where it was impossible to submit the evidence at the hearings of the JFTC, and there was no gross negligence on the part of the party in failing to submit such evidence.

In the UK decisions of Competition Commission in merger and markets cases can be reviewed by the CAT only on judicial review grounds, whereas OFT's decisions in antitrust cases can undergo a full merits review.

In CANADA appellate courts afford a high level of deference to findings of facts made by judges of lower courts. In general, appellate courts will only reconsider the findings of fact of the lower court judge where this court made a **"palpable and overriding error".** Additionally, as discussed earlier, leave is required to appeal the Competition Tribunal's factual findings. **Consequently, most competition law appeals will address questions of law**.

ITALY, the U.S. and ZIMBABWE are countries of legal review. In ZIMBABWE it is so because the courts are yet to receive training in competition law. In ITALY as a general matter, the judicial review of the antitrust decisions is a typical judgment of the legality of the ICA's decisions, extended to the manner in which the ICA exercised its powers (e.g., reasonability, fairness of the proceeding, etc.). In the U.S. appellate courts typically review only the legal aspects of district court decisions and FTC opinions. **Courts of Appeals typically do not assess or reconsider the factual determinations of lower tribunals, and in the rare cases when they do, they generally apply a substantially deferential standard of review.** For example, in the case of appeals from FTC decisions in administrative adjudicatory cases, appellate courts use a **"substantial evidence" test**, which asks whether the FTC's findings are supported by "such relevant evidence as a reasonable mind might accept as adequate," not whether the reviewing court "mak[ing] its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences," would reach the same conclusion.

2.2. *Judicial scrutiny of procedural decisions*

Analysis of the answers submitted by participants of the survey revealed diverse approaches they had to the question.

Some countries indicated that only final decision of a competition authority can be challenged by court, therefore procedural decisions **can be questioned only together with the final decision** (CHILE, ITALY, JAPAN[7], SLOVAKIA).

In MAURITIUS, an appeal provided under the Competition Act seems to be a **full appeal**. Hence judicial scrutiny will be both on the Competition Authority's procedural decisions as well as the decision punishing a company for anticompetitive behavior. Similarly, in BELGIUM judicial control over procedural decisions results in full review and new decision by the Court of appeal. In the EUROPEAN UNION article 263 TFEU applies to all European Commission decisions, including procedural decisions. Article 263 TFEU confers on the General Court and the ECJ jurisdiction to review the decision on the basis of five grounds of annulment (namely lack of competence, **infringement of an essential procedural requirement or of the Treaty or of any rule of law related to its application and misuse of powers**). In the U.S., the Courts of Appeals typically do not review procedural aspects of DOJ or FTC decisions. For FTC administrative adjudications, the U.S. Courts of Appeals will review **procedural determinations only if they have a substantial effect on the outcome of a case.** Also in TAIWAN the courts can review the TFTC's administrative procedural decisions **under specific conditions**. In GREECE as a general rule, confirmed by the Athens Administrative Court of Appeal, **procedural decisions** of the HCC (e.g. decisions appointing experts, decisions regarding the joint handling of similar cases or the procedural separation of cases) **are considered preparatory acts and thus are not regarded as actionable measures.** The legality of those acts is examined in the context of an action challenging the final HCC judgment thus they are reviewed on both procedural and substantive grounds. **Nonetheless,** according to the case-law of the General Court of the EU adopted by Greek Administrative courts, **an autonomous appeal against a procedural decision is possible under the exceptional circumstances** that the said decision taken during the preparatory proceedings constitutes the culmination of a special procedure - distinct from aiding the HCC to judge on the substance of the case, produces binding legal effects affecting the appellant's rights and clearly changing his legal position. Up to the present time, no appeals against procedural decisions have been considered admissible by the Greek Administrative justice. Article 174 of the "Administrative Procedure Act" stipulates that "If the party or an affected person is dissatisfied with the decision made or the action taken by an administrative authority in conducting the administrative procedure, he may file a statement to this effect only if and when he is also dissatisfied with the substantive decision and files a statement therefore; provided that this does apply where the decision made or the action taken by an administrative authority is enforceable or it is otherwise provided for in this Act or any other law or regulation."

In case of ITALY it is worth noting that, in a recent decision of the Tribunal[8], the administrative judges have stated the admissibility of the appeal against the ICA's decisions to open an investigation and to authorize an inspection. The appeal of the ICA to the Council of State against this decision is still pending. Moreover, in the last three years, parties also presented appeals against the ICA's decisions to reject commitments. In this regard, administrative judges recently clarified the not independently challengeable nature of these kind of procedural decisions[9]. Finally, as for access to ICA's documents/file, this is independently actionable under Section 116 of the Code of Administrative procedures.

[7] In Japan, any person, who was subject to some measures as provided for in the AMA, which was taken by the investigator (Section 22 (1) of the Rules on Administrative Investigations by the Fair Trade Commission) or the hearing examiners(Section 35 (1) of the Rules on Hearing by the Fair Trade Commission), may make a motion for objection to the Commission.

[8] See Tribunal, decisions n. 864 e 865 of January 26th 2012.

[9] See Council of State, decision n. 4393 of July 20th 2011.

In PORTUGAL if an appeal is lodged against an interlocutory decision by the Competition Authority, the request is submitted to the Office of the Public Prosecutor, and may be complemented by any information that the Competition Authority considers relevant for a ruling on that appeal.

In BULGARIA the CPC may take procedural decisions to establish **procedural violations of the parties involved in the proceedings** before the administrative authority (e.g. to impose penalty for failure to provide the required information or for incomplete, inaccurate and misleading information). These types of the CPC's decisions (interim in nature) are also subject to two levels of review.

In DENMARK the DCCA's procedural decisions may be appealed **in the same way as the administrative decisions on prohibition**, if the procedural decision relates to a prohibition decision according to the Competition Act and if the prohibition decision may be appealed to the Competition Appeals Tribunal. In PAKISTAN the Appellate Authorities are equally empowered to scrutinize the CCP's procedural decisions. In addition to the Appeals, the aggrieved party may also file a constitutional petition before the relevant High Court.

In THE NETHERLANDS the procedural aspects of the NMa decision, such as on the admission of interested parties to the proceedings, are **scrutinized with the same intensity as its substantive decisions**.

In SPAIN the sanctioning nature and primarily procedural CNC resolutions (involving questions of confidentiality, inspections, procedures) usually enjoy a **double channel of review**. An administrative review of the decision by the competent body (the Directorate of Investigation) which may cause helplessness or irreparable damage may be appealed to the Council of the CNC through administrative appeal (art. 47 LDC). A judicial review on Council resolutions that address the aforementioned administrative remedies (against acts of the Directorate of Investigation) are susceptible to administrative appeal before the Contentious-Administrative Chamber of the Audiencia Nacional – AN (and subsequent appeal to the Supreme Court) in the same terms as the sanctioning resolutions of the CNC. Equally, the non sanctioning Council resolutions (such as complaint file, authorization of a concentration) are also susceptible to the same judicial revision before the AN and the Supreme Court as the sanctioning resolutions of the CNC (procedural or formal aspects).

Some participants of the survey decided to present the **procedure according to which the procedural decisions are challenged.** For example once a formal investigation has been opened, any concerns or complaints about the UK OFT's procedures or how an investigation is handled should be made to the relevant Senior Responsible Officer. If the dispute is not resolved thereby, certain procedural complaints may be referred to the OFT's Procedural Adjudicator. The purpose of OFT's Procedural Adjudicator trial is to provide a swift, efficient and cost-effective mechanism for resolving certain types of disputes on procedural matters between the parties and case teams. The OFT's procedural decisions may also in certain circumstances be amenable to judicial scrutiny pursuant to an application for judicial review the claimant. The review will be undertaken by the High Court rather than the CAT. A decision by the OFT may be challengeable by way of judicial review on grounds that it is, for example, ultra vires, illegal, unreasonable or a breach of natural justice or of a party's legitimate expectations. In LATVIA the decisions of the Competition Councile i.e. decisions regarding - the initiation or non-initiation of a case; the extension of the time period for taking of a decision; the determination of violations, imposition of legal obligations and fines; the termination of the investigation of a case; mergers of market participants; notified agreements, except for decisions regarding the initiation of a case and the extension of the time period for the taking of a decision, may be appealed by undertaking to regional administrative court within one month from the day when such decision came into force. Decisions which may be appealed by undertaking in a stage of proceeding court is empowered to review the both aspects – the factual and the legal ones. In NORWAY procedural complaints are handled by the Ministry of Government Administration, Reform and Church Affairs. Furthermore, any aspect of a case may be tried in the courts, including

procedural issues. In ZAMBIA the decisions of the Competition and Consumer Protection Commission are under judicial scrutiny, firstly via the Tribunal and secondly via the courts.

In TURKEY as the TCA is an administrative body, **all its decisions are subject to judicial scrutiny**. In GERMANY procedural decisions can be subject to legal scrutiny. For those procedural decisions where the Bundeskartellamt has a certain power of discretion the scrutiny is limited to certain types of errors. In FRANCE **part of the procedural decisions undergo judicial scrutiny** - in the field of anticompetitive practices, inadmissibility decisions and rejection decisions may be challenged before the Paris Court of Appeal. Whereas measures of "judicial" administration such as decisions to refer a case to a judge for civil or criminal action are judicial, decisions ordering the separation of the initial referral or decisions of the Board to remand a case to the investigation services are not subject to judicial review. In SWEDEN, a number of the Swedish Competition Authority's procedural decisions may be appealed to a court. In POLAND in the course of the proceedings the President of UOKiK may issue resolutions (procedural decisions). If legal regulations allow appeals regarding given resolution to the court, the complaint should be lodged within one week from the day of delivering the resolution. The court may overrule the resolution, change it or dismiss the complaint.

In CANADA decisions of "federal boards, commissions or tribunals" may be judicially reviewed in Federal Court. The *Federal Court Act* subjects certain decisions made by the Commissioner **to a limited form of judicial scrutiny.** However, the Commissioner's decisions to commence or discontinue inquiries are administrative acts that are generally **not subject to judicial review in the absence of bad faith on the part of the Commissioner.**

The Commissioner may, with court authorization, search for and seize records, take sworn oral evidence and demand the production of records pursuant to the Act. Individuals and corporations served with these *ex parte* orders **can challenge them if they are of the view that they were issued based on incomplete, misleading or inaccurate information.** The Commissioner can also rely on *Criminal Code* search warrants when investigating criminal offences. At the request of those who have standing, a superior court judge can review these search warrants based on the sufficiency of evidence to establish the reasonable grounds to believe that evidence will be found in the place to be searched. The reviewing judge cannot substitute his or her opinion as to the sufficiency of the evidence; he or she is limited to determining if there was evidence upon which the issuing justice acting judicially could determine that a warrant should be issued.

Some answers relate to **procedures applied by competition authorities**. In BARBADOS to the extent that there is a complaint about the Barbados Fair Trading Commission's procedures then the courts will decide on the procedure and if it is appropriate. The answer from FIJI contains a statement that the **courts are capable of reviewing the FCC's procedures**, but this has not been done to date.

In FINLAND, when the FCA makes a proposal for fines to the Market Court, the court is not empowered to resolve the demands concerning the procedural issues. The same applies to the Supreme Administrative Court when decision of the Market Court is appealed. However, with regard to the FCA's proposals for fines, an administrative complaint can be filed with the Ombudsman or the Chancellor of Justice. They cannot change or overturn decisions made by authorities, but e.g. issue a reprimand or instructions on the proper procedure for future reference.

A number of answers focus on **demands towards procedural decisions**. In HUNGARY they are scrutinized in terms of their lawfulness. For the UK CC decisions the Competition Appeal Tribunal will entertain appeals on the basis of judicial review grounds which might be an error of law, irrationality, unreasonableness, or procedural unfairness. In NEW ZEALAND the Commerce Commission's procedural decisions may be subject to judicial review by a judge of the High Court.

The role of the courts in judicial review is to ensure that decisions by a public body are made "fairly, reasonably, and in accordance with law".[10]

In BRAZIL the **main procedural aspects subject to judicial review** concern general legal principles, such as due process of law, adversary proceeding, and full defense. The answer from RUSSIA underlines that the competition authority makes its decision based on the competition legislation and would defend it in the court in case the decision is challenged by the party the decision applies to. The same applies to COLOMBIA, KENYA and ZIMBABWE.

2.3. *Partial annulment of decision*

In case of partial annulment of the decision courts are empowered to decide **instead** of the competition authority in CHILE, COLOMBIA, FIJI, FRANCE, GERMANY, NORWAY, PAPUA NEW GUINEA, POLAND, ROMANIA, SWEDEN, ZAMBIA, ZIMBABWE.

In HUNGARY Article 83(4) of the Hungarian Competition Act stipulates that the court may overrule the decision made by the GVH. On the basis of this provision, courts are actually allowed to change and replace the authority's decision with their own decision on the basis of their own assessment of the case. However, courts **can only review the administrative decision within the limits set by the application for review**, i.e. the decision shall not go beyond the relief sought by the applicant. In case of fines there is no possibility for overruling, i.e. if it cannot be established that the authority has violated the law during its proceedings, **it is not possible for the court to change the amount of the fine**, and the court is not entitled to review the authority's decision which has been taken within its margin of discretion.[11]

In ROMANIA where a decision is partially annulled on appeal, courts are empowered to reduce a company's **penalty** without remanding the decision to the RCC.

In RUSSIA the court can annul the decision as a whole or reduce the amount of fine for the antitrust violation. It **cannot request the competition authority to make another decision on the same case**. In case the authority disagrees with the court's decision it may challenge it in the arbitration court of higher instance or the Supreme Arbitration Court of the Russian Federation.

In ISRAEL in administrative cases, the Courts (on appeal) are empowered to amend the IAA's decision and are **not bound to remand the decision** to the IAA (in criminal proceedings and applications for approvals of restrictive arrangements the substantive decision is made by the court or tribunal, and not by the IAA).

In ITALY since the judicial review of administrative courts is limited to a control of legality, judges may only either totally or partially annul or uphold the ICA's decision. Therefore, in case of partial annulment, courts **may not reform the ICA's decision by issuing a judgment modifying that decision, neither may they remand the case to the ICA for a new assessment**. It is different in cases where the partial annulment involves the fines imposed by the ICA. In the case of appeals regarding fines, the standard of review is on the merit and courts have a wide review power on the amount of the fine. The court may substitute the fine imposed, even reviewing the merit of the suitability of the sanction itself.

In SPAIN both the AN and the Supreme Court can reject all or part of a resolution by the CNC, both with regards to the infringement and to the determination of the fine. In case of a rejection limited to the amount of the fine, the court may reduce the amount of it, but not increase, because of the prohibition of *reformatio in pejus*. **Generally,** in those cases of partially annulled decisions regarding

[10] *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at [553].

[11] Decision No. Kf. V.39.361/2001/4. of the Supreme Court

a reduction of the fine**, the case comes back later to the CNC to revise the decision or adopt a new one.** By contrast, the contentious-administrative courts cannot overturn a CNC's decision to shelve a complaint and instead impose a fine. Such cases must return to the CNC as every competition case in the administrative system need a previous initiation by the CNC.

In numerous countries courts have **both** powers – to decide instead and to remand the decision to the authority. That is the case for BARBADOS, BELGIUM, BRAZIL, CANADA, FINLAND, GREECE, THE NETHERLANDS, MAURITIUS, NEW ZEALAND, PAKISTAN, SWITZERLAND, TAIWAN, the U.S. Although this discretionary power often depends on the nature of the case.

In JAPAN, courts can annul the decision partially and totally or remand the decision to the JFTC, according to the rule of administrative law, however, courts are not entitled to order the decision instead of the JFTC.

In BELGIUM, the Court of appeal of Brussels is empowered to decide itself, but may also remand the decision to the Competition Council for a new decision. As far as the amount of the penalty is concerned, the Court of appeal is not only empowered to decide itself, but also **bound to do so.** In BARBADOS the decision whether to annul, adopt or remand the decision back to the authority **rests entirely with the court** once it has been appealed.

In the EUROPEAN UNION as a general principle, under Article 266 TFEU, the General Court may not substitute its own decision on the merits, while the institution whose act has been annulled must take the necessary measures to comply with the judgment (which may include the re-adoption of a decision).

However, if a decision is partially annulled[12], the General Court may decide instead of the European Commission if it considers that it has all elements necessary to take a decision. Specifically with regard to fines in cartel decisions, the General Court may, rather than remanding the decision to the European Commission for re-adoption, directly correct the level of the cartel fine itself (see also question 6 above). Otherwise the case can be remanded to the European Commission.

In BULGARIA where the matter does not lie within the discretion of the administrative authority, after declaring the nullity or revoking the administrative act, the court shall adjudicate in the case on the merits. Outside the cases referred above, as well as where the act is null by reason of lack of competence or if the nature of the said act precludes adjudication in the matter on the merits, the court shall transmit the case file to the relevant competent administrative authority **with mandatory instructions on the interpretation and application of the law.** Also in NEW ZEALAND when the court remands a decision back, it must advise the Commerce Commission of its reasons for doing so, and give the Commerce Commission **direction in relation to the reconsideration**.

In DENMARK the situation is different for administrative and prosecutorial decisions. In the first case the courts may **decide instead** of the competition authority **if the parties have claimed an alteration of the decision**. In the latter case the courts have both powers.

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[12] The GC may not, merely because it considers a plea relied on by the applicant to be well founded, automatically annul the challenged act in its entirety. Annulment of the act in its entirety is not acceptable where it is obvious that that plea, directed only at a specific part of that act, is such as to provide a basis only for partial annulment. As the Court held in **C-441/11 P *Verhuizingen Coppens***, "*in administrative procedures in particular, the principle of procedural economy suggests that EU legal acts should be annulled only partially in cases of doubt, because it is then possible to avoid any repetition of the administrative procedure and possible fresh judicial proceedings or at least to restrict their subject-matter. In addition, in anti-trust cases in particular, a repetition of the administrative procedure could, depending on the circumstances, be contrary to the ne bis in idem principle. Furthermore, only partial annulment of Commission decisions is more consistent with the fundamental requirement of an effective enforcement of the EU competition rules than their complete annulment.*" (paragraphs 27-29 of the judgment).

In the UK the courts' approach depends on the authority which issued the decision[13]. For example, the CAT has the power to annul the CC's decision - decision in merger and markets cases - either partially or totally. If it does so, the CAT may refer remand the matter back to the CC with an order to reconsider the decision and make a new decision in accordance with its ruling[14]. In practice, the CAT will not annul a decision without also referring it back to the CC to make a new decision. For OFT antitrust decisions the CAT is empowered to confirm or set aside the decision which is the subject of the appeal or any part of it and may: remit the matter back to the OFT or impose or revoke or vary the amount of a financial penalty, or make or give such directions, or take such other steps as the OFT could itself have given or taken, or make any other decisions which the OFT could itself have made. Accordingly, the CAT has a discretion in a 'partial annulment' situation as defined above either remit or take any decision which the OFT could itself have taken.

In the US in reviewing FTC decisions in administrative adjudications, the Courts of Appeals may either render decisions that supersede the FTC's legal conclusions with respect to liability, or may remand for further FTC proceedings consistent with the principles set forth in the court's opinion. When they affirm the FTC's determinations as to liability but find fault with the remedies adopted by the agency, courts typically remand to the agency for further consideration of remedies. **The court ordinarily enters a final order only when doing so does not require any new or additional findings of fact; if such findings are needed, the matter is normally remanded to the FTC.** For DOJ cases filed directly in district court, the authority of the court of appeals to decide the case depends on the nature of the case and the basis for the district court's decision. Ordinarily, when a court of appeals disagrees with the decision of the district court, it generally sends the case back to the district court for further proceedings with instructions that can be fairly specific or general. For example, if a court of appeals determines in a civil or criminal appeal that the DOJ's antitrust theory is legally flawed, it might leave the district court with nothing to do but enter judgment for the defendant. On the other hand, procedural or evidentiary errors are likely to result in an appellate opinion directing the district court to correct the error and render a new decision, perhaps after a new trial.

In CROATIA, CZECH REPUBLIC, KENYA, LATVIA, TURKEY courts must remand the case to the competition authority for adoption of a new decision.

In PORTUGAL if the decision is annulled, the competition authority must adopt a new decision, which will then be subject to appeal.

In CYPRUS if the decision is annulled by the Supreme Court, the competition authority re-examines the cases and adopts a new decision which will then be subject to appeal.

2.4. *Changes in the level of fines*

BARBADOS, BELGIUM, BRAZIL, BULGARIA, CHILE, CROATIA, DENMARK, EUROPEAN UNION, FIJI, FINLAND, FRANCE, GERMANY, KENYA, MAURITIUS, NORWAY, PAKISTAN, POLAND, PORTUGAL, SLOVAKIA, SWITZERLAND, TURKEY, the UK, ZAMBIA – in these jurisdiction the courts can **change the level of fine in any direction.**

In ISRAEL in criminal cases, the court fixes the fine. Where a decision by the IAA to impose administrative sanctions is under appeal, The Antitrust Tribunal is empowered, *inter alia*, to increase or decrease the sum.

Some competition authorities underline that changing the level of fine is not a common practice of courts in their countries.

13 CC merger and markets decisions are appealable on judicial review grounds to the Competition Appeal Tribunal (first instance of review). The OFT's antitrust decisions are appealable on the merits to the Competition Appeal Tribunal (first instance of review).

14 Enterprise Act 2002 s.179(5)

For example in CROATIA there is **no practice** so far as the Agency only started imposing fines in 2012. In SLOVAKIA there has been no case of sanction increase yet. The UK CC to date has not used its power to impose fines for failure to comply with a statutory request for information, therefore there have been no cases of court review in that respect.

In many countries courts are entitled **only to maintain or reduce** the amount of fine. This statement is valid for COLOMBIA, CZECH REPUBLIC, THE NETHERLANDS, JAPAN, LATVIA, ROMANIA, RUSSIA, TAIWAN.

In HUNGARY the binding rule is that the court is limited by the parties' request. If the plaintiff does not dispute the legality of the amount of fine, then the court is not entitled to investigate the amount *ex officio*. If the plaintiff asks the court to decrease the fine, **it is not entirely clear whether the court may, as a result of reviewing its amount, increase the fine.** Such a decision probably would not be justified. Unlike under the EU law[15], under Hungarian law there has been no published decision in which a court has increased the amount of a fine. In THE NETHERLANDS the limit of what judges are allowed to do can be found in the legal principle of ***'reformatio in peius'***. This principle states that a defendant may not be disadvantaged, compared with the original decision, by the fact that he has appealed that decision. **This means that Dutch courts are not empowered to increase a fine imposed by the NMa, but they can decrease it. But there is no rule or legal principle preventing the Appeals Tribunal, after the District Court has lowered a fine, reversing that decision and subsequently again raising the level of the fine to the original amount fined.** In such a case, however, the fine imposed by the Appeals Tribunal may not supersede the level of the fine originally decided upon by the NMa. In SPAIN as contentious-administrative courts only revise cases and due to the prohibition of *reformatio in peius,* courts can only reduce sanctions imposed by the CNC, but never raise them. In GREECE there is **no express legal provision** in the Code of Administrative Court Proceedings limiting the administrative courts' competence to increase the level of fines when reviewing on the merits an administrative act (such as the decisions of the HCC), however, in accordance with the general legal principle of *'reformatio in peius'* the Athens Administrative Court of Appeal has not so far increased the level of a fine as imposed by the HCC. The Court at its discretion may reduce such fines.

In the US, neither the DOJ, nor the FTC have authority to impose fines directly. If the DOJ seeks a fine, it will file a complaint in federal court and ask the court to impose a fine. Where appropriate, **the FTC may ask a federal court to order a defendant to disgorge its ill-gotten gains from anticompetitive activities**. In addition, the **DOJ, on behalf of the FTC, may ask courts to impose civil penalties in suits against violators of FTC orders** (or if the DOJ declines to do so or fails to act within a specified time period, the FTC may do so in its own name). **In these cases, the judge has discretion to increase or decrease the monetary remedy sought by the FTC.** Moreover, if the DOJ asks a the court to impose a fine **and** the court does so, the amount of the fine is reviewable by a court of appeals. If the court of appeals determines that a fine is too high or too low, the usual remedy is to remand the case to the lowercourt for recalculation of the fine in accordance with the decision of the court of appeals.

In CANADA the Commissioner does not set the amount of administrative monetary penalties ("AMP") in civil reviewable matters or fines in criminal offences, both of these are imposed by the Competition Tribunal or the competent courts. The Commissioner or PPSC may make recommendations as to the level of AMPs and fines, but the level of AMPs and fines are determined by the Competition Tribunal or the competent courts. **Appellate courts may review the level of AMPs or fines.**

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[15] Section 31 of Regulation 1/2003/EC: "*The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed."* Case no. T-241/01. Scandinavian Airlines System AB v Commission of the European Communities.

NEW ZEALAND's Commerce Commission and Papua New Guinea's Independent Consumer and Competition Commission (ICCC) **do not impose fines.**

In SWEDEN the general principle is that the Swedish Competition Authority must bring an action before a court in order to impose fines on a company and so does not adopt the level of fines itself. The court may impose a fine lower than the level requested by the Authority in its action, but may not impose a fine higher than that requested. When the Swedish Competition Authority orders a company to pay a fine, which is possible if the Authority considers that the material circumstances regarding the infringement are clear and the company consents to the order, such an order can be appealed only on certain grounds. If the appeal is granted, the Authority's **fine order will be set aside in its entirety**.

In TURKEY and CYPRUS courts are **not empowered to change the level of fine**.

Answer from ZIMBABWE contains a statement that so far, the levels of penalty have been fixed and cannot be altered by any court. For every breach of the law there is a pre-set fine. The fine levels range from level one to level five.

2.5. Grounds for total annulment of decisions by courts

Only some of the survey's participants were able to provide an answer to this question. From among the replies presented the following broad categories for annulments were cited:

Issues related to the facts alleged

- **Insufficient research on the facts of the case**: NETHERLANDS (cartel and Unilateral Conduct - insufficient research when rejecting a complaint); TURKEY (deficiency arising from not conducting preliminary inquiry); HUNGARY (A decision was annulled in a merger case as the decision had been based on facts which had been inappropriately explored.); SLOVAKIA (finding of facts is not sufficient for assessment of the matter).
- **Errors in factual findings and presenting factual grounds:** POLAND; CHILE **(**discrepancy on facts (Supreme Court considered evidence in the case to be enough; TDLC did not); SLOVAKIA (finding of facts being the source of administrative decision is contrary to the content of files).

Lack of evidence

- GREECE (vertical agreement), NMa (cartel and UC - lack of evidence on the potentially anticompetitive effects of specific types of discounts), TAIWAN; US FTC (evidence on market definition was not persuasive); NORWAY (the evidence provided considred insufficient to prove the alleged abuse);
- LATVIA (Incorrect assessment of the evidences.)
- ROMANIA (lack of sufficient information provided by RCC when sending its request of information to an undertaking during a sector inquiry such as the legal grounds justifying the request of information, the objective and the deadline for answering to the request).

Insufficient/difference in economic or legal reasoning

- CZECH REPUBLIC, DENMARK **,** PAKISTAN, CHILE, SLOVAKIA (Decision of the administrative body came out from the incorrect legal assessment of the matter; decision could not be examined for its opacity or lack of reasons.)
- SPAIN (Cartels or horizontal agreements: the decision did not establish an illegal designed agreement nor tested the anticompetitive effects of the conduct).

- TAIWAN (difference on the application of law provisions between agency and judges).
- CHILE (discrepancy over applicable requisites for conduct in collusion and unilateral conduct cases and to be considered anticompetitive).
- NORWAY (different interpretation of the concept of abuse).
- GERMANY (Different interpretation of the magnitude of individual effects; different weighing of individual issues to be considered; different interpretation of facts or economic or legal issues.)

Procedural Issues

- PORTUGAL; CYPRUS (The main ground for annulment was due to decisions of Supreme Court that found fault with the composition of the Commission); POLAND; UK CC (Merger: procedural fairness: an interested third party to the merger was not given sufficient opportunity to make representations to the CC about the CC's provisional decision.)

Remedial issues

- HUNGARY (In a unilateral conduct case that was closed by a commitment the court found that the decision was not clear on how the commitment would solve the competition concern. It also found that the provision of standardised compensation for all customers was unfounded as all customers had suffered different losses.)

For the rest of the jurisdictions the question was not applicable or they had no such experience in the last three years.

2.6. Grounds for partial annulment of decisions by courts

Only some of the survey's participants were able to provide an answer to this question. From among the replies presented the following reasons can be listed:

Issues related to the facts alleged

- POLAND (Errors in presenting factual grounds; errors in factual findings).

Lack of evidence

- FRANCE (Lack of evidence of the participation of one of the five companies involved in a cartel)
- Hungary (Cartels: lack of evidence; insufficient legal reasoning).
- JAPAN (There was not enough evidence to support the fact that one of the enterprises was engaged in the illegal action).
- NETHERLANDS (Cartel: insufficient research by the NMa on the facts of the case; lack of evidence of an infringement. Unilateral conduct: insufficient research when rejecting a complaint about suspected unilateral conduct; lack of evidence on the potentially anticompetitive effects of specific types of discounts; lack of evidence on the infringement).
- PORTUGAL

Insufficient/difference in economic or legal reasoning

- DENMARK (Insufficient economic reasoning (cartel); vertical agreement).
- FRANCE (Court upheld four of the five grounds of an abuse of a dominant position for various practices (non-compete clause, exclusivity clause, unjustified discrimination

- GERMANY (Different interpretation of the magnitude of individual effects; different weighing of individual issues to be considered; different interpretation of facts or economic or legal issues.)
- GREECE (insufficient legal reasoning in a unilateral conduct case).
- NORWAY (Different interpretation of the concept of abuse; the evidence provided being insufficient to prove the alleged abuse; different interpretation of the degree of guilt).
- SLOVAKIA (Unilateral Conduct, Cartel: decision of the administrative body came out from the incorrect legal assessment of the matter; finding of facts is not sufficient for assessment of the matter; decision could not be examined for its opacity or lack of reasons). The grounds for partial annulment of decisions are the same as in case of total annulment. The Code of Civil Procedure does not distinguish between total and partial annulment in this respect.
- TAIWAN (Insufficient evidence is the main reason for all categories; difference on the application of law provisions between TFTC and judges.
- UK CC (Merger: insufficient evidence; the CAT held that the CC's decision on the excision of certain information from CC documents to be provided to the acquiring party was a decision that could be appealed; the CAT found the CC had misdirected itself as to the relevant legal question, taken into account irrelevant considerations, failed to have regard to relevant considerations and reached an irrational conclusion.
- UK CC (Other decisions (Market Investigation): The evidence that the CC based one of its remedy decisions on was inadequate, the CC having failed to take into account relevant considerations; failure to take into account all relevant costs of the proposed remedial action; and apparent bias (subsequently overturned on appeal).

Remedial issues

- BELGIUM (Court of Appeal confirmed measures imposed but limited their duration in time to a shorter period than the Competition Council); BULGARIA (excessiveness of the sanction; non-compliance of the specific amount of the sanction with the principle of proportionality to the established infringement.)

- FINLAND (One merger decision in which the conditions imposed by the Market Court were stricter than the commitments originally proposed by the parties to the FCA. The Market Court found that the impediment of competition resulting from the acquisition could have not been prevented by the commitments proposed by the parties to the FCA. The FCA was hence correct in proposing that the Market Court ban the merger.)

- GREECE (vertical agreement and Cartel reduction of fine based on the gravity of the conducts; the basis for the calculation of the company's turnover; the turnover of the industry associations; the aggravating and mitigating circumstances; lack of transparency in the calculation of fines; different methodologies used case by case).

- HUNGARY (the wrong net revenue was used when setting the fine; the duration of the infringement was incorrectly defined)

- ROMANIA (Cartel: wrong establishment of the fine; Mergers: incorrect calculation of fine; Others: proportionality of the fine with the gravity and duration of the infringement).

- SPAIN (Horizontal agreements and cartels: lack of proportionality or discrepancy in the calculation of the fine; among several imputed behavior only one has been proved; participation of some enterprises in the agreement has not been established. About abusive or unilateral conduct: existence of abuse but only in the domestic market; the court upheld the infringement but reversed the fine in finding that there was no guilt in the offender.)

2.7. Grounds for changing the level of fine by court

Only some of the survey's participants were able to provide an answer to this question. From among the replies presented the following reasons can be listed:

Financial Reasons

- The economic crisis: BULGARIA
- Disregarding the company's financial situation: BULGARIA
- The financial difficulties of the firm in question: FRANCE
- The ability to pay: FRANCE
- The financial difficulties encountered by another undertaking: FRANCE
- Errors in calculation of the entrepreneurs' turnover: POLAND
- Incorrect financial year for the calculation of annual gross revenue: TURKEY
- The modification in the value of sales achieved by one of the undertakings: FRANCE
- The modification in the value of sales retained: FRANCE

Evidentiary Issues

- The court did not confirm one of the few practices included in the decision: POLAND
- Insufficient economic reasoning: DENMARK
- Lack of evidence. Denmark: PORTUGAL
- Lack of an infringement: HUNGARY
- Finding of facts is not sufficient for assessment of the matter: SLOVAKIA
- Decision could not be examined for its opacity or lack of reasons: SLOVAKIA

Mitigating Circumstances

- Incorrect consideration of mitigating / aggravating circumstances: BULGARIA
- Improper assessment of considerations of the efficiency: LATVIA
- The purpose of Law could be achieved with a lower sanction: BULGARIA
- Discrepancy in appreciation of the gravity of conducts: CHILE
- The absence of participation of one undertaking to some of the practices established in the Autorité's decision: FRANCE
- Cooperation of the undertaking in the HCC's investigation: GREECE
- Excessive amount of fine compared to the duration of violation. GREECE
- Different interpretation of the severity of the infringement: Holland

- The court found that the duration of the infringement was shorter: HUNGARY
- Different estimation of the level of harmfulness of a given practice for competition: POLAND
- The violation is not a recidivist one: RUSSIA
- Lack of proportionality or discrepancy in the calculation thereof: SPAIN

II. DRAFTING AND PRESENTING AGENCY'S DECISIONS

1. Use of economic evidence[16]

1.1. *Economic evidence*

BARBADOS, BELGIUM, BULGARIA, CHILE, CROATIA, CYPRUS, CZECH REPUBLIC, DENMARK, FIJI, GERMANY, ITALY, PAKISTAN, PAPUA NEW GUINEA, ROMANIA, RUSSIA, SWEDEN, SWITZERLAND, the UK, the U.S., ZIMBABWE – in these jurisdictions economic evidence is **used in all or most of proceedings** concerning infringements of competition.

However, it was remarked that decisions are not entirely based on economic evidence as they involve **also legal and factual evidence** (CROATIA). It was noted that the **level of sophistication of economic evidence** might vary considerably depending on the nature of the infringement (SWEDEN). Also the **relevance of the economic evidence** may vary from case to case. It may have a decisive influence in the merger's analysis, while in case of cartels originated by leniency applications, economic elaborations may be less relevant.

The answer from SPAIN indicated that the use of economic evidence is **not strictly necessary to sanction all forms of anticompetitive practices**. Infringements by object (cartels and other restrictive practices, business associations recommendations on prices and trading conditions, etc.) do not require proof of anticompetitive effects nor require an economic test if they can be accredited through other evidence: documentary (associations' minutes, press releases, emails, etc..), witness, etc. In other types of infringements (agreements where necessary to demonstrate anticompetitive effects in the market, abuse of dominant position, etc.) and infringements by object, where proven facts of the market are collected, in which there is no direct evidence of the agreement, economic analysis is necessary. The CNC uses economic analysis in the study of cases at three levels: simple economic analysis based on the facts of the case, econometric analysis in more complex cases and empirical evidence broadly through market data, fees, etc.

In CZECH REPUBLIC the Office uses economic evidence in all its administrative proceedings in the field of antitrust. In cases where the conduct is prohibited per se (usually in horizontal agreements – hard core cartels) the usage of economic evidence serves as a **supportive tool** which is not necessary for punishing such a prohibited behavior. On the contrary, economic evidence in administrative proceedings dealing with mergers and abuse of dominant position is **irreplaceable**.

In GERMANY **all assessments of anti-competitive practices resulting in a prohibition and/or fine need to be sufficiently substantiated**. Depending on the case, evidence can include data and the economic or econometric analysis of market shares, market concentration levels, capacity constraints, consumer preferences, switching costs, barriers to market entry, access to up-stream and down-stream markets, competitive pressure exerted by other products, observable pricing strategies and so on.

16 Economic evidence in broad terms, i.e. evidence based on any quantitative data, and not necessarily limited to sophisticated econometric analyses etc.

In RUSSIA the evidence may include the calculation proving the excessive level of pricing in unilateral abuses or parallel behavior in cartel cases

In the UK the Competition Commission's task is to conduct in-depth investigations, to determine the existence of a 'substantial lessening of competition' (in the case of mergers) or an 'adverse effect on competition' (in the case of a Market Investigations). These are economic effects tests and thus call for the CC to undertake economic assessments and make robust decisions on the basis of economic evidence. **Parties would also be more likely to appeal the decision if there was no economic evidence to support the CC's conclusions.**

The CC has **published guidance setting out the types of economic tools** it may use when analyzing a case.

In many jurisdictions there is **no legal obligation** to rely on economic evidence **in all cases** concerning anticompetitive practices – BRAZIL, COLOMBIA, EUROPEAN UNION, FINLAND, GREECE, THE NETHERLANDS, HUNGARY, ISRAEL, JAPAN, KENYA, LATVIA, MAURITIUS, NEW ZEALAND, NORWAY, POLAND, PORTUGAL, TAIWAN, the U.S., ZAMBIA.

In LATVIA, similar to other countries, in most cases there is a need to use economic evidences, i.e. merger cases, dominant position cases and cases of prohibited agreements, except prohibited agreements proved "by object". For example, if it is prohibited agreement **"by object"** then there would be **more legal arguments and aspects (case-law) and less need for economic evidences**, but if it is prohibited agreement **"by effect"** then **certainly all arguments would be mostly based on economic analysis and evidences**.

In the US, neither the DOJ nor the FTC is required to use economic evidence in every case. On the basis of long experience and judicial precedent, certain "**hard core**" practices, such as price-fixing, are condemned on a ***per se*** **basis and without economic analysis**. In non-*per se* cases, economic evidence often plays a large role in modern competition law enforcement. There are also a small number of civil antitrust violations outside the scope of the Clayton and Sherman Acts which may not require economic evidence to find liability. However, in most civil antitrust cases brought by the FTC and DOJ, all parties to the action will present economic evidence, and the courts will rely on economic evidence to justify their decisions. Both the DOJ and the FTC can rely on **any relevant and material evidence, and both agencies** apply economic evidence, reasoning, and principles when **interpretting the evidence, assessing competitive effects, and designing remedies**.

In THE NETHERLANDS there is no legal obligation to substantiate decisions with economic evidence. However, an infringement of the Dutch Competition Act must be proven beyond reasonable doubt and in many cases such a conviction may only be reached on the basis of economic evidence. **Economic evidence in this context refers not to models and economic theory, but to (economic) proof that negative effects can actually occur on a concrete market.** On the basis of the well-known *T-Mobile* case[17], a debate has started on the **proper use of economics within disputes concerning competition law**. In this case, the Appeals Tribunal made a reference to a preliminary ruling to the Court of Justice, concerning the kind of evidence required to prove an infringement of Article 81 EC (old). The Court of Justice replied that in the case of a 'restriction by object,' there is no need to prove the actual effects of the contested conduct. However, **the facts and (legal and economic) circumstances of a specific restriction have to be investigated in order to demonstrate that the alleged conduct is likely to restrict competition.**

In the case of mergers, in an important judgment[18] the Appeals Tribunal ruled that the NMa has a **certain amount of discretionary power to decide on the effects of a merger on the market**. However, this **decision may not be based solely on a general and abstract model but should also**

[17] Case C-8/08 *T-Mobile and others v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-04529.

[18] CBb 28 november 2006 AWB 05/44 9500 (*Nuon Reliant*)

incorporate facts and circumstances taking place before and after the merger. An economic model is therefore not enough to block a merger. The Appeals Tribunal seems to follow the Tetra Laval case[19] in its approach, but is more strict than the Court of Justice with regards to certain types of economic evidence.

1.2. *Tests on admissibility*

In the U.S. the Federal Rules of Evidence (FRE) are a set of uniform rules passed by Congress that govern the admissibility of evidence introduced in federal civil and criminal trials. Any evidence a litigant seeks to introduce at trial must be admissible under the FRE. In particular, FRE 702 governs the admissibility of testimony from expert witnesses, including the testimony of expert economists. Rule 702 charges trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony[20]. It outlines four factors, known as the *Daubert* factors, that the trial court is required to consider in determining the admissibility of evidence, including: testing; peer review; error rates; and acceptability in the relevant scientific community.

The Federal Rules of Evidence also provide **non-binding guidance in FTC administrative adjudications.** Under the FTC's rules of practice, in order be admissible in administrative adjudication, the evidence must be shown to be "**relevant, material, and reliable**." With respect to **economic evidence, a higher standard may be sometimes applied to the opinion testimony of expert witnesses**. These opinions may be subject to challenge on the grounds that the witness lacks sufficient expertise on the relevant issues involved, such that the opinion would be unreliable.

In ZIMBABWE the **HHI Index and CR4** is used.

In FIJI the common test on admissibility is **relevance**, in MAURITIUS it is **assistance**, **relevance, impartiality, evidentiary reliability**. In PORTUGAL economic evidence must be relevant to the case and **obtained according to the applicable procedural rules**. In BELGIUM economic evidence are **facts,** which have to be **advanced**, and, if challenged by the undertaking concerned, **proven**. In NEW ZEALAND expert economic evidence is only admissible if it satisfies ss 4, and 23 to 26 of the Evidence Act 2006 (the Evidence Act). Section 4 of the Evidence Act defines: **Expert** means a person who has specialised knowledge or skill based on training, study, or experience**. Expert evidence** means the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion.

Expert economic evidence is admissible if it is likely to be of **substantial help** to the fact finder **in understanding** other evidence or ascertaining any fact that is of consequence to the determination of the proceeding[21]. Experts must comply with the applicable rules of the court relating to the conduct of experts[22], and the Commerce Commission must ensure that the expert satisfies and acts in accordance with the relevant **internal Commerce Commission guidelines: 'Appointment of Expert Witness Policy'** and **the High Court Rules: 'Expert Code of Conduct'.**

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[19] Case C-12/03 *Commission v Tetra Laval* [2005] ECR I-00987, paragraph 39.

[20] FRE 702 was amended in response to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) and later cases applying *Daubert*. Under the amended FRE 702, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

[21] Evidence Act 2006, s 25.

[22] Evidence Act 2006, s 26.

In GERMANY there is no specific test like the Daubert-Test in the US but there are standards that have developed over time. These have influenced the **"Best practices for expert economic opinions"** published by the Bundeskartellamt, that outline **minimum requirements to be fulfilled for economic opinions to be considered to be of sufficient quality**. In the UK there are no formal tests on the admissibility of economic evidence. **Economic evidence is controlled in the CAT in the same way as other evidence**[23]. It is also noted that the OFT and Competition Commission have published joint **Merger Assessment Guidelines**, which deals with the design of survey material for submission by parties in merger cases. The CAT has recently stated that attempts to introduce new detailed technical expert evidence in judicial reviews of the Competition Commission decisions should be strongly discouraged and disallowed other than in very clear cases.[24]

In PAKISTAN there are no specific tests for admissibility of economic evidence, however, CCP takes into account the established tests across the globe for reliance on economic evidence. For example that such evidence is obtained from credible sources and can be verified through substantive documents and materials.

In FRANCE in the cases where its decision must rely on economic analysis, the Autorité makes its own assessments on the basis of the raw data it has collected and its own findings. It may also examine evidence put forward by parties. It has not formalized any specific test, but it **checks the underlying assumptions of the economic surveys**, requests their **truthfulness and exhaustiveness** and **may require raw data**, including questionnaires and samples so as to be able to re-run them. As regards courts, there is no use of formal criteria akin to the "Daubert standard".

In ROMANIA in administrative proceedings, **competition inspectors having economic expertise** are in charge of drafting and checking the admissibility of economic evidence contained by the report of an investigation. The competition inspectors checking for the admissibility of economic evidence contained in the report of investigation are **distinct from those assigned to the investigation team** and are **appointed in the difficult cases by the president of RCC, on a case-by-case basis**.

In FINLAND, economic evidence suffers **the same scrutiny as any other legally obtained evidence presented in a case before the courts.** As such, there are no statutory limits on the admissibility or use of economic evidence. Whether or not the court finds the economic evidence sufficiently compelling or convincing is another matter entirely. In BRAZIL economic evidence is gathered with the utmost care in order to respect all evidence admissibility contained in CADE's internal procedure regulations and Brazilian procedure Laws. In ZAMBIA the rules are the **general rules** that apply for admitting expert evidence apply**.**

In BARBADOS The Fair Competition Act has both Civil and Criminal aspects. For Civil issues, the case must be prove on a **balance of probabilities** whereas for Criminal issues the case must be proven **beyond a shadow of a doubt**. Also in PAPUA NEW GUINEA the civil test of proof (the balance of probability) is applied and in criminal cases, the proof is beyond reasonable doubt. In ISRAEL in criminal cases, the standard and rather strict criminal evidentiary rules apply. As for administrative cases, a rule of reason standard exists; the main issue in such cases is **not the admissibility of evidence, but rather the weight the Antitrust Tribunal should attribute to it.**

In CZECH REPUBLIC the Office uses economic evidence on a **case-by-case basis**. Economic evidence must **fulfill procedural circumstances** (it has to be obtained pursuant to legal principles, it has to be included in the particular case file and it has to be relevant to the subject of administrative proceedings). This kind of evidence **is verified by the Office** and the Office usually expresses its

[23] The CAT's approach to evidence is laid out in rule 22 and 23 of the CAT Rules SI 2003/1372. Also, paragraph 12.8-12.11 of the CAT's Guide to Proceedings, October 2005 deals with the use of experts, which will include economic experts.

[24] *BAA Limited v Competition Commission* [2012] CAT 3 at paragraph 80

opinion on this evidence. Also in JAPAN and SPAIN the admissibility of economic evidence depend on the case.

In FINLAND the appellate authority **shall review all evidence available** and **determine on which grounds the resolution can be based**. In GREECE there are no specific rules and/ or guidelines regarding the admissibility of economic evidence. In all cases where such evidence is submitted the HCC **evaluates whether technical standards are met**, assesses the **congruence and consistency** of the economic analysis with other pieces of quantitative and qualitative evidence and evaluates the **relevance and the reliability** of the data submitted.

In HUNGARY the GVH has **discretion concerning the admissibility of evidence**, including economic evidence. (Naturally, except for extreme situations, such as evidence obtained illegally). Nevertheless, it is worth mentioning at this point that the GVH **outlined a set of criteria** concerning the quantitative analyses submitted by parties in 2010 as part of a broader effort to provide guidance in the economic analysis of mergers[25]. In order to be taken into account by the GVH, such quantitative analyses should also include the **data set**, a **description of the sources of the data set**, and a **methodological documentation** (outlining assumptions, aggregations, data substitutions, etc.). In addition, an analysis which is based on a survey should also include **sampling information**, the **questionnaire** and a **description of how the survey was conducted.** The purpose of this is to enable the GVH to check and replicate the quantitative analysis in question. The same document also deals with the best practices which are applied to the data which is used in such analyses (e.g. frequency or period and length of time series). This is in part to prepare parties for the general characteristics of possible data requests by the GVH in merger cases, and in part to guide them in terms of what kind of data can make their own quantitative analysis more relevant for GVH consideration.

In THE NETHERLANDS there is no test for the admissibility of economic evidence, the judges are **free to take notice of or disregard any evidence** put before them. However, as the judgments by the Appeals Tribunal (mentioned in the previous question) show, it is not enough to base a decision on purely theoretical economic models/reasoning. First of all, the Appeals Tribunal wants to see (economic) evidence to substantiate the (negative economic impact of the) theory of harm. The NMa must show that the theory of harm is not purely theoretical but is realistically able and likely to happen: the harm to competition must be based on the (likely) effects of the anticompetitive conduct.

In COLOMBIA, KENYA, SWEDEN, SWITZERLAND and TAIWAN there are **no tests** for admissibility of economic evidence.

Some answers indicate the types of evidence. In BULGARIA generally the eligibility varies. For instance any company's economic evidence underwritten by managers, including reports, tables, etc. are allowed. Other permissible evidence are annual financial statements drawn up and certified according to specific accounting law requirements. In CHILE the TDLC issued **an internal regulation** (N°7/2006) that addresses **the way the parties should file technical or economic reports and opinions**. According to such regulation, besides an electronic file containing the report, the parties should provide "the original databases and those directly used to make the estimations, to specify the model of estimations applied, the commands used to employ such databases and to estimate the regressions coefficients or simulations, and the charts with the results; as well as the databases and statistics directly used to build the charts or descriptive statistics used to make such reports". The idea behind such ruling is that **the TDLC should be able to replicate the calculations or estimations of the reports**. If a report does not fulfill the requirements of the regulation, it might be not admitted or disregarded.

[25] A GVH által az összefonódások kvantitatív elemzéséhez felhasznált adatok részletezettségére és minőségére vonatkozó elvek. (GVH, 2010)

EUROPEAN COMMISSION did not provide any answer to the question, whereas in DENMARK the same tests apply as in EU law.

1.3. *Economic experts*

BARBADOS, BRAZIL, BULGARIA, COLOMBIA, CROATIA, CZECH REPUBLIC, EUROPEAN UNION, FINLAND, FRANCE, GERMANY, GREECE, THE NETHERLANDS, HUNGARY, ISRAEL, LATVIA, MAURITIUS, NEW ZEALAND, NORWAY, PAPUA NEW GUINEA, POLAND, PORTUGAL, ROMANIA, RUSSIA, SLOVAKIA, SWEDEN, SWITZERLAND, TAIWAN, the UK, the U.S., ZAMBIA, ZIMBABAWE – in these jurisdictions internal economic experts of competition authorities **can participate** in the judicial review process.

In GERMANY economists generally are involved throughout the procedure, not only at the later stage of the judicial review process, as the deciding bodies, the Decision Divisions, are staffed with **almost as many economists as lawyers**. Moreover, the General Policy Division on Economic Issues in Competition Policy (the equivalent to a chief economist department), may be involved in all stages of the proceeding, not only in the preparation phase but also at the appeal stage before the court.

In FRANCE economic experts of the Autorité participate in the judicial review process on a case-by-case basis; their analysis is frequently requested by the Legal Service who represents the Autorité before courts. They help to prepare for the hearing and appear before the courts. **Where economic analysis is crucial in a case, they may also take part in the hearing**. For instance, the economist Vice-President of the Autorité has already submitted oral observations before the courts.

In SPAIN the defense of the CNC in the judicial review process is conducted through the State Bar, a specialized group of officials of the Ministry of Justice in charge of the defense of the Administration. The CNC (through the Council Secretariat) is always in touch with the officials of the State Bar working before the AN and the Supreme Court to prepare the defense of appealed competition cases before these courts. In cases where the judicial discussion focuses on economic analysis, CNC officials, including the chief economist, participation in the preparation of the defense is broader.

In HUNGARY the chief economist takes part in the judicial process when it is deemed necessary. It is more common for the chief economist to participate in the preparation of the written documents which are submitted to the court. There has been **one case so far** in which the chief economist has also participated in the hearing.

In BRAZIL the Chief economist is the head of the economic department which is an advisory body to all of CADE. That means that if the Attorney General's Office find it necessary it might ask the Plenary to request the Economic Department's opinion on a case, nonetheless this **does not occur routinely**.

In POLAND economic expects may participate if the case requires so, however this occurs , but rarely. It is usually the result of the complicated nature of the market or infringement in question rather than the necessity to defend particularly sophisticated pieces of economic analysis.

In the UK CC unless the issues being challenged are solely procedural, preparation of the defense of any challenge will likely involve the input of internal economists and other professional members of the team (e.g. financial and business analysts, remedies staff) as well as the CC's internal lawyers. The CC engages **external Counsel with expertise in advocacy** when a challenge is begun and works with them to **prepare the defense, develop the litigation strategy** and **to present the CC's case at the Hearing**. The CC does not always submit witness statements but there have been occasions when it has felt it useful to do so. Under judicial review proceedings, if a statement is filed, there is a possibility that the person making the statement may be called to give evidence, though this has not been the CC's experience to date. In the OFT the team from the Office of the Chief Economist will participate in the preparation of the OFT's defense of its decisions on appeal **where there is an economic component to that defense**. An external economic expert may be appointed to appear before the CAT in defense of the OFT's case, where an economic expert is deemed necessary.

In THE NETHERLANDS if the parties to the proceedings submit economic evidence to support their positions, the economic experts of the NMa will be called upon to help refute this evidence. They can **help by either advising the legal experts**, who will subsequently use their reasoning (in a more "accessible form") in their pleadings submitted to the court, or the Office of the Chief Economist will be called upon **to write a report refuting the assertions of the parties.** When finished, that report will be added to the case file. The Office of the Chief Economist is **also more generally involved with the drafting of decisions, by giving general guidance and advice on the use of economics in competition law**. In PAKISTAN the economic experts are part of the investigation at the initial level and thereafter assist the members of CCP during the adjudication process.

In the U.S., economists at the FTC and DOJ participate in the investigation, preparation, and litigation phases of a matter. At the FTC, however, staff members who participated in the investigation or prosecution are **prohibited from participating in the FTC's decision or review of an administrative adjudicatory matter**. If the matter is appealed to a court of appeals, these separation of functions rules no longer apply and economists may assist with the preparation of the appeal, which is normally conducted on the basis of the written record developed before the administrative tribunal. DOJ economists may also be available to testify as expert witnesses at trial, provided that they also have not been "tainted" by direct involvement in the investigation. Neither economic experts nor any other witnesses appear or present testimony before U.S. appellate courts, though their testimony at trial or in the adjudicatory hearing form part of the record on appeal and may be considered by the appellate courts in that context.

In many countries internal economic experts take part **only in preparation phase of the hearing.** That is the case for BULGARIA, CZECH REPUBLIC (The experts of Chief Economist Department participate on drafting the final decision and cooperate with the legal experts who represent the Office before courts), GREECE, NEW ZEALAND, SWITZERLAND, ZIMBABWE.

In TURKEY internal economic experts are not involved in the judicial review process, however there is **no legal obstacle** for such a mechanism. Currently there are economists working as case handlers in the TCA. Case handlers may give technical opinion to the Legal Department for judicial review process, when there is such a need.

In BELGIUM, CHILE, CYPRUS, DENMARK, FIJI, KENYA, ITALY internal economic **experts do not participate** in the judicial review process. In FIJI and KENYA the competition authorities do not have an economic expert.

In most jurisdictions competition authorities rely on their **own economic experts** – BARBADOS, BELGIUM, BRAZIL, CHILE, COLOMBIA, CROATIA, CYPRUS, EUROPEAN COMMISSION, FRANCE, HUNGARY, ISRAEL, ITALY, JAPAN, LATVIA, POLAND, PORTUGAL, RUSSIA, SPAIN, TAIWAN, TURKEY, ZIMBABWE.

In BULGARIA and CROATIA external economic experts are not hired **due to financial reasons** and also because the economists from the authority have sufficient knowledge about the markets in question.

In DENMARK the DCCA is **not precluded from using external economic experts**. It depends on the specific case.

In CZECH REPUBLIC, FIJI, FINLAND, GERMANY, THE NETHERLANDS, KENYA, MAURITIUS, NORWAY, PAPUA NEW GUINEA, SLOVAKIA, SWEDEN, SWITZERLAND, the UK, the U.S., ZAMBIA it is **possible to appoint external economic experts.** However, in SLOVAKIA, the Antimonopoly Office does not have any relevant experience in this respect.

In GERMANY the Bundeskartellamt may **both** draw on its own expertise and use external economic experts. In THE NETHERLANDS the NMa **can call in the expertise of external economic experts, but it is not under an obligation to do so** and will always remain **solely responsible for the soundness of the report of such an expert**. It therefore must check whether or not the recommendations laid down in a report are supported by the facts of the case. The NMa sometimes employs external

economic experts to conduct empirical studies, mostly when preparing an initial decision. In appeal before the courts, no use is made of such external experts. Instead, the expertise of their own economists or the Office of the Chief Economist is employed.

In the U.S. the DOJ often hires external economic experts to testify at trial in merger and civil non-merger cases.

In PAKISTAN the CCP and the Appellate Authorities may seek the opinion or assistance of external economic experts in respect of appeals; however, this has not happened so far.

In the UK the CC has a team of economists, employed on a fulltime/permanent basis. Also typically, the Group of CC members who are the decision makers in cases will include an expert in Economics. On occasion, the CC **supplements this internal expertise with advice from external economists**, usually those with particular expertise in the industry under investigation. However, **this does not happen often**. In SWITZERLAND the Swiss Competition Commission asked external economic expert's reports in **one merger case**.

In BELGIUM the original complainant, of third parties supporting the decision of the Competition Council, when available, defend the decision of the Competition Council in the judicial review process. In ROMANIA the external economic experts are appointed by the Court from a list of neutral experts, following a grounded request coming from the company challenging the RCC's decision.

In GREECE the Greek Competition Act 3959/2011 provides for the appointment of external experts concerning issues or problems where **an expert opinion is deemed indispensable**, by virtue of an HCC decision. Such experts are summoned to appear before the HCC during the oral hearing of the case. Their expertise forms part of the case file and when the final decision is challenged forms part of the file deposited by the Court. The same applies to the expertises submitted by the parties to the HCC procedure. Until now no external economic expert has ever been appointed to assist the HCC during the judicial review process.

BELGIUM, BRAZIL, BULGARIA, CHILE, DENMARK, EUROPEAN UNION, FIJI, FINLAND, FRANCE, GERMANY, GREECE, THE NETHERLANDS, HUNGARY, ISRAEL, ITALY, KENYA, NORWAY, PAKISTAN, POLAND, PORTUGAL, ROMANIA, SPAIN, SWEDEN, SWITZERLAND, TAIWAN, the U.S., ZAMBIA – in these jurisdictions **courts can appoint their own economic experts,** however in practice they do it **very rarely** or **never**.

For example, in THE NETHERLANDS the Court has the power to appoint an expert to whom they can submit questions. The decision whether or not to appoint such an expert is up to the court and, if it does appoint one, **the court is not bound by the advice**, provided by the economic expert. So far, a judge has made use of this possibility only once.

In POLAND the court may appoint experts in order to seek their opinion in cases requiring special knowledge (Article 278, The Act on Competition and Consumer Protection). These can be experts from the list of court experts or other persons with relevant qualifications – the so called ad hoc experts. Experts are usually appointed to decide on **technical or accounting issues** (e.g. how certain costs of water provision should be allocated to various groups of customers) rather than to conduct or appraise sophisticated empirical (e.g. econometric) analyses.

In NEW ZEALAND when the High Court hears an appeal of a Determination of the Commerce Commission (as opposed to when the Commerce Commission brings proceedings against a party for a contravention of the Commerce Act) there must be at least one lay member present to constitute a sitting of the High Court. In other cases, the High Court, on its own discretion or on the application of one of the parties, may appoint lay members to assist the Court.

In the UK economic experts appointed by the parties are in principle appointed as independent experts and ultimately answerable to the Court. **The CAT panel may sometimes also comprise an**

economist. On occasion, the CAT has also asked for the economic experts from both sides to agree points of common ground and/or to give the CAT panel **a teach-in.**

BARBADOS, COLOMBIA, CROATIA, CYPRUS, LATVIA, MAURITIUS, RUSSIA, ZIMBABWE – in those countries economic experts are **not appointed** by the courts.

1.4. *Presenting economic evidence - guidelines*

BELGIUM, BRAZIL, COLOMBIA, CROATIA, CYPRUS, DENMARK, EUROPEAN UNION, FIJI, FINLAND, FRANCE, GREECE, THE NETHERLANDS, HUNGARY, ISRAEL, ITALY, JAPAN, KENYA, LATVIA, MAURITIUS, NEW ZEALAND, NORWAY, PAPUA NEW GUINEA, POLAND, PORTUGAL, RUSSIA, SLOVAKIA, SWITZERLAND, TAIWAN, TURKEY, ZAMBIA, ZIMBABWE – in these jurisdictions there are **no** internal guidelines on presenting economic evidence.

However, in BRAZIL there is an **established routine** of reviewing, supporting and participating **as much as legally possible** in CADE's decision making process before any court discussion that makes it easier to defend the cases before courts and guides new attorneys.

In THE NETHERLANDS the NMa does *not* make use of internal guidelines (in the sense of staff working papers used by the European Commission) on the use of economic evidence. Instead, an evaluation happens on a **case-by-case basis** both during the investigation, and following the case in the interest of employing **tailor-made solutions**. When the NMa submits an economic report during the proceedings before the court, such a report will always be accompanied by a **text explaining calculations and figures in layman terms.** This is done to allow the judge to understand the issues clearly. If necessary, **an economist can come to the hearings and give a detailed explanation of the report**.

In several countries internal guidelines on presenting economic evidence **are being prepared** – BARBADOS, BULGARIA, CZECH REPUBLIC.

In PAKISTAN Qanoon-e-Shahadat Order (the Evidence Act) is followed, which contains in itself the guidelines for presentation of every type of evidence. In addition to the above, a general framework regarding the admissibility of evidence during the proceeding before the CCP are elaborated in Regulation 26A and 26B of the Competition (General Enforcement) Regulations, 2007.

In CHILE TDLC issued internal regulation N° 7/2006. It applies only to written pleadings. There is no regulation or guideline addressing the way to present economic evidence during the hearings. **Power point presentations** are frequently used by the parties when presenting economic evidence before the TDLC.

In GERMANY the Bundeskartellamt not only has internal guidelines but also in 2010 issued and published its "Best practices for expert economic opinions", outlining **minimum requirements to be fulfilled for economic opinions to be considered to be of sufficient quality.** This includes guidance on how and when economic evidence needs to be presented in a proceeding before the courts.

http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bekanntmachung_Standards_Englisch_final.pdf

In SPAIN in February 2010, a paper **on indications (homogenization) for the data request to the parties** in competition proceedings was presented. However, this document has not been used so far in the judicial review proceedings.

In SWEDEN **the chief economist will always be involved in the preparation of a court case**. Before a case is brought before a court by the Swedish Competition Authority the case is also presented to the chief economist and members of the office of the chief economist for **analysis and feedback on the economic analysis and the economic** evidence which the case team will rely on in the court proceedings.

In the U.S. there are **rules of procedure that govern presenting economic evidence before a court and the FTC**. A party is entitled to present its case or defense by sworn oral testimony and documentary evidence. **Economic evidence is usually presented by an expert.** The parties must serve each other with **a list of experts they intend to call as witnesses** to present economic evidence at the hearing not later than one day after the close of fact discovery. In the DOJ there are no written guidelines on presenting economic evidence to courts, but it follows the Federal Rules of Evidence, a set of uniform rules passed by Congress that govern the admissibility of evidence introduced in federal civil and criminal trials.

In administrative adjudicatory proceedings before the FTC, each respondent must provide the other parties with a copy of any expert witness report not later than 14 days after the deadline for service of the complaint counsel's expert reports. Complaint counsel must serve respondents with a list of any rebuttal expert witnesses and a rebuttal report prepared by each such witness not later than 10 days after the deadline for service of respondent's expert reports. A rebuttal report must be limited to rebuttal of matters set forth in a respondent's expert economic reports.

Each report must be signed by the expert and contain a complete statement of all opinions to be expressed and the basis and reasons for them; **the data, materials, or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years**.

In addition, the parties have the right to conduct depositions of economic experts prior to the trial.

2. Decision drafting techniques

2.1. *Drafting teams*

In nearly all of the jurisdictions participating in the survey, decisions are drafted in **teams comprising lawyers and economists.**

For example, in CROATIA the team always consists of one lawyer as main case handler and one economist (from the level of expert associate up to senior adviser) with the supervision of Head of Department. In NORWAY the Competition Authority strives to achieve **balanced teams**, where both **senior and junior officials**, as well as lawyers and economists are participating. In CZECH REPUBLIC each case handler is **specialized in particular markets** (energy, environment, transport, etc.). In the UK Competition Commission the team consists of CC staff with legal, business, and economics backgrounds and will be led by a senior case administrator ('Inquiry Director'). The CC's current pool of Inquiry Directors comprise of people with a **variety of different qualifications.** These include backgrounds as management consultants, private practice lawyers, economic advisers, policy advisers and finance managers. **Previous relevant experience, expertise and resourcing** are all factors taken into account when establishing the case team.

In CHILE the TDLC has 3 lawyer-judges and 2 economist-judges. 4 lawyers and 3 economists form the professional staff. Both judges and staff members are specialized in competition issues. A team of 2 judges (1 lawyer and 1 economist) and 2 staff members (also 1 lawyer and 1 economist) are assigned to each case. However, it is not unusual for the members of one team to cooperate with the others or share ideas. The Secretary Lawyer (who is also TDLC's Chief of Staff) **coordinates the teams**, and distributes the workload as appropriate and in accordance to the Tribunal's definition of priorities.

In some of the jurisdictions teams are headed by **team leaders.** For example in the EUROPEAN COMMISSION the case team is composed of one or several case handlers (mixed case teams of, for instance, an economist and a lawyer are encouraged), the **case manager** and the case secretary. The

case team is the main responsible for the handling of case (i.e. the case-team is responsible for a comprehensive research of facts and their accurate rendition in decisions and other internal and external documents, for a timely implementation of all procedural steps). The work of the case team is led and coordinated by a case manager who, **drawing on experience provides the case handlers with advice and guidance as and when they need it.** S/he is responsible, in consultation with the case handlers, for identifying the key issues and setting the line of the case. S/he ensures liaison with the upper echelons of DG COMP management and other services. The HoU provides her/his support by contributing with her/his know-how during the initial assessment phase, by ensuring soundness and consistency during the case assessment phase, by supporting all actors in the presentation of a case or file to the Commissioner and by contributing to the communication with external stakeholders.

Teams might be **supported by other employees** of the competition authority. For example in ITALY the ICA's officials work in teams of both lawyers and economists. Moreover, they have the technical support of the ICA's Legal Service Office and of the ICA's Chief Economist's team.

In GERMANY the independent Decision Divisions of the Bundeskartellamt are divided according to sector and are staffed with roughly the same number of economists as lawyers. Within each Decision Division **one rapporteur** will be responsible for drafting a decision proposal, but will usually be supported by case handlers who are **not yet qualified as rapporteurs** (therefore have less than seven years of experience). The Decision Divisions are **supported and advised by the General Policy Divisions, such as the General Policy Division for Economic Issues and the Division for Litigation and Legal issues.** Therefore, there can be intense debate and discussion between several members of the Decision Division and members of the specialized General Policy Divisions at all stages. In HUNGARY the Litigation Unit provides assistance to the Competition Council when it is drafting the decisions. Besides this, a new unit, called the **Decision Making Support Unit** was set up in 2012 in order to help the CC with its preparatory work (e.g., research regarding the undertakings, case law, timetable etc.).

The decisions drafted by the teams are often internally **scrutinized.** For example in SWEDEN before a decision is adopted a draft is always reviewed by officers from the legal department and the office of the chief economist other than those officers involved in the drafting of the decision. In the UK throughout competition investigations, as part of the quality assurance which the OFT adopts in every case[26], the OFT regularly scrutinizes the way the investigation is being handled and the assessment of the evidence to ensure that the OFT's actions and decisions are well-founded, fair and robust. This involves **seeking internal advice** from specialist advisors on the legal, policy and economic issues that arise. In some instances, the OFT may also seek advice from **external counsel**. In particular, to provide a further **internal check and balance** before a Statement of Objections is issued or a final decision on infringement is taken, specialized lawyers and economists from outside the case team analyse and review the relevant facts and key underlying evidence, and highlight to the case team and the relevant decision maker(s) the legal and/or economic risks associated with the proposed course of action. The OFT's General Counsel and Chief Economist are responsible for ensuring that there has been a throughout review of the robustness of, respectively, the legal ad economic analysis (and of the evidence being used to support this) and that the relevant decision maker(s) is/are aware any significant legal risks or risks on the economic analysis before the decision to issue a Statement of Objections or a final decision on infringement is taken.

Some of the answers indicate working methods of the teams. For example in FINLAND with regard to the qualifications and positions of team members, each member is responsible for an certain field, such as financial issues, economics or legal argumentation. The working methods of team include e.g **case team meetings, brainstorming sessions and exchanging written materials such as memos**. In PAPUA NEW GUINEA the teams interact **on a daily basis mainly through e-mails, verbal discussions**

[26] Para 9.4 – 9.7 of 'A guide to the OFT's investigation procedures in competition cases', OFT126rev, October 2012.

and teleconferences. In BULGARIA the CPC Chairman determines the case team members for each investigation. The team must consist of at least one economist and one lawyer. Usually, **the economist collects economic evidence and prepares the economic analysis. The lawyer drafts the legal conclusions of the case.** For the determination of all other facts both of them work together. In NORWAY the team members **work very closely together, and everyone normally participates in the drafting of the decision**.

In some jurisdictions, the **composition of the teams is fixed**, whereas in others they are formed on a **case-by-case basis.** For example, in BELGIUM Councilors of the Competition Council drafting decisions work in teams of 3 Councilors, called Chambers of the Competition Council. The Chambers are established by the General Assembly of the Competition Council. In THE NETHERLANDS the size of the team differs per case, depending on its complexity and the necessary expertise. Consistency between cases is preserved by management, with whom the teams have regular contact.

In TURKEY the officials drafting the decisions work in teams, but they are individually tasked with drafting the decisions. The members of the team are well-informed on competition law. They work as examination experts. **In the first years of the TCA, the case handlers (competition experts) were drafting the decisions. Because of the workload of case handlers, the drafting team has begun to draft some of the decisions**. The need to draft the decisions in a simple and a more understandable manner was the one of the main reasons to establish a drafting team.

In FRANCE **the chairman of the competent panel drafts the decisions** with the support of the Legal Service in order to reinforce the consistency of the Autorité's decisional practice. The draft decision is thereafter reviewed by the other permanent members of the Board. The Board is composed of 17 members: the President, 4 vice-presidents (permanent members) and 12 non-permanent members. The President is appointed in consideration of his expertise in the legal and economic areas. The other members of the Board are qualified as follows: 6 members are members or former members of the Cour de cassation, Conseil d'Etat, Cour des comptes or other judicial or administrative courts, 5 members have expertise in the economic or competition areas, 5 members worked in the production, distribution, services fields or, as liberal professions or a manager of a consumer association.

In SPAIN during the investigation phase of a case an instructor is appointed, who has to work within a team in the corresponding sector unit of the Investigations Directorate. At the end of the case, the SO is drafted, including a proposal by the Directorate, and it is sent to the CNC Council, the decision-making body, which takes the decision. The Council is a collegial body composed of lawyers and economists. **Each case file corresponds to a member of the Council that adopts the role of speaker or presenter and must refer the matter to the rest of the Council for discussion and comments.** The Council deliberates cases in order to agree on a collective decision. The aforementioned "speaker" is responsible for drafting the final decision that expresses the collective position adopted. Should a member of the Council not agree with the majority, he/she has to draft its own divergent vote.

Throughout the resolution phase, the Council can refer to internal advisers with legal and economic background.

In MAURITIUS decisions are drafted by the Commissioners themselves. The Competition Agency has an administrative arm and adjudicative arm. The investigation is done by the Executive Director and his staff, and the decision is taken by the Commissioners. The Commissioners act independently of the Executive Director and there is **no interference in the decision making process** - even in terms of writing the decision.

In ZIMBABWE only one person drafts the decisions.

2.2. *Guidelines on decision drafting*

BELGIUM, COLOMBIA, CYPRUS, CZECH REPUBLIC, DENMARK, EUROPEAN UNION, FINLAND, FRANCE, GERMANY, THE NETHERLANDS, LATVIA, NEW ZEALAND, NORWAY, PAPUA NEW GUINEA, PORTUGAL, RUSSIA, SPAIN, SWEDEN, SWITZERLAND, TAIWAN, TURKEY, the UK (CC) – in these jurisdictions competition authorities **use either electronic templates or/and have internal guidelines on drafting decisions**. In most cases it depends on the type of case and therefore the type of decision. However, in many cases **guidance on economic elements is not included**.

In BULGARIA, at present an internal program is being prepared on the drafting of decisions where the presentation of economic evidence is included. In BRAZIL as the legislation is brand new[27], drafting of new compatible guidelines is still a work in progress.

In SWEDEN the Swedish Competition Authority uses electronic templates and checklists when drafting a decision. They include guidance on incorporating economic elements in decisions, for instance economic models that might be useful when the relevant market is defined. In FRANCE the Autorité uses electronic templates and has internal guidelines on drafting decisions which include guidance on incorporating economic elements in the decisions particularly concerning the calculation of the fine's amount. In COLOMBIA internal guidelines and checklists establish the economic procedural analysis to be carried out in the economic studies, including economic tools, and qualitative procedures.

There is no specific guidance incorporating economic elements in the EUROPEAN COMMISSION decisions. The drafting of the European Commission's decisions must comply with formal rules, for reasons of legal certainty, clarity, precision, protocol or uniformity. To that end the European Commission's Manual of Procedures provides guidance on the different steps of competition procedures as well as Modules, Checklists and Templates to be used during the drafting phase. In SWITZERLAND templates for the decisions are used but they do not include guidance on incorporating economic elements in decisions. These templates contain the different titles and subtitles of the different parts of the decisions. They are helpful to structure the decisions.

BARBADOS, BRAZIL, CHILE, CROATIA, FIJI, GREECE, HUNGARY, ISRAEL, ITALY, JAPAN, KENYA, MAURITIUS, PAKISTAN, POLAND, ROMANIA, RUSSIA, the UK OFT, the U.S., ZAMBIA and ZIMBABWE – **no formal templates/guidelines** are used.

In the U.S. decisions are not drafted using electronic templates or a rigid set of internal guidelines or checklists, but the FTC and DOJ have published **substantive guidelines concerning the analysis of specific economic issues in some categories of competition law cases** (these include the *Horizontal Merger Guidelines* (first issued in 1992, and revised in 1997 and 2010), the *Antitrust Guidelines for Collaborations Among Competitors* (issued in 2000), the *Statements of Antitrust Enforcement Policy in Health Care* (1996), and the *Antitrust Guidelines for the Licensing of Intellectual Property* (1995)).

Given its prosecutorial role before the courts, the DOJ does not draft decisions in civil or criminal cases.

Competition agencies from GREECE, LATVIA, ROMANIA and the UK OFT indicated that when drafting a decision the **decisions already adopted** are taken into account. In HUNGARY the decision makers have to follow the provisions of the Competition Act and Act CXL of 2004 on the General Rules of Public Administrative Procedures and Services, which have **detailed provisions in connection with the requirements (e.g. compulsory content) of the decisions**.

[27] Brazilian new competition legislation entered into effect on May 30th, 2012.

2.3. Decision content and language

Drafting in detail

Nearly all the respondents answered that decision documents should be drafted in way that presents the evidence and reasoning on which the decision is based **in detail**. They pointed out different grounds of such an approach.

The answer from LATVIA (but also from many other countries) indicates that it is necessary to draft a decision which sets out in detail the evidence and reasoning on which the decision is based, because **then it is easier to defend it in court**. Apart from that, there can be a situation when that person who was in charge (who makes case research and drafts the decision) is no longer working at the Authority and there is nobody who can explain or clarify some facts (details) in the decision. It is especially important if it is taken under consideration that in some countries it is **impossible to provide arguments or extra explanation to the court if it is not already included in the underlying decision**.

The answer from BELGIUM contains a statement that a detailed reasoning in the decision may in some instances **provide guidance to the market**. Also, the U.S. the FTC responded that it is important for the decisions to fully explain the factual determinations and legal basis in order to avoid the appearance of arbitrary or capricious government decisions that could unreasonably favor or disfavor particular parties, and to **provide clear guidance to the parties and other interested stakeholders as to the applicable legal standards.** According to the competition agency from ZAMBIA a detailed decision is **good especially for jurisdictions that are still building case law**. In those jurisdictions where ample case law exists on various arguments and principles, summarized or concise decisions may be used on a case by case basis. The UK OFT replied that the publication of a fully reasoned decision is important from the point of view of **establishing precedents**, **deterring similar unlawful behaviour** and **facilitating compliance**.

In FRANCE the Autorité issues decisions which set out in detail the evidence and the reasoning given that (i) the legal standards of proof, aligned on EU law, are high (concurring, serious and precise evidence, effects-based approach), (ii) its decisions constitute a key element of advocacy and (iii) such details may be used for private enforcement actions.

In some countries the decision documents are very detailed as this is required by provisions of law, for example in NORWAY the decision document has to be drafted in appropriate detail for all relevant factors to be sufficiently addressed in order to fully meet the necessary and strict legal standard, as well as the high expectations of the parties on the quality of a decision on intervention from the authorities. EUROPEAN COMMISSION decisions must set out the reasoning in **sufficient detail**, so as to comply with procedural requirements (notably the obligation to state reasons), **allowing the addressee to efficiently exercise the rights of defence**.

The UK OFT notices that there are certain risks in presenting facts and reasoning in significant detail in an infringement decision. For example, a long detailed decision may result in court proceedings **focusing in depth on factual or economic points of detail that are not central to the main findings of infringement**. Also, detailed decisions may create a **higher risk of inconsistencies** in drafting or reasoning in different parts of the decision, or that the reader loses sight of the thrust of he reasoning.

Some participants of the survey underlined that the level of the detail depends on the case. In GERMANY some complex legal, factual or economic issues require more detailed description and discussion, while some clear-cut and undisputed cases may be summarized. In TURKEY **if the subject is new** and different from other decisions or very important as a case law, it is better to draft a decision document which sets out in detail the evidence and reasoning on which the decision is based. Otherwise, it is better to draft a concise decision document which sets out a shorter summary

of the evidence and reasoning. In BELGIUM the decision should be detailed **to the extent that the report** of the Competition Prosecutor **is challenged by the undertaking concerned**.

In CHILE the TDLC decisions point out the relevant facts according to applicable law, the evidence regarding each of those facts, and the legal and economic reasoning applied to assess them in order to arrive to a well grounded decision. General rules applicable to courts require **decisions to be understandable by non-specialists**, thus it is considered that the **optimal level of detail is the one that allows any educated person to understand the problem, the decision and its legal and economic grounds**. The level of detail required to do so will depend on each case (how many accusations, defenses, parties, or facts are involved) and how easy or difficult is it to explain them and the reasoning to decide on each accusation/defense with regard to each party. In COLOMBIA the authority always takes into account different types of cases and the impact they have on the market, but a **mean point** would be considered by the SIC as the optimal level of detail to draft a decision.

Anticipating counter arguments

Some of the countries indicated that **the counter-arguments of parties should be anticipated to a large extent**. For example the answer from BELGIUM contains a statement that it should be done to the extent possible. These arguments are generally already being invoked in the proceedings before the Chamber of the Competition Council. In THE NETHERLANDS the arguments of parties on appeal should be anticipated as much as possible, and wherever possible the NMa should also include negating facts and evidence in the decision. Also, any objections voiced by the parties to the case must be refuted adequately both in the decision and in the submissions to the courts, because if not the judge will not be convinced of the rightness of that decision.

In the answer from BRAZIL it is underlined that considering that all decisions made by CADE may potentially be reviewed by the judiciary, it is important to **always keep in mind the legality of evidence and arguments** in order to comply with all legislation needed and avoid judicial issues with the parties. So, CADE's decisions often addresses legality issues that may be discussed in the judicial system.

Some answers note that it might be **difficult to foresee the arguments**. Competition agency from ZAMBIA claims that it could prove difficult to guess the arguments on appeal in some cases the best approach therefore is to answer all questions arising in a given case and to provide as much clarity as possible. In SWEDEN it is possible for the party concerned to submit new counter-arguments in the appeal proceedings, but it is usually very difficult to foresee what new arguments might be introduced after an appeal.

In many jurisdictions competition authorities do not have to speculate about the possible counter-arguments as they are aware of the potential objections. This is possible mainly thanks to the **statement of objections** issued before the final decision is rendered. EUROPEAN COMMISSION, FINLAND, FRANCE, GERMANY, GREECE, LATVIA, NORWAY, ROMANIA, SWITZERLAND, the UK invoked this argument.

For example, in FRANCE before a decision is issued by the Board of the Autorité, the investigation services draft a statement of objections and a report which both include a synthesis of the parties' arguments and therefore **anticipate the answers of the parties to the objections raised by the investigations services. The Board is therefore informed of the soundness of the objections and may anticipate some of the pleas in appeal**. In GREECE the HCC decisions deal with all the arguments put forward by the parties to the infringement during both the investigation phase and the oral hearing. In particular, the parties present their arguments a) in their replies to requests for information, b) in a written memorandum submitted following the notification of the Statement of Objections and at the latest 30 days prior of the oral hearing, c) in the rebuttal made by way of supplement to the memorandum submitted at the latest 15 days prior to the hearing, d) during the

oral hearing and e) in a final memorandum submitted after the oral hearing. The above procedure (given the number of instances that the parties have to put forward their arguments) allows the HCC to have a clear view of the arguments and counter-arguments to be put forward by the parties on appeal and to draft its decision accordingly.

In LATVIA the participants of the process may become acquainted with the case, express their own point of view and submit additional information within 10 days from the moment of receipt of the information necessary for the Council to take a decision (this letter of information is somewhat similar to the European Commission's Statement of Objections). In ROMANIA the investigated companies are offered the legal possibility to submit **written observations** on the report of investigation. The written observations submitted by the parties may predict, to a certain extent some of the elements of the parties' defense on appeal. The RCC's decisions retain therefore both the written observations of the parties to the report and the RCC's answers to those observations.

In the UK the business(es) under investigation (and, where appropriate, third parties) will have had the opportunity to make written and oral representations on the OFT's Statement of Objections during the administrative phase. In cases in which, having considered the parties' written and oral representations on liability, the OFT is considering issuing a financial penalty, parties will also be provided with a **draft of the OFT's proposed penalty calculation**, on which they make written and oral representations. In addition, case teams hold regular **state of play meetings with parties** at which the OFT shares its provisional thinking on a case. The OFT will then deal with any material representations made by the business(es) under investigation (and, where appropriate, third parties) in the infringement decision[28]. However, there is a **potential asymmetry** in the appeal process to the extent that appellant parties have more scope to introduce new arguments and evidence on appeal that they had not previously submitted as part of the administrative process. By contrast, the OFT is generally confined to the arguments and evidence presented in its Decision.

In SPAIN the judgments of the AN and the Supreme Court to review the decisions of the CNC are subject to an internal analysis to study all aspects. The analysis is performed in judgments favorable to the CNC or not favorable, totally or partially. Thus, new decisions can anticipate some of the legal concerns of the courts, reinforcing or modifying the analysis when necessary. Similarly, it keeps track of the jurisprudence of the ECJ, which is frequently cited by the Spanish courts.

In RUSSIA the FAS **makes decisions regardless of possibility of their challenging** in the court by the party the decision applies to. In PAKISTAN CCP do not deal with anticipated arguments that may be raised at the appeal stage.

Use of precedent and agency legal departments

In the EUROPEAN COMMISSION the **consultation of the legal advice** during the drafting of a Commission's decisions ensures the legality of the decision and it is of vital importance in preventing or reducing the risk of subsequent litigation. In ROMANIA the Reports of investigation are submitted to the Legal Department for an expert opinion. Any decision issued by RCC is to be submitted to the legal control of the Legal Department because the law requires public authorities to get a legal visa from their internal legal department on their administrative acts. The Legal Department takes into consideration the possible approach of judges and therefore, some amendments may be required. In DENMARK internal decision-making processes include, for example, an internal hearing, where officials - that have not been involved in the case - conduct a **peer review** of the draft decision.

In GREECE when drafting a decision, members of the HCC's Board take into consideration all **previous case-law** as developed by the administrative courts and all **relevant experience** as accumulated when defending HCC's decisions before the competent Courts. In THE NETHERLANDS the NMa pays

[28] Para 13.8 of 'A Guide to the OFT's investigation procedures in competition cases' OFT1253rev, October 2012

close attention to the possible approach taken by the judge in a particular case. This is achieved mainly through a **careful analysis** of previous decisions, especially when a case was lost. The Legal Department writes a **synopsis of the judgement** and an **accompanying legal opinion** on every judgment issued by the Dutch courts. This is also done for important judgments of the European courts in Luxembourg. These legal opinions focus on the **lessons to be learned from each judgment**, which is distributed among the officials of the NMa. Moreover, every year the Legal Department **analyses all case law of the foregoing year** to compare and contrast the verdicts and to **signal any new or emerging trends or topics.** These efforts have resulted in a clear insight into the level of judicial review an on what judges find important. **This makes it easier to decide on a case by case strategy and approach to influence and convince judges.**

In the U.S. FTC decisions are drafted with applicable judicial precedents in mind, and as lucidly as possible to ensure that reviewing courts will understand their basis. In some cases, the **courts of appeals have been strongly influenced by well-written FTC decisions** that clearly analyze competition issues and cogently articulate legal and economic principles, and **these decisions have provided the basis for establishing new legal principles**.

The vast majority of the competition agencies taking part in the survey answered that their decisions are drafted in a language that can be understood by non-specialists. Answers from SWEDEN and JAPAN indicate that usage of plain language in decisions is applied to **the extent possible**.

Within the EUROPEAN COMMISSION the cooperation between the case team and the legal service provide **scrutiny in order to guarantee that the economic analysis is drafted in a way that is comprehensible for non-specialists**. In FRANCE the Autorité is particularly mindful of its **mission of advocacy**, economic analysis contained in its decision is guided by clarity and thus accessible to non-specialists. In PAKISTAN the orders of CCP are detailed and published for the information of the public, therefore, every effort is made to ensure that issues are addressed in a language which can be understood by the general public with convenience. In RUSSIA generally the economic considerations are presented clearly enough for them to be understandable for a person with general legal education.

Clear and understandable language

While drafting a decision, competition agencies often take into consideration how the judge will approach it. They take into account language, legal requirements toward the decisions and previous experience.

For the competition authority from BARBADOS it is critical that the possible perspective of the judiciary is taken into consideration. This encapsulates situations such as **using non-technical language** and any counter arguments which may arise. In CHILE the TDLC drafts its decisions in a way that non-specialists can understand them, this includes for the Supreme Court judges. In SWEDEN, decisions are always drafted in a transparent way. The Swedish Competition Authority will explain in some detail the facts considered, the evidence relied on, and the legal and economic analysis the conclusions are based on. In SWITZERLAND the decision are drafted **as precisely and clearly as possible**.

Guides to good writing

In SWEDEN, NEW ZEALAND and the UK there are special **standards concerning the language** used in competition authorities' decisions. The Swedish Competition Authority has a communication guideline and the aim is that all communication from the authority, including decisions, shall be easy to understand for the broader public. In NEW ZEALAND all writing undertaken by the Commerce Commission must comply with the **Plain English Standard**. The central focus of the Plain English

Standard is on the reader. Information is conveyed clearly and concisely to its intended audience in a language that the reader can understand from a single reading. The UK CC maintains internally a Good Writing Guide. This guide includes a **glossary of specialized terms** which non-economists may find difficult or inaccessible and suggests these be explained or a plainer alternative used.

In ITALY when more complex economic analysis is undertaken, since it can be very technical, it is usually reported in a **separate Appendix**, while its results are described in a more accessible language in the text of the decision. In GERMANY the "Best practices for expert economic opinions" state that expert opinions must be comprehensible to a non-economist audience. An expert opinion should always include **a non-technical summary** addressing the purpose of the analysis, specification, result and robustness.

Competition agencies from COLOMBIA, CROATIA, PAKISTAN, RUSSIA and TAIWAN responded negatively to the question.

In DENMARK the DCCA strives in general to draft decisions in an intelligible language, but the economic analysis is not necessarily drafted in a language that is accessible to non-specialists. BRAZIL's CADE answered that unfortunately, decisions contain various technical terms either judicial or economic that may make the understanding of such decisions difficult to non-specialists. In GREECE economic evidence is presented **in accordance with the technical and other standards** prevalent in the profession and the wording adopted is the wording used in economics. **In Greece precision and scientific accuracy are not sacrificed in favor of accessibility to non-experts.**

2.4. Fines

In most of the jurisdictions participating in the survey there are regulations concerning fines. In some countries they may have a form of legal act, in others they be included in internal guidelines. The guidelines may be either binding or non-binding. Generally the guidelines contain methods of calculating fines, however generally there is **no guidance on presenting** those methods.

GERMANY is the only exception, in that it has a "**Best practices for expert economic opinions" which includes guidance on how to present the facts and analysis.**

Binding guidelines

In BELGIUM there are binding guidelines on the calculation of fines. **The method** of setting the fine, provided for by these guidelines, **is presented in the decisions** of the Competition Council. In THE NETHERLANDS the NMa is subject to a formal ministerial guideline on the setting of fines, which gives the basis for the calculation. Furthermore, there are corresponding internal guidelines giving further guidance on the calculation of fines. According to this guidance, **the decisions on the imposition of fines should include all the steps taken and all the elements used to calculate the fine**. The elements should be justified by reference to the ministerial guidelines. In FRANCE, the Autorité adopted its Notice on the Settling of Financial Penalties on 16 May 2011. This **binding notice** explains in detail **how the Autorité sets financial penalties on a case-by-case basis**, pursuant to the four criteria provided by the Code of commerce: (i) the seriousness of the infringement, (ii) the importance of the harm done to the economy, (iii) the situation of the undertaking or of the group to which the undertaking belongs and (iv) reiteration.

In GREECE, in 2006, the HCC adopted a Notice regarding the calculation of fines. This Notice is legally binding on HCC (in the sense that HCC is bound to act accordingly and must not deviate on a regular basis from its own Notices) but it is not binding on the Athens Administrative Court of Appeal. It is noted that according to this Notice the HCC **can depart from the method of setting fines laid down therein, in order to ensure the appropriate deterrent effect in a particular case**. CROATIA has provisions on setting up of fines in Competition Act and then further elaborated in **Regulation on the**

Method of setting of fines and there are also **Internal Guidelines.** Moreover, the Croatian Competition Agency **in its final decisions** establishing the breach of Competition Act **explains the method of setting up of fines** and mitigating or aggravating circumstances which are taken into account when calculation the fines.

Non-binding guidelines

In ISRAEL the IAA has published guidelines on the calculation of fines. These guidelines elaborate on the manner in which the IAA will account for the various considerations set by law (e.g. the duration of the offence, the harm inflicted on the public, the offender's part in the offence etc.), according to which the fine will be calculated.

In POLAND the guidelines are not legally binding, however the President of UOKiK, based on the criteria included in the guidelines determines the financial fine imposed in decisions. **Guidelines determine facts deciding on harmfulness of the breach** (the nature of breach, specifics of the market and the entrepreneurs activity) upon which the base amount of the fine is set; moreover facts justifying increasing the base amount of fine (long-term breach), **mitigating and aggravating circumstances** and guidelines on **maximum fine** and **specifically low fines**.

Changes to guidelines

In HUNGARY, in the middle of 2011, the GVH undertook to reconsider its notice on the method of setting fines in antitrust cases, which was repealed in May 2009. As a result of this process, the President of the Hungarian Competition Authority and the Chair of the Competition Council together issued a new notice on the Method of Setting Fines in Antitrust cases. This new notice has been in operation since 1st February 2012. The new antitrust fine notice sets out the basic principles of the GVH's fining policy and furthermore, it **presents the process and the applicable considerations that must be taken into consideration when a fine is being imposed**. In addition, it evaluates the content of the abovementioned considerations and clarifies their relative weight towards each other. Due to the revision of the antitrust notice – in accordance with European trends – the GVH aims to provide a stronger deterrent effect by fining those cartels which are seriously harming competition. It is also important to mention that the antitrust notice issued by the GVH is one of the **most transparent fining guides in Europe** as it allows for step by step tracking of the fining process.

In the UK the OFT is required by statue to prepare and publish guidance as to the appropriate amount of any financial penalty imposed[29]. The OFT is then required to have regard to the guidance in force at the time of setting the amount of a penalty[30]. In September 2012, the OFT published a revised penalty guidance (OFT423, 'OFT's guidance as to the appropriate amount of a penalty'). This guidance sets out the basis on which the OFT will calculate financial penalties where the OFT exercises its discretion to require a financial penalty to be paid.

In the U.S. in 2003, the FTC issued a *Policy Statement on Monetary Remedies in Competition Cases*, which outlined an analytical framework to guide FTC determination of appropriate circumstances for the use of monetary equitable remedies in federal court. Although intended to clarify past FTC views on this topic, **the practical effect of the *Policy Statement* was to create an overly restrictive view of the Commission's options for equitable remedies**. Accordingly, in August 2012 the Federal Trade Commission withdrew the *Policy Statement* and relies instead on existing **case law** to guide the FTC's use of disgorgement and restitution remedies, and evaluates the unique circumstances of each case through that framework.

[29] Pursuant to its obligation under subsection 38(1) of the 1998 Act.
[30] Pursuant to its obligation under subsection 38(1) of the 1998 Act

In KENYA and PORTUGAL the competition agencies are currently working on the creation of fining guidelines.

No Guidelines

In CHILE the competition authorities have no guidelines. However, in CHILE there are some non-exclusive criteria that should be considered: gravity, economic benefit, second offense criteria, and cooperation with justice. In FIJI and PAPUA NEW GUINEA there are no guidelines since the fines are left for the court to decide.

In NEW ZEALAND the Commerce Commission does not set fines; this is the role of the court. The **courts have established principles** for assessing pecuniary penalties for different types of breaches of the Commerce Act.

In JAPAN the calculation of the surcharge and its procedure is rigidly stipulated in the AMA and its implementation orders. Therefore the JFTC has no discretion on it. In BRAZIL all fines must respect Chapter III of the mentioned law that refers to Penalties. The Chapter sets what sort of penalties may be considered and what amounts are considered reasonable for each type of action against the economic order.

2.5. Officials drafting and presenting decisions

The practice concerning officials representing competition agencies in courts varies.

Same team

In CROATIA, FINLAND, ISRAEL, LATVIA, PAPUA NEW GUINEA[31], SWEDEN, POLAND, TAIWAN and ZAMBIA the case is handled by **the same team of officials** at the phase of drafting and presenting the decision in court.

In GERMANY **the Litigation and Legal Issues Division** represents the Bundeskartellamt before the court in Düsseldorf **together with the competent Decision Division**. The Litigation and Legal Issues Division may already be involved in all cases before a decision is taken and will be involved in all major cases.

In NEW ZEALAND Internal Counsel are closely involved in representing the Commerce Commission before the court, and are also involved in drafting decisions. Internal Counsel **sometimes represent** the Commerce Commission in court. In NORWAY **in some cases, officials in charge of drafting decisions will also represent the Competition Authority** before the court. In other cases, where it is appropriate, the Attorney General will represent the Competition Authority. Normally, agency **officials drafting decisions will assist with preparing the case to be handled by the court**. In RUSSIA it is the FAS legal department that represents the agency in the court. Its representative take part in commissions preparing the decisions, as a rule.

Different teams

In some jurisdictions there is division **between the case handlers and the internal lawyers** who represent the competition agency before the court. That is the case, e.g. in BULGARIA, COLOMBIA,

[31] In Papua New Guinea the team is composed of economists and lawyers, which also includes external lawyers and economic experts.

DENMARK, EUROPEAN COMMISSION, FRANCE, THE NETHERLANDS, HUNGARY, MAURITIUS, ROMANIA, TURKEY. In some of these competition agencies, cooperation between the two teams will be very close, in others it will be informal, or indeed entirely prohibited.

In HUNGARY decisions are drafted by the Members of Competition Council, and the agency is represented before the court by the members of the Litigation Unit on behalf of the Competition Council, which **closely cooperates** with the Competition Council. In more complex cases the members of the Litigation Unit become involved before the decision is made, usually when the statement of objection is prepared. In TURKEY drafting team and court teams are comprised of different officials. There is **no official co-ordination or cooperation during the drafting process between these two separate teams other than unofficial contacts.** But the Legal Department which is responsible to represent the TCA before the court may take **official opinion of the relevant enforcement department** (i.e. the case handler who conducted the inspection/examination) **if there is such a need.**

In THE NETHERLANDS the NMa operates with a so-called 'Chinese Wall' construction, meaning that the work related to the imposition of fines (or sanctions) and the (possible) appeals before the courts are not handled by the same case handlers who wrote the initial report on the infringement. The officials who deal with the administrative appeals by companies against the initial decision can be but are not necessarily the same as the ones dealing with the judicial appeals. If they are not the same officials, close interaction is allowed and encouraged, especially with regards to the use of language and the anticipated judgment of the court. However, it is important to note that discussion between the case handlers involved in the investigation and those in the legal department involved in drafting the legal decision is strictly prohibited. In the courtroom, meanwhile, the pleadings are always done by **case handlers who have followed special training of their oral presentation skills**.

In the CZECH REPUBLIC decision-drafting is the responsibility of **first-instance case handlers**. The **second-instance decisions are drafted by case handlers who at the same time represent the Office before the court**. They cooperate with the first-instance case handlers (e.g. if any clarification is needed). In the U.S. the Administrative Law Judge drafts initial decisions and the FTC's final decisions are drafted by one of the five Commissioners. In some instances, the attorneys who ultimately represent the agency before the court may consult informally or formally with the drafters of the FTC's decision. In addition, one or more attorneys from the Office of General Counsel involved in a particular appeal typically have also provided legal advice to the drafters of the FTC's decision.

External counsel

In some countries competition agencies are represented before courts by **external counsels**. For example in DENMARK to represent the authority before the courts, he DCCA uses an attorney-of-law from an external law firm. The DCCA official and the attorney-at-law will only interact if the decision is appealed. In PAKISTAN the Members of CCP are responsible for the passing and drafting of decisions of CCP, however, they do not represent CCP before the Courts which is done by external legal experts. If and when necessary, the Director General (Legal)/Registrar of the CCP attends the Courts. In GREECE Greek Competition Law 3959/2011 contains a provision for the creation of a Legal Support Office within the HCC that would take on the representation of the Authority in court; nonetheless the said provision has not yet been activated. Thus the HCC outsources its legal representation to lawyers outside the Authority. **Legal experts of the HCC** that participate in the drafting of the Statements of Objections and assist the Rapporteur **may not by virtue of law legally represent the HCC before courts**. In ZIMBABWE the internal legal personnel draft decisions. However in Zimbabwean legal system an external advocate will have to represent the Competition and Tariff Commission before the courts.

Also in the UK it will be external counsel who represents the CC before the court. They are **instructed by CC internal lawyers** (who will generally have also worked on preparing the decision report as part

of the staff inquiry team). In particularly contentious cases the external counsel may also have advised while the case was being investigated by the CC. At various stages in the court process, the CC's internal lawyers and external Counsel will call upon the views and opinions of the CC's internal staff and members. Concerning the OFT during an appeal it is represented at Court by experienced competition counsel who are instructed by the Litigation Unit in the General Counsel's Office. During this time, **the case team will be involved on a day to day basis in reviewing counsel's submission to the Court and in advising on the evidence and analysis**.

In BELGIUM the decision is drafted by a Chamber of the Competition Council, whereas the Competition Council is not represented by that Chamber before the Court of appeal. The reason is that it is widely considered to be the case under Belgian law that an administrative jurisdiction, which the Competition Council is by law, to the extent that it renders decisions in Chambers, cannot intervene in the proceedings before its appellate court, in this case the Court of appeal of Brussels. Therefore, the appropriate institution to represent the Competition Council before the Court of appeal is the Competition Prosecutor or the College of Competition Prosecutors. But the **Competition Prosecutors are not eager to represent the Competition Council before the Court of appeal** (the Competition Council, represented by the College of Competition Prosecutors or by a Competition Prosecutor, is not required to do so in every case that is being appealed, see the VEBIC judgment of the Court of Justice of the EU of 7 December 2010). A concern about the College of Competition Prosecutors or a Competition Prosecutor intervening before the Court of appeal, is that they **are not necessarily inclined to defend the decision of the Chamber of the Council, to the extent that it differs from the report of the Competition Prosecutor in the same case**.

In KENYA the Director of Public Prosecutions (DPP) handles **criminal matters** as the Attorney General (AG) handles the **civil matters**. However in future the Authority may hire a panel of lawyers as experts to deal with the Authority's cases as provided under section 13 (2) of the Kenyan Competition Act.

Training

Nearly all participants of the survey confirmed that their employees responsible for drafting the decisions are provided with trainings on the legal and economic developments.

In a majority of the jurisdictions **regular trainings** are organized. For example, in COLOMBIA the office regularly trains its officials. In EUROPEAN UNION the European Commission organizes regular training for case handlers on substantial and procedural issues as well as on drafting techniques. In CZECH REPUBLIC the Office´s officials receive **occasional training** and participate in several conferences where they can exchange their views and experience with experts form other competition agencies. In POLAND officials who draft the decisions take part in **ad hoc** (internal and external) trainings and courses on the legal and economic developments.

The trainings can have very different forms. For example in FRANCE Officials of the Autorité who draft the decisions receive regular trainings on both legal and economic developments. The economists working at the Autorité provide **internal trainings** which represent around 5 to 6 days per year. Economic trainings may also be performed by **external trainers.** Members of the Legal Service also provide **internal trainings on specific legal issues** such as the attributability of the infringement, the calculation of financial penalty, etc. Furthermore, **debriefings on each decision** issued by the Board intervene on a regular basis in front of all the members of the Autorité. In ITALY the ICA **regularly** organizes for all **staff internal seminars on "hot topics"** and on the recent legal and economic developments, together with general training to keep the institutional memory and expertise. Moreover, ICA also frequently **organizes seminars and conferences** with external experts and law and economic professors, well-known in the competition law and economics field both at national and international level.

In BRAZIL CADE is keen on its Human Resources policies and often establishes trainings as they are necessary. Frequently, CADE's officials are **sent to courses in foreign countries** in order to keep in touch with any developments on the area. Also, officials have **access to the most important publications about competition in the world** through CADE's **subscriptions**. In PORTUGAL the PCA provides regular training to its staff by way of a **yearly training programme**. Staff members receive training by way of internal and external conferences, seminars, teleseminars and workshops. This **training programme is set out in an internal regulation and is an integral part of the PCA's human resource strategy**.

In NEW ZEALAND the Commerce Commission staff who draft decisions are involved in developing their legal and economic skills and knowledge. The Commission has **internal knowledge sharing** and discussion forums for both legal and economic developments. Commission legal staff also attend regular training sessions in accordance with the continued legal education requirements of the NEW ZEALAND Law Society. In CROATIA there is a system of internal education where colleagues educate each other or some foreign experts hold seminars in the Agency and also officials participate in international seminars, workshops and conferences where current competition law developments are discussed. **In BELGIUM officials have a mandate for six years, which is only renewable after passing an exam. This means that they have to continue to educate themselves, if they want to stay on the job.**

In THE NETHERLANDS the NMa has an **in-house academy** which organises courses on a number of issues, for example on the use of evidence. In the UK the OFT has recently founded an **Enforcement academy** to provide training and to spread best practice at the OFT. Lectures are available on ad hoc basis and may deal with important/new issues of law and economics. These resources are available to the OFT officials who draft decisions. This builds on the wide range of legal and economic courses that have always been, and continue to be, available to OFT staff.

In SWITZERLAND the officials participate in internal training **at the beginning of their job** in the authority. Then there are regular meetings of economists and lawyers during which they can share ideas or present cases. Additionally, the officials have the opportunity to attend conferences or training dealing with competition law or economic aspects. In GERMANY the Bundeskartellamt offers in-house training for newcomers and also presentation and discussion rounds on specific topics that are open to all staff members on a regular basis. In addition, the Bundeskartellamt organises conferences at national and international level to discuss current issues in competition law. Moreover, the Bundeskartellamt`s officials are very active in participating in conferences etc. and a significant number **are active in academic work, like teaching or publishing**. All these activities help to continuously increase and update the general knowledge base of the Bundeskartellamt. In CHILE TDLC´s staff participates in academic activities and courses in Chile and abroad.

In BULGARIA, GREECE, HUNGARY, JAPAN and LATVIA there are **no such trainings**. In BULGARIA the officials who draft the decisions **will soon begin to receive regular training** on legal and economic developments. In HUNGARY the members of the CC do not receive regular training on legal or economic developments. However, the GVH makes an effort to update colleagues about recent developments: a) recent legal developments are summarised by the Legal Unit, b) the Litigation Unit informs colleagues on a daily basis about judicial developments. (Whenever a Court passes a judgment or a hearing takes place the Unit provides information to the staff of the GVH about the result). This information covers two areas: (i) factual aspects and (ii) summaries and excerpts of those parts of the judgment that have importance as a principle, or that have precedent value) c)there are also weekly presentations within the GVH on specific sectors or legal issues in connection with recent cases. In JAPAN the officials who draft a decision (the hearing examiners) do not receive such regular training, but hearing examiners are selected among persons who have adequate knowledge and experience in law and economics. In addition, most of them (4 of 6 hearing examiners) are qualified for the legal profession.

Measures to improve decision drafting

The competition agencies have presented **various measures leading to improvement of decision drafting and presenting the evidence successfully in court**.

BULGARIA has introduced a **mechanism for internal consultations prior the decision-taking process** that has improved the way of drafting and presenting the evidence in court. The responsible case team and the legal department are involved in the consultations. They prepare oral and written opinions regarding the legal qualification in question and the previous court practice in the subject matter. A **classification of the court practice with emphasis on different legal areas** may improve the state of play.

In CHILE **teamwork drafting between lawyers and economists** is very important in order to explain economic evidence in their decisions in a way that the Supreme Court (composed only of lawyers) may understand the decisions more easily. Lawyers provide the economic arguments with a legal structure and language that is more familiar to Supreme Court judges. It implies, for example, that the hypothetical academic economic analysis that economists are used to, is avoided in TDLC decisions. Other measures to present economic ideas are to include **graphs, charts, figures and tables** in the decisions. They express facts or ideas more clearly than words. For example, to show the relationship between market participants, related companies, or property relations between companies. The competition agency from RUSSIA utilizes a collegial way of preparation of the decisions as a way for improving their quality.

In COLOMBIA the **implementation of econometric analysis** and the use of **concentration and dominance indexes**, and the **adoption of a hearing for the defendants to contravene the evidence as a legal tool,** have improved the way of drafting the decisions. An improvement that can be done is to implement a legal disposition to establish binding guidelines to calculate fines.

In SPAIN Since the creation of the CNC in 2007, **greater coordination** both internally (between different units of the organization) and externally (with the State Bar) has improved decision-making and its defense at trial. However, an even greater coordination with the State Bar can improve the current situation. What is more, through the CNC Communication on the quantification of sanctions applicable to operators who violate competition rules, the CNC seeks to establish a set of guidelines for its actions. The guidelines are meant as a contribution to enhancing transparency and objectivity in calculating penalties, strengthening their deterrent effect and reinforcing legal security for economic operators.

In the CZECH REPUBLIC the Office sometimes holds **informal meetings with judges** who scrutinized its decisions and **discuss** these already adopted decisions in detail. These meetings provide both parties with great opportunity to exchange views and experience. The Office also invites judges to participate in its conferences, which enable judges to improve both their knowledge of competition law and economic-based knowledge. In TAIWAN the TFTC **invited judges and lawyers to lecture** on procedural issues subjective to Administrative Litigation Act and litigation techniques, as well as legal writing skills on drafting decisions.

In the EUROPEAN UNION, the European Commission's decisions are subject to internal scrutiny by way of a system of checks and balances, including **panel scrutiny**. Moreover, the European Commission runs an on-going quality management exercise, including for example the **regular updating of a Manual of Procedures and Checklists**, as well as **close internal liaison in the process leading up to the adoption of a decision at all levels concerned**, in particular the Legal Service. Moreover, **judgments** by the European courts **are carefully reviewed and discussed within the European Commission**, including the Legal Service. Following a given judgment, the wider implications for the European Commission's decisional practice are assessed and included in any guidance material where appropriate. The continuation of the monitoring exercise to further improve decisional output will help further improve drafting as the process evolves. Moreover, **internal training** for the drafting of decisions and presenting of evidence is available.

In SWEDEN before a decision is taken or a case is brought before a court by the Swedish Competition Authority the case is presented to officers of the office of the chief economist for **analysis and feedback** on the economic analysis and the economic evidence which the case team will rely on in the court proceedings. The case is also presented to officers of the legal department for analysis and feedback on the legal analysis and the evidence relied on. This is done in a very structured way, and the **experience is that the quality has improved**. The Swedish Competition Authority has also increased the **use of oral evidence** in court (witnesses) in order to prove the violation at hand and to give the court a better understanding of the functioning of the market at hand. In SWITZERLAND competition agency has begun to systematically ask oral questions (interrogation) to parties, in the investigative stage by the Secretariat and in the decision stage by the Competition Commission.

In FINLAND at the FCA, there is a **Senior Research Officer** specialized in legal argumentation and procedural law issues who reviews all the FCA's proposals for fines. This has made the FCA's argumentation more consistent. In HUNGARY setting up the **Litigation Unit** in 2008 was the most important measure. The Unit's involvement in the drafting process is a great help for the Competition Council (i.e. for the decision-making body).

According to the competition authority from GREECE some of the steps which may be taken are: a) **rebutting all arguments** put forward by the parties during the procedure before the HCC; b) **following developments in the administrative law** especially in order to sufficiently address procedural objections put forward by the parties; c) **taking into consideration** and citing in the decision all relevant **case-law of both the EU and national courts**; d) **hiring specialized administrative and/ or competition law lawyers** to defend HCC's decisions in courts; e) **streamlining cooperation** among the investigative arm of the Authority, the Rapporteur of each case and the lawyers to represent the authority in court when to present evidence in court.

In THE NETHERLANDS one manner in which the NMa has improved the way decisions are drafted and evidence presented is through the **analysis of its own case law**. The outcome of some of these analyses is presented during a biweekly lunch meeting, or it may be included in a course organised by the in-house academy. Such courses are presented by the NMa's own experts, on the basis of it's own cases. Judgements and legal opinions are also published on the internal employee network. Another way in which the NMa increases the quality of its decisions is **to take case handlers responsible for the investigation of anticompetitive conduct and for drafting the decisions to court hearings**. This gives them a better idea of the kinds of questions a judge asks, allowing them to better anticipate those questions during their investigations and when drafting their decisions. In ROMANIA RCC continuously **learn from past case law** and constantly endeavors to improve its way of drafting decisions. In TURKEY improvement is done through **careful examining** of the reasoning of the courts, the TCA tries to draft the decisions in more clear and legally complete way. Moreover, the **reasoned decisions of the courts are disseminated** to all relevant staff (the case handlers, the drafting team, the legal officers, etc) in order to avoid annulment of the cases. Through dissemination of the court decisions and conducting meetings with case handlers and drafting team; the decisions began to be more precise and legally consistent.

In PAKISTAN the continuous legal research, capacity building programs, trainings and experience sharing programs with the mature jurisdictions has helped at the CCP in drafting the decision and considering the economic evidence in the proceedings before CCP.

Measures indicated in the answer from LATVIA: 1) **higher requirements for new employees**; 2) **more involvement** of experts from the analytical departments in a stage of court; 3) **staff training** (including specific training for new employees). Measures from the State side could be: 1) increased funding (**budget**) which in turn we can use for: 1) **better technical support** (e.g. for better handling of electronic evidence); 2) regular training for the Staff; 3) salary increase.

In NEW ZEALAND the Plain English Standard that Commerce Commission staff must follow has improved the way decisions are drafted. There is potential scope to improve the drafting of decisions through **referencing and cross-referencing evidence on the file**.

In PAPUA NEW GUINEA the **evidence gathering method**, **called the evidence** matrix, a table consisting of the elements of the offence, whom to obtain the evidence from, the kind of evidence obtained, outstanding evidence or tasks, project officers, among other things. This makes it easier for officers to draft the decisions based on the evidence matrix.

In POLAND internal guidelines on the calculation of fines constituted a measure of improvement. In ZAMBIA the authority has established a standard template for drafting decisions which guides all officers as they write decisions.

In the U.S. the FTC's **diligence in recruiting and retaining** the most talented attorneys, economists, and other professionals, and its systematic program of providing training to its staff, has contributed significantly to the agency's success in drafting decisions and presenting evidence to reviewing courts. Continued emphasis on writing briefs that tell the story of harm, providing a narrative of acts and consequences that support a particular conclusion, could further improve the agency's presentation of its case in court. In ZIMBABWE the Legal Division is recruiting personnel with legal drafting experience, from Attorney General's office.

Some improvements aim at **better understanding of competition agency's reasoning by the judiciary**

In BULGARIA, the competition authority seeks to improve its internal consultation process by introducing **systematization of the court practice** divided by the different legal areas.

In the EUROPEAN COMMISSION the **introduction of the Chief Economist Team** represented an adaptation of internal processes as a reaction to the EU courts' findings, and **economic reasoning in SOs and the European Commission decisions has since been reinforced** and is drafted in an understandable manner. Moreover, the Chief Economist Team has expertise in presenting its reasoning to the EU courts. The reinforced economic reasoning is also one of the reasons why the European Commission decisions are set out in somewhat greater detail. Moreover, the European Commission works closely with the Legal Service in adapting its decisions to the standard of proof as defined by most recent case-law.

In SPAIN besides working directly with the State Bar lawyers defending cases in recent years, the CNC has held **annual seminars** with the State Bar along with other regulatory agencies (Energy, Telecommunications, etc.) in order to address common problems in defending cases and the submission of economic evidence. Besides, it invites State Bar lawyers to specialized seminars on specific topics.

In FRANCE as only the Legal Service submits written and oral examinations before the courts as a general rule, its agents are **trained to present evidence and reasoning before courts**. The **Legal Service discusses internally specific issues with the case-handlers** that were involved in the case. In addition, between a third and a half of the Legal Service team, depending on the period, are judges. It should be noted that the Legal Service does not present a case before the Paris Court of Appeal but discusses the main legal and factual elements of the case. In ITALY the ICA, over the years, has **strengthened the ICA's Legal Service**, as well as other staff offices, with both internal and external personnel with significant experience of litigation before the administrative courts.

In THE NETHERLANDS a special training on pleading in court is organised under the leadership of a specialised commercial firm specialised in **presentation techniques and persuasion of judges** (both in writing and orally). In ROMANIA RCC organizes every year training seminars for its staff on **rhetoric, communication, updating of laws, economic analysis**, etc. All staff of the NMa may also attend the Dutch Organization of Competition lawyers seminars, which are held 6 times a year.

In ISRAEL the IAA's **senior staff** reviews almost all submissions to the courts or Antitrust Tribunal, and takes part in the preparation of the lawyers and economists who appear before the court. In addition, the IAA holds **mock trial sessions**, based on real cases, designed to train economists and lawyers. In the U.S. the FTC continually strives to present economic evidence and arguments more effectively in court. One training method used is to conduct moot courts before oral arguments. **The sessions are sometimes recorded to allow for better feedback and preparation in presenting complex economic analysis in a clear and understandable way**.

In TAIWAN the TFTC has an **internal guideline** for preparing pleas and oral hearing for judicial review made by the administrative courts. The internal guideline includes the process of how **to coordinate case handlers and staff from Department of Legal Affairs** (appeal case handler) **to present the case in the courtroom**.

In PAKISTAN the CCP possesses some experience in adapting its internal processes in order to achieve better understanding of its reasoning by the judiciary. The measures adopted by CCP in this regard *inter alia* include scheduling of workshops, conferences and trainings. In addition to the above, CCP also give **specific briefings to its external counsels for presenting the case before the Courts at the Appellate forum.**

III. DIALOGUE WTH COURTS AND JUDGES

1. *Discussions on law enforcement/law review – training of judges*

BRAZIL, BELGIUM, BULGARIA, COLOMBIA, CROATIA, EUROPEAN UNION, FRANCE, GERMANY, THE NETHERLANDS, HUNGARY, ITALY, JAPAN, NORWAY, POLAND, PORTUGAL, ROMANIA, SLOVAKIA, SPAIN, the UK and the U.S. – in these jurisdictions, the judiciary may participate in discussions on law enforcement/law review.

In BRAZIL CADE is hosting together with the Brazilian Association of Federal Judges a joint seminar entitled "Competition and Judiciary" that will take place in 2013. In SPAIN the CNC and the governing body of judges, the General Council of the Judiciary, **work together through a collaborative agreement**. The agreement provides for the creation of several working groups for seminars on competition for judges and magistrates and support of technical issues related to the Competition Act, as well as knowledge of case law. Many CNC communications have been previously discussed in seminars that have been attended by the judges.

Sometimes involvement of the judges in those discussions takes place **in frames of public consultations** addressed to a broader range of recipients. For example, the EUROPEAN COMMISSION holds public consultations as part of the preparatory phase for new policy or legislative initiatives. In that context, all stakeholders are invited to submit comments, including the judiciary. It is similar in THE NETHERLANDS, FRANCE, NORWAY and ROMANIA. In the UK the OFT does not seek to involve the judiciary specifically in discussions on law enforcement/law review. Discussions on the OFT's role in law enforcement will usually take the form of consultation exercises conducted by the OFT on proposed changes to its procedures and its guidance. It is open to the judiciary, as with other members of the public, to respond to those consultations. Some answers indicate that **public consultations are not always organized by the competition authority**. For example, in NEW ZEALAND the judiciary can attend discussions on law enforcement or law review. However, the Commission does not publically host discussions on competition law, so does not actively seek judicial attendance. In HUNGARY acts and other legislative instruments are drafted by the Ministry of Public Administration and Justice. The judiciary and the GVH are also involved in this process in the course of the public consultations on the legislative drafts, as provided for by the law applicable to

legislative procedures. In the UK the CAT, as well as the CC, participated in the UK Government's recent review of the UK competition regime[32]. Discussions about review and reform of substantive competition law are led by the Department for Business Innovation and Skills. It would be open to the judiciary, as with other members of the public, to respond to those consultations. In THE NETHERLANDS the legislature will ask the Council for the Judiciary (which is the official representative body of the judiciary) as a stakeholder about its opinions with regard to discussions on law enforcement/law review.

In the U.S. the FTC and DOJ organize workshops or presentations from time to time, in which judges, officials, and practitioners discuss current issues affecting the law. Those programs, however, involve **only a very small number of the judges** in the UNITED STATES.

In SLOVAKIA, praxis proved that it is very important to establish and develop the expert cooperation with judges and to exchange the viewpoints on topical issues of competition law. Therefore, the Office considers the dialogue with judges as an important part of its competition advocacy activities. For instance in March 2012 the Antimonopoly Office in cooperation with the Faculty of Law of Trnava University in Trnava organized the workshop on "Margin squeeze". Event was attended by the Slovak and Czech judges.

One agency indicated that initiating open public discussion with courts/judges on specifics of competition law did not bring success. **Judges seem to be hesitate and not seem ready to openly discuss closed cases or competition law issues**, even in a public forum. However, recently, a few judges showed some interest in the discussion.

In BARBADOS, CHILE, CZECH REPUBLIC, DENMARK, FIJI, GREECE, ISRAEL, LATVIA, MAURITIUS, PAPUA NEW GUINEA, PAKISTAN, RUSSIA, SWITZERLAND, TAIWAN and ZAMBIA – there is **no direct dialogue** between the competition agencies and the judiciary on enforcement of the law or its review.

However, in GREECE the case-law as developed is taken into consideration when amending either internal procedures or the respective legislation in order to address deficiencies of the investigation and decision-making procedure as prescribed by courts' decisions.

In CANADA the competition authority, as a law enforcement agency, keeps an arms-length relationship with the judiciary. As such, the Bureau did not respond to this portion of the questionnaire

BARBADOS, BELGIUM, BRAZIL, BULGARIA, CHILE, CROATIA, CYPRUS, CZECH REPUBLIC, DENMARK, FINLAND, FRANCE, GERMANY, GREECE, THE NETHERLANDS, HUNGARY, ISRAEL, ITALY, JAPAN, LATVIA, MAURITIUS, PAPUA NEW GUINEA, PAKISTAN, POLAND, PORTUGAL, ROMANIA, RUSSIA, SPAIN, SWEDEN, SWITZERLAND, TAIWAN, TURKEY, the UK, the U.S., ZAMBIA, ZIMBABWE – in all those countries judges **take part in conferences/seminars/training in the field of competition law** organized either by competition authorities and/or in other public or private fora.

In BRAZIL aside from the **institutional advocacy work** (conferences/seminars/training), CADE's standing before the Judiciary has been strengthened by a more proactive role of CADE's Attorney General's Office, which has lead to an increasing number of lawsuit proposals, either to require the payment of fines imposed by the Council or to obtain a judicial order for the compliance of remedies imposed by CADE. The follow-up of judicial procedures involving CADE has become a priority, and very often CADE's attorneys **go personally before courts to explain the merits of the decisions**. Such initiatives contributed to strengthen the relationship between judges, the legal community and CADE, as well as to promote increasing recognition and confidence in relation to the work performed by CADE. Furthermore, CADE's Attorney General and the president carried out done **formal visits to all regional courts president in order to raise awareness among the judicial community to**

[32] For more information see: www.bis.gov.uk/Consultations/competition-regime-for-growth?cat=closedwithresponse

competition issues. Also CADE's Attorney General has negotiated for the National magistracy school to give more attention to competition issues when giving **courses to federal judges.** In this sense, the school has agreed to add one specific module on competition to all judges during their first training course.

In GERMANY judges **frequently** partake in conferences and the like in the area of competition law and that refers not only to events organized by the Bundeskartellamt. Also in RUSSIA conferences and other discussions with judges are quite frequent and are conducted on a regular basis. In the UK the CAT **judges often attend or speak at private or public conferences.**

In the U.S. the American Bar Association has a judicial representative on the leadership Council of the Bar's Section of Antitrust Law (SAL), and some federal judges participate in SAL programs, such as conferences, seminars, and antitrust continuing education programs. Some judges also participate in judicial training and education programs including those provided by law schools and economic consulting firms. In addition, the FTC and DOJ, in cooperation with members of the federal judiciary and sometimes with development agencies such as the U.S. Agency for International Development, has included judicial education as part of its **international technical assistance program**. Recognizing that judges may be more disposed to engage in substantive legal discussions with fellow jurists, participation by U.S. judges has contributed significantly to the success of the program.

EUROPEAN COMMISSION: Since 2002, the Directorate-General for Competition operates, as part of the Commission's **Civil Justice Programme**, a grants programme with an annual budget of € 800.000. On that basis, it co-finances training programmes for national judges dealing with competition law. These programmes have so far reached more than 6500 national judges. In addition, the European Commission pursues dialogue with the judiciary through conferences and events with the aim of discussing and exchanging views, experience and best practices on the application of competition rules.

In DENMARK the DCCA **rarely organizes seminars** etc. for judges in the field of competition law. In ZAMBIA some judges have, in the past, taken part in conferences or seminars in the field of competition law organized by the Commission. The Commission has **plans to increase the frequency of such conferences**. In the CZECH REPUBLIC the Office sometimes **informal meetings** with judges who scrutinize its decisions in detail and discuss these decisions which have already been adopted decisions in detail. These meetings provide both parties with great opportunity to exchange views and experience. The Office also invites judges to participate in its conferences, which enable judges to improve both their knowledge of competition law and economic-based knowledge. In ZIMBABWE the **first workshop ever** took place on 19 November 2012.

In FRANCE judges may take part in conferences and seminars in the field of competition law organized either by the Autorité or in other public or private events. **They do not do so however very frequently due to insufficient time and resources.** Also in ISRAEL and in PAPUA NEW GUINEA member of the judiciary **sometimes** attend conferences.

In the answer from BARBADOS it was underlined that the **turnout in trainings for judges is usually low**. As assumed reason of judges rarely taking part in the seminars some agencies mentioned the high number of cases judges have to deal with and lack of time, as well as relatively low number of competition cases.

In THE NETHERLANDS the judiciary do attend important private conferences, but when there they limit themselves to **acting as observers** rather than taking an active part in discussions. Furthermore, judges seldom enter into discussions, round-tables or similar meetings organised by the NMa, a **conscious choice to safeguard their independence.**

In HUNGARY most of the judges do not perform an extensive scientific activity, in general they do not publish articles and do not take part in conferences. However, there is an upward trend to pursuing such activities. The GVH is responsible for the organisation of the activity of the **OECD-GVH Regional**

Centre for Competition in Budapest, within the framework of which seminars for judges (including Hungarian judges as well) have been organised over the past few years (once-twice a year, co-financed by the EU Commission). These seminars provide judges with an opportunity to improve their understanding of competition law and economics, to exchange views on the latest developments in EU competition law, and to discuss the key challenges arising in competition law cases from a judicial perspective. Judges from ROMANIA participate in the seminars organized by the OECD RCC as well as in other training courses. In PORTUGAL the PCA also has a Protocol of Cooperation with the Centre for Judicial Studies (CEJ – *Centro de Estudos Judiciários*). In the framework of this agreement, competition officers from the PCA provide training sessions annually to judges and public prosecutors, both in training and as professional training.

In CHILE only judges from the TDLC partake in conferences/seminars/training in the field of competition law. Supreme Court members do not have such practice.

In COLOMBIA the **budget** allocated by the State does not provide a concrete training of judges on specific topics. In FIJI judges do not participate in conferences/seminars/training **due to limited resources.**

In NEW ZEALAND the Commerce Commission **has not historically hosted public discussions on competition law and law reform.** This is the role of the Ministry of Business, Innovation and Employment. In KENYA the competition law is relatively new, therefore conferences/seminars/training **will be considered in future.**

2. *Cooperation of Competition Authorities within judicial proceedings*

In CROATIA Article 66 of the current Competition Act **defines cooperation** of the Agency with judicial and other authorities **in resolving the cases in respect of undue distortions of competition i**n the territory of the Republic of Croatia.

In JAPAN the AMA stipulates that, where a suit for suspension or prevention of infringements under the provisions of Article 24 of this Act and a suit for damages under the provisions of Article 25 of this Act has been filed, **the court may ask for the opinion of the JFTC** with respect to the application of this Act and the amount of damages caused by such violations as provided in the said article. (Article 83-3(2) and Article 84(1)).

Also in FRANCE, NORWAY, ROMANIA, SWEDEN courts **can ask competition authorities to provide their standpoints**. In the answer from TURKEY it was indicated that Turkish legislation does not foresee any cooperation between national courts and the competition authority. But as a general principle of any legal system, **everyone (including the public bodies) is in charge of providing the necessary information and documentation to the courts if they demand so.**

In FINLAND Section 49 "Hearing of Finnish Competition Authority" of the Competition Act states that when reviewing a competition infringement case, **the court shall give the FCA the opportunity of being heard**, as well as, when reviewing a damages claim referred to in Section 20(1), the court may request a statement from the FCA. In FRANCE, GREECE, NORWAY and SWEDEN the competition authority may **submit observations to the court.** Articles L. 462-3 and R.461-1 of the French Code de commerce enable the President of the Autorité to submit observations to any court on its own initiative in the name of the Autorité. According to the Greek Competition Act, the HCC obtaining authorization from the competent court of law can submit oral or written observations to the court for matters concerning the application of competition legislation in an ***amicus curiae*** capacity concerning cases it is not party to. The authority thus can request from the court all relevant documentation necessary for the formulation of the above mentioned observations.

In SWITZERLAND according to Article 15 of the Cartel Act, if the legality of a restraint of competition is questioned in the course of civil proceedings, the **case shall be referred to the Competition Commission for an expert report.**

In the EUROPEAN UNION regulation: **Article 15 of Regulation 1/2003**, in application of **the general obligation of sincere cooperation between the EU institutions and the Member States** pursuant to Article 4(3), first paragraph, of the Treaty on European Union (TEU), expressly provides the following **different mechanisms of cooperation between the EUROPEAN COMMISSION and national courts:**

a) Firstly, the possibility for national courts **to ask the Commission for information or for an opinion concerning the application of the EU competition rules** (Article 15(1) Regulation 1/2003);

b) Secondly, the possibility for the Commission and national competition authorities **to submit, on their own initiative, *amicus curiae* observations to a national court relating to the application of Articles 101 and 102 TFEU** (Article 15(3) Regulation 1/2003 see also below at section IV.3);

c) Thirdly, Member States **national courts are obliged to forward to the Commission a copy of any written judgment deciding on the application of Articles 101 and 102 TFEU** (Article 15(2) Regulation 1/2003).

In 2004, the European Commission issued a new Notice on the cooperation with the courts of the EU Member States in the application of the EU antitrust rules, where the principles concerning judicial application of those rules and the specific means of cooperation are further explained.

More specifically, as regards requests for information and opinion issued by national courts, the European Commission endeavours to reply to information requests within one month and to provide opinions within four months. The Commission invites national courts to consider this possibility for any factual, economic or legal question for which they perceive a need for information or non-binding guidance.

Since the entry into force of Regulation 1/2003 on 1 May 2004, the Commission has issued opinions in **more than 20 occasions** in response to requests from national courts. The Commission publishes its opinions as soon as it has received the approval for publication by the requesting court. The opinions are available at http://ec.europa.eu/competition/court/antitrust_requests.html.

In answers from BELGIUM and CYPRUS it was indicated that cooperation between the national courts and competition authorities is ruled by the Regulation 1/2003.

In BULGARIA a special mechanism came into force in 2010 in order for Bulgaria to comply with its obligation under art. 15 (2) of Council Regulation (EC) No 1/2003 to submit to the EUROPEAN COMMISSION all national courts judgments on the application of Art. 101 and 102 of TFEU. In its Action Plan for 2010, the Commission on Protection of Competition put as one of its priorities **building a mechanism for cooperation** between the institutions – the national courts, the CPC and the European Commission, for exchange of information under Art. 15 (2) of Council Regulation (EC) No 1/2003. The CPC proposed to the Ministry of Justice and to the Supreme Judicial Council **to adopt an appropriate act for the above-stated purpose.** The Supreme Judicial Council of the Republic of Bulgaria, obliged the presidents of all courts in the Republic of Bulgaria, including the Supreme Court of Cassation, the Supreme Administrative Court, all courts of appeal, all district and regional courts in the country to forward to the CPC without delay any written judgment regarding claims for damages resulting from infringements of Art. 101 and 102 of TFEU. After receiving these judgments, the CPC will send them to the European Commission.

In the answer from BARBADOS a need for a warrant was presented as an example of situation when cooperation between courts and competition authorities takes place. In POLAND, the President of UOKiK **cooperates with courts on certain aspects of proceedings** carried out by the competition authority. For example, the President of UOKiK may address a territorially competent regional court to examine witnesses and obtain an expert opinion, where it is supported by the character of the

evidence or consideration of significant inconvenience or significant costs of obtaining the evidence. Also, whenever a proceeding conducted by the President of UOKiK involves a search in residential or any other premises performed either by the Police, or representatives of the competition authority, consent of the Court of Competition and Consumer Protection is needed.

In the answer from the U.S. it was said that the process of judicial review of federal agencies' decisions, established by the U.S. Constitution and by fundamental legislation such as the Federal Trade Commission Act and the Administrative Procedure Act, ensures **a relationship in which the federal courts articulate legal principles that guide the agencies' decisions, while the agencies enforce the law and apply it to address new forms of business conduct.** The agencies also strive to apply new economic learning in decisions that ultimately come before the courts, consistent with established legal precedents.

In LATVIA the legislation does not foresee any cooperation between national courts and competition authority except in situations when there is a **civil case regarding a violation of Competition Law** then the court has a duty to inform the authority (**action for damages**).

Also, in BRAZIL the legislation does not foresee any cooperation between national courts and CADE, nevertheless the proactive role of the authority and its Attorney General mentioned in the question above is a good example of cooperation between the two institutions. In THE NETHERLANDS, according to the legislative provisions the only contact between the NMa and the national courts is through the appeal process. However, a practice has developed in which the District Court and the Appeals Tribunal has **yearly discussions** with the NMa **about common managerial aspects of the appeals procedure, such as the inflow of new cases or current themes in upcoming cases.** This will allow the judges to decide on the proper scheduling of those upcoming cases. In ZAMBIA there are no explicit rules but the Competition and Consumer Protection Commission anticipates cooperation between itself and the national courts in relation to **training and advocacy**. In the answer from ZIMBABWE it was underlined that the Attorney General's personnel and advocates have the **intention to bring some cooperation** amongst all parties with regards to competition law

In ITALY the Competition Act 1990 does not foresee specific forms of cooperation with national courts. However, the Italian legislation (art. 100 of the Italian Constitution) establishes an advisory function, although not binding, of the Council of State towards Public Administrations. Therefore, the ICA may ask the Council of State to deliver, within its advisory functions, opinions and questions on general legally controversial issues, although not on specific ICA's investigations or on issues that may be object of judicial review.

In CHILE, COLOMBIA, CZECH REPUBLIC, DENMARK, FIJI, GERMANY, HUNGARY, MAURITIUS, NEW ZEALAND, PAKISTAN, PORTUGAL, RUSSIA, SPAIN, TAIWAN and the UK there are no legal provisions concerning specific cooperation between national courts and competition authorities. The answer from GERMANY contains a remark that such a rule would have to be **drafted carefully**, so as not **to compromise the impartiality of judges in any way**.

In most jurisdictions it is possible for the courts to ask competition authorities for clarifications and factual information. In BRAZIL, BULGARIA, COLOMBIA, GREECE, THE NETHERLANDS, LATVIA, NEW ZEALAND, RUSSIA, SWITZERLAND, TAIWAN, the UK, the U.S. and ZIMBABWE courts ask for clarifications and information **in cases where competition authorities are parties of the proceedings.**

In the CZECH REPUBLIC, FINLAND, FRANCE, GERMANY, HUNGARY, ISRAEL, ITALY, JAPAN, PORTUGAL, SLOVAKIA, SPAIN, SWEDEN and TURKEY competition authorities may receive requests from courts **also in cases which they are not directly involved in**. For example, in ITALY within the phase of judicial review administrative judges usually ask ICA, through court orders and decisions for, both legal clarifications and factual information. This occurs **quite often**. Furthermore, both the civil courts (for example within the damage actions) and the criminal courts may ask the ICA for information and documents. This has also already occurred on a number of occasions; generally, the ICA's **approach**

tends to be collaborative. In SWEDEN in cases before a court where the Swedish Competition Authority is not a party, the courts have the possibility to ask the Authority to submit a statement. Such a statement might address both legal issues and factual information. This opportunity **has only been used once** by a Swedish court. In JAPAN the JFTC establishes an **internal standard** on providing relevant materials for the purpose of promoting more effective use of lawsuits for damages due to a violation of the AMA. So, at the request of the litigant or courts, the JFTC provides the court with the relevant materials pursuant to the standard.

In PAKISTAN the Courts may ask CCP for clarifications or information relating to competition matters. This has been done once where the Supreme Court of Pakistan appointed CCP as a commission and asked it to submit a report relating to the sugar industry.

In BELGIUM **occasionally**, the Court of appeal of Brussels has asked the College of Competition Prosecutors **to conduct an investigation and to file a report**, e.g. on market definitions. In FIJI courts may request information when referring to the interpretation of the Decree. In the U.S. in significant cases, the Supreme Court often invites the Solicitor General – the head of the DOJ unit responsible for presenting the government's positions to the Supreme Court – **to submit briefs and present arguments**, even if the government is not a party to the matter under review. The FTC **frequently** provides legal analysis and factual information to the office of the Solicitor General in such cases that implicate competition law and other matters for which the FTC has relevant expertise.

In TURKEY, national courts can apply to **any authority** for expert examination. National courts can also, on their initiative, consider the decision/opinion of the TCA as **preliminary issue**. The TCA may also appear before a national court **as intervener**, but this intervention is subject to approval of the court.

In the EUROPEAN UNION, in addition to the possibility to submit requests for preliminary rulings to the European Court of Justice under Article 267 TFEU, **national courts may, pursuant to Article 15(1) of Regulation 1/2003, consider the possibility of requesting the Commission's opinion on questions concerning the application of EU competition rules.**

Since the entry into force of Regulation 1/2003 on 1 May 2004, the Commission has issued opinions in **more than 20 occasions** in response to requests from national courts. The Commission publishes its opinions as soon as it has received the approval for publication by the requesting court. The opinions are available at

http://ec.europa.eu/competition/court/antitrust_requests.html.

The European Commission endeavours to reply to information requests within one month and to provide opinions within four months. The Commission invites national courts to consider this possibility for any factual, economic or legal question for which they perceive a need for information or non-binding guidance.

In POLAND in general courts do not ask for legal clarifications or factual information, but it happens that courts ask for materials of the cases, e.g. civil courts hearing compensation cases (while the Antimonopoly Act significantly limits the possibility to transfer such data, see Article 73). That can be done also by prosecutors or courts in penal proceedings.

MAURITIUS, PAPUA NEW GUINEA, ROMANIA, ZAMBIA have little or no experience in that respect. CROATIA, CYPRUS, DENMARK, NORWAY, the UK CC answered the question negatively.

3. *Submission of own-initiative observations (amicus curiae) by a competition authority*

According to the answer from BARBADOS the law appears to give the Barbados Fair Trading Commission the **freedom of submitting, on its own initiative, *amicus curiae* observations to national court.**

BELGIUM, COLOMBIA, FIJI, FRANCE, GERMANY, HUNGARY, LATVIA, NEW ZEALAND, NORWAY, PAKISTAN, ROMANIA, SPAIN, SWEDEN, the UK, the U.S., ZAMBIA – in these jurisdictions competition authorities are **also entitled to make observations on their own initiative** to their national courts.

In the U.S. the FTC and DOJ are authorized to file an *amicus* brief in courts of appeal cases without the consent of the parties or seeking leave of the court. Accordingly, the DOJ and FTC actively monitor pending private antitrust appeals and Supreme Court petitions looking for cases raising issues that the agencies might wish to address in an *amicus* filing. Both the FTC and the DOJ have used the *amicus curiae* process to help courts (primarily the Courts of Appeals and the Supreme Court) better understand both generic competition issues and matters affecting competition in specific industries in which they have expertise. As such, the DOJ and FTC strive to assist the courts in shaping the development of the law to most effectively promote economic efficiency, innovation, and the well-being of consumers.

In NORWAY there is a provision in the Civil Proceedings Act, Section 15-8, under which public bodies may, on their own initiative provide the court with an *amicus curiae*, as long as it is within the area of the public body's expertise. This enables the Competition Authority to provide the court with a **text to enlighten public interests in any case which raises issues of competition, regardless of any provisions of the Competition Act being argued**. Additionally, Section 9 of the EEA Competition Act allows for the Competition Authority to provide the court with amicus briefs, and with the court's permission, to present an opinion orally. This provision would, however, only be applicable to cases invoking the EEA Competition Act, which is only the case for breaches involving trade between EEA member states.

In LATVIA although there is no specific legal regulation regarding amicus curiae observations the competition authority may nevertheless submit such observations based on the given rights in Latvian Law. Because according to the Competition Law (paragraph 7) the Competition Council is entitled: 1) to provide opinions regarding conformity of the activities of market participants with regulatory enactments governing competition; 2) submit pleadings, applications and complaints to a court in the cases provided for in this Law and other regulatory enactments. But despite the fact that in theory authority can submit *amicus curiae* observations, while **in practice there is no case** when there would have been such a necessity. Also in FIJI the right to submit *amicus curiae* observations has not yet been performed.

In BELGIUM the National Competition Authority has to be aware of an appropriate cases pending. It has two ways to do so. One is information obtained by a party to the suit. The other is the **obligation for the courts to send a copy of a judgment applying competition law to the Competition Council**, allowing the Competition Council to submit *amicus curiae* observations in the appeal proceedings. **Unfortunately, this obligation is only rarely complied with.**

In FRANCE the Autorité may, on its own initiative, submit *amicus curiae* observations to national courts on both European and national legal basis. In the UK OFT may make written observations (and **apply to make oral observations**) in cases that raise competition issues[33]. While there is no similar provision in the CAT rules, the CAT's rule do provide for persons with sufficient interest to apply to intervene in proceedings before the CAT[34]. Generally, the national courts will appoint *amicus curiae* where appropriate in all the circumstances. The Article 15 (3) of Regulation 1/2003 is also applied. In SPAIN the Competition Act contains provisions similar to those of art. 15 of EC Regulation 1/2003.

[33] See the CPR Practice Direction on 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 – and CPR Practice Direction 52 on Appeals. We note also that these Practice Directions require that where a party's case raises such competition issues, a copy of the statement of case or notice of appeal must be served on the OFT at the same time as it is served on the parties to the case.

[34] Pursuant to rule 16 of the CAT Rulet SI 2003/1372

As regards the EUROPEAN UNION, **Article 15(3) of Regulation 1/2003** empowers the European Commission to submit, of its own initiative, written observations to national courts on issues relating to the application of Articles 101 or 102 TFEU, when the coherent application of Article 101 or 102 TFEU so requires. With permission of the national court in question, NCAs and the Commission may also make oral observations.

"Coherence" of application of Articles 101 or 102 TFEU can, firstly, relate to the ***consistency* of the application of these rules** (see recital 21 of Regulation 1/2003) and, secondly, to the ***effectiveness* of enforcement** (see ECJ case C-429/07, *Inspecteur van de Belastingdienst v X BV*), in particular with regard to remedies (fines and penalties). When exercising its discretion to submit, on its own initiative, an observation to a national court, the European Commission considers whether it sees a **significant risk of incoherence in the application of Article 101 or 102 TFEU beyond the specific case**. It also takes into account whether it has other means to take a position on the issue at hand. As regards the stage of proceedings, **cases which have reached the court of last instance at national level are in general regarded as better candidates for an *amicus curiae* observation than lower courts.**

Until the end of 2012, the European Commission submitted **12 *amicus curiae* interventions** to national courts in seven Member States, of which nine were made since 2010. Issues on which the European Commission intervened include, *inter alia*, disclosure of leniency documents, tax-deductibility of fines, interpretation of vertical agreements and the application of Article 101(3) TFEU to crisis cartels.

The Commission publishes its *amicus curiae* observations as soon as it has received the approval for publication by the national court to which the observation has been submitted. The observations are available at

http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html.

Article 15(3) of Regulation 1/2003 grants the possibility to submit observations to national courts on issues of application of the EU competition rules also to the national competition authority of their Member State.

In some European countries this provision of Regulation 1/2003 **is the only possibility for the competition authority** to submit observations to national courts. That is the case for BULGARIA, CYPRUS, CZECH REPUBLIC, DENMARK, FINLAND, GREECE, THE NETHERLANDS, ITALY, POLAND and PORTUGAL. However, in ITALY in the ICA's experience, **the possibility provided by the EU legislation has never occurred so far**. In the answer from CZECH REPUBLIC it was stated that the presence of *amicus curiae* at the court is **not common**. Also in THE NETHERLANDS in the past couple of years, the NMa did not use its power to submit *amicus curiae* on its own initiative. This **has not been necessary**, because in civil procedures the case law of the NMa and the Court of Justice is observed and properly applied. The civil-law judge does not differ from the interpretations of competition law concepts or of case law. Thus, there has been no need to use the *amicus curiae* powers in order to guide the interpretations of those judges. The NMa does get **requests from courts to intervene as amicus curiae**, for example from the Appeals Court of Amsterdam who asked the NMa to explain the block exemption regulation for the automotive sector. Such requests are very rare and when they do occur, they are assessed on their importance for the uniform interpretation of competition law, for which the NMa is responsible. If a question does not comply with this criterion, the NMa will not proceed to give an *amicus curiae* intervention.

In HUNGARY at the request of the court, the GVH shall inform the court, within sixty days of receipt of the order of the court requesting this information, of its legal opinion on points concerning the application of the relevant provisions of the Competition Act. When the GVH's legal opinion is not requested, it is for the GVH to decide whether to provide observations or not. Due to the relatively small number of such notifications from the courts, and to the fact that ***amicus curiae* rules are relatively new** in the Hungarian legal system, the GVH always provides observations. There have

been no cases so far in which the GVH had to give observations in a lawsuit that had not been notified to it beforehand; nevertheless such intervention cannot be ruled out in the future, even though the applicable law is not absolutely clear on whether such an opportunity exists or not. Of course, such intervention would require the GVH to possess a serious interest in the case.

In TURKEY if the relevant **court orders an expert opinion** from the TCA, it may fulfill such a demand. But the TCA has not submitted, with its own initiative, any *amicus curiae* for a matter not in the scope of Competition Act

In BRAZIL considering that the legal defense of cases are taken by the Attorney General's Office, who represents CADE's interests on the cases, there is **not any need to submit *amicus curiae* observations to national courts**. Additionally, art. 118, from Law no. 12.529 of 2011, states that in legal proceedings in which the application of that competition law is discussed, **CADE should be invited to intervene in the action as an assistant**, hence even if the case has a subsidiary interest in competition law CADE will take part of it.

In GREECE the Greek legislation does not authorize the HCC to submit *amicus curiae* decisions solely on its own initiative. Also in JAPAN and in SWITZERLAND competition authorities **cannot act on their own initiative** in that respect. In KENYA and ZAMBIA competition agencies **not entitled** to act as amicus curiae in their national courts.

4.4. *Problematic issues*

In some answers to the question whether there are **any problematic issues experienced by the authority** it was noted that judges lack with understanding of competition issues, moreover some of them are not willing to broaden their knowledge.

In answers from two countries it was said that **trainings were organized but judges usually did not manage to participate,** e.g. due to time constraints**.**

In one of the European countries judges are not very keen on interacting with the National Competition Authority or with the European Commission, in the sense that they keep these interactions to a minimum. Interactions with the competition community at large are limited by the fact that most **judges do not have a sufficient command of the English language**.

In one of the European Countries another problematic issue is that the Court of appeal, which is also an appellate court of general jurisdiction, has the tendency to treat the decisions of the Competition Authority like the judgments of lower judges of the ordinary judiciary of which it has to hear the appeal. This means that they have the **tendency to review the case anew, without having much consideration for how and what the Competition Authority has decided**. In another country, the Civil Procedure Law provides for the referral to the National Competition Authority of the judgments of private enforcement of competition law, to facilitate coordination between judicial and administrative bodies in the implementation of the Competition Act. Although the NCA receives most of the judgments, sometimes it has been found that some of them have not been notified. Secondly, in case of fines, there are sometimes discrepancies in the quantification of fines between the courts and the NCA, as these courts sometimes respect the NCA resolution in terms of infringement but **reduce the fines without a clear reasoning**.

In one of the jurisdictions the analysis made by judges **does not always comprise economic fundamentals that are essential in the factual situation**. In another, the major problem is that, since there is no specialized court for competition cases and **judges may lack a background in competition or economics,** judges and NCA's may have different views on application of provisions in competition law. One of the answers indicated that most judges and lawyers are finding it difficult to grasp the concepts involved. Therefore, **in attempting to understand the economic aspects cases may take longer than anticipated in court**. Apart from that, it is possible that there are not many competition

cases in a given country, and the rules on legal domicile lead to cases being spread to various courts and various judges. The facts and evidence of the cases may be extensive. This may call for a need for clarifications, and for **a thoroughly structured presentation of the case**. Moreover, the field of competition law is highly specialized, and **some cases may call for the assessment of complex economics-based problems, which is not an area of expertise for a particular judge.**

One of the replies contains a statement that most judges are receptive and attentive to the issues. However competition is usually taken by them as a novelty and that **lack of experience on such specific matters seems to lead to riskier decisions.**

In another European jurisdiction if any issues arise, they pertain to the application by judges of national procedural rules, which are often applied (due to tradition) with more rigidity as compared with procedural rules at EU context. Albeit significant progress made in interpreting those rules in light of correspondent provisions at EU level, NCA **decisions are still**, and relatively more often in comparison with European Commission decisions, **annulled for formalities** (e.g. composition of NCA chambers, conduct of oral hearings and certain other procedural acts) **which essentially have no bearing to the substantive assessment of the case** (nor could they alter the course of the decision-making progress).

One of the NCA wrote that in the past, challenges were also **due to lack of procedural certainty**, which has been tackled with the adoption of the new competition law. It created greater procedural certainty by establishing procedural rules within its framework, gaining independence from other subsidiary legislation.

Another problem described is that the **judges** tend to formally apply the law, including its procedural aspects and **sometimes can be reluctant to hear arguments related to damages to competition and adverse effects of the behavior in question on the economy or the relevant market.**

According to one of the replies judges are open to the explanations given by the competition authority or its reasoning in court. Nonetheless, **judges are critical of the evidence collected by that NCA to prove the infringement and the manner in which it has been gathered**. Consequently, they also pay close attention to the scope and breadth of the investigation which the NCA conducts to use as the basis for its decision.

A critical issue experienced within the judicial review of another NCA's decisions concerns the **methodology and criteria used** by that NCA **in the imposition and calculation of the fines** imposed on the companies. Furthermore, the **requests by civil and criminal courts to transmit to them information in the NCA's possession - often of confidential nature and/or concerning on going investigations** - have raised several issues over the years. In particular, a very sensitive issue regards the interaction between antitrust and criminal proceedings. Indeed, in the legal system of that country, they are carried fully independently one from the other and they could also be carried out in parallel by the NCA and criminal courts. In this context, **the NCA's officials are obliged to inform the Public Prosecutor of any evidence of crime they might have incurred during the investigation of antitrust cases.** This obligation may become **problematic with regard to the interplay between antitrust and criminal rules within the leniency programs in bid ridding cases**, which are criminally prosecuted. Indeed, this circumstance may have a significant chilling effect on the number of leniency applications presented before the NCA.

Some jurisdictions have organized specialised courts dealing with competition cases of all kinds, which is a great advantage of their competition system. **Due to the specialisation, the courts accumulate expertise and experience in the complex and sometimes unique issues concerning competition law cases.** It can be observed that in view of their predominantly legal background **judges still tend to base their decisions on a qualitative analysis of market structure and market data**. Quantitative economic analysis is considered as a complement, where data can be made available with reasonable effort. In those cases, the **judges judge on the grounds of the economic deliberations submitted by the parties' experts, rather than by a court-appointed expert.** The

requirements that an economic analysis needs to fulfil to be accepted in court are also relatively strict.

It should be noted that in many jurisdictions no problems concerning interaction with the judges have not been encountered.