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**COMPILATION OF THE RESPONSES TO THE UNCTAD QUESTIONNAIRE**

**SESSION I: Implementation of competition law and policy**

# COMPILATION OF THE RESPONSES TO THE UNCTAD QUESTIONNAIRE

## SESSION I: Implementation of competition law and policy

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## Austria

### 1. Questions on appropriate sanctions and remedies:

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*
- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*
- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

As regards procedural fines:

The grounds for the imposition of procedural sanctions / fines are false/misleading information in a merger notification, false/misleading or incomplete provision of information or noncompliance with a Cartel Court's order to provide information.

The type and nature of the sanction (civil, administrative, criminal, and combined) is that of a civil sanction, imposed by the Cartel Court.

Procedural sanctions can be imposed on undertakings (individuals only in case of sole proprietorship).

The criteria for determining the sanction/fine are defined in § 30 Cartel Act: Gravity and duration of the infringement; Enrichment; negligence/fault; economic strength of the undertaking; contribution to the Court's fact finding.

As to the limits § 29 Cartel Act provides for that fines in the cases cited above may not exceed 1% of the total turnover achieved in the last business year.

As regards sanctions on the merits of the case:

The grounds for the imposition of fines as sanctions on the merits are as follows: Participation in cartels (§ 1 Cartel Act, Art 101 TFEU); abuse of a dominant market position (§ 5 Cartel Act, Art 102 TFEU); retaliatory measures (§ 6 Cartel Act); unauthorised implementation of a merger (§17 Cartel Act); non-compliance with a commitment decision (§ 27 Cartel Act).

Their legal nature is not entirely clear - there are diverging opinions on it in legal doctrine. In some instances the Supreme Cartel Court has characterised the fines imposed by the Cartel Court as "criminal-offence-like" sanctions.

§ 29 Cartel Act states that fines in the cases cited above may not exceed 10 % of the total turnover achieved in the last business year.

We do not have specific guidelines on fines. In past cases the European Commission's guidelines on fines were taken as a point of reference for the calculation. This has been acknowledged by the Supreme Cartel Court insofar as the legal criteria for their imposition and the underlying valuations are comparable.

As a general principle, the decision is enforceable only when it becomes final (§ 43 AußStrG). However, the Cartel Court may declare the decision provisionally binding and enforceable, if necessary to prevent detriments to a party or the public interest.

The Court has generally followed the suggestions made by the FCA in regards to fines. A major breakthrough was when the Cartel Court decided on Dec 14th 2007 on the imposition of fines against the following undertakings:

- Otis GmbH 18,2 Mio EUR,
- Kone Aktiengesellschaft 22,5 Mio EUR,
- Schindler Aufzüge und Fahrtreppen GmbH 25 Mio EUR,
- Haushahn Aufzüge GmbH 6 Mio EUR and
- Doppelmayr Aufzüge AG 3,7 Mio EUR.

These were the highest sanctions imposed so far in an Austrian cartel case.

## 2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*
- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*
- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

There are basically three competition authorities, one is the Bundeswettbewerbsbehörde (FCA), the Bundeskartellanwalt (Federal Cartel Prosecutor - FCP) and the Cartel Court. Both, the FCA and the FCP are entitled to initiate Cartel Court proceedings. The FCA is the investigative authority in Austria and can investigate the full range of Art 101 and 102 TFEU and the legal national provisions. The FCP has not been conferred with investigative powers himself, but he may request information from the BWB or ask the BWB to conduct investigations.

In principle, prohibition decisions and/or decisions imposing fines can only be taken by the Cartel Court. The FCA thereby acts as a “prosecutor” bringing and litigating the case before the

Cartel Court but cannot take decisions in Cartel cases itself. The Cartel Court only conducts proceedings on application. Applications can be made by the FCA, the FCP, regulators, chambers and concerned undertakings. Applications to impose a fine can only be filed by the FCA and the FCP.

Therefore the FCA as the investigating authority is not competent to take decisions finding, terminating and sanctioning infringements.

## Azerbaijan

### 1. Questions on appropriate sanctions and remedies:

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

Laws of the Republic of Azerbaijan “On antimonopoly activity”, “On unfair competition”, “On natural monopolies” which are part of the antimonopoly (competition) legislation, set forth the system of financial sanctions and orders on elimination of violations of the laws. For example, according to the law of the Republic of Azerbaijan “On unfair competition” in case of violation of the law by imitating a business activity of a competitor (to commit unlawful action) - financial sanctions equal to one sum of illegal profit or two sums if commits repeatedly in the next year, are applied to market subjects. According to this law committing illegal actions by copying of economic activity of competitor, unfair entrepreneurship, unscrupulous business behaviour, delusion of consumers- financial sanctions up 10 per cents or if action repeats the next year 20 per cent of total profit of market-oriented subject raised under unfair competition, are applied to market subjects.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

Violation of the requirements of antimonopoly legislation (laws of the Republic of Azerbaijan “ On antimonopoly activity”, “ On unfair competition”, “On natural monopolies”) are determined by the Rules “On reviewing cases about violating of antimonopoly legislation” approved by the resolution of the Cabinet of Ministers, 29 May 1998, number 120. According to this Rules cases on violation of antimonopoly legislation are determined through investigation by the Commission created in the competition body, and financial sanctions (which are relevant to the character and content of violation) are applied to the market subjects which violate the law.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

Main challenges encounter when enforcing sanctions and remedies in competition cases are about data accessing and determination of the violation time.

## 2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

According to the article 4.1 of the Rules “On reviewing the cases of violating of antimonopoly legislation” approved by the resolution of the Cabinet of Ministers, 29 May 1998, number 120, executive authorities, market subjects (their officials) and citizens, at the same time individual entrepreneurs according to the current legislation can complain either administratively or judicially, about the avoiding completely or partly, the resolutions and orders of antimonopoly body on settling the cases of antimonopoly legislation violation in essence, eliminating resolutions on imposing fine on and financial sanctions. Resolutions and orders of antimonopoly body can be appealed within six months from the date of adoption, excluding claims which limitation of action doesn't concern.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

Judicial review process on violating of antimonopoly legislation is conducted on the basis of submitted evidences, evidences got during court examination and testimonial evidences. Court examination includes review of both legal and factual assessment.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

Main challenges in the judicial review process are legitimating evidences arisen on the basis of economic settlement of accounts, proving cartel agreements and artificial overvaluation.

## Benin

### 1. Questions sur les sanctions et les mesures correctives :

- *Prière de décrire le régime de sanction et/ou de mesures correctives prévu par la loi sur la concurrence de votre pays et donner des indications sur la façon dont il est mis en application.*
- *Prière d'indiquer comment les sanctions et/ou les mesures correctives sont déterminés lors de l'examen d'un cas spécifique.*
- *Prière d'indiquer les obstacles que vous devez surmonter dans l'application des sanctions et/ou de mesures correctives.*

La loi sur la concurrence au plan national est en cours d'étude dans les institutions concernées. A défaut de cette réglementation, c'est la loi n° 90-005 du 15 mai 1990 fixant les conditions d'exercice des activités de commerce en République du Bénin qui est applicable pour les dossiers de concurrence.

Pour ce qui concerne le régime des sanctions et les mesures correctives, il faut signaler que les infractions aux dispositions de la loi n° 90-005 sont punies d'un emprisonnement allant de un (1) à cinq (5) ans et d'une amende de cinq cent mille (500 000) FCFA à dix millions (10 000 000) FCFA ou de l'une de ces deux peines seulement.

Il est important de souligner que le régime des sanctions et les mesures correctives prévues dans le projet de loi sur la concurrence prévoient les peines allant de 10 000 à 25 000 000 FCFA et d'un emprisonnement de quinze (15) jours à deux (02) ans selon le cas.

La loi 90-005 du 15 mai 1990 définit pour chaque type d'infraction l'amende correspondante.

L'autorité de la concurrence n'est confrontée à aucun obstacle dans l'application des sanctions et/ou mesures correctives.



## *2. Questions sur le recours :*

- *Prière de décrire les procédures de recours ou d'appel prévu par votre loi et leur application par l'autorité de concurrence et les autorités de régulation sectorielles de votre pays.*
- *Quelle est la fréquence des recours dans les affaires de concurrence dans votre juridiction (recours portant sur l'examen des aspects juridiques des affaires ; recours requérant des preuves additionnelles) ?*
- *Quels sont les obstacles à surmonter par l'organe d'appel, les requérant, les tierces parties dans l'examen des recours ?*

La loi sur la concurrence n'étant pas encore votée par le parlement béninois, seule la loi 90-005 demeure applicable. Lorsque l'Administration et le délinquant ne parviennent pas à une entente sur l'amende à payer par ce dernier, le dossier est transmis au Tribunal qui statue.

Les recours dans les affaires de concurrence, jusqu'à ce jour, sont quasi-inexistants.

Pour cela, aucun obstacle n'est à surmonter par l'organe d'appel, les requérants et les tierces parties dans l'examen des recours.

## Brazil

### 1. Questions on appropriate sanctions and remedies:

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

The Brazilian Competition Policy System (BCPS) is composed by three separate institutions: the Brazilian Administrative Council for Economic Defense (CADE), the Secretary for Economic Law of the Ministry of Justice (SDE), and the Secretary for Economic Monitoring of the Ministry of Finance (SEAE).

The Law 8884, enacted in 1994, is the Brazilian Antitrust Law and had been amended three times: in 1999, imposing a merger notification fee; in 2000, giving the BCPS new powers to conduct investigation, notably powers to conduct dawn raids and to institute a leniency program; and in 2007, clarifying the procedures for settling conduct cases and authorizing settlement in cartel cases.

### Sanctions

According to the Brazilian Law, the main sanction is the charge of fines, which can be imposed in cases of condemnation for anticompetitive behavior and for failure to observe CADE's orders as well as for obstruction of an investigation by various means (Articles 25, 26 and 26-A).

Businesses are subject to fines from one to thirty percent of their gross revenue in the year prior to the beginning of the investigation, but no less than the amount of the unlawful gain from the conduct. Managers of companies in violation may be fined from ten to fifty percent of their company's fine. It is noteworthy that the fine is calculated considering the respondent's total revenues, not just the amount from the relevant market involved. Other individuals and organisations not engaged in commerce activities (such as trade associations), which therefore do not have revenues upon which a fine can be calculated, may be fined between approximately BRL 6,000 and 6,000,000 (currently about USD 3,500 – 3,500,000), as prescribed in Article 23, *in verbis*:

Article 23. The following antitrust penalties shall apply:

I - for companies: a fine from one to thirty percent of the gross pretax revenue thereof as of the latest financial year, which fine shall by no means be lower than the advantage obtained from the underlying violation, if assessable;

II - for managers directly or indirectly liable to their company's violation: a fine from ten to fifty percent of the fine imposed on said company, which shall be personally and exclusively imposed on the manager; and

III - in the case of other individuals and other public or private legal entities, as well as any de facto or de jure associations of entities or persons, even temporary ones, with or without legal identity, that do not engage in business activities, when it is not feasible to use the gross sales value, the fine will be 6,000 (six thousand) to 6,000,000 (six million) UFIR or any other index replacing it.

Sole Paragraph. Fines imposed on recurring violations shall be doubled.

The Law also imposes fines due to untimely presentation of merger notifications, in the terms of Article 54, paragraph 5:

(...)

Paragraph 5. Noncompliance with the deadlines set forth in the preceding paragraph will be punishable with a fine in an amount between 60,000 (sixty thousand) UFIR and 6,000,000 (six million) UFIR, imposed by CADE without prejudice to the opening of an administrative proceeding pursuant to article 32 hereof.

In addition, the Law establishes some accessory penalties that can be applied cumulatively to the fines, as provided in Article 24:

Article 24. Without prejudice to the provisions of the preceding article, the fines listed below may be individually or cumulatively imposed on violations, whenever the severity of the facts or the public interest so requires:

I - at the violator's expense, half-page publication of the summary sentence in a court appointed newspaper for two consecutive days, from one to three consecutive weeks;

II. - ineligibility for official financing or participation in bidding processes involving purchases, sales, works, services or utility concessions with the federal, state, municipal and the Federal District authorities and related entities, for a period equal to or exceeding five years;

III. - annotation of the violator on the Brazilian Consumer Protection List;

IV - recommendation that the proper public agencies:

(a) grant compulsory licenses for patents held by the violator; and

(b) deny the violator installment payment of federal overdue debts, or order total or partial cancellation of tax incentives or public subsidies;

V - the company's spin-off, transfer of corporate control, sale of assets, partial discontinuance of activities, or any other antitrust measure required for such purposes.

## Remedies

For means of clarity and didactic, the term "remedies" will be treated here as acts that contribute to CADE's decisions enforcement. These remedies can be applied either to conduct and mergers/acquisition cases. The behavioral remedies – orders requiring the merged entity to provide access to its distribution network, or requiring transparency in pricing, for example – are imposed, as opposed to structural remedies – divestitures of assets or, less frequently, outright denial of the transaction.

Table 1 shows the distribution of these two types of remedies for 2007 and 2008. These data do not include orders involving non-compete clauses. Also, it should be noted that in some cases both types of remedies were imposed; those cases are represented twice.

Table 1. Distribution of behavioral and structural remedies, 2007-2008

	2007	2008	Total
<b>Behavioral</b>	8	10	18
<b>Structural</b>	4	8	12

Considering the behavioral remedies, Article 53 of the Brazilian Competition Law permits CADE to reach Settlement Agreements, also called Cease-and-Desist Orders (in Portuguese, Termo de Compromisso de Cessaç o - TCC), with respondents in conduct cases (cartel cases had been specifically excluded by law from those procedures, that changed with a 2007 amendment to the competition law<sup>1</sup>) to establish the obligation to cease the anticompetitive practice that has been investigated.

A respondent can propose a TCC at any time in the process, whether the investigation is in SDE or at CADE. CADE has sole responsibility for settlement negotiations, but SDE can make recommendations to CADE on settlement terms. In a case with multiple respondents, a single respondent can settle, while the case continues against the others. Respondents have only one opportunity to settle. Agreement must be reached within 30 days of initiation of negotiations, with the opportunity for one extension of 30 days. Settlements can be reached either with an admission of guilt or without (*nolo contendere*), at CADE's discretion, but if the case was initiated through a leniency agreement the respondent must admit guilt.

<sup>1</sup> Law 11482/07.

The agreement will contain the amount of the monetary penalty, which must not be lower than the minimum fine fixed by the competition law (1% of the respondent company's total revenues for the prior year). The agreement may also require other actions by the respondent, such as necessary steps to end the alleged violation or a compliance program. A settlement extends only to administrative liability. A non-leniency respondent must deal with federal and state prosecutors on a case-by-case basis.

To date, TCCs have been reached in five cartel cases. Three were recent, one involving an international cartel in marine hoses, a second in an international cartel in compressors and a third involving driving schools. In 2007 CADE settled with two companies, also operating internationally, in separate cases in the cement and beef industries.

Regarding the merger and acquisitions analysis, restraints can be considered remedies as well, since they are conditions to the transaction's approval. Article 58 of the Brazilian Competition Law authorizes CADE to enter into Performance Agreements (in Portuguese, Termo de Compromisso de Desempenho - TCD), which are agreements with parties on remedies in mergers considered to be anticompetitive:

Article 58. The CADE Board will define performance commitments to be assumed by any interested parties that submitted acts for review pursuant to article 54 hereof, so as to ensure compliance with the conditions established in paragraph 1 thereof.

Paragraph 1. Performance commitments will take into consideration the extent of international competition in a certain industry and their effect on employment levels, among other relevant circumstances.

Paragraph 2. Performance commitments shall provide for volume or quality objectives to be attained within predetermined terms, compliance with which will be monitored by SDE.

Paragraph 3. Failure without good cause to comply with performance commitments shall cause the CADE approval to be revoked pursuant to article 55 hereof, followed by the opening of an administrative proceeding for the adoption of the applicable measures.

TCDs may contain both structural and behavioral remedies. They have required such actions as divestitures of physical assets or of intellectual property, such as brand names, compliance with performance and/or investment targets, the provision or supply of goods or services to customers or other parties for a specified period, elimination of exclusivity agreements and maintenance of employment levels. Such agreements establish parameters and duties to be accomplished by the

merging parties as an alternative to the full block. Whenever TCDs are breached, the operation is fully challenged and the parties shall desist (if there has been no merger yet) or divest. CADE's use of TCDs was common in the late 1990s but dropped off between 2000 and 2004.

Still on M&A review process, important to note the Resolution 45, which created a mechanism termed "Agreement to Preserve Reversibility of Transaction" ("Acordo de Preservação de Reversibilidade da Operação" or APRO) aiming to avoid the negative effects of a posterior unlawfulness of the transaction. These effects can be mitigated as well by the use preventive orders. Typically, preventive orders and APROs impose restrictions or conditions on the acquiring company's freedom to integrate activities, close stores or plants, dismiss workers, terminate brands or product lines, alter marketing, investment, or research plans, or liquidate assets. Both preventive orders and APROs include provisions that specify fines for failure to comply with the restrictions imposed.

However, BCPS' experts have also forged a legal mechanism that may prevent or soften postmerger inconvenients by means of negotiating an agreement with the merging parties right after the case is filed. Said mechanism is the so-called Agreement to Preserve the Reversibility of the Transaction (APRO). APROs offer two main incentives for the private parties: they are clear means to show will to cooperate with the authorities and may be the least costly alternative whenever the risk of antitrust intervention is high.

#### Leniency program<sup>2</sup>

The Brazilian Leniency Program structure resembles those that exist in several other countries. Article 35B provides that SDE can enter into agreements with individuals and corporations participating in a cartel that can, depending on the circumstances, either completely excuse the applicant from sanctions or reduce them by one- to two-thirds. The applicant must satisfy the following conditions: (i) the applicant is the first to come forward and confesses his participation in the unlawful practice; (ii) the applicant ceases its involvement in the anticompetitive practice; (iii) the applicant was not the leader of the activity being reported; (iv) the applicant agrees to fully co-operate with the investigation; (v) the co-operation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the anticompetitive

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<sup>2</sup> For more information about the Brazilian Leniency Program see: <http://portal.mj.gov.br/data/Pages/MJ9F537202ITEMIDA0C5C3163D834AB588C7651A10B74C32PTBRNN.htm>. Accessed in: July 13, 2010.

practice; (vi) at the time the company comes forward, the SDE has not received sufficient information about the illegal activity to ensure the condemnation of the applicant.

The degree to which the applicant is excused from sanctions for its cartel activity depends on whether SDE was previously aware of the alleged cartel. Full immunity is available if SDE had no knowledge of the illegal activity; partial leniency of up to two-thirds of the possible fine is available if SDE did have such knowledge.

A grant of leniency under this program excuses the applicant from criminal prosecution for the same conduct under the Federal Economic Crimes Law (8137/90). It does not address other criminal laws, such as racketeering and fraud, that might apply to this conduct, nor does it excuse the applicant from possible liability for damages in a private lawsuit.

Finally, while SDE, the principal investigating body in conduct cases within the BCPS, has authority to enter into a leniency agreement on its own, it is up to CADE to make the final decision on the sanction, either excusing the applicant from all sanctions or reducing the amount of the fine, depending on whether SDE had prior knowledge of the conduct.

SDE has been especially proactive in promoting the leniency program. It sent letters to 1,000 businesses in Brazil informing them of the program, which caused several companies to come forward to discuss their eligibility. It also conducted a “roadshow”, in which it held meetings with international law firms with offices in Washington and Brussels informing them of the liability, including possible criminal prosecution, facing foreign executives who engage in cartel conduct that affects Brazilian commerce. In 2008 SDE published a Model Annotated Leniency Agreement and Leniency Policy Interpretation Guidelines and the BCPS published a booklet for public consumption, Fighting Cartels: Brazil’s Leniency Program.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

The appropriate sanction is determined in accordance with the provisions established in the Article 27, of the Brazilian Antitrust Law, which are: (i) the severity of the violation; (ii) the violator's good faith; (iii) the advantages obtained or envisaged by the violator; (iv) actual or threatened occurrence of the violation;(v) the extent of damages or threatened damages to open

competition, the Brazilian economy, consumers, or third parties; (vi) the adverse economic effects on the market; (vii) the violator's economic status; (viii) recurrences.

The application of a remedy in the Brazilian Antitrust System, as explained before, depends on the nature of the transaction/conduct involved. The choice of certain remedy has a direct relation to the kind of situation dealt with.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

In respect to the enforcement of sanctions/remedies, CADE has learned, through his own experience, to draw better remedies for concentration problems. The case of mergers involving fuel distribution and its vertical relationship with resale market are a very good example. If we compare the remedies used in the merger BR/AGIP and the recent case PETROBRAS (BR)/IPIRANGA, we will observe a very important progress in the way that CADE dealt with this vertical relationship.

In the first case, BR/AGIP, there were some arguments that ensured competition in the distribution (UPSTREAM), the resale market (DOWNSTREAM) would not be affected, since the resale competition is between resellers and not between flags (distributors). However, CADE understood that it was necessary to analyze the vertical impacts of the merger BR/AGIP in particular municipalities affected by the merger. According to CADE, there was a sort of concentration of rights regarding the "exclusive supply of liquid fuels to given set of resellers". Moreover, this same concentration of rights to exclusive supply, coupled with the concentration of other rights, especially the rights to license the trademark and the lending of equipment for use in the retail service in question, allowed the distributor to "influence decisively in the formulation of business strategies by these establishments". Based on these arguments, it was found that the relationship between distribution and retail service station would resemble that of shared control, with the peculiarity that the space for trade policy decisions of one of the "controllers" (the "manager" of the business) is already structured by the decisions of others, and the decisions of the former are constantly monitored by the second. This understanding stems from the fact that, although, for reasons of regulatory nature, distributors of fuel can not be owners of retail service stations. Thus, the power to set prices/quantities and the ownership of key assets, such as brand, make the dealer a kind of "joint control" of the retail service station, more precisely, an actor with the ability to direct the decisions of the owner in the achievement



of their own – i.e, the distributor – interests. Also, it was not possible to exclude the possibility that under certain circumstances, the individual interests of the distributor are not aligned to the individual interests of the formal owner of the property dealer. Verifying problems with vertical concentration in several municipalities, it was suggested, in BR / Agip case, the divestiture of gas stations (retail) to resolve the vertical problem of the concentration on upstream (distribution).

However, it turns out that the imposition of this kind of remedy can create difficulties with the retail service, since resellers are not directly linked with the merger itself, and they may have objections to comply with this decision. In addition to this inherent problem of implementation, there are issues of convenience of the adoption of this remedy, especially because it is possible that the merged firms are the most efficient distributors at the municipal level and with lower price.

So, CADE started to have a differentiated approach on this matter. In a recent case judged by CADE, Petrobras (or BR) bought, in northern part of Brazil, some distribution assets that belonged to Ipiranga. CADE understood that determination of selling assets could be the more expensive option to put fuel in the city, assuming that the sale of stations to distributors are inefficient, or even creating a restriction of supply, if the retail service station refuses to offer other fuel retailer, closing the gas station. After analyzing the concentration over more than 2000 municipal markets, CADE found only 21 cities where there were serious vertical problems. In these cities, despite the fact that BR would not be the owner of the brand "Ipiranga" forever (and only for 5 years) and also the fact that there are a lot of evidences of dynamic competition in the sector, the merged firms agreed, in the selected municipalities, not to impose any contractual penalty or penalty to retail service who wanted to contract with competing distributors, under the terms negotiated in a TCD.

This remedy was far more efficient than a unilateral imposition of divestiture. And such case was just an example of successful bilateral negotiation of TCD (such as seen in Mate Leão/Coca-Cola, ALL Case; and others).

In regard to the challenges faced in the enforcement of CADE's sanctions, the mayor problem is the company's refusal to voluntarily attend the obligations imposed by CADE. In spite of this fact, CADE has demonstrated, in many opportunities, its commitment to severely punish cartels. One important example was the crushed rock cartel, in which the Council imposed fines to the

firms that ranged from 15 to 20 % of their respective gross revenue of the year prior to the beginning of the investigation. It is important to note the increase in the amount of fines imposed for participating in a cartel – from 1% of the gross revenue imposed in 1999 to firms in the steel cartel (the first cartel case adjudicated by CADE) to 22,5% of the gross revenue of firms involved in the sand extraction cartel, a decision issued by CADE in 2008.

Others cartels were also punished by CADE, such as the airline companies cartel (2004), the steel bars cartel (2005), the cartel against generic drugs (2005), the newspaper cartel (2005), the international vitamins cartel (2007), the private security firms cartel (2007) and the meat-packing cartel (2007).

## 2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

The BCPS recognizes that Brazilian courts are a critical part of the competition law enforcement process. In competition cases respondents are increasingly willing to challenge the BCPS in court, both with interlocutory motions while an investigation or case is pending and with appeals after a final decision by CADE. The principal effect of this propensity to litigate in competition cases has been the decision enforcement delay. For example, until recently the great majority of CADE's orders in conduct cases had not been enforced because of judicial appeals.

Petitions by private parties for review of government agency actions are heard by the federal courts of first instance. By law, challenges to actions of the BCPS agencies must be filed before the federal court located in Brasilia. The first instance judge has authority to adjudicate most claims, and may also conduct evidentiary proceedings to supplement the factual record. The second level of appeal in the Brazilian system is the Federal Court of Appeals, which can be reviewed by the Superior Court of Justice (STJ). If the claim involves some unconstitutional statutory application it will be examined by the Supreme Federal Court (STF), an 11 judge body that addresses only constitutional questions.

In the field of competition law, Brazilian courts have traditionally declined to review the merits of decisions taken by specialized tribunals such as CADE, on the theory that courts of general

jurisdiction are not qualified to do so. Therefore, BCPS's decisions are usually appealed on the grounds of violation of due process or constitutional provisions.

In Brazil, the principle of *stare decisis* – the doctrine in common law systems that gives precedential effect – in some cases binding – to prior decisions in the same or higher court – is not formally applicable. Formerly judges were theoretically completely independent and could virtually ignore higher court decisions. That has changed to some degree. Higher court decisions have some precedential effect, especially on constitutional issues.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

As said before, the Brazilian courts have traditionally declined to review the merits of decisions by specialized tribunals such as CADE, so their analysis recall mainly over procedural aspects and constitutional violations.

Nevertheless, it seems that courts are increasingly willing to consider the merits of CADE's decisions and those of other specialized tribunals, sometimes under a theory of abuse of power, or when it is determined that a tribunal's decision is fundamentally at odds with the purpose or goals of the underlying statute. In any case, respondents in BCPS cases regularly challenge the BCPS in court on due process and constitutional grounds.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

Judicial review of competition cases has emerged as an important issue for the BCPS. Many of the CADE's decisions imposing sanctions or remedies have been appealed to the courts. Courts have issued injunctions suspending the implementation of CADE's orders, and because a typical court case can take ten years or more if appealed to the highest level, the effect is effectively to frustrate the antitrust enforcement process. CADE has been more proactive in court in recent years with some success, especially in collecting fines, but there are limits to what the BCPS can do on its own.

CADE understands that it faces formidable challenges in its litigation program, and is striving for a more effective in court. Nonetheless, the underlying problem, inherent delays in court cases, is mostly beyond the BCPS's control.

## Burkina-Faso

Il convient de préciser qu'au Burkina Faso, il existe deux structures compétentes en matière de concurrence :

- La Commission Nationale de la Concurrence et de la Consommation (CNCC) est une structure de mission du Ministère du Commerce, de la Promotion de l'Entreprise et de l'Artisanat. Elle est chargée de la régulation de la concurrence et de la consommation. A cet effet, elle mène des activités qui protègent non seulement les intérêts des consommateurs mais aussi ceux des opérateurs économiques.

- l'Inspection Générale des Affaires Economiques, structure centrale du Ministère du Commerce de la Promotion de l'Entreprise et de l'Artisanat, est une structure de contrôle de toute activité économique en ce qui concerne la concurrence entre les opérateurs économiques, la qualité des produits et la métrologie, les questions de fraude et bien évidemment les droits du consommateur. A ce titre elle sanctionne toutes infractions aux règles de la concurrence qu'elle constate. Elle est dotée d'une Inspection de la concurrence.

### *1. Questions sur les sanctions et les mesures correctives :*

- *Prière de décrire le régime de sanction et/ou de mesures correctives prévu par la loi sur la concurrence de votre pays et donner des indications sur la façon dont il est mis en application.*

Les infractions aux règles des concurrences font en principe l'objet de poursuites judiciaires.

Elles sont constatées au moyen de procès verbaux par les agents habilités du Ministère du Commerce, de la Promotion de l'Entreprise et de l'Artisanat que sont les agents de l'Inspection Générale des Affaires Economiques.

Ces procès verbaux ainsi que les conclusions de l'inspection sont transmis, par le biais de l'agent judiciaire du trésor, au procureur du Faso (procureur de la république au Burkina Faso) en vue du déclenchement de l'action publique.

Toutefois, conformément à l'article 49 de la loi 15/94/ADP du 5 mai 1994 portant organisation de la concurrence au Burkina Faso l'administration, donc l'Inspection Générale des Affaires Economiques peut accorder le bénéfice de la transaction au contrevenant.

Les contrevenants font généralement l'option de la voie transactionnelle, ce qui fait que les tribunaux sont rarement sollicités pour les affaires de concurrence.

La violation des règles en matière de concurrence est donc en pratique sanctionnée par le paiement d'une amende transactionnelle. L'exécution de la transaction met fin à l'action publique et entraîne main levée des saisies.

- *Prière d'indiquer comment les sanctions et/ou les mesures correctives sont déterminés lors de l'examen d'un cas spécifique.*

La loi 15/94/ADP du 5 mai 1994 portant organisation de la concurrence au Burkina Faso définit les pratiques constitutives d'infractions aux règles de la concurrence ainsi que les sanctions correspondantes pour chaque infraction.

Ainsi, une fois la pratique malsaine constatée, il est procédé à sa qualification puis à l'application de la sanction prévue en tenant compte des circonstances atténuantes ou aggravantes.

- *Prière d'indiquer les obstacles que vous devez surmonter dans l'application des sanctions et/ou de mesures corrective.*

Les difficultés rencontrées tiennent d'une part au manque de moyens des structures chargées de réguler la concurrence, et d'autre part, à la réticence des opérateurs économiques à intégrer les principes de la concurrence dans leurs habitudes.

Cette réticence découle de la faible connaissance des principes de la concurrence et l'ignorance de l'importance de la politique de la concurrence dans le développement économique de nos pays, ce qui fait que la culture de la concurrence tarde à s'y implanter.

## *2. Questions sur le recours :*

- *Prière de décrire les procédures de recours ou d'appel prévu par votre loi et leur application par l'autorité de concurrence et les autorités de régulation sectorielles de votre pays*

En cas de constatation d'infraction, celle-ci est portée à la connaissance du contrevenant.

Lorsque l'infraction est contestée par ce dernier ou en cas d'échec de la solution transactionnelle, le dossier doit être transmis à la juridiction compétente qui l'examinera. Il convient de souligner

que les affaires de concurrence sont généralement résolues par voie transactionnelle, ce qui offre moins de cas de recours devant les tribunaux.

- *Quelle est la fréquence des recours dans les affaires de concurrence dans votre juridiction (recours portant sur l'examen des aspects juridiques des affaires ; recours requérant des preuves additionnelles) ?*

Au regard de ce qui précède il serait difficile de déterminer le degré d'intensité de l'examen par les tribunaux dans les affaires de concurrence.

En plus les tribunaux de commerce viennent fraîchement d'être créés.

- *Quels sont les obstacles à surmonter par l'organe d'appel, les requérant, les tierces parties dans l'examen des recours ?*

Difficile d'apprécier du moment où les affaires de concurrence n'arrivent généralement pas à la saisie des tribunaux.

## Bhutan

### 1. Questions on appropriate sanctions and remedies:

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

There is no separate Act dealing with unfair competition and antitrust practices.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

Not applicable.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

In the absence of any specific laws dealing with competition offences, there is no scope for enforcement of any competition law.

### 2. Questions on judicial review:

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

In the absence of a law, there is no proper institution for enforcement of Competition law.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

There has not been any trial or judicial review of any competition cases till date.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

There is no Competition authority.



## Canada

### *1. Questions on appropriate sanctions and remedies:*

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

The *Competition Act* (the “Act”) is a federal law that applies, with limited exceptions, to all industry sectors in Canada. It is administered and enforced by the Competition Bureau (the “Bureau”), and sets out criminal and civil penalties for anti-competitive conduct.

The Act’s civil regime addresses such conduct as abuse of dominance, and defines the procedural and substantive aspects of merger review. The criminal regime includes provisions respecting, among others, bid-rigging and conspiracy. Other forms of competitor collaborations, such as joint ventures and strategic alliances, may be subject to review under a civil provision that prohibits agreements only where they are likely to prevent or lessen competition substantially.

### Sanctions and Remedies Available Under the Act’s Civil Regime

Generally, with respect to civil matters that are reviewable by the Competition Tribunal (the “Tribunal”), the Commissioner of Competition (the “Commissioner”) may seek interim orders to prevent the allegedly anti-competitive conduct. Such orders may be sought prior or further to an application to the Tribunal.

Regarding abuse of dominance, the Tribunal, on application by the Commissioner, may make an order prohibiting all or any of the accused from engaging in the anti-competitive practice in question. The Act also gives the Tribunal discretion to order any other remedial action, including divestitures of shares or assets, and administrative monetary penalties (“AMPs”) not exceeding \$10 million (or \$15 million in the case of a subsequent order).

In respect of agreements between competitors that are civilly reviewable and that substantially prevent or lessen competition, the Tribunal may issue remedial cease-and-desist orders.

For other civilly reviewable conduct, such as price maintenance, refusals to deal,<sup>3</sup> tied selling, exclusive dealing and market restriction, the Tribunal may issue an order, on application by the Commissioner or an affected party, requiring or prohibiting certain conduct in the marketplace; however, no monetary penalties are available under these provisions.

Where the Bureau believes that a merger is likely to prevent or lessen competition substantially, the Commissioner may either apply to the Tribunal to challenge the merger under the applicable provisions of the Act, or negotiate remedies with the merging parties in order to resolve competition concerns on consent. Where the Tribunal finds that a merger prevents or lessens, or is likely to prevent or lessen competition substantially, it may issue an order prohibiting the merger, or a remedial order requiring the parties to dissolve the merger or make divestitures.

Parties to a proposed transaction that exceeds certain monetary thresholds must notify the Commissioner and wait for a statutory review period to expire before the transaction may close. Parties who fail to respect the waiting period rules may face an order requiring them to dissolve the merger, make divestitures, or pay an AMP of up to \$10,000 for each day of non-compliance.

#### Sanctions and Remedies Available Under the Act's Criminal Regime

Cartel agreements are criminal offences punishable by terms of imprisonment of up to 14 years and/or a fine of up to \$25 million. Bid-rigging agreements are punishable by terms of imprisonment of up to 14 years and/or a fine in the discretion of the court.

If the Commissioner concludes that an offence has been committed, evidence may be referred to the Director of Public Prosecutions (the "DPP") with a recommendation that criminal charges be brought. The DPP will then decide whether a prosecution is in the public interest. Where there is a finding of guilt, the Bureau will typically recommend, in addition to a fine and/or imprisonment, that the DPP consider applying to a court for a prohibition order to prohibit any behavior that constitutes, or is directed toward, the commission of an offence. Such prohibition orders can last for up to 10 years and may include prescriptive terms requiring positive steps or acts to ensure compliance with the law. Business organizations and individuals may be subject to a prohibition order under the Act.

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<sup>3</sup> The Commissioner may also analyze a refusal to supply under the abuse of dominance provision, where an AMP can be imposed.

Prohibition orders can also be issued without a finding of guilt where the court finds that a person has done, is about to do, or is likely to do, any act or thing constituting or directed toward the commission of an offence.

In urgent circumstances, the DPP may apply for an interim injunction to temporarily halt behavior that constitutes, or is directed toward, the commission of an offence.

The Act also provides a private right of action for the recovery of damages. This remedy is available where there has been a violation of the criminal provisions of the Act, or a failure to comply with an order of the Tribunal or a prohibition order issued by a court.

Businesses and individuals involved in activities that may violate the criminal provisions of the Act can approach the Bureau and request immunity from prosecution, provided that the applicant meets certain conditions, including cooperating with the Bureau's investigation and any ensuing prosecutions. Under the Bureau's Immunity Program, immunity from prosecution is only available to the party involved in the offence that is the first to make an application. Subsequent parties to come forward may request other types of lenient treatment, such as recommendations by the Bureau to the DPP for reduced fines in return for co-operation with the Bureau and the DPP. In all cases, the DPP has ultimate discretion to accept or reject the Commissioner's recommendation.

Finally, in limited circumstances<sup>4</sup>, the Bureau will consider the merits of an alternative case resolution. Alternative case resolutions include issuing a warning letter or seeking an undertaking or a prohibition order.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

Generally, in administering and enforcing the Act, the Bureau is guided by its *Information Bulletin on the Conformity Continuum*, which outlines the principles to be applied in determining the appropriate means of addressing a possible violation of the Act. In making such a determination, the Bureau considers a number of factors, including the actual or potential economic impact of the practice, whether the practice is widespread, the presence of market power, and the history of compliance of the firm(s) or individual(s) involved. Where the

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<sup>4</sup> For example, when the actual or potential economic harm is negligible or when there are no aggravating factors and there are significant mitigating factors. Further details regarding alternative case resolutions may be found in the Bureau's *Information Bulletin on the Conformity Continuum* (Ottawa: Industry Canada 2000).

Commissioner determines that it is not appropriate to refer a matter for criminal prosecution to the DPP or file an application for an order from the Tribunal, the Commissioner may elect instead to resolve a matter by way of an alternative case resolution. Similarly, negotiating an acceptable settlement via an enforceable consent agreement can often lead to an outcome that is less costly and time-consuming than contested proceedings.

Where a formal proceeding is concluded, the Act stipulates what sanctions may be imposed to address the impugned conduct. Specific provisions of the Act or common law principles provide guidance to the decision-maker on fixing the amount of any monetary amount to be paid. For example, the Act requires that the Tribunal consider a number of aggravating and mitigating factors when assessing the amount of an AMP in respect of abuse of dominance, including any evidence of the effect on competition; the gross revenue from sales affected by the practice; actual or anticipated profits affected by the practice; the financial position of the firm; and, its history of compliance with the Act. Similarly, in determining the amount of an AMP levied upon the parties to a proposed merger who fail to abide by the statutory waiting period before closing, the Tribunal or the applicable court must consider the parties' financial position, history of compliance with the Act, and the duration of the period of non-compliance.

As described above, although the Bureau may provide advice and recommendations to the DPP in the prosecution of a matter, final decisions ultimately rest with the DPP, including with respect to sentencing requests, and matters of immunity, leniency and settlement. In all criminal matters in Canada, sentences imposed are at the sole discretion of the judiciary, with reference to statutory sentencing objectives and principles set out in Canada's *Criminal Code*.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

Effective enforcement of sanctions and remedies requires clear legal rules and standards that can serve as guidance to businesses and legal practitioners. The Bureau continues to work closely with stakeholders in Canada's competition regime to ensure that businesses operating in Canada are presented with comprehensive guidance, while at the same time promoting competitive markets by deterring anti-competitive conduct. With globalization and international trade liberalization, an increasing number of mergers and acquisitions involve more than one jurisdiction. Multi-jurisdictional merger reviews can lead to many challenges in the merger review process, and require competition agencies to seek ways to minimize the impact of differences between agencies' merger review standards and procedures. To avoid potential

conflicts, competition authorities work to achieve better results by communicating regarding the design and implementation of merger remedies.

2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

Judicial Review of Administrative Decisions of the Commissioner

The Act grants the Commissioner the power to make certain administrative decisions, such as commencing or discontinuing an inquiry. Under Canadian administrative law, these types of decisions may be subject to judicial review to evaluate the legitimacy of this executive action. Canadian courts have stated that they will defer to the Commissioner's discretionary decisions in the absence of bad faith, the exercise of her discretion for an improper purpose, or the use of irrelevant considerations.

Appeals from the Adjudication of Competition Cases

The Commissioner has no adjudicative function, but may secure formal remedies through proceedings before the courts or the Tribunal. The specific forum in which the Commissioner seeks to adjudicate a competition case will depend on the venue stipulated in the Act for the matter at issue.

In respect of criminal matters, investigations are carried out by the Commissioner, while prosecutions are undertaken by the DPP. The DPP has independent discretion to determine the sufficiency of evidence and whether a prosecution is in the public interest. Adjudication of criminal cases is undertaken before the provincial or territorial lower courts, superior courts of the provinces or territories, or the Federal Court.

The court and Tribunal decisions described above may be appealed; however, the applicable appeal route will depend on the forum in which a matter is initially heard. Generally, lower court decisions are appealed to the relevant superior court, while superior court decisions are appealed to the Court of Appeal of that province or territory. In contrast, decisions of the Federal Court and the Tribunal are appealed to the Federal Court of Appeal. Provincial/territorial and federal appellate court decisions may ultimately be appealed to the Supreme Court of Canada. However,

in all civil cases and in most criminal cases, leave to appeal must first be sought and obtained from the Supreme Court.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

### Judicial Review

As indicated above, the Federal Court has stated that it will defer to the administrative discretionary decisions of the Commissioner in the absence of bad faith on the part of decision-makers, the exercise of discretion for an improper purpose, or the use of irrelevant considerations.

### Appeal

In civil matters, in Canada generally, in recognition of the advantage held by the trier of fact who has seen and heard the witnesses, appellate courts traditionally treat findings of fact with deference. Similarly, an appellate court will not lightly interfere with an assessment of damages or discretionary orders by a trier of fact. In contrast, an appellate court will review an appeal on a question of law or jurisdiction on a standard of correctness.

In addition to the general principles noted above, Canada's courts have offered specific comments in the context of appeals from decisions of the Tribunal. In particular, the Federal Court of Appeal has noted that it would intervene only if the Tribunal's conclusions were unreasonable or otherwise erroneous in law.<sup>5</sup> The Supreme Court of Canada, in identifying the complex and "peculiarly economic" nature of decisions under the principal civil part of the Act, stated that Tribunal findings under that part need not be reviewed for correctness, but must instead be reviewed on a standard of reasonableness.<sup>6</sup> Subsequent decisions have indicated that a less deferential standard will be applied when the Tribunal is required to decide on a general question of law that is not squarely within its expertise.

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<sup>5</sup> *P.V.I. International Inc. v. Canada (Commissioner of Competition)*, 2004 FCA 197 (2004).

<sup>6</sup> *Canada (Director of Investigation and Research) v. Southam*, [1997] 1 S.C.R. 748.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

The complex nature of competition litigation can create certain challenges. In particular, judges may be unfamiliar with the principles of competition analysis, and may be presented with highly technical evidence. This can contribute to delays in resolving enforcement matters.

In addition, the complexity of competition litigation often results in a time-consuming and costly effort to accumulate and present relevant evidence. The final disposition of a given matter may not occur for a period of years, especially given the prospect of several stages of appeal. Lengthy litigation processes lead to increased costs, which can be burdensome on the Bureau's limited resources. For third parties with an interest in the outcome of a given case, this will also postpone the certainty that results from the conclusion of a case.

Finally, for private parties involved in civil matters that allow for private access to the Tribunal under the Act, such parties face an additional challenge in evidence-gathering.

## Costa Rica

### *1- Cuestiones relativas a las sanciones y recursos apropiados:*

- *Sírvase describir el sistema de sanciones y los recursos previstos en el derecho de la competencia de su país así como su aplicación en la práctica.*

La Ley No. 7472, “*Ley de Promoción de la Competencia y Defensa Efectiva del Consumidor*” faculta a la Comisión para Promover la Competencia (COPROCOM), en su artículo 27 inciso c) a investigar la existencia de monopolios, carteles, prácticas o concentraciones prohibidas en esta Ley, para lo cual puede requerir a los particulares y los demás agentes económicos, la información o los documentos relevantes y sancionar cuando proceda las prácticas contrarias a esta legislación.

En ese sentido, previo a valorar el tema de sanciones y los recursos es importante señalar algunos aspectos relativos al procedimiento administrativo sancionador que son considerados en los procesos sancionatorios por la Comisión para Promover la Competencia.

Procedimiento Administrativo Sancionatorio:

Se lleva a cabo aplicando el procedimiento administrativo ordinario establecido en el Libro Segundo de la Ley General de la Administración Pública y respetando los principios del debido proceso, el informalismo, la verdad real, el impulso de oficio, la imparcialidad, la celeridad y la publicidad.

La Comisión para Promover la Competencia cuando dicta un acuerdo donde ordena la apertura de un procedimiento administrativo sancionatorio (con base en el resultado de una investigación o la admisibilidad de una denuncia); en su calidad de Órgano Decisor nombra a la Unidad Técnica de Apoyo como Órgano Director del procedimiento, para que se haga cargo de la fase de instrucción del caso.

De acuerdo con la jurisprudencia de la Sala Constitucional en todo procedimiento sancionatorio, como son los procedimientos que lleva la Comisión se debe cumplir con el debido proceso, el cual está compuesto de los siguientes elementos:

- a) Hacer traslado de cargos al afectado, lo cual implica comunicar en forma individualizada, concreta y oportuna, los hechos que se imputan a la Parte o Partes.



- b) Permitir el acceso irrestricto al expediente administrativo.
- c) Concederle un plazo razonable para la preparación de su defensa.
- d) Concederle la audiencia y permitirle aportar toda prueba que considere oportuna para respaldar su defensa.
- e) Fundamentar las resoluciones que pongan fin al procedimiento.
- f) Reconocer su derecho de recurrir contra la resolución sancionatoria.

El procedimiento ordinario se tramita mediante una comparecencia oral y privada ante el Órgano Director, en la cual se admite y evacua toda la prueba y alegatos de las partes involucradas en el procedimiento, que fueran pertinentes.

Terminada la comparecencia, la Comisión debe dictar el acto final de acuerdo a la recomendación que le realice el Órgano Director del procedimiento, salvo que este quiera introducir nuevos hechos, completar la prueba, o cuando le haya sido imposible en la primera comparecencia dejar listo el expediente para su decisión final; en cuyo caso y previo acuerdo favorable de la Comisión, realizará el Órgano Director una segunda comparecencia. No pueden realizarse más de dos comparecencias.

Las resoluciones dictadas por la Comisión se ejecutarán desde que se notifiquen, excepto que contra ellas proceda la suspensión de sus efectos, porque pueda causar perjuicios graves o de difícil reparación, según lo establece el artículo 148 de la Ley General de la Administración Pública. O bien, por aspectos de legalidad conforme lo que dicta para tal efecto el Código Procesal Contencioso Administrativo.

#### Sistema de Sanciones:

En materia de sanciones en Costa Rica, el Órgano de competencia puede ordenar, mediante resolución fundada y tomando en consideración la capacidad de pago, a cualquier agente económico que infrinja las disposiciones contenidas en el Capítulo III de la Ley No.7472. En ese sentido, los tipos de sanciones que puede imponer son:

- a. La suspensión, la corrección o la supresión de la práctica o concentración de que se trate.

- b. La desconcentración, parcial o total, de cuanto se haya concentrado indebidamente, sin perjuicio del pago de la multa que proceda.
- c. El pago de una multa, hasta por 65 veces el monto del menor salario mínimo mensual por haber declarado falsamente o haberle entregado información falsa a la Comisión, con independencia de otras responsabilidades en que incurra.
- d. El pago de una multa, hasta por 50 veces el monto del menor salario mínimo mensual por retrasar la entrega de la información solicitada por la Comisión.
- e. El pago de una multa, hasta por 680 veces el monto del menor salario mínimo mensual por haber incurrido en una práctica monopolística absoluta.
- f. El pago de una multa, hasta por 410 veces el monto del menor salario mínimo mensual, por haber incurrido en una práctica monopolística relativa.
- g. El pago de una multa hasta por 75 veces el monto del menor salario mínimo mensual a las personas físicas que participen directamente en las prácticas monopolísticas o concentraciones prohibidas, en representación de personas jurídicas o entidades de hecho o por cuenta y orden de ellas.

Cuando las infracciones mencionadas en los tres últimos puntos revistan gravedad particular, la Comisión puede imponer como sanción una multa equivalente al 10 % de las ventas anuales obtenidas por el infractor durante el ejercicio fiscal anterior o una hasta por 10 % del valor de los activos del infractor. De estas dos multas se impondrá la que resulte más alta.

En cuanto a cómo se debe establecer la cuantía de la multa, la Ley No. 7472, en su artículo 29 señala 8 parámetros que la Comisión debe considerar para realizar la graduación de la misma, y que son:

- a. la gravedad de la infracción
- b. la amenaza o el daño causado
- c. los indicios de intencionalidad
- d. la participación del infractor en el mercado
- e. el tamaño del mercado afectado

- f. la duración de la práctica o concentración
- g. la reincidencia del infractor
- h. la capacidad de pago del infractor

Como se puede observar, los parámetros anteriores pretenden adecuar las multas a la situación específica de cada agente y que la multa impuesta no afecte de manera significativa el funcionamiento y la operación normal del agente económico.

La sanción dependerá del tipo de práctica realizada, y en la mayoría de los casos se impondrá: a) la suspensión o corrección de la práctica o concentración de que se trate; b) la desconcentración parcial o total, de cuanto haya concentrado indebidamente; c) la imposición de una multa expresada en salarios mínimos.

El artículo 67 de la Ley No. 7472 establece que la negativa de entrega, la falsedad o la inclusión de datos inexactos o incompletos en los documentos requeridos a los agentes económicos, debe ser sancionada como falta grave por la Comisión. Cuando la falta se cometa en virtud de la solicitud formulada por el Ministerio de Economía, Industria y Comercio (MEIC), este remitirá esos documentos a la Comisión, para que ésta realice las acciones correspondientes, en caso que se trate de materia relacionada con el ámbito de acción de la Comisión, es decir, por información solicitada por la supuesta comisión de alguna de las conductas establecidas en el Capítulo III de esta Ley. En este caso, servirá como denuncia la certificación formal que expida la dependencia respectiva.

Considerando los aspectos anteriores, se establece el monto de la sanción impuesta al agente económico. En este sentido, el monto de la multa se determina por el múltiplo de la cantidad de salarios impuestos y el monto del salario mínimo mensual, que varía cada 6 meses y que equivale a la remuneración que establece el Poder Ejecutivo, mediante decreto, por recomendación del Consejo Nacional de Salarios del Ministerio de Trabajo y Seguridad Social o de la autoridad competente.

Los agentes económicos sancionados deberán cancelar por entero de Gobierno el monto de la sanción impuesta. Al ser efectiva la sanción y cancelada la multa, el monto de la sanción va a la Caja Única del Estado. Si el agente económico sancionado se niega a pagar la suma establecida, se certificará el adeudo para que con base en él se plantee el proceso de ejecución en vía judicial. De acuerdo con el artículo 68 de la Ley No. 7472, las resoluciones o las órdenes de la Comisión en el ámbito de sus funciones que no sean observadas ni cumplidas dentro de los plazos

correspondientes establecidos por ésta, constituyen la comisión del delito previsto en el artículo 305 del Código Penal, que establece lo siguiente:

***“Desobediencia :***

*Artículo 305-Se impondrá prisión de quince días a un año al que desobedeciere la orden impartida por un funcionario público en el ejercicio de sus funciones, salvo que se trate de la propia detención.”*

En tales casos, la Comisión debe proceder a testificar piezas, con el propósito de sustentar la denuncia ante el Ministerio Público, para los fines correspondientes.

Recursos que los agentes económicos pueden presentar:

De conformidad con la Ley General de la Administración Pública, (específicamente los artículos que corren del 342 al 355), rigen supletoriamente para lo imprevisto en la Ley No.7472. Dentro del procedimiento administrativo ordinario, cabrán los recursos ordinarios sólo contra el acto que lo inicie, contra el que deniega la comparecencia oral o cualquier prueba y contra el acto final. La Ley General de Administración Pública establece como recursos ordinarios, los siguientes:

- Recurso de revocatoria o reposición,
- Recurso de apelación,

Será extraordinario el recurso de revisión. La Ley General de Administración Pública prevé la interposición del recurso de revisión contra los actos finales firmes en los que concurren alguna de las situaciones contempladas en el artículo 353 de esa Ley.

También, las resoluciones de la Comisión para Promover la Competencia pueden ser recurridas en la vía judicial, por razones de legalidad y constitucionalidad. Por razones de legalidad mediante un procedimiento contencioso administrativo abreviado, en sede Contenciosa Administrativa. Específicamente, en el caso de la resolución final las partes tienen un plazo de 3 días para interponer el recurso de revocatoria.

Un aspecto importante es que el resarcimiento de daños y perjuicios en la legislación costarricense establece la posibilidad de hacerlo en la vía judicial. Es decir, la Comisión en su

resolución final no puede establecer por sí misma el pago de daños y perjuicios. El interesado debe agotar la vía administrativa para posteriormente ir a solicitarlos en la vía judicial.

- *Sírvase explicar cómo se determina la sanción o el recurso adecuado en un determinado caso relativo a la competencia.*

#### **i) Aplicación de la sanción**

La Comisión como organismo encargado de velar por la aplicación de la Ley No.7472, ha realizado una labor que responde al mandato legal, que se puede dividir en dos partes: su actividad preventiva y de promoción y la actividad de protección y sancionatoria. En la Comisión la primera, desde sus inicios, trabajando por una cultura de competencia, por la difusión de la Ley No. 7472 en beneficio del consumidor y del mercado. La segunda, a través de la protección del proceso de competencia mediante la resolución de denuncias, consultas e investigaciones de oficio y de la labor sancionatoria.

En materia de competencia y libre concurrencia la sanción pretende reprimir los comportamientos anticompetitivos sancionables por la Ley y prevenir la repetición de dichos actos, ya sea por los mismos participantes o por los participantes de otros mercados.

Siempre que se habla de las sanciones que un órgano como la Comisión impone, por violación a normas de competencia, hay que tener presente que son violaciones al interés público, es decir, se causa un perjuicio a toda la colectividad y no a un grupo o empresas en particular. En este orden de ideas, siempre buscando como norte la adecuada asignación de los recursos económicos y por ende un mayor bienestar para la colectividad.

La Comisión en sus primeros años no ejerció su poder sancionador de una forma rigurosa, más bien el mecanismo sancionatorio ha sido gradual con el fin de que el mercado pueda ser contestado rápidamente ante posibles prácticas anticompetitivas, utilizando también mecanismos de abogacía de la competencia. Pero aunque se ha mantenido este actuar, en algunos casos ha sido necesario imputar una sanción administrativa.

No obstante, con el transcurrir de los años, las sanciones y medidas antimonopolio tomadas por la Comisión evidencian que no sólo ha habido un aumento en la cantidad de salarios mínimos impuestos a los agentes económicos, sino también en los montos de las multas.

Para ilustrar el proceso sancionatorio seguido durante los años que tiene la Comisión de operar y de cómo ha evolucionado y materializado dicho proceso; el siguiente cuadro contiene el historial de las multas y los agentes sancionados desde 1995 al 2010, según número de expediente, partes involucradas y tipo de conducta.

### **Cuadro No. 1**

#### **Comisión para Promover la Competencia**

#### **Casos Sancionados,**

**Según: número de expediente, agente económico, tipo de práctica y monto total de la sanción, 1995-2010**

<b>No. de Expediente</b>	<b>Sector, Empresa o Agentes económicos involucrados</b>	<b>Tipo de Práctica</b>	<b>Monto Total de la Sanción</b>
02-95	BTICINO DE C. R.	Imposición de precios de reventa, e imposición de trato exclusivo. Artículo 12 de la Ley.	¢3.128.241,00
08-95	FABRICAS DE HIELO	Acuerdo de precios. Artículo 11 inciso a) de la Ley	¢ 156 410,75
07-95	COMPAÑIAS DE GAS: TROPIGAS DE C.R y GAS NACIONAL ZETA	Acuerdo de precios. Artículo 11 inciso a) de la Ley	TROPIGAS DE C.R. ¢ 5.026.250,00 GAS NACIONAL ZETA ¢ 3.026.250,00

			Total: ¢ 8 052 500,00
07-98	AGUAS MINERALES DE C. R.	Negativa de entrega de información.	¢ 626.400,00
28-98	CAMARA NACIONAL DE FARMACIAS (CANAFAR)	Evitar la entrada de nuevos competidores.	¢178.560,00
15-98	CAMARA NAC. FRIJOLES Y AFINES	Intercambio de información para la compra de frijoles a granel y acuerdo de precios para la venta de la bolsa 900 gr de frijol negro. Artículo 11 inciso a) de la Ley	¢22 735 020,00
11-99	LOCUTORES	Acuerdo de precios. Artículo 11 inciso a) de la Ley	¢ 167 580,00
34-99	TRANSPORTISTAS DE CONTENEDORES	Acuerdo de fijación de precios. Artículo 11 inciso a) de la Ley	¢ 44.261.680,00  Acuerdo tomado en el artículo 6 de la sesión 33- 2000 del 12-09-00
36-99	TENERÍAS	Acuerdo de precios. Artículo 11 inciso a) de la Ley	¢ 15 332 240,00

28-00	CORREDORES DE BIENES RAÍCES	Acuerdo de Precios Artículo 11 inciso a) de la Ley	¢ 6.692.260,00
IO-006-01	PORCICULTORES	Restricción de oferta de carne	¢ 32 478 682,50
31-99	AGENTES ECONÓMICOS DE ASOCIACIÓN NACIONAL DE INDUSTRIALES DEL SECTOR ARROCERO	Por la violación a los artículos 11 inciso b) y 12 inciso e) de la Ley 7472.	¢ 44.261.680,00
IO- 003-01	FRUTA DE PALMA	Artículo 11 inciso a) por acuerdo en el precio del aceite refinado y por el inciso b) por acuerdo en el volumen de venta de aceite refinado.	¢ 33.903.705,00
IO-03-06	COPAMEX S.A..	Sumario por no entrega de información de conformidad con los artículos 28 inciso d) y 67 de la Ley. Así como 89 de su Reglamento.	¢934.122,00
D-07-01	COCA COLA INTERAMERICAN CORPORATION Y EMBOTELLADOR	El artículo 12 incisos b), c) y g) del artículo 12.	¢ 68 056 720,00 Acuerdo tomado en el artículo 6 de la sesión 19-



	A PANAMCO TICA S.A.		2004 del 25-05-04
IO 005-03	COOPERATIVA MATADERO NACIONAL DE MONTECILLOS R.L.,	Sumario en contra de Coopemontecillos, por violación al artículo 67 de la Ley No. 7472 de la Ley de Promoción de la Competencia y Defensa Efectiva del Consumidor.	¢282.084,00
IO-006-03	Bristol Myers Squibb de Costa Rica Limitada	Por violación al artículo 67 de la Ley	¢3.761.120,00.
IO-007-03	MARIMAR DE SAN JOSÉ S.A	Por violación al artículo 67 de la Ley de Promoción de la Competencia y Defensa Efectiva del Consumidor, No. 7472.	¢3.761.120,00
IO-009-01	CORPORACIÓN DE SUPERMERCADO S UNIDOS	Por la violación al artículo 12 incisos b) y e) de la Ley No. 7472	¢205.911.8 40.00  Acuerdo tomado en el artículo 7 de la sesión 37- 2005 del 15-11-05
IO 002-03	Abonos Agro (Mercado de Varilla	Artículo inciso por venta atada	¢63.980.090,00

	para Construcción)		
IO 009-05	Demurrage Collection Services INC.	Procedimiento sumario por violación al artículo 67 de la Ley No. 7472	¢6.673.300,00
D-001-07	Cable Tica- Coopesca	Artículo 12 , Inciso g) por Negativa de Trato	¢63.980,00 Acuerdo tomado en el artículo 5 de la sesión 32- 07 del 11-11-07
D-006-07	Sanción interpuesta a la Cooperativa de Electrificación Rural de Alfaro Ruiz R.L por denuncia de .Cable Zarcero S.A.	Prácticas anticompetitivas violatorias del artículo 12, inciso g) de la Ley 7472.	¢21.320.910,00
IO 04-05	Agentes económicos en el mercado aduanero	Por prácticas monopolísticas absolutas tipificadas en el inciso a) del artículo 11 de la Ley No. 7472 por intercambio de información.	Sanción: Que en el plazo de un mes soliciten a la Junta Directiva de la Asociación convocar a una Asamblea General con el fin de acordar la suspensión de la publicación y distribución del Arancel de Servicios (ADACOR) en cualquiera de sus versiones. Que dentro de los cinco días posteriores a la celebración de esa

			<p>Asamblea General, aporten al expediente administrativo copia del acta respectiva con el fin de constatar el acatamiento de lo ordenado en el punto anterior.</p> <p>Que se realice un comunicado de prensa para dar a conocer que ese arancel de servicios no puede ser usado en la determinación de las tarifas que cobran los agentes aduanales, del que se deberá aportar copia a este expediente.</p> <p>Que se informe a todos los agentes aduanales que trabajan para las Agencias Aduanales parte de este procedimiento, que el ADACOR no debe ser utilizado en la determinación de las tarifas arancelarias.</p> <p><b>NO SE IMPUSO MULTA PECUNIARIA</b></p>
IO 009-03	Pozuelo S.A	Procedimiento Sumario, violación al artículo 67 de la Ley No. 7472	¢4.701.400,00

IO- 011-04	Miembros de la Junta Directiva de la Corporación Hortícola Nacional	Artículo 11 inciso a) de la Ley 7472 por la práctica de intercambiar información a fin de concertar el precio de venta de la cebolla.	¢82.003,50  Acuerdo tomado en la sesión 18-08 del 03-06-08
IO 016-04	BN Vital Operadora de Pensiones Complementarias S.A., Operadora de Planes de Pensiones Complementarias del Banco Popular y de Desarrollo Comunal S. A., INS Pensiones Operadora de Planes de Pensiones Complementarias S.A., Interfín-Banex Operadora de Planes de Pensiones Complementarias S.A., Vida Plena Operadora de Planes de Pensiones Complementarias S.A., BAC San José Pensiones Operadora de Planes de Pensiones	Artículo 11 inciso a) de la Ley 7472 por llevar a cabo un acuerdo que fijó el monto de las comisiones para la administración de los fondos correspondientes al ROPC y al FCL.	BAC San José ¢178.997.634 BCR Pensiones ¢261.153.751 BN Vital ¢661.358.000 IBP Pensiones ¢227.403.841 INS Pensiones ¢194.021.588 PopularPensiones ¢701.649.478 Vida Plena ¢250.808.023  Total: ¢ 2. 475.392,315

	Complementarias S.A., BCR-Pensión Operadora de Planes de Pensiones Complementarias S.A		
D-05-06	Parqueo Calle Cuarenta S.A., Parqueo La Sabana (Hexágono S.A.), Parqueo Talum (Desarrollos Talum S.A.), Estacionamiento Centro Colón S.A. (Francisco Fernández), y el Parqueo K S.A.	Artículo 11 inciso a) de la Ley 7472 por llevar a cabo un acuerdo con el fin de aumentar las tarifas por el servicio de parqueo de vehículos en las inmediaciones del Edificio Centro Colón.	¢15 894 873,00
IO 01-08	EMPRESA DE SERVICIOS PÚBLICOS DE HEREDIA S.A.	Artículo 67de la Ley No. 7472 Procedimiento sumario por no entrega de información en el caso que se sigue por la supuesta violación a los artículos 12, 13, 14 y 15 de la Ley No. 7472	¢9.619.250,00
O18-09	Banco Nacional de Costa Rica	Artículo 67de la Ley No. 7472	¢9.811.650

		Procedimiento sumario por no entrega de información en el caso que se sigue por la supuesta violación a los artículos 12, 13, 14 y 15 de la Ley No. 7472	
O28-09	Banco Popular y Desarrollo Comunal	Procedimiento administrativo sumario contra el BANCO POPULAR Y DE DESARROLLO COMUNAL, por violación al artículo 67 de la Ley N° 7472.	¢10.302.250 Acuerdo 04-10/art. 6/26-01-10 Voto 5, de las dieciocho horas treinta minutos del veintiséis de enero de dos mil diez

**Fuente:** Archivos de COPROCOM y Unidad Técnica.

Cifras Preliminares

Algunos ejemplos de casos en los que se ha seguido el procedimiento administrativo sancionador son: El caso de la Corporación de Supermercados Unidos (CSU) y el caso de las Operadoras de Pensiones Complementarias (OPC). Ambos casos, podrían establecer un antes y un después en el desarrollo del procedimiento sancionatorio en la vía administrativa que tutela esta Comisión. Lo anterior, por hechos trascendentales relacionados con la aplicación de la sanción en términos del Órgano de Competencia, por la entrada en vigor del nuevo Código Procesal Contencioso

Administrativo que vino a sustituir la Ley de la Jurisdicción Contenciosa Administrativa y de otros aspectos inherentes al proceso de competencia y libre concurrencia.

1. En el caso de Supermercados se aplica por primera vez la multa máxima que impone la Ley No. 7472 en términos de salarios mínimos y en varias conductas tipificadas en el artículo 12 de la Ley No. 7472 siendo que para los recursos se aplicó la Ley de la Jurisdicción Contenciosa Administrativa (que se encontraba vigente en ese momento), en razón de que los agentes económicos para acudir a la vía judicial debían obligatoriamente primero agotar la vía administrativa de la Comisión.
2. En el caso de las Operadoras de Pensiones Complementarias, por primera vez se aplica las multas máximas en términos del 10% de las ventas o de hasta el 10% de los activos. Es un caso donde los agentes económicos acuden a la vía judicial sin que necesariamente se agote la vía administrativa; al entrar en vigencia el nuevo Código Procesal Contencioso Administrativo.

Ambos ejemplos permitirán una visión más amplia de cómo la Comisión se ha convertido en un ente mucho más represivo, con el propósito de desincentivar efectivamente la realización de prácticas monopolísticas por parte de agentes económicos. Así las cosas tales situaciones se ilustran a continuación:

### **Caso de la Cadena de Supermercados CSU**

Una de las determinaciones más importantes del año 2005, corresponde al expediente IO-009-01 en el mercado de los supermercados; a raíz de la investigación de oficio realizada por la Unidad Técnica de Apoyo dentro de la cual se recibió una denuncia planteada por la empresa DIBOYCO S.A., iniciándose, un procedimiento administrativo ordinario contra la empresa Corporación de Supermercados Unidos (CSU) con el fin de determinar prácticas que lesionaran la competencia y libre concurrencia en el mercado.

Finalizado dicho procedimiento la Comisión en el artículo séptimo de la sesión ordinaria N° 37-2005, consideró responsable a la empresa Corporación de Supermercados Unidos S.A. de la

imposición de diversas condiciones, así como de boicot, siendo dichas conductas tendientes a mantener el posicionamiento del formato de supermercados Palí, y constituyendo actos probados que son susceptibles de ocasionar un desplazamiento indebido de agentes económicos y el impedimento sustancial a la entrada.

Por lo anterior, se sancionó a la empresa Corporación de Supermercados Unidos, S.A. por la violación al artículo 12 incisos b) y e)<sup>7</sup> de la Ley No. 7472, valor total de la sanción que corresponde a ¢205.911.840,0 (doscientos cinco millones novecientos once mil ochocientos cuarenta colones); es decir, aproximadamente \$ 415 278,8 dólares<sup>8</sup>.

#### **a) Determinación de la Sanción en CSU**

Comprobada la infracción a la Ley No. 7472 por parte del agente económico se valoró la gravedad de la acción, de conformidad con los criterios de valoración enunciados en el artículo 29 de la Ley No. 7472 y considerando el artículo 28 inciso f), se le impuso a la Corporación de Supermercados Unidos S.A. la siguiente sanción:

- 410 veces el salario mínimo aplicable según la Ley 7472, por la imposición de la condición a los proveedores de aportar información sobre terceros, principalmente en lo que respecta a la solicitud de estudios de precios en los acuerdos de suministro de productos e información sobre los descuentos otorgados a otros agentes. Dicho valor total es equivalente a ¢51.477.960,0 (cincuenta y un millones cuatrocientos setenta y siete mil novecientos sesenta colones).

- 410 veces el salario mínimo aplicable según la Ley 7472, por la imposición del requerimiento a los proveedores de estudios que demuestren o reflejen los cambios de precios en otros competidores como requisito para efectuar cambios en los precios de venta de sus productos. Dicho valor total es equivalente a ¢51.477.960,0 (cincuenta y un millones cuatrocientos setenta y siete mil novecientos sesenta colones)

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<sup>7</sup> "....

*b) La imposición de precio o las demás condiciones que debe observar un distribuidor o proveedor, al vender o distribuir bienes o prestar servicios.*

....

*e) La concertación entre varios agentes económicos o la invitación a ellos para ejercer presión contra algún cliente o proveedor, con el propósito de disuadirlo de una conducta determinada, aplicar represalias u obligarlo a actuar en un sentido específico.*

*f)...."*

<sup>8</sup> Tipo de cambio para la venta al 13 de diciembre del 2005.



- 410 veces el salario mínimo aplicable según la Ley 7472, por la imposición a los proveedores de aumentar el descuento otorgado ante precios inferiores de otros competidores. Dicho valor total es equivalente a ¢51.477.960,0 (cincuenta y un millones cuatrocientos setenta y siete mil novecientos sesenta colones)

- 410 veces el salario mínimo aplicable según la Ley 7472, por la invitación a otros agentes para aplicar represalias a otros agentes competidores con el fin de mantener un diferencial de precios en la cadena Palí. Dicho valor total es equivalente a ¢51.477.960,0 (cincuenta y un millones cuatrocientos setenta y siete mil novecientos sesenta colones).

Además se le ordenó a la Corporación de Supermercados Unidos S.A., suspender las conductas sancionadas y abstenerse en el futuro de promover, incentivar o ejecutar en modo alguno, dentro del mercado nacional, prácticas como las demostradas. Específicamente:

- a. Imponer la condición a los proveedores de aportar información sobre cualquier condición de comercialización de éstos con terceros.
- b. Imponer la condición a los proveedores de demostrar que el cambio de precios que solicitan ya se ejecutó en el mercado antes de aceptarla en CSU.
- c. Imponer la condición a los proveedores de aumentar los descuentos a CSU ni disminuirlos a terceros por el solo hecho de que otros competidores ofrecen el producto a precios más bajos.
- d. Invitar o de cualquier forma promover que los proveedores administren el mercado, esto es, a que tomen medidas contra aquellos clientes que ofrecen productos a precio inferior al de Palí.
- e. Utilizar de cualquier forma o por cualquier medio a sus proveedores para tener injerencia en la relación de éstos con sus clientes.
- f. Efectuar imposiciones en contra de sus proveedores y en perjuicio real o potencial de estos y/o sus clientes.

- g. Realizar cualquier acto violatorio del artículo 12 de la Ley No. 7472 u otra disposición contemplada en dicha ley.

Igualmente, la Comisión para Promover la Competencia acordó instruir a la Unidad Técnica de Apoyo para que periódicamente requiera a CSU, la información comercial que se estime relevante, a efectos de verificar el cumplimiento de lo ordenado.

A la parte se le previno que se le otorgaba un plazo de 10 días a partir de la firmeza de la resolución en sede administrativa, para que efectuaran depósitos a favor del Estado mediante entero de Gobierno en el Banco Crédito Agrícola de Cartago, por la suma de la sanción indicada. Para la realización de dicho cálculo se utilizó el Decreto Ejecutivo No. 32455-MTSS que fija el monto de salario mínimo mensual para el segundo semestre del 2005. Depositada la suma adeudada el agente económico debía de remitir el comprobante a la Comisión para Promover la Competencia.

#### **b) Recursos Interpuestos durante el proceso de CSU**

Durante el procedimiento administrativo sancionador en las distintas fases procesales la Corporación de Supermercados Unidos S.A. planteó una serie de recursos y excepciones ante este órgano hasta agotar la vía administrativa y ante la Sala Constitucional, ante esta última instancia por cuestiones de inconstitucionalidad.

Los recursos interpuestos durante la instrucción del procedimiento administrativo están relacionados con el inicio del procedimiento; contra la caducidad de la acción por mención de hechos más allá de los seis meses que prevé la Ley 7472; sobre la forma de conducir la audiencia por parte del Órgano Director, sobre las supuestas violaciones de CSU (principio de inmediación de la prueba, principio de imputación); incongruencia del auto de apertura con el informe de la investigación preliminar; sobre la competencia del Órgano Director dentro del procedimiento; sobre la indefensión causada a CSU en la primera audiencia al emitir ésta conclusiones, existiendo la posibilidad de que se realizara una segunda comparecencia, entre otros aspectos.

No obstante, en la resolución final a la parte sancionada se le indicó que contra la determinación de la Comisión cabía el recurso de reconsideración o de reposición. En aquel

entonces, conforme a la Ley de Promoción de la Competencia y Defensa Efectiva del Consumidor y la Ley Reguladora de la Jurisdicción Contencioso Administrativa, las partes disponían de un plazo de dos meses contados a partir de la notificación del acto. Tales recursos fueron interpuestos y rechazados por la Comisión, dándose por agotada la vía administrativa y pudiendo la parte acudir a la vía judicial, tal como lo fue.

En su momento la sanción impuesta a este agente económico fue representativa en razón de que era la primera vez que se sancionaba con una multa relativamente alta, para la trayectoria que llevaba la Comisión.

### **Caso de las Operadoras de Pensiones Complementarias (OPC)**

Uno de los últimos casos que revisten de especial interés para la trayectoria de esta Comisión y del proceso de competencia, es el caso de las Operadoras de Pensiones Complementarias, el cual aún se encuentran a nivel de discusión en la Comisión, algunas adiciones y aclaraciones que han solicitado tres de las siete partes. Además de todo lo recurrido que han realizado las Operadoras en la vía contenciosa administrativa.

Así las cosas, el caso tiene la siguiente connotación:

#### **a) Determinación de la Sanción en el caso de las OPC's**

La Comisión en la Sesión No. 17-2009, determinó que siete de las ocho Operadoras de Pensiones que operan en el país acordaron -en conjunto- cobrar el porcentaje máximo establecido por la Superintendencia de Pensiones (SUPEN) en relación con el Fondo de Capitalización Laboral (FCL) y con el Régimen Complementario de Pensiones Obligatorias (RCPO); por la infracción al artículo 11 inciso a) de la Ley No. 7472.

Un hecho importante de esta determinación fue que la Comisión para Promover la Competencia acordó imponer la multa máxima, de un 10% de las ventas o hasta un 10% de los activos, a las Operadoras de Pensiones que participaron en el acuerdo al determinar que era una infracción de gravedad particular, por cuanto:

- La cotización en los Fondos de Pensiones es de carácter obligatorio para toda la población asalariada costarricense, lo que elimina la posibilidad de que los afiliados opten por retirar sus fondos de las operadoras como resultado de un descontento si consideraran que son muy altos los costos de administración cobradas por éstas.

- Según información proporcionada por la SUPEN, a diciembre del 2004, en el Régimen Obligatorio de Pensiones Complementarias se tenían registradas 1.273.943 cuentas individuales, esta cifra corresponde al número de trabajadores que han realizado al menos un aporte para su pensión complementaria. De esa cantidad, se estima que cada mes cotizan para su cuenta individual alrededor de 780.000 trabajadores.
- Aunque la normativa establece la posibilidad de cambiar de operadora como resultado de un aumento en las comisiones, el hecho de que se diera de manera conjunta por todas las empresas en el mercado, excepto una, minimizó o eliminó esta posibilidad afectando gravemente a los cotizantes porque debieron absorber este aumento sin mayor posibilidad de cambiar de operadora.
- La cuantificación de los beneficios obtenidos por el cobro de la comisión sobre aportes para las operadoras, durante el periodo comprendido entre enero del 2005 a diciembre del 2008, demuestra que sus ingresos adicionales fueron muy significativos ya que ascendieron a más de 15 mil millones de colones, como se aprecia en el siguiente cuadro:

#### **Cuadro No.2**

**Ingresos operacionales generados por la comisión sobre aportes - Periodo comprendido: enero 2005 a diciembre 2008. Según Operadoras de Pensiones Complementarias.**

<b>OPERADORA</b>	<b>INGRESOS APORTES</b>	<b>POR %</b>
BAC PENSIONES	1.283.483.504	8,0
BCR PENSIONES	1.818.510.501	11,4
BN VITAL	5.498.650.168	34,4
INTERFIN-BANEX PENSIONES	2.058.074.276	12,9
INS PENSIONES	304.783.480	1,9
POPULAR PENSIONES	3.566.836.404	22,3
VIDA PLENA	1.433.938.896	9,0
<b>TOTAL</b>	<b>15.964.277.229</b>	<b>100,0</b>

*Fuente: Elaboración propia utilizando la información del Estado de Resultados de cada operadora contenidos en el sitio web de la SUPEN.*

- Es importante destacar que según datos aportados por la SUPEN respecto al FCL, la comisión sobre aportes se cobró desde enero del 2005 hasta abril del 2006. Posterior a esa fecha, se sustituyó por el cobro de una comisión sobre saldo administrado de 2%.
- De no haber aumentado las operadoras de pensiones antes enumeradas las comisiones, los montos que aparecen en el cuadro anterior continuarían en las cuentas de los afiliados.

Por lo anteriormente señalado, y muy especialmente por la obligatoriedad de afiliación a los fondos, la cantidad de trabajadores afectados, el monto de ingresos recolectado por las operadoras en perjuicio de los afiliados, esta Comisión consideró que el acuerdo celebrado por las Operadoras sancionadas con el fin de elevant las comisiones que obtienen por la administración de fondos de forma sincronizada se calificó como una conducta de gravedad particular.

Por lo que, para efectos de sanción se consideró el párrafo último del artículo 28 de la Ley No. 7472, que señala una multa del 10% de las ventas o de hasta el 10% de los activos (el que resulte más alto) para estimar el monto de la sanción por infracción a la Ley No. 7472.

Una vez valorados todos los criterios en forma individual para cada empresa y conforme a lo establecido en el párrafo último del artículo 28, se impuso una multa correspondiente al 10% de los activos a cada uno de los infractores, por resultar mayor que el correspondiente al 10% sobre las ventas, con la única excepción de la operadora Interfín-Banex Pensiones a la que se le impuso una multa correspondiente al 10% de las ventas, por resultar ésta mayor que la correspondiente al 10% de los activos.

**Cuadro No. 3****Ingresos operacionales y Activos de las Operadoras de Pensiones****Enero del 2008 a diciembre del 2008****-En colones-**

<b>OPERADORA</b>	<b>ACTIVO TOTAL</b>	<b>INGRESOS OPERATIVOS</b>	<b>10% ACTIVO</b>	<b>10% INGRESOS</b>
BAC PENSIONES	1.789.976.336	1.410.344.406	178.997.634	141.034.441
BCR PENSIONES	2.611.537.508	2.325.559.115	261.153.751	232.555.912
BN VITAL	6.613.580.000	4.550.147.000	661.358.000	455.014.700
INTERFIN BANEX PENSIONES	2.104.365.429	2.274.038.412	210.436.543	227.403.841
INS PENSIONES POPULAR PENSIONES	1.940.215.878	427.839.013	194.021.588	42.783.901
	7.016.494.784	4.055.383.661	701.649.478	405.538.366
VIDA PLENA	2.508.080.228	1.223.185.232	250.808.023	122.318.523

*Fuente: Estados financieros de las Operadoras a diciembre de 2008, descargados de la hoja web de la SUPEN*

Así las cosas, se estableció de manera a cada agente económico las siguientes multas:

- BAC San José ¢178.997.634
- BCR Pensiones ¢261.153.751
- BN Vital ¢661.358.000
- Interfín-Banex Pensiones ¢227.403.841
- INS Pensiones ¢194.021.588
- Popular Pensiones ¢701.649.478
- Vida Plena ¢250.808.023

Multa total que asciende a ¢ 2. 475.392,315 millones de colones. Asimismo, de conformidad con el inciso a) del artículo 28, se le ordenó a las empresas sancionadas abstenerse en el futuro de realizar prácticas monopolísticas anticompetitivas y se exoneró de toda responsabilidad a la Operadora de Pensiones de la CCSS dado que no participó en el acuerdo de precios.

**b) Sobre los recursos en el caso de las OPC's**

Igualmente conforme a los principios constitucionales y de legalidad, las partes en el procedimiento administrativo seguido en este caso interpusieron diversos recursos contra el auto de apertura, audiencia oral y privada y contra el acto final que emite la Comisión, entre otros; siendo los recursos resueltos en las diferentes fases procesales.

Algunos de los recursos y nulidades interpuestas por las partes ante la Comisión se refieren a aspectos como: incidente de abstención y recusación del Órgano Director, impugnación de artículos periodísticos que constan en el expediente administrativo, incidente de nulidad contra el acuerdo contenido en el artículo sétimo del acta de la Sesión Ordinaria N°41-05, contra la transcripción de la audiencia oral y privada del procedimiento, entre otros. Además de otros recursos contra la determinación de la sanción, que fueron rechazados en todos sus extremos por la Comisión.

Un aspecto importantísimo que diferencia este caso de otros es que una de las Partes involucradas en el procedimiento recurrió lo resuelto por la Comisión en la vía Contenciosa Administrativa (en apego al nuevo Código Procesal Contencioso Administrativo), mientras que la Comisión estaba en proceso de contestar los recursos interpuestos contra el acto final.

La Comisión a través de la Procuraduría General de la República, calidad de abogado del Estado fue informada de que el Tribunal Contencioso Administrativo acogió la medida cautelar anticipada solicitada por la Operadora BAC San José Pensiones, suspendiendo cualquier cobro de la sanción hasta que la misma sea resuelta.

Esta medida ha sido extensiva para otras tres operadoras más, que igualmente y en su momento han solicitado por separado la misma medida cautelar. Por lo que hasta que el Tribunal Contencioso Administrativo no resuelva tales medidas, el trámite de cobro está suspendido para

cuatro de las siete Operadoras. De manera que, si tales Operadoras no recurren la vía Contenciosa Administrativa y no se configura momentáneamente la orden de una medida cautelar anticipada a favor de ellas, lo que procede es el pago de la sanción. Todo ello, de conformidad con el procedimiento de cobro que para tal efecto se ha seguido en otros casos según el artículo 64 de la Ley No. 7472.

- *Sírvase describir algunas de las dificultades que pueden plantearse al aplicar las sanciones o recursos en casos relativos a la competencia.*

En este momento las dificultades que podrían haberse relacionado con el tiempo o la celeridad de los procesos que lleva un Tribunal Contencioso Administrativo, para resolver medidas cautelares anticipadas u otras acciones que dejan suspendida la aplicación y el cobro de una sanción como el caso que se citó de las Operadoras de Pensiones Complementarias.

Además de la dificultad en términos de logística que según sea se requiere para atender solicitudes de fotocopias de expedientes y otros aspectos importantes para la firmeza del mismo; más cuando los Tribunales señalan plazos de 3 días para que la Procuraduría General de la República aporte en ese término fotocopias certificadas de un expediente; en cuyo caso es la Comisión quien debe atender la solicitud de la Procuraduría y el tiempo es limitado para obtener la réplica del legajo de documentos.

Otro aspecto importante, es el nivel de coordinación entre el Órgano de Competencia y la Procuraduría General de la República. En especial con el Procurador (como representante del Estado) que atiende los casos de la Comisión ante los Tribunales.

Lo anterior, porque la Comisión no funge como coadyuvante en estos procesos en la vía judicial, lo más que podría hacer es monitorear el caso en esa vía. En el sentido de que el Procurador a cargo de un caso debe conocer a fondo lo resuelto por la Comisión; por ello, es indispensable capacitar a los Procuradores sobre el Proceso de Competencia, incluso a los mismos jueces que resuelven sobre el tema en la vía Contenciosa Administrativa. Más aún, ahora con la entrada en vigor del nuevo Código Contencioso Administrativo.

Fortalecer el proceso de capacitación de jueces, procuradores, letrados y magistrados es esencial, más cuando cada vez cobra mayor fuerza la revisión de los casos de competencia en la vía



judicial y eso representa una evaluación que legitima la labor de tutela y aplicación de la Ley No. 7472.

De manera inversa, igualmente los funcionarios del órgano de competencia deben estar preparados para atender, en caso de ser necesario, las audiencias orales y citaciones que el Tribunal Contencioso Administrativo señale, para que asistan a una audiencia en la vía judicial ya sea en calidad de testigos o peritos. En este sentido, se requiere obtener mayor cooperación que provea recursos presupuestarios para lograr una mayor preparación de funcionarios en aspectos de oralidad, procedimiento administrativo sancionador, entre otros.

## *2- Cuestiones sobre el examen judicial:*

El examen judicial que se aplica a un caso específico, desde la óptica de la Comisión para Promover la Competencia representa la legitimidad de su labor. Por consiguiente, una labor que se materializa en la rendición de cuenta, que actores de gran relevancia como los jueces demuestran mediante la revisión de los casos la validez de las determinaciones del órgano de competencia. Es decir, que las decisiones tomadas tengan la certeza y seguridad jurídica para el administrado. No sólo por el interés público que representa sino por los beneficios que genera en el mercado y en la protección al consumidor.

- *Sírvase describir el sistema de examen judicial/procedimiento de apelación de las decisiones tomadas por la autoridad encargada de la competencias o los organismos reguladores del sector de su país en los casos relativos a la competencia.*

Que mejor forma de valorar los resultados de las actuaciones de la Comisión para Promover la Competencia sino es a través del proceso de estudio y de validación que los mismos Tribunales de Justicia han realizado de un caso concreto y significativo; como es el caso de los agentes Corredores de Bienes Raíces, tramitado bajo el expediente 028-00.

### *a) Antecedentes del caso 028-00 de Agentes Corredores de Bienes Raíces*

Analizado el expediente número 28-00 referente al procedimiento de oficio iniciado contra algunos agentes corredores de bienes raíces, y con fundamento en la prueba evacuada, la Comisión para Promover la Competencia en el artículo quinto, punto E, de la Sesión 26-2002, acordó sancionar algunos miembros de la Cámara Costarricense de Corredores de Bienes Raíces

(en adelante CCCBR), por la comisión de prácticas monopolísticas absolutas, artículo 11, inciso a) de la Ley No. 7472.

La Comisión logró determinar que hubo una concertación para influir o manipular los precios a cobrar por compra y venta de propiedades, así como el cobro de comisiones por alquileres; como resultado de una votación unánime tomada en Asamblea General en la que se dispuso reformar totalmente los estatutos, código de ética y demás reglamentos de la CCCBR.

En razón de lo anterior, se exoneró de responsabilidad a un persona física y se declaró como responsables a un total de 28 de agentes económicos, para una sanción total de 58 salarios mínimos (equivalente a una multa por salario mínimo de ¢73 295 colones).

Se ordenó a todas las personas participantes en dicha práctica monopolística absoluta suspender y abstenerse en el futuro de realizar cualquier acto violatorio tanto del artículo 11 como de los restantes de la Ley No. 7472. Asimismo, se les otorgó el plazo de un mes, para que modifiquen los términos del Código de Ética, de manera que se omitiera toda referencia en cuanto a porcentajes u otro tipo de indicaciones respecto a usos y costumbres en el medio, que puedan sugerir en forma alguna un precio. Específicamente, que sean derogados o modificados en la parte relevante los artículos 19, 20, 21 y 27 del Código de Ética. Asimismo, que una vez derogados los artículos anteriores, la CCCBR realice un comunicado a sus asociados para darlo a conocer.

a) Sobre el examen judicial del caso 028-00 de Agentes Corredores de Bienes Raíces.

El procedimiento a seguir en la vía judicial del caso de Corredores de Bienes Raíces agotó varias instancias, como a continuación se detalla:

i) ***Resolución del Tribunal Contencioso Administrativo. Expediente judicial No. 03-000060-161-CA, sobre la apelación en proceso especial de Impugnación del Acto de la Comisión para Promover la Competencia por la sanción impuesta a algunos agentes económicos en el caso de la Cámara de Corredores de Bienes Raíces (CCCBR).***

La Sección Segunda del Tribunal Contencioso Administrativo, emitió la resolución No. 275-2005 de las diez horas treinta minutos del diecisiete de junio del dos mil cinco. Dicho Tribunal

resolvió rechazar la apelación por las excepciones de falta de legitimación ad causam activa y pasiva, así como la falta de interés actual, acogiendo parcialmente la defensa de falta de derecho y aclarando procedente la demanda sólo en los términos que se dirán, entendiéndose denegada en lo no expresamente concedido de la siguiente forma:

*“Se anula el acto de la Comisión para Promover la Competencia No. 26-2002 de las 17 horas del 10 de septiembre del 2002, artículo quinto, únicamente en cuanto concedió a los actores el plazo de un mes para modificar los términos del Código de Ética de la Cámara Costarricense de Corredores de Bienes Raíces. Se resuelve sin especial condenatoria en costas”*

Posteriormente, la parte elevó la sentencia a otra instancia en la vía judicial, en razón de que el Tribunal no anuló del todo la resolución de la Comisión.

**ii) *Segunda instancia el Tribunal Contencioso Administrativo, Sección Tercera emite resolución No. 73-2006 de las quince horas treinta minutos del ocho de marzo del dos mil seis.***

En dicha resolución, acogió la defensa de falta de derecho y revoca la sentencia apelada, es decir, la sentencia que había acogido parcialmente la resolución de la Comisión para Promover la Competencia, para en su lugar denegarla en todos sus extremos. Determinando que las costas personales y procesales estarán a cargo de los vencidos. Aún así las partes, continúan el proceso en la vía judicial y elevan a casación la resolución de la Comisión.

**iii) *La Sala Primera de la Corte Suprema de Justicia, resolvió el Expediente de Corredores de Bienes Raíces (No. 28-00). EXP: 03-000060-0161-CA Voto: 000755-F-2007***

En esta instancia se confirmó nuevamente el criterio de la Comisión para Promover la Competencia en vía judicial. La Sala Primera de la Corte Suprema de Justicia rechazó el recurso de casación interpuesto por la Cámara Costarricense de Corredores de Bienes Raíces (CCCBR), por la sanción impuesta a algunos agentes corredores de bienes raíces, por la comisión de prácticas monopolísticas absolutas contrarias a la Ley No 7472, según la resolución emitida en el artículo quinto del Acta No. 26-2002 de las 17 horas del 10 de setiembre del 2002.

iv) *Tribunal de Casación donde se confirme o no la Resolución No. 73-2006 de las quince horas treinta minutos del ocho de marzo del dos mil seis, emitida en segunda instancia por el Tribunal Contencioso Administrativo, Sección Tercera. Expediente judicial No. 03-000060-161-CA,*

A partir de las resoluciones anteriores, el criterio de la Comisión para Promover la Competencia fue confirmado en vía judicial. De esta manera, si bien la primera resolución cuestionó el aspecto del mes (plazo) para modificar los términos del Código de Ética, en el cual se incluían disposiciones contrarias a la normativa de competencia, en la resolución de la Sección Tercera se confirma la resolución de Comisión para Promover la Competencia también en este aspecto.

Así dichas sentencias reafirman la sanción impuesta por la Comisión, y en última instancia en lo que compete al Código de Ética se le concedió a los actores el plazo de un mes para que lo modifiquen. De esta manera, la modificación versará, particularmente, en aquellos puntos referentes a los porcentajes **u otro tipo de indicación respecto a los usos y costumbres en el medio que puedan sugerir en forma alguna un precio.** Específicamente debían ser derogados o modificados en la parte relevante los artículos 19, 20, 21 y 27 del Código de Ética y realizar posteriormente un comunicado a todos los asociados.

Este proceso tiene especial relevancia por cuanto constituye el primer falló que el Tribunal de Casación debió resolver en materia de competencia y donde se entró a analizar la actuación de la Comisión para Promover la Competencia, que hasta el momento ha sido validada en otras instancias judiciales. Además, es un precedente para otros procesos impugnados por razones de legalidad, que están en trámite en la vía judicial.

- *Cual es el grado de intensidad del examen judicial en los casos relativos a la competencia? (Evaluación jurídica únicamente, evaluación jurídica y apreciación de los hechos, admisibilidad de nuevas pruebas, etc.)*

Como se citó anteriormente, recurrir las resoluciones de la Comisión para Promover la Competencia por parte de agentes económicos sancionados en la vía judicial ha cobrado fuerza con el transcurso de los años, más aún, tratándose de sanciones cada vez más altas.

Actualmente, de los 24 casos que han sido sancionados conforme a los datos del Cuadro No. 1 es importante indicar que muchos de los agentes económicos vinculados a poco más de 10 casos

han acudido a la vía judicial para recurrir la resolución de la Comisión para Promover la Competencia. Tal que, conforme al seguimiento que se le ha dado al estado los casos recurridos en los Tribunales; los resultados, según cada caso son los siguientes:

#### **Cuadro No. 4**

#### **Estado actual de casos resueltos por COPROCOM recurridos por agentes económicos en la Vía Judicial**

<b>No. de Expediente</b>	<b>Estado actual en vía judicial</b>
Expediente de COPROCOM No. 15-98 agentes económicos sancionados en el <b>Mercado de Frijoles</b>	Varios de los agentes económicos sancionados recurrieron la instancia del Tribunal Contencioso Administrativo, siendo tramitado y acumulado el caso bajo el expediente 00-516-161. El caso tiene sentencia (Voto No. 4308,
Expediente de COPROCOM No. IO 01-06 <b>Cámara Costarricense de Porcicultores y otros</b> Expediente en sede judicial No. 03-274-161 (fue acumulado a este el 03-275-161).	Tiene sentencia, el Voto No. 63-2009-S-VIII; declarándose sin lugar las demandas planteadas. Posteriormente, las partes presentaron Recurso de Apelación contra dicha a sentencia y se está a la espera de la decisión.
Expediente de COPROCOM No. 31-99 agentes económicos sancionados en el <b>mercado de arroz</b> Expediente en el Tribunal No. 02-575-161 (acumulados el 02-576-161 y el 02-574-161)	Se declara procedente la demanda interpuesta. (Voto 100-2009-S-VII). Luego la Procuraduría interpuso Recurso de Apelación y se está a la espera de su resolución. Lo tiene en estudio la Licda. Cristina Víquez desde el 07/10/2008

<p>Expediente de COPROCOM No. 34-99 agentes económicos en el <b>sector de transporte</b></p> <p>Expedientes en los Tribunales: Nos. 01-252-163, 01-346-161, el 01-342-161, 01-345-161, 01-347-161, 01-344-161</p>	<p>El expediente No. 01-252-163 fue archivado desde el 07/03/2003.</p> <p>Los expedientes 01-346-161, 01-345-161, 01-347-161 y 01-344-161 fueron acumulados al expediente 01-342-161</p> <p>En el expediente 01-342-161 se dictó sentencia (Voto 26-2009-S-X) en contra de la COPROCOM. La Procuraduría apela la sentencia y se está a la espera de su resolución.</p>
<p>Expediente de COPROCOM No. D 07-01, Caso de <b>Coca Cola</b></p> <p>Expedientes en sede judicial No. 04-460-161, 05-143-161 y el 05-147-161</p>	<p>El expediente No. 04-460-161 está listo para que se dicte sentencia.</p> <p>En lo que respecta al expediente 05- 143-161 está suspendido hasta que se llegue a la misma etapa procesal que el del expediente 04-460-161.</p>
<p>Expediente de COPROCOM No. IO 09-01 <b>Corporación de Supermercados Unidos, CSU</b></p> <p>Expediente en sede judicial No. 07-28-161</p>	<p>El Tribunal Contencioso Administrativo acepto prueba de un caso similar en Argentina y el Juzgado está esperando que le remitan dicha prueba</p>
<p>Expediente de COPROCOM IO 03-01, <b>PALMA TICA</b></p> <p>Expediente en sede judicial No. 03-161-161</p>	<p>Se rechaza el Recurso de Apelación y se confirma la sentencia apelada, la cual había sido resuelta a favor de la Procuraduría.</p>
<p>Expediente de COPROCOM No. D-01-07 <b>COOPELESCA</b></p> <p>Expediente en sede judicial No. 09-851-1027-CA.</p>	<p>Se rechazo la conciliación.</p> <p>Hay una audiencia para el 24/05/2010; para recibir Prueba.</p>

Expediente de COPROCOM No.D-006-07 <b>Cable Zar</b> Expediente en el Tribunal es el No.09-1186-1027	En sede judicial el caso está para resolver
Expediente de COPROCOM IO 016-04 <b>OPERADORAS de PENSIONES COMPLEMENRTARIAS</b> Expediente en sede judicial 09-1871-1027	Medidas cautelares anticipadas interpuestas por las Operadoras de Pensiones Complementarias: IBP Pensiones, Bac San José Pensiones, Popular Pensiones y BCR Pensiones

**Fuente: Elaboración de la UTA con datos obtenidos del monitoreo realizado en la vía judicial**

Adicionalmente, es importante señalar que casos que en este momento se encuentran en proceso de instrucción como en el caso de la concentración Atlas-Mabe, expediente CE 001-08 también han sido recurridos en sede judicial. Al respecto, se declaró sin lugar un Recurso de Casación, relacionado con este caso al confirmarse la inadmisibilidad de la demanda siendo que por ahora lo que discuten es el pago de las costas en esa instancia judicial.

- *Cuales son las principales dificultades a que se enfrentan la autoridad encargada de la competencia, el apelante, terceros y el propio órgano de examen en el proceso judicial?*

En general, los procesos que ingresan a la vía judicial llevan su tiempo conforme al volumen de trabajo de los Tribunales, por lo que el acto de materializar las sanciones por parte del Órgano de competencia podría tener implicaciones, como que: La aplicación efectiva de las sanciones podría demandar un determinado tiempo hasta que la acción en la vía judicial sea resuelta; por ejemplo cuando se aceptan medidas cautelares que suspenden el cobro de la acción por parte de la Procuraduría General de la República (PGR). En cuyo caso, la sanción se hará efectiva hasta cuando los Tribunales Administrativos resuelvan; ejemplos de situaciones así existen en la actualidad con el caso de las Operadoras de Pensiones Complementarias por cuanto los Tribunales han concedido medidas cautelares anticipadas a las Operadoras (Bac San José Pensiones, IBP Pensiones, BCR Pensiones y Popular Pensiones OPC).

Otro aspecto que dificulte el proceso es que si las multas impuestas por el Órgano de competencia son canceladas por los agentes económicos, es conveniente que los montos cancelados sean retenidos por la Administración Activa y no se vayan a la Caja Única del Estado mientras se encuentre un proceso legal en sede judicial. Lo anterior, por cuanto no se sabe si esa instancia acogerá en todos sus extremos la resolución COPROCOM o por el contrario la acepta parcialmente o la rechaza.

Además, con el nuevo Código Procesal Contencioso Administrativo la Administración Activa encargada de llevar los procesos administrativos deberá a futuro considerar posibles costas y otros recursos en caso de que la vía judicial desestime una resolución de COPROCOM y los agentes económicos valoren la posibilidad de cobrar un supuesto daño en la vía civil.

Estos al menos son aspectos que deberán prever las autoridades de competencia como posibles implicaciones a las determinaciones que tomen cuando se resuelve un caso, por ello, la valoración y comprobación de las prácticas anticompetitivas es un tema muy delicado y de gran trascendencia, tanto en sede Administrativa como Judicial. De ahí que, la rendición de cuentas que se da en la vía judicial legitimizara o no, la labor del Órgano de competencia.



## Croatia

### *1. Questions on appropriate sanctions and remedies:*

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

Until the date, the system of sanctions for the breach of the Competition Act and other competition rules has been conducted in the following manner: the Croatian Competition Agency (further: CCA) adopted a decision determining a breach of Competition Act and then submitted a claim to the designated Minor Offence Court to start the minor offence proceedings against the undertaking concerned and the responsible person of the respective undertaking. Therefore, the Minor Offence Court had the competence to impose fines.

However, the practice showed insufficient level of fines imposed for severe breaches of competition rules. With the aim to ensure efficient and comprehensive application of competition rules and more coherent and standardised approach to imposing fines for competition law infringements in Croatia, the new Competition Act was adopted in June 2009 with entering into force on 1 October 2010. The New Competition Act empowers the CCA to impose fines for hard core restrictions such as restrictive agreements or abuse of a dominant position. The fines could be up to 10% of the aggregate turnover of the undertaking for the most serious breach of competition rules or up to 1% for other violations of the competition rules. The new power to impose fines will also include the possibility to increase the fine in order to exceed the amount of gains improperly obtained as a result of the infringement.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

Minor Offence Courts have usually determined the level of fines applying not only Competition Act but also Minor Offence Act and often set lower level of fines applying the latter law. In the new system applicable from 1 October 2010 when the CCA will have the power to impose fines directly, the level of the fine will be determined applying certain, well established criteria such as seriousness and duration of infringement and possible mitigating or aggravating circumstances to be defined in a new bylaw. More precisely, after adoption of the decision of the CCA establishing breach of Competition Act, a two-step methodology will be applied when actually setting a fine - a basic fine amount will first be set, followed by an adjustment to this amount, either upwards or downwards, depending on the circumstances of a case. The circumstances of a

case that the CCA must consider in making any adjustments are: aggravating circumstances, features that make an infringement more serious and can therefore cause an increase in a fine, for example, being the instigator of a competition law infringement and, mitigating circumstances, features that make an infringement less serious and can therefore lead to a decrease in a fine, for example, limited involvement in a competition law infringement.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

So far, the only obstacles were insufficient numbers of decisions and too low level of fines imposed by Minor Offence Courts (in 12 years of work of the CCA only around twenty decisions of the Minor Offence Courts determining fines were adopted, mostly in last three years). Another problem was the statute of limitation which usually expired because the Minor Offence Court judges were waiting for the decision of the Administrative Court in the judicial review.

## 2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

The decisions brought by the CCA are final decisions adopted at the end of the administrative proceeding. Hence, against the decisions of the CCA, no appeal is allowed, but the injured party may file an administrative dispute before the Administrative Court of the Republic of Croatia within 30 days from the receipt of the decision.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

According to the current Competition Act, the level of intensity of the judicial review in competition cases has been low and it has been focused mostly on procedural flaws and not on the merits of the case. However, new Competition Act empowers the Administrative Court not only to review procedural aspects of the decisions brought by the CCA but also the fines set by the CCA. In order to ensure that competition law is more effectively adjudicated upon by the Croatian courts, review of the decisions of the CCA will go solely before the Croatian Administrative Court. It is expected that within this court there will eventually be a dedicated chamber with specialised judges dealing with competition law cases. The following aspects of

the CCA decision will be reviewed by the Administrative Court: misapplication or erroneous application of substantive competition law provisions, manifest errors in the application of procedural competition law provisions; incorrect or incomplete facts and inappropriate fines and other issues. Against the decision of the CCA establishing an infringement of this Act and imposing a fine for the committed infringement a claim may be filed by the injured party to the proceedings, whereas against the decision of the CCA establishing that no infringement of competition rules has been committed a claim may be filed also by a person who filed the initiative and the person who has been granted the same procedural rights which are enjoyed by the person who filed the initiative.

Regarding the new evidence in the judicial review, new Competition Act provides that the plaintiff may not present new facts in evidence but that he/she may propose new evidence relating to the facts which had been presented in evidence during the proceeding. New facts may be presented only under the condition that the plaintiff provides evidence that he/she did not have or could not have had knowledge of these facts during the proceeding. All actions brought before the Administrative Court of the Republic of Croatia shall be urgent.

Taking all the explained changes in the new Competition Act, it is expected that the intensity of the judicial review should increase in coming years.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

Main challenge for parties, judges, attorneys and third parties has been the insufficient knowledge of competition rules. Furthermore, another challenge was duration of the proceedings in the Administrative Court exceeding often three to four years after the claim to start the administrative dispute has been submitted.

Division of jurisdictions between Administrative Court and Minor Offence Courts was another factor leading to low efficiency of judicial review. Lastly, another challenge posed is process of constant changes of EU soft law which Croatia should also adopt and apply.

## Cyprus

### 1. Questions on appropriate sanctions and remedies:

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*
- For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the year within which the infringement took place or in the year which immediately preceded the infringement. Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10% of the sum of the total turnover of each member of the association.
- The Competition Commission may require the undertakings and associations of undertakings concerned to bring such infringement to an end.
- Impose on undertakings or associations of undertakings penalty payments not exceeding €85.000 per day in order to compel them to put an end to an infringement in accordance with a decision taken.
- Impose any behavioural or structural remedies which are proportionate to the infringement committed and are necessary to bring the infringement effectively to an end.
- Where the Commission for the Protection of Competition intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings.
- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

The appropriate sanction/remedy is determined by the Competition Commission depending on the gravity and the duration of the infringement.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

Not Applicable. The Commission for the Protection of Competition is best suited to answer this question.

2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

The Supreme Court of Cyprus has exclusive jurisdiction to review judicially every administrative act, decision or omission. Such jurisdiction covers the whole area of governmental and administrative action in the public sphere, but excludes acts, decisions or omissions of public authorities relating to the private rights of individuals.

In the exercise of its administrative jurisdiction, the Supreme Court may confirm an administrative act or decision or declare it as null and void. In the case of omissions, it may declare that such omissions should not have taken place and that whatever has been omitted should have been performed. Any decision given is binding on all courts, organs or authorities and must be acted upon by those concerned.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

The jurisdiction of the Supreme Court is limited to the review of the legality of the act and cannot go into the merits of the decision under review and substitute the decision of the Commission with its own decision.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

Not Applicable. The Commission for the Protection of Competition is best suited to answer this question.

## Ecuador

### 1. Cuestiones relativas a las sanciones y recursos apropiados:

- *Sírvase describir el sistema de sanciones y los recursos previstos en el derecho de la competencia de su país así como su aplicación en la práctica.*

La legislación de competencia vigente en Ecuador es la Decisión 608 de la Comunidad andina, la misma que se aplicaba en base al Decreto 1614 de 2009.

El Decreto Ejecutivo 1614, en su artículo 15, en concordancia con el Artículo 34 de la Decisión 608, señala que:

“Medidas correctivas y sanciones-cuando se determinare la existencia de practicas anticompetitivas, abuso de posición dominante, dentro de los supuestos del articulo 34 de la Decisión 608 de la CAN se aplicara las medidas correctivas y/o sancionatorias contempladas en ese mismo Art. De la decisión:

- Cese de la practica en un plazo determinado
- Imposición de condiciones u obligaciones determinadas; o
- Multas

Como podemos ver, la 1ra y segunda son correctivas y la 3ra es sancionadora.

El artículo 34 de la decisión 608 y el artículo 16 del DE 1614 señalan que la multa será hasta de un máximo del 10% del valor de los ingresos totales brutos del infractor, correspondiente al año anterior a la fecha del pronunciamiento definitivo.

- *Sírvase explicar cómo se determina la sanción o el recurso adecuado en un determinado caso relativo a la competencia.*

En la Decisión 608, el Artículo 34, párrafo tercero, al igual que el artículo 16 del Decreto Ejecutivo, también es mandatario al señalar que si deben considerar varios criterios para graduar las sanciones. La decisión 608 tiene los criterios básicos constantes en doctrina y aplicados en la práctica para la graduación de sanciones, y otros adicionales que constan en el artículo citado del Decreto Ejecutivo, así tenemos:

Criterios básicos:

- 1) Nivel de los danos causados a la libre competencia en el ámbito de la Comunidad Andina en función de la modalidad y el alcance de la competencia;

- 2) Dimensión del mercado afectado
- 3) Cuota del mercado de la empresa correspondiente;
- 4) Efecto de la restricción de la competencia sobre los competidores efectivos o potenciales;
- 5) Duración de la restricción de la competencia;
- 6) Reiteración de la realización de las conductas prohibidas.

Criterios adicionales:

- 7) Gravedad de los hechos;
- 8) Beneficio obtenido;
- 9) Conducta procesal de las partes;
- 10) Otras partes del proceso económico y los consumidores o usuarios.

Asimismo, esta autoridad utiliza como referente la Directriz CE para el cálculo de las multas impuestas, en aplicación del Artículo 23, apartado 2, letra a), del reglamento (CE) número 1/2003 (directrices para el cálculo de multas).

- *Sírvase describir algunas de las dificultades que pueden plantearse al aplicar las sanciones o recursos en casos relativos a la competencia.*

Los retos son:

Capacitar a jueces de alzada que revisan el proceso y comprendan sobre libre competencia y como se fijan las multas.

Reglamentación con mayor detalle para reducir potenciales abusos de discrecionalidad en la sanción.

El cobro de la multa no es considerada como un juez, por lo que las medidas correctivas pueden ser vistas como violación a derechos constitucionales.

Potestad para efectuar investigaciones in loco sin autorización previa de juez civil.

## *2. Cuestiones sobre el examen judicial:*

- *Sírvase describir el sistema de examen judicial/procedimiento de apelación de las decisiones tomadas por la autoridad encargada de la competencias o los organismos reguladores del sector de su país en los casos relativos a la competencia.*

La constitución del Ecuador prevé en su artículo 173 que,

“los actos administrativos de cualquier autoridad del Estado podrán ser impugnados, tanto en la vía administrativa como ante los correspondientes órganos de la Función Judicial”

Por ello, las resoluciones de la Autoridad de Competencia pueden ser impugnadas ante la Función Judicial, en específico ante el Tribunal de los Contencioso – Administrativo.

La ley de la Jurisdicción Contencioso-Administrativa señala en su capítulo 1 referente al Ejecución de la Jurisdicción Contencioso-Administrativa, artículos 1, 2,3 y 10.

- *Cual es el grado de intensidad del examen judicial en los casos relativos a la competencia? (Evaluación jurídica únicamente, evaluación jurídica y apreciación de los hechos, admisibilidad de nuevas pruebas, etc.)*

Aun no existen ejemplos de casos de Competencia ante el Contencioso Administrativo en razón de que ningún proceso ha llegado a resolución final sancionadora.

- *Cuales son las principales dificultades a que se enfrentan la autoridad encargada de la competencia, el apelante, terceros y el propio órgano de examen en el proceso judicial?*

Al momento, dado el reciente nacimiento de la Agencia de competencia de Ecuador, no ha habido ninguna impugnación al Tribunal Contencioso administrativo, sin embargo, se prevé que los mayores retos, entre otros, serán:

- El Tribunal Contencioso Administrativo no tiene capacitación sobre estas formas de valorar la prueba en Derecho de Competencia Económica, por lo que puede considerarlas ilegales. Forma de valorar la prueba y la actuación de la Autoridad de Competencia.
- La utilización de indicios por parte de la Autoridad de Competencia.
- La utilización de informes económicos para concluir la existencia o no de prácticas anticompetitivas.
- Asimismo, la regla general señala que la carga de la prueba la tiene quien alega un hecho; sin embargo, en derecho de Competencia Económica la carga de la prueba puede ser dinámica. Esta práctica, por la falta del Derecho de la Competencia Económica, por parte del Tribunal Contencioso Administrativo, puede ser considerada como ilegal por este.
- El desconocimiento de que una conducta anticompetitiva puede ser sancionada incluso sin estar tipificada, ello en base jurídica de la Cláusula Prohibitiva General. El tribunal Contencioso Administrativo puede considerar dicha sanción como ilegal por este desconocimiento.
- La discrecionalidad que tiene el derecho de Competencia Económica puede ser considerada ilegal por el tribunal Contencioso Administrativo.



# Ethiopia

## 1. *Questions on appropriate sanctions and remedies:*

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

Those who abuse market dominance or engage in unfair competition or engage in concerted action of price fixing and the like will be sanctioned to a fine of 10% of the value of the total their assets or 15% of their annual sales. Their collaborators will also subject to a fine of 5000 to 50000 Ethiopian Birr. Violators of the law are also subjected to administrative sanctions like paying compensation or lose of licence etc. For what constitute abuse of market dominance or unfair competition or acting in concert to distort competition or administrative sanctions, see the attached Ethiopian trade practice proclamation No 329/2003.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

According to the article 27 of the trade practice proclamation No 329/2003, the trade practice investigation commission “shall take into consideration the seriousness of the offence, the damage caused, the market share of the violator, the size of the market affected, and the financial status of the violator;” Therefore, this is the way provided for by the law on how sanctions and/or remedies in a given case are supposed to be determined.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

The biggest challenge encountered when enforcing sanctions/remedies in competition cases in the inability to execute sanctions or remedies. Those found guilty of contravention of the law are not willing to abide by the sanctions or remedies passed against them.

2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

The Ethiopian trade practice proclamation No 329/2003 allows appeal against sanctions or remedial passed by the Trade practice investigation commission to the Federal high court with in 30 days from the rendering of the sanction's or remedies. The sanctions or remedies can not be executed before the expiry of the 30 days.

The Ethiopian law also does not prohibit the judicial review of Administrative decisions except in some particular cases explicitly provided for in the particular laws.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

We have not any statistical data on the intensity of judicial review in competition cases, but it looks that there are no many appeals to higher judicial organs.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

N/A

## Finland

### 1. Questions on appropriate sanctions and remedies:

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

According to Article 7 of the Competition Act (the Act on Competition Restrictions 480/1992, incl. amendment 318/2004) a business undertaking or an association of business undertakings which infringes the provisions of Articles 4 or 6 of the Competition Act or Articles 81 or 82 of the EC Treaty (now Articles 101 and 102 of the Treaty on the Functioning of the European Union, TFEU) shall be fined (a competition infringement fine), unless the conduct shall be deemed to be minor or the imposition of the fine is otherwise unjustified in respect to safeguarding competition.

The fine will be imposed by the Market Court upon the proposal of the FCA. The Market Court is not bound by the FCA's proposal on the amount of fine. The payment is an administrative fine and it will be paid to the state.

Fines are only imposed on business undertakings or an association of business undertakings. It is not possible to impose sanctions on natural persons.

According to Article 13(3) of the Competition Act, the FCA may accept commitments proposed by the alleged infringer and order that the commitments are binding. Commitments are not applied when the infringement is particularly serious, e.g. hardcore cartel or a clear infringement which involves a need to create or strengthen deterrent effects. When the FCA accepts commitments it adopts a formal commitment decision where it states that the commitments are binding and that there is no longer grounds further action by the FCA.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

According to Article 7 of the Competition Act when fixing the amount of the fine, regard shall be given to the gravity, extent and duration of the competition restriction. Additionally, the amount shall not exceed 10 % of the total turnover of the company in the preceding year.

The case law has further clarified the circumstances to be taken into account when setting the fine. Such circumstances can include e.g. the social effects of cartel in public procurement, as noted in the asphalt cartel case, and recidivism as noted in the timber cartel case (please see Section III, question 1). In the asphalt cartel case, the FCA considered the social effects of the cartel especially harmful since asphalt works were largely public procurement made by the

state and the municipalities. In the timber cartel case, the FCA referred recidivism as an aggravating factor for the fine, as the same companies had already before been found to infringe the Competition Act.

With regard to the commitment decisions, Article 13(3) of the Competition Act states that commitments must eliminate the restrictive nature of the conduct. The commitments must be precise enough that companies are able to implement them and thus comply with the decision.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

With regard to enforcing sanctions, the FCA found that the fines imposed by the Market Court were previously at a low level. However, the FCA considers that the decision of the Supreme Administrative Court in the asphalt cartel case in 2009 has corrected the situation. With regard to enforcing commitment decisions, the FCA considers that the following questions are of importance: how the compliance with commitments can be guaranteed best and how the changes in the market conditions will be taken into account in designing commitments, i.e. the validity of remedies in the long run.

## *2. Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

The decisions adopted by the FCA can be appealed to the Market Court. As the FCA cannot impose fines, the Market Court is the first instance decision making body when fines are imposed. The Market Court decisions - including both its ruling on the appeal of the FCA's decision and its ruling concerning FCA's proposal for fines - can be appealed to the Supreme Administrative Court.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

Both the Market Court and the Supreme Administrative Court can consider question of law and facts. Both instances have full jurisdiction to examine all questions of facts and law relevant to the dispute before it and consider the submission on their merits.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

With regard to the judicial review process, the FCA considers that an important question is the length of proceedings. FCA itself aims to transfer the resources to the most harmful cases.

# Germany

## 1. Questions on appropriate sanctions and remedies:

- Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.

In cartel and antitrust proceedings the following sanctions and remedies are available under German law:

First of all, the Bundeskartellamt may order the relevant undertakings to cease the respective conduct (Section 32 ARC)<sup>9</sup>. In administrative fine proceedings (*Bußgeldverfahren*), it may also impose monetary fines (Section 81 ARC). Criminal sanctions are – with the exception of bid-rigging<sup>10</sup> – not available.

In addition, the Bundeskartellamt may also impose certain interim measures (*einstweilige Maßnahmen*, Section 32a ARC).

Also, any anticompetitive contract or agreement is by law considered null and void (Sections 1, 19, 20 ARC and 134 Civil Code (*Bürgerliches Gesetzbuch*)).

In addition to these sanctions, the parties affected by anticompetitive conduct may also seek *private judicial relief* in court. German courts may order the violator to cease the respective conduct and may also impose private damages. Like the Bundeskartellamt, they may also impose certain interim measures.

In merger control cases the Bundeskartellamt must generally block any anticompetitive merger, the standard to be applied being the creation or strengthening of a dominant position (Section 36 ARC). In order to avoid a blocking decision, the Bundeskartellamt may also grant clearance subject to conditions or obligations (Section 40 (3) sentence 1 ARC). However, only structural, but no behavioural remedies are admissible under German law (Section 40 (3) sentence 2 ARC). Also, the relevant undertakings must generally not put into effect (*vollziehen*) a concentration which has not been cleared by the Bundeskartellamt (Section 41 (1) sentence 1 ARC). Legal transactions violating this prohibition are considered null and void (Section 41 (1) sentence 2 ARC). The Bundeskartellamt may also impose monetary fines for violating this prohibition (Section 81 (2) no. 1 ARC).

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<sup>9</sup> Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*).

<sup>10</sup> See Section 298 Criminal Code (*Strafgesetzbuch*).

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

Some sanctions are mandatory by law and therefore do not leave any discretion on behalf of the Bundeskartellamt. This holds true for Sections 1, 19, 20 ARC and 134 Civil Code as well as for Section 41 (1) sentence 2 ARC. Consequently, any anticompetitive contract or agreement mentioned in Section 1 ARC (cartels) or Sections 19, 20 ARC (abuse of dominance, unfair hindrance) – as well as any transaction violating Section 41 (1) sentence 1 ARC (“jumping the gun” in merger cases) – is by law considered null and void.

Further, in merger control cases the Bundeskartellamt must as a general rule block any anticompetitive merger (section 36 ARC). Thus, it has in principle no discretion as far as the relevant remedy is concerned, once it has determined that a given merger is in fact anticompetitive. However, as mentioned above, merger clearances may be granted subject to conditions or obligations. The decision on whether to block a particular merger or to clear it subject to conditions or obligations falls within the discretion of the Bundeskartellamt. Thereby, the Bundeskartellamt will primarily consider whether the relevant conditions or obligations would fully satisfy any competitive concerns that arise from the transaction.

In cartel and antitrust proceedings, the Bundeskartellamt has full discretion whether to order the relevant undertakings to cease a certain conduct and whether to impose a monetary fine. In doing so it must take into account both the gravity and the duration of the infringement (see also Section 81 (4) sentence 6 ARC). Further, the Bundeskartellamt has issued guidelines on the imposition of fines (available at

[http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bussgeldleitlinien-E\\_Logo.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bussgeldleitlinien-E_Logo.pdf)).

The decision on whether the parties affected by anticompetitive conduct should seek *private judicial relief* falls within the full discretion of the relevant parties. In particular, it is not necessary for the Bundeskartellamt to have taken an enforcement decision before the relevant parties initiate private action.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

Enforcing sanctions and remedies in competition cases poses its own challenges. In cartel and antitrust proceedings, this holds true for both the formulation of the cease and desist order as well as for the imposition of monetary fines. In the past, the formulation of cease and desist orders has proven particularly challenging in cases where the Bundeskartellamt not only

ordered the relevant undertaking to cease a given conduct, but at the same time also *mandated access* for a competitor – e.g. in essential facility cases. As far as the imposition of fines is concerned, determining the adequate level of fines is a demanding exercise.

In merger proceedings, particular challenges can be encountered with regard to the design of appropriate conditions and/or obligations. For example, conditions for a merger clearance can generally be designed as conditions precedent (*aufschiebende Bedingung*) or as conditions subsequent (*auflösende Bedingung*). Both scenarios can require detailed rulings, e.g. regarding hold separate provisions, nomination of a trustee, etc. Should a merger be cleared subject to a condition subsequent, particular problems can arise when the relevant conditions are not met because the relevant undertakings would then have to divest certain assets they have acquired in the course of the transaction.

## 2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

Under Section 63 (1) sentence 1 ARC, any formal decision by the Bundeskartellamt can be appealed to the Düsseldorf Higher Regional Court (*Oberlandesgericht Düsseldorf*) which operates separate and dedicated divisions for competition law proceedings. Decisions by the Düsseldorf Higher Regional Court can, according to Section 74 (1) ARC, generally be appealed to the Federal Court of Justice (*Bundesgerichtshof*) which also operates a division for competition law proceedings.<sup>11</sup>

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

As the court of first instance, the Düsseldorf Higher Regional Court may conduct a full review of the legal and factual assessment of the Bundeskartellamt's decision. Thereby, it may in principle fully review the discretionary elements of the decision (Section 71 (5) sentence 1 ARC). Further, new evidence is generally admissible before the Düsseldorf Higher Regional Court.

By contrast, the Federal Court of Justice will only review the legal assessment of the Bundeskartellamt and new evidence is generally not admissible. Like the Düsseldorf Higher

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<sup>11</sup> Please note that different rules apply for private actions.



Regional Court , however, the Federal Court of Justice will in principle also fully review the discretionary elements of the Bundeskartellamt's decision (Sections 76 (5) sentence 1 and 71 (5) sentence 1 ARC).

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

So far, the judicial review process of decisions taken by the Bundeskartellamt has generally run very smoothly. In cartel proceedings, appellants have sometimes complained that they are not granted full access to leniency applications filed with the Bundeskartellamt by other parties of an alleged cartel. This issue has been taken to the European Court of Justice for clarification.

## Hungary

### *1. Questions on appropriate sanctions and remedies:*

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

The Hungarian Competition Act (HCA) entered into force 1 January 1997. According to the rules of its scope of applicability the Act applies to market practices carried out on the territory of the Republic of Hungary by undertakings, including branches in Hungary of undertakings domiciled abroad with the exception for the control of concentrations, except where otherwise regulated by statute. With the exception of practices relating to unfair competition and unfair manipulation of consumer choice, the HCA shall also apply to market practices of undertakings carried out abroad if they may have effects on the territory of the Republic of Hungary.

The Gazdasági Versenyhivatal (GVH), the Hungarian Competition Authority was established in 1990. The GVH is a public, budgetary institution. All the duties of the GVH are prescribed by law. The GVH is a single administrative organ. However, the investigative and decision making part of the proceedings are divided within the authority and this is reflected by the organisational structure as well; the resolutions of the GVH are brought by the Competition Council on the basis of the report prepared by the investigative sections.

The competences of the GVH cover the enforcement of competition rules concerning agreements between competing enterprises (cartels, other horizontal agreements, vertical restraints), abuse of dominant position, control of concentrations and unfair manipulation of consumer choice. Besides the direct law enforcement the GVH promotes the general consideration of competition rules and the single enforcement by issuing notices that describe the basic principles of the law enforcement practice of the GVH.

The GVH may impose sanctions for procedural breaches (non-compliance with procedural obligations) and on the merits of the case.

A **procedural fine** may be imposed on the party or other persons participating in the proceedings, furthermore on persons obliged to provide assistance in clarifying the facts of the case if they engage in an act or display behaviour which is aimed at protracting the proceedings or preventing the disclosure of facts, or which has such an effect.

A person who disrupts the trial may be called to order by the chairman of the trial. In the case of repeated or grave disruption, such a person shall be expelled from the room, and a procedural fine may be imposed.

The Criminal Code penalises perjury committed in administrative procedures.

Procedural sanctions may be imposed against the party (undertaking) or other persons participating in the proceedings, furthermore on persons obliged to provide assistance in clarifying the facts of the case.

The HCA determines the minimum and maximum level of procedural fines for persons, who protract the proceeding or prevent the disclosure of facts. For undertakings the minimum level is HUF 50000 (€ 174), the maximum level is 1 % of the undertaking's net turnover in the preceding business year. The amount of procedural fine for natural persons who do not qualify as an undertaking and the maximum level of this kind of fine is HUF 500000 (€ 1740).

If the time limits specified for the performance of procedural obligations are exceeded, the maximum of the daily amount of the procedural fine is 1 % of the undertaking's per-day net turnover in the preceding business year and (against natural persons who do not qualify as an undertaking) HUF 50000 (per day) at most.

In the proceedings of the GVH **sanctions** may be imposed **on the merits of the case** against undertakings infringing the HCA. The maximum fine may not exceed ten per cent of the net turnover, achieved in the business year preceding that in which the decision establishing the violation is reached, of the undertaking or, where the undertaking is member of a group of undertakings that is identified in the decision, of that group of undertakings. The maximum fine imposed on social organisations of undertakings, public corporations, associations or other similar organisations may not exceed ten per cent of the total of the net turnover in the preceding business year of undertakings that are members to these organisations.

Furthermore, in merger cases if the party fails to submit an application for the authorization of a concentration, the GVH may impose fines against the party the amount of which may not exceed HUF two hundred thousand (approx. EUR 700) per day. The contract resulting in the concentration of undertakings does not come into existence, unless the authorization is given by the GVH. The legal consequences of an invalid contract apply to transaction, as defined by the Civil Code.

In addition, the Criminal Code penalizes bid rigging in public procurement procedures and concession tenders with imprisonment for up to five years. If the value of the public contract

involved is below substantial value, the criminal sanction can be imprisonment for up to two years.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

The amount of the fine is established with all the relevant facts of the case taken into account, in particular the gravity of the violation, the duration of the unlawful situation, the benefit gained by the infringement, the market positions of the parties violating the law, the imputability of the conduct, the effective co-operation by the undertaking during the proceedings and the repeated display of unlawful conduct. The gravity of the violation is established, in particular, on the basis of the threat to economic competition and the range and extent of harm to the interests of consumers and trading parties.

There was a sentencing guideline (notice) in force between January 2004 and May 2009, but due to problems arisen in the court review process (at the second instance review court) concerning the application of the notice, it was revoked. Now the GVH is in the process of collecting more experience about how the old guideline ought to be fine-tuned in order to fit to the requirements of the review courts (although the newest practice shows that the Supreme Court does not have problem with the original guideline, since several cases at the Supreme Court level (on the highest level) in respect of the fine-calculation made along the notice have been won by the GVH when the authority challenged the judgements made by the second instance review court. This means that it seems very likely that the original fining notice will not be substantially modified).

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

Fines imposed in competition supervision proceedings and not paid within the time limit set for the compliance qualify as public debt to be exacted like taxes and to be collected officially upon request of the GVH by the competent tax authority.

## 2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

In cases where an action is brought in order to get the decision reached in competition supervision proceedings reviewed by the court (both on the merits of a case and complementation and/or amendment affecting the operative part of the decision), the statement of claim has to be, within thirty days of the conveyance of the decision, submitted to the Competition Council of the GVH or taken to the post as registered mail.

The Competition Council of the GVH shall refer the statement of claim, along with the documents of the case and its observations about the contents of the statement of claim, to the Metropolitan Court within thirty days of receipt of the statement of claim.

A challenge of the decision reached on the merits of the case and imposing a fine has no automatic suspensory effect in respect of the fine in question. However, the party may request a suspension in its statement of claim (challenging the decision). In cases where the statement of claim contains an application for a suspension of the enforcement, the statement of claim and the documents of the case will be referred to the court within fifteen days of receipt of the statement of claim.

An appeal against the judgement of the Metropolitan Court may be requested from the Court of Appeal of Budapest.

Against the decision of the Court of Appeal legal remedies can be submitted to the Supreme Court (on legal questions only).

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

The court may overrule the decision made by the Competition Council of the GVH. In these administrative lawsuits the rules on Civil Procedure apply, the XXth chapter of which deals with the special rules on administrative lawsuits. According to Article 339/B of the Rules on Civil Procedure, decisions reached within a discretionary power (like the one made by the GVH) are deemed to be lawful provided the administrative body 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 to evaluate the reasonability of the discretion applied to the evidence.

In practice this means that the court can overrule the decisions of the Competition Council of the GVH, and they can even adopt a different point of view when evaluating the same circumstances. The judge will refer back cases only when any of the previously mentioned conditions of Article 339/B on the lawfulness of the GVH's decision are not met.

The Metropolitan Court and the Court of Appeal may overrule the resolutions of the GVH. The judgement of the Court of Appeal may be challenged only in respect of legal questions before the Supreme Court of Hungary.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

We can answer this question only on behalf of the GVH.

The GVH is successful in defending its resolutions before the courts. In about 90% of the cases the courts confirm the legal evaluation of the GVH, and the level of fines has been reduced only in a limited number of those cases.

In the recent years the Court of Appeal of Budapest reduced the level of the fines imposed by the GVH in several times, against which judgements the GVH sought legal remedy before the Supreme Court of Hungary. In its most recent judgements the Supreme Court seems to confirm the practice of the GVH.

# Japan

## 1. Questions on appropriate sanctions and remedies:

- Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.

### 1. Anticompetitive conduct

#### (1) Administrative measures

As a result of an investigation, if a violation of the Antimonopoly Act (AMA) is found, the Japan Fair Trade Commission (JFTC) issues a cease and desist order to eliminate the violation (Article 7, 49, etc., of the AMA).

If a violation corresponds to unreasonable restraint of trade, such as price fixing, bid-rigging, etc., or, private monopolization or certain types of unfair trade practices, the JFTC issues a surcharge payment order (Article 7-2, 50, etc. of the AMA).

The sum of surcharges is calculated on the basis of sales amounts of products or services in question during the period of violations (3 years at a maximum) by multiplying such sales amounts by calculation rates as determined according to types of violation, operation scales and business categories as follows.

	Surcharge rate						Leniency program
	Business categories			Repeated violation (+50%)	Leading entrepreneur (+50%)	Early termination (-20%)	
	Manufacturing	Retail	Wholesale				
Unreasonable restraint of trade	10% (4%)	3% (1.2%)	2% (1%)	Applicable	Applicable	Applicable	Applicable
Control type of private monopolization	10%	3%	2%	Applicable	Not applicable	Not applicable	Not applicable
Exclusionary type of private monopolization	6%	2%	1%	Applicable	Not applicable	Not applicable	Not applicable
Concerted refusal to trade, discriminatory pricing, etc.	3%	2%	1%	Not applicable	Not applicable	Not applicable	Not applicable
Abuse of superior bargaining position	1%			Not applicable	Not applicable	Not applicable	Not applicable

- “Early termination” means that the period of violations is less than 2 years, and such violations are discontinued by the day one month before the commencement of investigations.

- “Repeated violation” means cases where surcharge payment orders have been given during the period of 10 years before the commencement date of investigation.
- “Leading entrepreneur” means entrepreneur who plays leading roles, such as “organizer” in bid-rigging, cartels, etc.
- Percentages in parentheses are applicable to small and medium enterprises.
- As regards “Concerted refusal to trade, discriminatory pricing, etc.,” only when the party violates repeatedly during the period of years before the commencement date of investigation, the violation will be subject to a surcharge payment order.

Also, the JFTC is implementing a leniency program whereby surcharges are immunized or reduced on conditions as follows. Surcharge immunity or reductions apply to a total of 5 entrepreneurs. After the investigation has started, however, surcharge reductions apply to maximum 3 entrepreneurs.

Condition	Amount of reduction of surcharge
The first applicant before on-the-spot investigation	Immunity from total surcharges
The second applicant before on-the-spot investigation	Reduction of 50% of surcharges
The third applicant before on-the-spot investigation	Reduction of 30% of surcharges
The applicants after on-the-spot investigation	Reduction of 30% of surcharges



## (2) Criminal penalties

In some cases, criminal penalties such as imprisonment with work or fine are imposed against violation of the AMA. An individual who has carried out cartel is subject to imprisonment and/or fine, and a fine is also imposed on the entrepreneurs and trade associations involved (Article 89 – Article 95-3 of the AMA).

Types of illegal acts		Individual	Entrepreneurs
Private monopolization, unreasonable restraint of trade, substantial restraint of trade by trade associations		Imprisonment with work of up to 5 years or fine of up to 5 million yen	Fine of up to 500 million yen
Illegal acts of trade associations, such as execution of specific international agreements		Imprisonment with work of up to 2 years or fine of up to 3 million yen	Fine of up to 3 million yen
Violation of final cease and desist order		Imprisonment with work of up to 2 years or fine of up to 3 million yen	Fine of up to 300 million yen
Obstruction of on-the-spot investigation , etc.	Refusal to appear or report, etc.	Imprisonment with work of up to one year or fine of up to 3 million yen	Fine of up to 500 million yen
	Refusal of order of expert examination, etc.	Imprisonment with work of up to one year or fine of up to 3 million yen	Fine of up to 3 million yen
	Refusal of order of submission, etc.	Imprisonment with work of up to one year or fine of up to 3 million yen	Fine of up to 3 million yen
	Obstruction of on-the spot investigation , etc.	Imprisonment with work of up to one year or fine of up to 3 million yen	Fine of up to 3 million yen

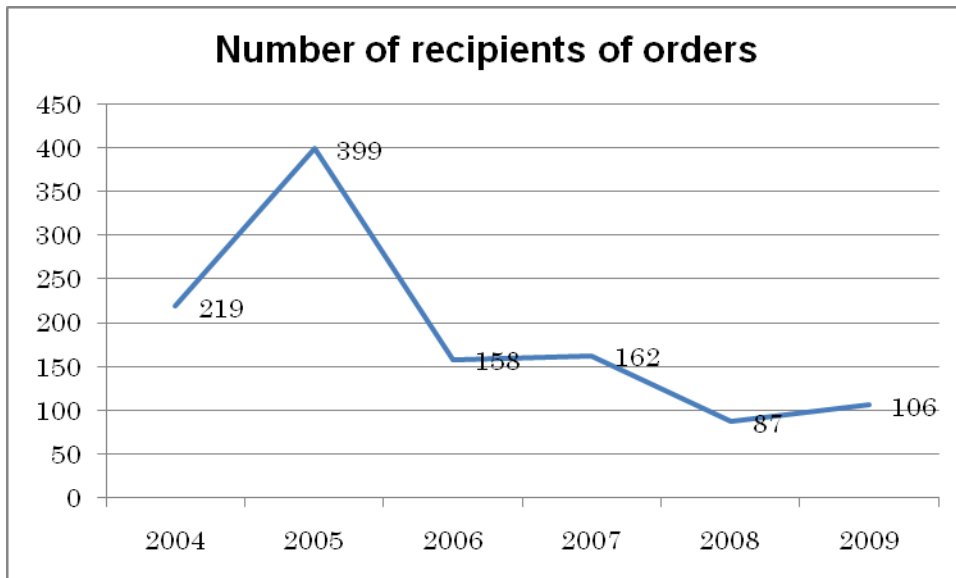
## (3) Merger and acquisition

As regards merger and acquisition, after the JFTC reviews a proposed business combination, if any competition problems exist in light of the provisions of the AMA, the JFTC notifies the parties and gives them an opportunity to present views and to submit evidence, then issues a cease and desist order, such as blocking of the business combination (Article 17-2 of the AMA).

## **II. Application in practice**

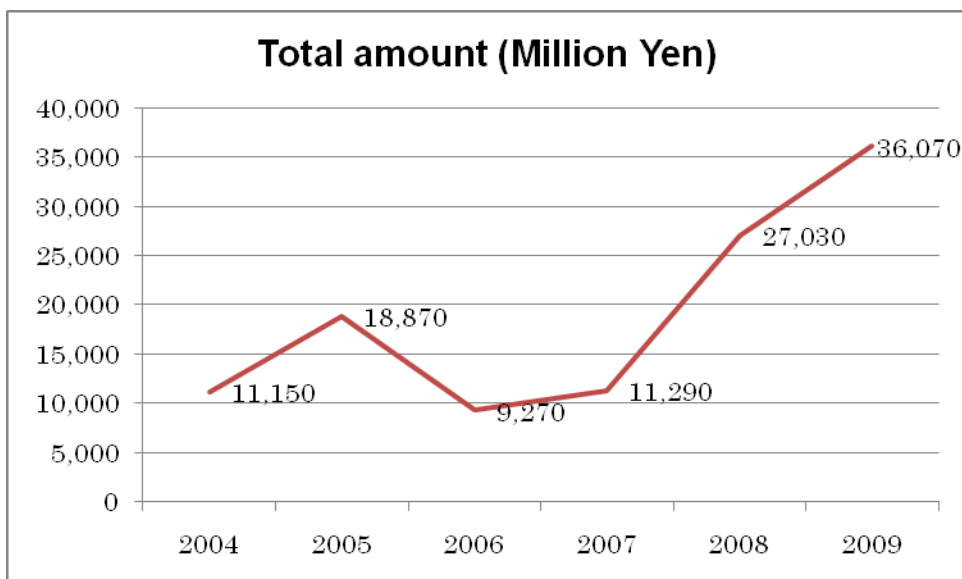
### **1. Surcharge payment order**

The number of recipients of surcharge payment orders in each of last 6 fiscal years is as follows.



(Source: JFTC)

The total amount of surcharge in each of last 6 fiscal years is as follows.



(Source: JFTC)

Thus, based on the comparison between the two graphs above, it could be recognized the scale of case in turnover has been developing in recent years.

### **2. Criminal penalty**

Since 2006, the JFTC filed accusation for criminal prosecutions for 4 major cases. After the trials by courts, criminal fines which amounted minimum 40 million yen to maximum 220 million yen

were imposed on entrepreneurs. Also, criminal fines or imprisonment with work were imposed (in each case, with probation) on the individuals in charge of the conducts in question.

### **3. Remedy to merger and acquisition**

In many cases, the parties voluntarily hold prior consultations with the JFTC in advance of prior notifications.

The JFTC carries out inspection in such a prior consultation stage, and in the case that it reaches a conclusion that the transaction is problematic based on the point of view of the AMA, the JFTC indicates such a problem to the parties. Then, the parties take a remedial measure on a voluntary base.

Based on this reason, the JFTC seldom imposes remedies in merger and acquisition cases as a formal action (cease and desist order).

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

See above.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

For the last five years the JFTC has faced various big challenges and overcome them. The challenges include introduction of a leniency program in the face of strong opposition from the business community, increase of surcharge rate, expansion of the scope of surcharge, increase of maximum prison terms, and introduction of premerger notification system for share acquisition.

#### *2. Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

(1) Currently, if the recipient of a cease and desist order or a surcharge payment order by the JFTC is unsatisfied with it, he/she can request the commencement of hearing procedures to the JFTC. Then, the hearing procedure within the JFTC is carried out. Usually, the JFTC appoints hearing examiners in each case and makes them carry out hearing procedure.

After the hearing procedure, the JFTC issues a decision on the case. If the recipient is still unsatisfied with the decision, he/she can appeal to the Tokyo High Court. Finally, the case could

be heard by the Supreme Court.

(2) As regard the appeal procedure mentioned above, in March 2010, the Cabinet submitted the amendment bill of the AMA to the Diet.

Based on the bill, the appeal procedure would be changed as follows.

The JFTC's hearing procedure will be abolished. The appeal suit pertaining to cease and desist orders and surcharge payment orders shall be subject to the exclusive jurisdiction of the Tokyo District Court. The appeal to the judgment by the Tokyo District Court shall be in the Tokyo High Court, then, the case could be appealed to the Supreme Court.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

Currently, Article 80 of the AMA stipulates that findings of fact made by the JFTC shall, if established by substantial evidence, be binding upon the court in regard to the suit.

Also, based on Article 81 of the AMA, offering of new evidence to the court by a party is limited to the following two cases.

(i) Where the JFTC failed to adopt the evidence without justifiable ground

(ii) Where it was impossible to submit the evidence at the hearings of the JFTC, and there was no gross negligence of the party in failing to submit such evidence

The amendment bill includes the repeal of these provisions, accompanying with the abolition of the JFTC's hearing procedure.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

As regards the hearing procedure of the JFTC, there is certain criticism that the JFTC reviews the administrative orders issued by the JFTC itself, thus, it lacks fairness.

Therefore, to resolve such criticism on procedural fairness, the amendment bill of the AMA was submitted to the Diet, and once enacted, it will abolish the JFTC's hearing procedure for administrative appeal and, will introduce a system in which any appeal suits pertaining to the administrative orders by the JFTC shall be subject to the jurisdiction in the court.

## Kenya

### *1. Questions on appropriate sanctions and remedies:*

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

Competition policy and law is enforced through the Restrictive Trade Practices, Monopolies and Price Control Act, Chapter 504, Laws of Kenya (Cap 504). The sanctions and remedies are based on the following three categories;

#### i) Restrictive trade practices

Restrictive trade practices covers acts intended to reduce or eliminate the participation of legal and natural persons in economic activities. It embraces trade agreements, trade associations, refusal and discrimination in supply, predatory trade practices, collusive tendering and bidding at auction sales. Upon gathering evidence to substantiate the allegations, the Commissioner is to inform the alleged offender in writing to comment and indicate remedies he/she is contemplating to take to rectify the situation. The Commissioner is also supposed to request the offender to take specific steps to discontinue with such practices and compensate the victim(s) for the past effects to enable them to participate actively in that particular business.

If no response is forthcoming from the Commissioner's request, the offender is invited to negotiate for a **consent agreement**. The agreement stipulates that the person desists from specified practices and will take specified measures to compensate for the past effect of such practices. If the offender still does not take appropriate remedies, the Commissioner is supposed to inform him of a proposal to recommend that the Minister make an Order regulating the practices in question.

The Minister's Order may require a person to desist from the offending practice and may also require him to take positive steps to assist existing or potential suppliers, competitor or customers in order to compensate for the past effects of those practices.

Any person who contravenes the Minister's Order is guilty of an offence shall be liable to a fine of one hundred thousand shillings (approximately \$1300) or to imprisonment for a term not exceeding three years or to both.

## ii) Unwarranted concentrations of economic power

Where necessary, the Minister, with the recommendation of the Commissioner may make an order directing any person whom he deems to hold unwarranted concentration of economic power in any sector to dispose of such portion of his interests in production or distribution or the supply of services as the exigency of the situation may deem necessary to remove the unwarranted concentration. However, efficiency considerations are taken into account when making such orders.

## iii) Control of mergers and takeovers

As for mergers and takeovers, Kenya is a suspensory jurisdiction.

Any person who consummates a merger or takeover without an authorizing order by the Minister is guilty of an offence and shall be liable to a fine of two hundred thousand shillings (\$2600) or to imprisonment for a term not exceeding three years or to both.

In all the three categories above, a person aggrieved by the Minister's order may appeal to the Restrictive Trade Practices Tribunal and if dissatisfied with the decision may appeal to the High Court whose decision shall be final.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

As illustrated above, these are statutory procedures, sanctions and remedies and they have to be followed.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

Generally, the whole procedure is quite convoluted and lengthy. This is also coupled with the monetary sanctions which are too lenient and not deterrent enough.

Regarding unwarranted concentration of economic power, the sanctions/ remedies may have serious ramifications on would be investors as they may be sending wrong signals.

For mergers and takeovers with conditions of divestiture, there is a possibility of lack of buyers to buy would be investment which may lead to lowering of prices.

## 2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

For Restrictive trade practices, the Commissioner is the first adjudicatorial institution through a consent agreement. The procedure of decision is as earlier illustrated in part (A) above.

The second is the Minister through a Ministerial Order.

The third adjudicatorial institution is the Restrictive Trade Practices Tribunal (Tribunal). Orders of the Minister which are based on the recommendation of the Commissioner are appealable to the Tribunal. The Tribunal may overturn, modify, confirm, or reverse the Order appealed against. Appeals under merger or takeover brought to the Tribunal against any order of the Minister may not be consummated pending the determination of the appeal.

The fourth and final adjudicatorial body is the High Court. Its decisions are final.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

The level of intensity of the judicial review is dependent on the review of legal and factual assessment. The Tribunal's principal function is to arbitrate over competition disputes resulting from ministerial orders made on the recommendation of the Commissioner. After an appeal has been lodged at the Tribunal, it relies on the facts presented to it by the Minister and then explores the legal aspects to ascertain whether the law was followed to the latter. The same applies to the High Court which relies on the material facts as submitted by the Authority and then examines the law to see whether it was followed. Only two cases have been referred to the tribunal and one case to the High Court since the Authority's inception.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

### Competition Authority

- Long enforcement procedures especially in restrictive trade practices.
- At times, the person or parties concerned may fail to take remedial steps or fail to sign a consent agreement.

- It is not an offence to contravene the Commissioner's order as it is not provided for in the Act.
- The monetary sanctions in form of fines have been eroded by inflation and are not deterrent enough.

#### The Appellant

- The procedure for the appeal is long, and this may hinder they would be appellant from conducting his business given that time is of essence in business.

#### Third parties

- The judicial review process involves only those parties directly affected by the case; i.e. the offender and the appellant.

#### The review body

- The credibility test. People might not have confidence appealing to the Tribunal as it is constituted by the same Minister whose decisions are adjudicated by the Tribunal.
- The High Court is not a specialized Court for competition cases. The court system is further weighed down by extra ordinary delays in processing cases.



# Mauritius

## *1. Questions on appropriate sanctions and remedies:*

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

The Competition Act 2007 provides for:

(1) Financial penalties in cases of collusive agreements;

(2) Remedies, in cases of monopolies and mergers.

### **A. Financial Penalties**

The only form of restrictive practice that can result in a financial penalty under the Competition Act 2007 is a collusive agreement: price-fixing agreements, market sharing (section 41), bid-rigging (Section 42) or resale price maintenance (section 43). The Act provides that the Competition Commission of Mauritius (CCM) may impose a financial penalty only if it is satisfied that an enterprise has committed a breach of sections 41, 42 and 43 intentionally or negligently.

The ways the financial penalties are determined are elaborated in details further in this report.

### **B. Remedies**

Remedies applied by competition authorities are often divided into structural remedies, such as divestment, which aim to restore or enhance competition by changing the market structure, and behavioural remedies, which aim to change the behaviour of enterprises (through orders or contractual undertakings). Generally, structural remedies require little if any monitoring once the structural change has taken place, while behavioural remedies will normally require the CCM or a nominated agent to monitor compliance. The CCM may also make non-binding recommendations to Government.

#### ***Structural remedies***

##### ***Blocking mergers***

Anticipated mergers notified to the CCM and investigated can be blocked if they are expected to result in a significant lessening of competition (SLC) and if there is no more effective remedy.

If an SLC is expected only in some markets, then the CCM might block only part of the deal, allowing the merger to be completed subject to certain parts of the target enterprise remaining independent. Alternatively, the merger could be allowed to be completed in full, but the merged

enterprise would then be required to sell off part of the enterprise (within a specified period). In both cases, the CCM will apply the same principles to determining the package of assets that must be removed from the merged enterprise as are set out under „Divestment“ below, particularly the need for them to be viable under new ownership.

### ***Divestment***

The divestment of assets can represent a highly effective means to create a more competitive market structure than would otherwise have existed. However, as a remedy to apply in monopoly or other cases, the CCM recognizes that forced divestment represents a considerable intervention in property rights. It therefore will not require divestment in such cases, unless it is satisfied that no other equally effective remedy exists, and that such intervention is not disproportionate to the expected benefits.

### ***Viability***

The package of assets must be viable, whether in independent ownership or under the control of an existing player in the market. Viability requires that the divested business be able to offer an effective competitive threat to other producers in the market, while remaining profitable. It may well be the case that a larger divestment package is required, to create a viable competitor.

The CCM will generally regard a complete existing business as more likely to be viable than a package of assets extracted from existing businesses. In assessing the viability of a divestiture package, the CCM will consider not only the physical assets to be transferred, but also access to intellectual property, to customer relationships, staff expertise and any required regulatory permissions.

### ***Sale value of the divested package***

In general, the CCM will allow enterprises as much freedom as possible in choosing the manner of divesting their assets, as long as the effectiveness of the remedy is preserved, and the divestment proceeds in a timely fashion. Those enterprises will normally be responsible themselves for the sale. The CCM will not do impose conditions that could adversely affect the sale value of the assets, unless it is necessary to do so in order to preserve the effectiveness of the remedy.

The CCM will normally set a deadline for the enterprise itself to sell the assets. If it fails to do so without good cause within the deadline, the CCM itself will take steps to ensure that the assets are sold – typically by appointing a third party to act as a trustee with power to dispose of the assets. Fees and other costs incurred as a result of appointing such a trustee would normally be the responsibility of the divesting party.

The CCM may also place restrictions on the types, or specific identities of allowed buyers of the divested assets. Before proceeding to due diligence, enterprises divesting assets must obtain the CCM's approval of the preferred buyer. The CCM is likely to reject potential buyers if it believes that they will not use the assets to compete effectively in the relevant markets in which it has identified concerns.

If the assets cannot be sold to any buyers acceptable to the CCM, the CCM will review its decision and consider allowing sale to less acceptable buyers. However, before doing so, it will assess whether any aspect of the sale process (such as a minimum price) effectively prevents any acceptable buyers from bidding. It may appoint a divestment trustee, as noted above, to ensure that this is not the case.

Divestment remedies normally require no monitoring or enforcement by the CCM, once the sale of assets is complete. However, as part of the divestiture order (or accepted undertakings), the CCM will normally specify that the divested assets cannot be repurchased by the divesting enterprise (or otherwise come back under its control). This prohibition will be limited by a sunset clause, typically of ten years.

#### ***Intellectual property (IP) in remedies***

Whether as a remedy in itself or to accompany divestment of physical assets, the CCM may require the sale of IP rights, to promote competition in the affected relevant markets. For example, IP rights may be an inherent component of the business being divested (for example a trademark or a brand name), the absence of which would significantly weaken the competitiveness of the divestment package.

IP rights as part of a divestiture package may be sold or licensed. In general, the CCM has a preference for full transfer of IP rights through sale, to diminish the need for contact between the old and the new owners of the divested assets. Where IP can only be licensed, the CCM must approve the licensing terms, to ensure that they do not act to diminish the competitive effect of the divestment package.

#### ***Behavioural remedies***

The term „behavioural remedies“ covers a very wide range of possible interventions, all of them aimed at changing the behaviour of market participants. As noted earlier, the CCM's strong preference is for remedies which promote and protect competition itself, rather than merely mitigating the effects of inadequate competition.

#### ***Monitoring and enforcement***

Behavioural remedies may take the form of orders by the CCM, or undertakings by the parties concerned. Such orders or undertakings require monitoring and may require periodic review, as we discuss below.

In assessing the proportionality of different possible remedies, the CCM will take into account the costs of monitoring and enforcement. In general, the CCM will place less weight on costs incurred by the party creating the problem than costs imposed on third parties, the public sector or the CCM itself. Where possible, the CCM will seek to make its remedies self-enforcing, for example by finding ways of embodying them in commercial contracts which private sector counterparties will have an interest in enforcing. If monitoring and enforcement must be carried out on the CCM's behalf, the CCM will seek to ensure that the costs are borne primarily by the enterprises at fault.

All behavioural remedies will contain arrangements for review, triggered either by a specific date or a set of objective circumstances. It is not the intention that the review should be as intensive as the original CCM investigation. Consequently, where possible, the CCM will establish clear criteria for lifting the remedy when it makes its original order (or accepts undertakings). All behavioural remedies will contain a sunset clause, typically 10 years, to ensure that they lapse if not reviewed.

### ***Enabling measures***

Behavioural remedies that seek to create better access for new entrants, or allow smaller existing competitors to expand, are termed enabling measures. For example, a vertically integrated enterprise might be required to purchase some of its requirements from competitors, rather than its own upstream suppliers - a class of remedies termed „access measures“. Access measures typically force enterprises to behave in ways that go against their incentives to maximize profits, and therefore require very careful design and monitoring, if they are to be effective and to minimize the distortion they create to normal competition.

When large enterprises have been found to be abusing a monopoly position (or a merger to create such a position), behavioural remedies could be used as an alternative to divestment, to enable new entrants or smaller existing players to compete more effectively. Such measures might include restrictions on the monopoly's ability to conclude long-term or exclusive contracts with customers or suppliers, or might involve more complex measures such as restrictions on bundling products, discounts or other marketing and pricing devices.

The CCM notes that such measures, in addition to being administratively difficult to implement can themselves distort competition. They amount to an attempt temporarily to reduce the degree

of competition in the market, and the CCM will need to be convinced that such restrictions are necessary to promote competition in the long run, before it chooses such an approach.

By their nature, enabling measures must be time-limited. They are intended to promote competition by encouraging entry. After time, they will either have succeeded (in which case they will be unnecessary) or failed. Either way, they will be removed.

### ***Informational remedies***

Competition problems typically become more acute the more ignorant or confused customers are about competitive alternatives. Either as a remedy for a general failure of competition, or to correct a problem specifically arising from a lack of information, the CCM may require enterprises to provide more information. More directly, enterprises might also be required specifically to draw the attention of customers to the existence of competitors or to procedures for cancelling or amending their decision to buy (such as „cooling off periods“) so that it is easier for customers to switch to competitors.

General consumer regulations from Government are a better approach to long-run consumer protection than can be provided by CCM decisions, applied only to enterprises which have been investigated.

### ***Price control remedies***

The Act specifically permits the CCM to impose a “requirement that the enterprise shall [...] cease or amend a practice or course of conduct, including conduct in relation to prices”, for breaches of sections 44-46 (monopoly situations) and “require an enterprise to [...] adopt, or desist from, such conduct, including conduct in relation to prices”, in the case of mergers. Thus, the CCM can issue directions to control prices.

The CCM does not have the power to control prices generally in the economy. Any price controls can be imposed only on a case-by-case basis, following investigation, of breaches of the Competition Act or of mergers likely to result in a significant lessening of competition. Price controls can only be imposed on enterprises found to be in breach of the Act and not on any other enterprises active in the market. The CCM is not a price regulator, with the ability simply to intervene to reduce prices upon complaint.

The ability to control prices as a remedy to abuse of monopoly or an anticompetitive merger is a powerful tool in the CCM’s toolkit, but one that will be used only with caution. The CCM regards free competition as the best guarantor of good outcomes for customers and the economy in general, and would therefore expect a price control to act as a poor second-best alternative to remedies that enhance or protect competition.

The benefits of price controls are that they provide rapid and direct relief to customers suffering excessive prices as a result of monopoly power. However, price controls may also be ineffective, costly to implement and distortionary compared to free competition. Controls on prices are sometimes necessary to prevent exploitation of an extreme monopoly position (or to promote other government objectives, although this is not a matter for the Competition Commission). However, as a solution to a failure of competition, they should be seen as a last resort.

If the CCM imposes a price control as a remedy, it will specify the circumstances in which that remedy would be removed, just as it will for other behavioural remedies. If it is expected that price controls will be required indefinitely (for example, if the CCM has identified a market that is a natural monopoly given the scale of the market in Mauritius, and expects abuse of that monopoly to be unavoidable) then it may be more appropriate to recommend that Government impose price controls in that sector, rather than to do so through Commission decisions on a case-by-case basis.

### ***Recommendations to Government***

In addition to these actions taken by the CCM itself, the CCM may make non-binding recommendations to Government. This would be appropriate in two general circumstances.

When, as a result of its investigation, the CCM has concluded that certain Government policies or regulations contribute to the competition problems it has found, the CCM might recommend removing or modifying them. It would be up to Government whether to do so, as only the Government can consider the effects of its policies other than on competition.

Secondly, if as a result of the CCM's investigation, it seems necessary to create permanent regulation over some matter, it may be better for the Government to legislate or otherwise introduce regulation than for the CCM to do so through behavioural remedies. Again, any such recommendation would be non-binding, and the CCM would normally introduce its own remedies as a temporary or fall-back measure alongside the recommendation, to be removed or modified if Government takes action.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

### **A. FINANCIAL PENALTIES:**

In imposing any financial penalty, the Competition Commission's objectives are two folds:

(1) Firstly, to reflect the seriousness of the breach;

(2) Secondly, to deter enterprises from engaging in anti-competitive practices

The imposition of a financial penalty is discretionary. The CCM will, where appropriate, impose financial penalties in respect of horizontal agreements which are collusive (Section 41); Bid Rigging (Section 42); and vertical agreements which involve resale price maintenance (Section 43), as they are the most serious breaches of competition law. This is aimed at deterring not only the infringing enterprises but also other like-minded enterprises which might be considering activities contrary to the section 41, 42 and 43 prohibitions.

#### ***Determining the amount of penalty***

A financial penalty imposed by the CCM under section 59 of the Act will be calculated taking into consideration:

- (a) the turnover of the enterprise in Mauritius in the last business/financial year, multiplied by the duration of the breach;
- (b) Adjustments to reflect other relevant factors such as deterrent value and any further aggravating or mitigating factors;
- (c) To a maximum of 10% of the turnover of the enterprise in Mauritius in the last business/financial year, multiplied by the duration of the breach.

#### ***Calculation of turnover multiplied by the duration of the breach***

In assessing the impact and effect of the breach on the market, direct or indirect impact, the CCM will take into consideration, among other things the net turnover (the value of sale of goods and services) of the enterprise in Mauritius for the last business year. The business year, for this purpose, will be the one preceding the date on which the decision of the CCM is taken, or if figures are not available for that business year, the one immediately preceding it.

Where the enterprise is a group of companies, the CCM will normally consider the relevant turnover to be that of the company active in the market(s) affected by the breach.

The amount of financial penalty to be imposed will also depend on the duration of the breach.

#### ***Other Relevant Factors***

The amount of financial penalty to be imposed may be determined by the Commission, as appropriate, on a case by case basis according to the following factors.

***(1) The seriousness of the breach, in terms of its effects upon competition and on consumers.***

In general, the CCM regards breaches of Sections 41 and 42 as particularly serious breaches of the Act. The greater the damage to customers of the colluding enterprises, resulting from the

increase in price over levels that would otherwise have obtained, the larger the CCM will normally set the penalty, up to the maximum limit imposed by the Act.

## ***(2) Deterrence effect of the penalty***

By its clear prohibition of collusive agreements, and the penalty regime it introduces, the Act establishes the principle that collusive agreements are no longer acceptable as a way of doing business. A fine should not be seen merely as part of the normal costs and risks of doing business. Consequently, the Commission will normally expect to set a fine at a level well above any assessment of damage to customers, or of the excess profits made by the parties to the collusive agreement.

### ***Other aggravating or mitigating factors***

In assessing the amount of financial penalty to be imposed, the CCM will consider any aggravating or mitigating factors.

(i) Aggravating factors include:

- (a) role of the enterprise as a leader in, or an instigator of, the infringement; (b) involvement in or awareness by directors and senior management;
- (c) retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the breach;
- (d) repeated breaches by the same enterprise or other enterprise in the same group; (e) breaches which are committed intentionally rather than negligently; or
- (f) retaliatory measures taken or commercial reprisal sought by the enterprise against a leniency applicant<sup>2</sup>.

(ii) Mitigating factors include:

- (a) role of the enterprise, for example, that the enterprise was acting under duress or pressure;
- (b) genuine uncertainty on the part of the enterprise as to whether the agreement or conduct constituted a breach;
- (c) adequate steps taken with a view to ensuring compliance with section 41, 42 and 43 of the Act, for example, existence of any effective compliance programme;
- (d) termination of the breach as soon as CCM intervenes; or
- (e) co-operation which enables the enforcement process to be concluded more effectively and/ or speedily.

### ***The maximum penalty***



The amount of financial penalty to be imposed may not exceed 10% of the turnover of the enterprise in Mauritius for each year of the breach, up to a maximum of 5 years.

The involvement of an association of enterprises (e.g. a trade association) in a breach of section 41, 42 and 43 of the Act, may result in financial penalties being imposed on the association itself, its members or both. Where the breach by an association of enterprises relates to the activities of its members, the penalty shall not exceed 10 percent of the sum of the turnover of the business of each member of the association of enterprises in Mauritius, active on the market affected by the breach, for each year, up to a maximum of 5 years.

## **B. REMEDIES**

Sections 60 and 61 of the Act concern “Directions relating to distortion, prevention or restriction of competition” (relating to restrictive practices under sections 44, 45 and 46) and “Remedies in merger control” (relating to mergers, as set out in sections 47 and 48), respectively. Directions under both of these sections will be referred to here as “remedies”.

It is important to distinguish such remedies from penalties applied under Section 59. Penalties can be applied only for intentional or negligent breach of the prohibitions on collusive agreements. They penalize past actions, to act as a deterrent against such breaches in the future. Remedies, in contrast, should not be seen as penalties. In imposing remedies, the CCM aims to make markets work better than they would otherwise have done, in the future. In particular, the CCM might make directions in order to remove restrictions to competition or otherwise to enhance (or prevent from worsening) the competitive working of the market. Where effective, such remedies will deal with the root cause of the problem. However, both Sections 60 and 61 also specify that the CCM may also remedy adverse effects, dealing with the symptoms of the problem as well as the causes.

The CCM will select a remedy, or package of remedies, to achieve these aims. In selecting a remedy, or package of remedies, the CCM will have regard to:

- (a) Effectiveness;
- (b) Timeliness; and
- (c) Proportionality of implementation costs to the expected benefits of the remedy

*(a) Effectiveness*

„Effectiveness“ will be judged according to a remedy’s likely effect on the state of competition in the relevant market, and the adverse effects resulting from any weakness of competition. The sole purpose of remedies is to remove or mitigate the effects of the anticompetitive effects identified by the CCM in its investigation. The CCM will not seek wider „remedies“ to promote competition in areas beyond those identified in its investigation report.

This does not imply that remedies under Sections 44-46 will always be limited to, or focused on, the anticompetitive agreement or conduct identified. A commitment to cease the conduct in question might not be as effective as alternative measures that would better deal with the competition problem identified by the CCM.

In merger control, the CCM will not seek through remedies to create a market that is any more competitive than was the case before the merger. An outcome in which an anticipated merger does not go ahead will therefore always be regarded as an effective and comprehensive solution to any problems that the merger was expected to cause, and will therefore always be a sufficient remedy (although outright prohibition will not be a necessary remedy in all circumstances). If an enterprise is prepared fully to abandon an anticipated merger, the CCM will not seek further remedies. The same will normally apply to full divestment (reversal) of a completed merger, although in this case the CCM may need to impose additional remedies to address any diminution of the competitive threat provided by the acquired assets, as a result of actions taken while they were under the control of the acquiring party, to restore the pre-merger state of competition.

In seeking an effective and comprehensive solution, the CCM will normally strongly prefer remedies which enhance or protect the process of competition, rather than those which attempt to deal with the adverse effects of a failure of competition. This is because competition between independent enterprises is normally the best guarantor of good outcomes for customers, and for the efficient working of the economy as a whole. Remedies which deal only indirectly with weak competition, for example by restricting the ability of enterprises facing weak competitive constraints to exploit that position, are unlikely to be as effective as strengthening those competitive constraints. Thus, when considering remedies the CCM will first seek a remedy that removes the problem by strengthening competition, only considering other remedies:

(a) If remedies to strengthen competition are unavailable;

(b) If the costs of implementing remedies to strengthen competition would be disproportionate to the benefits they would produce; or

(c) As an interim measure, if competition is expected to develop over time (possibly as a result of other remedies within the package adopted by the CCM)

This does not necessarily imply that structural solutions (divestment of assets, or prohibition of a merger) will always be preferred over other remedies. For example, changes to the behaviour of a monopolist, enforced by direction or undertakings, might remove barriers to entry or expansion by potential competitors and thereby promote competition. For mergers, where a substantial lessening of competition arises from a structural change in the relevant market, the CCM will always consider a structural solution as a possible remedy.

The CCM will only seek to apply remedies in the relevant markets identified in its decision. In most cases, anticompetitive conduct and the effects of that conduct will occur in the same relevant market. However, in some cases behaviour in one relevant market may have adverse effects on another (for example if a monopolist of one product leverages its market power through tying or bundling it with another product that would otherwise face competition). In such circumstances, the CCM may apply remedies in either or both relevant markets, to deal either with the cause or effects of the anticompetitive conduct, or both.

Remedies must, therefore, be specific to the problems identified. The CCM cannot accept as a remedy an offer by an enterprise to take some action in one relevant market (to the benefit of consumers) to off-set a loss of competition in another relevant market.

As noted above, it may well be appropriate for the CCM to apply a temporary remedy aimed at mitigating the effects of anticompetitive behaviour or mergers that reduce competition, if it expects competition to develop over time (whether because of pre-existing trends and anticipated developments, or other remedies that form part of a package). For example, tying and bundling might be prohibited after a vertical merger until sufficient competition develops in the market where the enterprise has market power.

### ***Timeliness***

Other things being equal, the CCM will prefer remedies that act swiftly to deal with problems it has identified, over those that operate only after a delay. However, timeliness and effectiveness of remedies may be in conflict, if the most effective remedies operate only over the longer term. In particular, remedies that aim to increase the degree of competition in a market by encouraging entry are likely to be quite slow in acting to correct a failure of competition. In such circumstances, the CCM may need to balance effectiveness against timeliness, although it may

instead adopt a package of remedies which both provide for short-term improvements and a more comprehensive long-term solution.

The CCM will not normally impose remedies if it expects problems to be transitory (whether because of naturally occurring trends or market processes that might solve the problem, or when considering whether additional remedies are required to supplement slow-acting remedies imposed by the CCM itself). The CCM does not regard it as appropriate to adopt a fixed definition of „transitory“. Normally, if the CCM expected entry or other competitive developments to solve a competition problem within two years, it would not seek further remedies, and it would be very unusual to impose a remedy for a problem that is expected to last less than one year. However, in circumstances in which the damage to competition, or the harm to consumers or the economy generally, is regarded as very great, it might be appropriate to impose remedies even for very short-term problems. Furthermore, if it regards the competitive developments as likely but uncertain, the CCM might impose a remedy as an alternative (active, or available to be activated), if they do not materialise.

### ***Proportionality***

It would not be sensible to impose remedies if the costs of those remedies are out of proportion to any benefits that can be expected to emerge from them. The CCM will therefore consider the proportionality of the costs of any remedy it imposes to the benefits it expects to result from the operation of that remedy.

It should not be assumed that the lowest-cost remedy will be chosen. The CCM's primary focus will be on the effectiveness (and timeliness) of different remedies, and a more effective remedy will normally be preferred to a less effective one even if its costs are higher. If the CCM judges that its preferred remedy on grounds of efficiency and timeliness would have costs that are disproportionate to its benefits, it will not impose that remedy but will consider alternatives. If no alternative remedy can be found that has costs that are not disproportionate to the benefits, then the CCM will impose no remedy.

„Proportionality“ is a broader concept than simply the comparison of two figures to see which is bigger. The CCM does not expect to conduct a full „cost-benefit“ analysis of its remedies, and does not regard itself as bound to produce any numerical estimates of costs or of the benefits of its remedies. The benefits of competition can be diffuse and difficult to quantify, while the costs are normally clearer.

Cash costs are not the only „costs“ of intervention. The benefits must justify the intervention itself. The CCM will not intervene in property rights (for example by requiring divestment in a

monopoly case) unless it expects substantial benefits from doing so, even if the cash costs of divestment are expected to be relatively low.

Nothing in this section should be taken to imply that the CCM is required to „prove“ or even demonstrate, that the benefits of its intervention will exceed the cost in any numerical sense. Instead, the CCM will consider (and welcomes submissions on) arguments that the costs of some proposed remedy are disproportionate, whether because those costs are unusually high or the benefits of the remedy are particularly low.

The assessment of costs is intended to be comprehensive, and additional sources of costs that are not discussed here can be considered by the CCM. However, there are two specific categories of costs that will not be considered by the CCM.

Firstly, the loss of any profits or other value resulting from the possession of monopoly power will not be considered a cost by the CCM. For example, if an intervention by the CCM is likely to result in lower prices to consumers, the CCM regards that as a benefit, not a cost. Such losses of monopoly profits might arise indirectly. For example, where divestment of assets is required, to create a more competitive market, it will often be the case that the market value of those assets is lower than the market value they would have held under monopoly ownership - because that value would have been inflated by the expectation of a stream of monopoly profits.

Secondly, the additional costs of reversing a completed merger will not be taken into account by the CCM when assessing proportionality. This is because enterprises planning to merge have the option of seeking prior approval for their deal, and so if they complete a merger without CCM approval they do so at their own risk. The CCM therefore takes no account of divestment costs when assessing a completed merger: as far as remedies are concerned, it is as if the merger has not yet occurred, to create neutrality in the assessment of anticipated and completed mergers.

### ***Offsetting benefits***

Section 50 of the Act requires the CCM to determine whether there are any off-setting benefits to be taken into account in determining the remedial action to be taken. These off-setting benefits, listed in Section 50(4) essentially provide for an „efficiency defence“<sup>3</sup>. If the CCM does find that there are significant off-setting benefits, this might cause it to modify its remedy package if the benefits would otherwise be lost. More rarely, this consideration could even extend to the CCM taking no remedial action at all, if any such action would nullify the benefits. For example, a merger might be permitted if it results in such economies of scale that the consumer will be better off despite a reduction in competition. „Efficiency“ or other arguments arise at the stage when the CCM is considering remedial action – which can only occur after it has reached a

decision that a restrictive practice exists. Efficiency arguments can therefore play no part in the CCM's decision as to whether a restrictive practice exists or not.

In assessing off-setting benefits, the CCM will consider whether its proposed remedy will nullify or weaken the off-setting benefits. The aim of the CCM is ideally to remedy the anti-competitive effect it has found, while also preserving any off-setting benefits (as part of the overall assessment of proportionality described above).

When the CCM considers whether there are off-setting benefits, it will apply the following criteria:

- (a) Off-setting benefits are limited to those categories specified in Section 50(4) of the Act
- (b) In assessing efficiency arguments, the key test for the CCM will normally be whether customers of the enterprise will be better-off. Thus, if it is claimed that costs will be lower as a result of the restrictive practice or merger, it must be expected that some cost savings will be passed to customers.
- (c) The off-setting benefits must be specific to the restrictive practice or merger and would not be available in its absence. The CCM may require parties to explain why contractual or other arrangements that do not harm competition cannot produce the same beneficial effect.
- (d) The off-setting benefits must be timely, and reasonably certain to appear within the foreseeable future.
- (e) Off-setting benefits must be a natural consequence of the restrictive practice or merger under investigation. It is not open to the parties to offer an unrelated off-setting benefit to compensate for anti-competitive effects.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

The Challenges that may be faced by the Competition Commission in enforcing sanctions/remedies in competition cases are:

(1) Failure by an enterprise to comply with the direction of the Commission

(2) Appeal by an enterprise against the Commission's directions

(1) Refusal to abide by the Commission's decision

When an enterprise fails without reasonable excuse to comply with a direction of the Commission, the latter must make an application to a judge in chambers for a mandatory order

requiring the enterprise to make good the default within a time specified in that order. However, before such an application is made to the Judge in Chambers, the Commission must consider any representations the defaulting enterprise wishes to make.

## (2) Appeal

Where any party is dissatisfied with an order or direction of the Commission, that party may appeal to the Supreme Court against that order or direction. An appeal shall be lodged with the Registrar of the Supreme Court, with a copy served on the Commission within 21 days of the date of order or direction of the Commission.

The Supreme has the power on appeal to:

Affirm, reverse, amend or alter an order or direction of the Commission;

Remit the matter to be further determined by the Commission with its opinion on the matter

Make such orders as it think fit.

It is important however to note that there is no stay of the decision of the Commission on appeal except for an order imposing a financial penalty on an enterprise.

### 2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

So far, no competition case has been taken on appeal by the Competition authority.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

The Competition Act 2007 provides for the right of appeal to the Supreme Court in section 68 and section 69 gives the power to the Supreme, on appeal to:

o Affirm, reverse, amend or alter an order or direction of the Commission;

o Remit the matter to be further determined by the Commission with its opinion on the matter

o Make such orders as it think fit.

As at date since no investigation has yet been concluded, there is no decision of the Commission which has gone on appeal. Consequently it is difficult to determine at this stage how the Court will entertain an appeal against a decision of the Competition Commission.

The Competition Act, however, speaks of an „appeal“ as opposed to a „judicial review“. Hence, the Court may well rule that this is a full appeal and consequently review legal and factual assessment.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

Not applicable in view of above answers.



## Netherlands

### *1. Questions on appropriate sanctions and remedies:*

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

The Board of the Dutch Competition Authority (NMa) has been entrusted with the enforcement of the Competition Act, the Electricity Act, the Gas Act, the Railway Act, the Aviation Act and the Interim Act on Media Concentrations. These Acts entrust the Board with the power to impose an administrative fine, an order subject to periodic penalty payments or a binding instruction to comply with this, for infringements of various provisions of the aforementioned Acts. The Board may also impose fines on natural persons for giving instructions or exercising de facto leadership with regard to an infringement.

Hereafter, the NMa will only address the imposition of fines. The NMa has not yet imposed a binding instruction and has only imposed an order subject to periodic penalty payments twice. Therefore, the NMa does not have a specific policy regarding those instruments.

The aforementioned Acts lay down two criteria for the application of fines: they should reflect the seriousness and duration of the infringement. Furthermore, the general principles of good governance, including the principles of equality and proportionality, must be taken into account. Finally, they should be set within the legal maximum of 1% or 10% (depending on the type of infringement) of the the world wide turnover of the undertaking involved. The maximum fine for a natural person is EUR.450.000. Within these boundaries, the Board of the NMa has a discretionary margin to set the level of the fine. In 2001, the Board issued fining guidelines for the setting of fines specifically with regard to infringements of the prohibition of cartels and abuse of a dominant position. On the 1<sup>st</sup> of October 2009 the Dutch Minister for Economic Affairs issued new fining guidelines with regard to all these types of infringements.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

With regard to infringements of the prohibition of cartels and abuse of a dominant position, the NMa takes the relevant turnover of the undertakings involved as a basis for the determination of the fines. The relevant turnover is defined as the value of all transactions, obtained by the

offender for the total duration of the infringement through the sale of goods and/or the delivery of services to which the infringement relates, after deducting turnover taxes. An amount equal to 10% of the relevant turnover is multiplied by a factor between 0 and 5 to calculate a basic amount for the fine. Hence, fines can reach up to 50% of the turnover involved. In the case of very serious infringements (such as hardcore cartels), the new fining guidelines of the Dutch Minister for Economic Affairs moreover introduce the possibility of adding a surcharge, which is equal to 25% of the turnover involved in the last full year of the infringement. This surcharge is inspired by the European Commission's fining guidelines of 2006. Then, aggravating and attenuating circumstances are taken into account by increasing or decreasing the basic amount. In line with the Commission's fining guidelines, the new fining guidelines also explicitly state that in case of recidivism the NMa may increase the fine by 100%. The resulting amount for the fine is capped (if necessary) at the statutory maximum. In appropriate cases, a leniency reduction is applied.

With regard to other infringements, for instance, non-cooperation with an investigation or failure to notify the NMa of the implementation of a concentration (merger), the NMa takes the total turnover of the undertakings involved as a basis for the determination of the fines. The starting point of the fine is set at the level of one-thousandth of the total annual turnover of the offender. The specific permillage is based on six categories with increasing levels of resulting starting points, depending on interest that the provision at hand seeks to protect. Then, aggravating and attenuating circumstances are taken into account by increasing or decreasing the basic amount. The resulting amount for the fine is capped (if necessary) at the statutory maximum.

If the Board imposes a fine on a natural person, it will establish a basic amount of the fine in relation to the gravity of the offence and the personal income and assets of that person. Depending on the type of infringement, the basic amount may either be between EUR 10,000 – EUR 200,000 or between EUR 50,000 – EUR 400,000. The Board may adjust the basic amount for aggravating or mitigating circumstances.

Sometimes extraordinary cases call for extraordinary measures. Shortly after its start-up phase, in 2004, the NMa was faced with the task of tackling a large cartel system which had become imbedded in the Dutch construction industry. The nationwide construction cartel investigations led to the imposition of fines on over 1,400 construction companies to the value of over 100 million euros. In order to deal with this case load, the NMa developed special fining guidelines

and a special procedure (the so-called fast-track procedure) for which companies could opt as an alternative to the regular sanction procedure). This special regime allowed the NMa to start proceedings against a large number of companies and thus encourage an overall culture change in the sector. There was no public sympathy for the structural bid-rigging practices in the construction cases. As a result, the vast majority of the companies involved wanted to clean up their act and put this ‘cartel episode’ behind them as quickly as possible in order to save their reputation and their status as a reliable contract partner. These companies opted for the fast-track procedure and paid the fines imposed by the NMa, agreeing not to further challenge the decision. A limited number of companies challenged the decisions of the NMa. In most cases the NMa’s decisions were upheld by the District Court. Judgment in the remaining cases, from the Court of final instance should be delivered by the end of 2011.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

There are some complaints that fines are ultimately passed on to the consumer, that fines have reached their ceiling. This complaint will definitely be repeated when the NMa’s fines increase. At some stage, this leads to the question: how high can you go and to what effect? Currently, discussions are taking place about extending Dutch competition law to create criminal offences which could then be imposed as an alternative to the administrative law sanctions, which would remain in existence. This is referred to as a ‘dual system of enforcement’, as it would allow competition law infringements to be punished either criminally or administratively. The threat of a prison sentence can be effective but it is important to the NMa that its leniency program remains effective in a dual system. A system whereby individuals, rather than companies, could be criminally sanctioned would slot more easily into the NMa’s current system of enforcement.

## 2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

Competition decisions taken by the NMa are reviewable before the District Court of Rotterdam. Subsequently both the NMa and the involved parties can appeal the decision of the District Court at the Trade and Industry Appeals Tribunal (College van Beroep voor het bedrijfsleven, CBp). These courts are exclusively authorised to rule in appeals against NMa decisions.

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

First, it is possible for addressees of decisions (persons/undertakings) to lodge an internal administrative appeal with the NMa within six weeks. This administrative appeal allows the parties to request the NMa to review its decision. A complete review of the case will then be carried out by the NMa whereby a different outcome of the case is possible. In cases where appellants are subject to a sanction, the NMa will review its decision in the light of advice received from an independent Advisory Committee. When appellants are dissatisfied with the result of this administrative appeal procedure, they may - within six weeks - appeal the decision to the administrative law chamber of the District Court. The decision of the District Court may be appealed to the Trade and Industry Appeals Tribunal.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

The Court of Rotterdam is the only ordinary court which is competent to handle cases of the NMa and other regulators, such as OPTA (telecommunication). A limited group of judges has been trained/specialised in economic public law, but the court has no experts in competition law or economics. The CBb (Trade and Industry Appeals Tribunal) is a specialised court in financial and economic public law. This court not only judges questions of law, but also investigates the merits of the case.

All fining decisions of the NMa may be challenged before the courts, which will fully review the decision. Both specialised administrative courts review the legality of the decision, by fully reviewing the facts, the legal qualification of the facts and the level of the fine. These courts may annul a decision (in whole or partially) and decide that the NMa must take a new decision or rule on the case themselves. The courts may impose a lower fine but may not impose a higher fine or find an infringement which the NMa has not found in its decision. Moreover, there is a general rule of law which entails that the appealing party may not end up in a worse position than before the appeal (legal prohibition of *reformatio in peius*).

Besides the power to review the merits of the case, the Rotterdam District Court and the Tribunal also review the lawfulness and proportionality of the exercise of public law powers by the NMa. The cornerstone for the judge will always be the principle of proportionality. This is not an easy, mathematical exercise. The NMa has been able to convince the Dutch courts that cartel behaviour affects the sound functioning of markets and is damaging for consumers. In general, cartel behaviour does not only result in higher prices but also results in more inefficient companies and less innovation.

The current case law allows us to conclude that the courts are willing to uphold the NMa's fine-setting system as set out under our fining guidelines, also when this leads to fines of a level which were hitherto unknown under Dutch legal practice (In 2008, the highest Dutch court upheld a fining decision by which a fine of 7 million was imposed by the NMa on the associations of veterinarians).

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

Given the 'time-sensitivity' of business transactions, no administrative appeal procedure exist regarding decisions of the NMa on concentrations which have been notified to the NMa. Such decisions may be directly appealed to the District Court. In certain (ie in situations where there is an urgent need") the District Court and the Tribunal may apply an accelerated procedure. In such circumstances, several time frames during the appeal procedure may be shortened. So far, the courts have not applied such an accelerated procedure in appeal in competition law cases. In addition, in urgent cases the courts may also grant interim relief by imposing temporary measures ('*voorlopige voorziening*'). To date, there have only been a few cases in which interim relief has been granted.

Based on article 63 of the Netherlands Competition Act, an NMa decision in which a fine is imposed will be 'suspended' during the appeal phase. However, article 67 of the Netherlands Competition Act provides that a fine must be paid within thirteen weeks after the fining decision has been published. The Supreme Court ('*Hoge Raad*') has decided that these provisions must be interpreted in such way that a decision becomes effective thirteen weeks following its publication and that (legal) interest is due if a fine has not been paid within this time frame. The NMa may, however, not demand payment of the fine during the appeal phase.

As far as the duration of the different phases is concerned, it is first of all important to note that Article 6 of the European Convention on Human Rights applies to sanctioning procedures regarding a violation of the Netherlands' prohibition of cartels or an abuse of a dominant position. This means, among other things, that the decision in these kinds of cases must be given within a reasonable time frame. According to case law, the starting moment of the reasonable time frame is, in principle, the moment when a report has been handed to the parties by the NMa; from this moment on, an undertaking may reasonably expect a fine to be imposed for a violation of competition rules. The Tribunal additionally ruled that the maximum duration of the reasonable time frame depends upon the factual and legal complexity of the case and of the 'behaviour' of the NMa as well as of the parties. As a 'basic rule', the Tribunal pointed out that a combined duration of two years of the sanctioning phase and the administrative appeal phase thereafter, cannot be regarded as unreasonably long. The Tribunal in addition pointed out that a time frame of 1,5 year for the procedure in appeal at the District Court, and two years for the procedure at the Tribunal, can be regarded as reasonable.

Since 1 January 2010, these courts may - by interlocutory judgment - grant the NMa the opportunity to correct a failure in its decision. By using such a judgment, a 'formal' annulment of the decision of the NMa and a 'repeat decision' of the NMa may be prevented, thereby achieving a (substantial) reduction in the time involved in the entire (administrative) appeal procedure. So far, no rulings as to decisions of the NMa have been made under this new regulation. It remains to be seen whether such measures will also be suitable for use in sanction procedures.

## Pakistan

### 1. Questions on appropriate sanctions and remedies:

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

The Competition Commission of Pakistan (the Commission) exercises its remedial powers as entrusted to the Commission under section 38 of the Competition Ordinance, 2010 (the Ordinance) to penalize any undertaking or any director, officer or employee of an undertaking if it determines that such undertaking:

- (a) Has been found engaged in any activity prohibited under the Ordinance;
- (b) Has failed to comply with an order of the Commission made under the Ordinance;
- (c) Has failed to supply a copy of the agreement or any other documents and information as required by the Commission;
- (d) Has furnished knowingly a false or misleading information or statement to the Commission; or
- (e) Knowingly abuses, interferes with, impedes, imperils, or obstructs the process of the Commission in any manner. Section 30 of the Ordinance lay down the procedure for the legal proceedings that the Commission should follow in cases of contravention. On receiving complaints from private parties, references from the Federal Government, or on instructions of the Commission, the Commission initiates investigation, prepares inquiry reports, issues show cause notices to relevant undertakings, conducts hearings and orders suitable remedies and penalties after thoroughly analyzing the concerned competition cases.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

Section 38 of the Competition Ordinance, 2010 states that the Commission may impose penalties at the following rates, namely:

- (a) For engaging in any activity prohibited under the Ordinance, an amount not exceeding 50M rupees (0.58 Million USD) or an amount not exceeding 15% of the annual turnover of the undertaking, as may be decided in the circumstances of the case by the Commission;

(b) For non-compliance of any order, notice or requisition of the Commission an amount not exceeding one million rupees (11,765 USD), as may be decided in the circumstances of the case by the Commission;

(c) For non-compliance of requisition of the commission to submit the agreement or other document, an amount not exceeding one million rupees (11,765 USD) as may be decided in the circumstances of the case by the Commission.

(d) For continuous violation of the order of the Commission, an additional penalty of one million rupees for every day after the first such violation.

Further, Guidelines on Imposition of Financial Penalties (Fining Guidelines) explain how the quantum of penalty is determined in a given competition case in Pakistan. Paragraph 4 of the Fining Guidelines states that a financial penalty imposed by the Commission shall be calculated taking into consideration, the following factors:

- (a) The seriousness of the infringement;
- (b) The duration of the infringement;
- (c) Aggravating or mitigating factors; and
- (d) Other relevant factors, e.g. deterrent value.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

A number of constitutional issues have been raised on the legitimacy and the jurisdiction of the Commission. Almost all the major actions taken by the Commission have been challenged before the Superior courts in judicial reviews. Instant stay orders granted in these judicial reviews by the superior courts have proved a great ordeal in the enforcement of competition law in the country.

## 2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

High Courts of the four provinces and the Supreme Court of Pakistan have the power to conduct judicial review for any action taken by the Commission. An order passed by a single Member of the Commission is filed before the Appellate Bench of the Commission comprising not less than



two Members. An appeal against the order of the Appellate Bench lies to the High Court and then to the Supreme Court of Pakistan.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

During judicial review, the courts may entertain both questions of law and fact. The Commission as well as the courts may admit new evidence in an appellate stage if they deem appropriate

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

Delay in the disposition of cases by courts is the major challenge faced by the competition authority in the judicial review process.

## Peru

### *1. Cuestiones relativas a las sanciones y recursos apropiados:*

- *Sírvase describir el sistema de sanciones y los recursos previstos en el derecho de la competencia de su país así como su aplicación en la práctica.*

En el Perú, el sistema de defensa de la libre competencia se encuentra regulado por dos normas principales: (i) el Decreto Legislativo 1034, Ley de represión de Conductas Anticompetitivas (en adelante, el DL 1034), mediante el cual se realiza un control de conductas; (ii) la Ley Antimonopolio y Antioligopolio del Sector Eléctrico, Ley 26876 (en adelante, la Ley 26876), mediante la cual se realiza un control de las estructuras en el sector eléctrico. Ambos cuerpos normativos cuentan con un correspondiente sistema de infracciones y de sanciones que aseguran su cumplimiento.

Respecto a las sanciones del DL 1034, en el artículo 43 de dicha norma se establece el sistema aplicable. De acuerdo al referido artículo, las sanciones varían:

(i) en caso se trate de una infracción leve, entre una amonestación y una multa de 500 UIT, siempre que dicha multa no supere el ocho por ciento (8%) de las ventas o ingresos brutos percibidos por el infractor, o su grupo económico, relativos a todas sus actividades económicas, correspondientes al ejercicio inmediato anterior al de la expedición de la resolución de la Comisión de la Defensa de la Libre Competencia del Indecopi. (En adelante, la Comisión)

(ii) en caso la infracción sea calificada como grave, la multa no será mayor a 1000 UIT; en este supuesto, la multa no podrá exceder el diez por ciento (10%) de las ventas o los ingresos brutos percibidos por el infractor, o su grupo económico, relativos a todas sus actividades económicas, correspondientes al ejercicio inmediato anterior al de la resolución de la Comisión.

En el supuesto que la infracción sea calificada como muy grave se podrá aplicar una multa superior a mil (1000) UIT, siempre que dicha multa no supere el doce por ciento (12%) de las ventas o ingresos brutos percibidos por el infractor, o su grupo económico, relativos a todas sus actividades económicas, correspondientes al ejercicio al de la resolución de la Comisión.

Asimismo, en el referido artículo 43.3 se establece que se puede imponer sanciones a los representantes legales o las personas que integran los órganos de dirección o administración de personas jurídicas, sociedades irregulares, patrimonio autónomo o entidades, según se determine su responsabilidad en las infracciones cometidas.

Por su parte, respecto a las medidas correctivas, el artículo 46 del DL 1034 indica que además de la sanción, la Comisión o el Tribunal de Defensa de la Competencia y de la Protección de la

Propiedad Intelectual del Indecopi (en adelante, el Tribunal) podrán dictar medidas correctivas conducentes a restablecer el proceso competitivo. Dichas medidas correctivas podrán consistir en (i) el cese o la realización de actividades, inclusive bajo determinadas condiciones, (ii) de acuerdo con las circunstancias, la obligación de contratar, inclusive bajo determinadas condiciones, (iii) la inoponibilidad de las cláusulas o disposiciones anticompetitivas de actos jurídicos, o, (iv) el acceso a una asociación u organización de intermediación.

De otro lado, en el artículo 6 de la Ley 26876 se establece que en caso de infracciones formales se podrá imponer una multa no mayor a 500 UIT, y en el caso de infracciones substanciales se podrá imponer multas de hasta 10% de las ventas brutos percibidos por las empresas involucradas correspondientes al año inmediatamente anterior a la imposición de la multa.

Adicionalmente, cabe señalar que, de acuerdo al artículo 5 de la Ley 26876, en los casos en los que se concluya que los actos de concentración pudiesen tener como efecto disminuir, dañar o impedir la competencia se podrá adoptar las siguientes medidas (i) sujetar el acto de concentración a las condiciones que determine la Comisión, y (ii) ordenar la desconcentración parcial o total de lo que se hubiere concentrado indebidamente, la terminación del control o la supresión de los actos, según corresponda.

- *Sírvase explicar cómo se determina la sanción o el recurso adecuado en un determinado caso relativo a la competencia.*

En el ordenamiento jurídico peruano en materia de determinación de multas para infracciones a las normas de libre competencia existen dos fuentes la Ley de Procedimiento Administrativo General, Ley 27444 (en adelante, LPAG), en la que se establecen los principios y reglas aplicables a todos los procedimientos administrativos sancionadores, y el propio DL 1034 en el cual se establecen los criterios que deben aplicarse para determinar la gravedad de la infracción y la correspondiente sanción, en el caso particular de infracciones establecidas en la referida norma. De acuerdo al artículo 230.3 de la LPAG, las autoridades deben actuar según el principio de razonabilidad, previendo que la comisión de la conducta sancionable no resulte más ventajosa para el infractor que cumplir las normas infringidas o asumir la sanción, y deben procurar que la determinación de la sanción considere criterios como la existencia o no de intencionalidad, el perjuicio causado, las circunstancias de la comisión de la infracción y la repetición en la comisión de infracción.

Por su parte, el artículo 44 del DL 1034 señala que la Comisión, tendrá en consideración para determinar la gravedad de la infracción y la aplicación de las multas correspondientes, entre otros, los siguientes criterios (i) el beneficio ilícito esperado por la realización de la infracción (ii) la probabilidad de detección de la infracción (iii) la modalidad y el alcance de la restricción de la competencia (iv) la dimensión del mercado afectado (v) la cuota de mercado del infractor (vi) el efecto de la restricción de la competencia sobre los competidores efectivos o potenciales, sobre otras partes en el proceso económico y sobre los consumidores (vii) la duración de la restricción de la competencia, (viii) la reincidencia de las conductas prohibidas, o, (ix) la actuación procesal de la parte.

De otro lado, la Ley 26876 no contiene criterios particulares para la determinación de la sanción vinculados a la aplicación del control de estructuras en el sector eléctrico. Por ende, son utilizados los criterios contenidos en la LPAG.

Respecto de las medidas correctivas, el DL 1034 no establece expresamente criterios para su imposición, por lo que aquellas atenderán a la naturaleza de la infracción y deberán de ser idóneas para restablecer el proceso competitivo.

De igual manera, si una operación de concentración en el marco de la Ley 26876 es aprobada pero sujeta a condiciones, estas últimas apuntarán a evitar los potenciales efectos perjudiciales derivados del acto de concentración.

- *Sírvase describir algunas de las dificultades que pueden plantearse al aplicar las sanciones o recursos en casos relativos a la competencia.*

La principal dificultad que se enfrenta en la aplicación de las sanciones se presenta al momento de determinar el monto de la multa aplicable, ello debido a la falta de datos para calcular el beneficio ilícito esperado por el infractor, el cual es uno de los criterios establecidos tanto en el LPAG y en el DL 1034.

Adicionalmente, una dificultad para garantizar el efecto de disuadir la realización de conductas anticompetitivas es la duración de los procedimientos en sede judicial, considerando además que los administrados pueden solicitar que el Poder Judicial suspenda los efectos de las resoluciones del Tribunal.

## 2. *Cuestiones sobre el examen judicial:*

- *Sírvase describir el sistema de examen judicial/procedimiento de apelación de las decisiones tomadas por la autoridad encargada de la competencias o los organismos reguladores del sector de su país en los casos relativos a la competencia.*

En el Perú, la decisión acerca de la infracción a las normas de libre competencia le corresponde a órganos administrativos. En este sentido, la Comisión es el órgano competente para resolver en primera instancia los procedimientos sobre infracciones a dicha norma son investigadas y sancionadas por el Organismo Superior de Inversión Privada en Telecomunicaciones, OSIPTEL. De acuerdo al artículo 13.2 de la referida norma, y al artículo 29 del Reglamento de la Ley 26876, las decisiones adoptadas por la Comisión pueden ser impugnadas ante el Tribunal, el cual constituye la segunda y última instancia en sede administrativa para resolver sobre la aplicación de dichas normas. El tribunal puede revisar los argumentos jurídicos utilizados por la Comisión en su decisión y de ser el caso modificarlos, incluso adoptando decisiones contrarias a las de primera instancia.

Por otro lado, si bien las decisiones del Tribunal constituyen la última instancia en sede administrativa, estas también pueden ser revisadas por el Poder Judicial a través del proceso contencioso administrativo. Mediante este último, aquella parte que considere que el Tribunal no ha realizado un adecuado análisis de los hechos o ha incurrido en una errónea aplicación de las normas, podrá cuestionar su decisión ante el Poder Judicial.

- *Cual es el grado de intensidad del examen judicial en los casos relativos a la competencia? (Evaluación jurídica únicamente, evaluación jurídica y apreciación de los hechos, admisibilidad de nuevas pruebas, etc.)*

El artículo 1 de la Ley que Regula el Proceso Contencioso Administrativo establece que la acción contencioso administrativa tiene por finalidad el control jurídico por el Poder Judicial de las actuaciones de la administración pública sujetas al derecho administrativo y la efectiva tutela de los derechos e intereses de los administrativos. En ese sentido, el examen judicial que se puede realizar a las decisiones de la autoridad administrativa no está limitado a una evaluación jurídica, sino que el Poder Judicial también puede realizar una evaluación de los hechos materia del caso.

Adicionalmente, se debe iniciar que en materia de libre competencia no han sido muchos los casos que han llegado a ser objeto de un proceso contencioso administrativo, por lo cual no existen criterios generales y determinados para el análisis judicial. En algunos casos el órgano

judicial competente se limito a realizar una evaluación de la interpretación jurídica aplicada por los órganos administrativos, mientras que en otros también se analizo la correcta acreditación de los hechos para la identificación de las infracciones. En consecuencia, el Poder Judicial ha entendido que puede realizar tanto una evaluación jurídica como de los hechos, aunque en algunas ocasiones ha optado por limitarse a efectuar únicamente la primera de estas.

Acerca del derecho de las partes para presentar nuevos medios de prueba en un proceso contencioso administrativo, el artículo 30 de la Ley que regula el Proceso Contencioso Administrativo señala que la actividad probatoria se restringe a las actuaciones recogidas en el procedimiento administrativo, salvo que se produzcan nuevos hechos o que se trate de hechos que hayan sido conocido con posterioridad al inicio del proceso.

- *Cuales son las principales dificultades a que se enfrentan la autoridad encargada de la competencia, el apelante, terceros y el propio órgano de examen en el proceso judicial?*

Una de las principales dificultades a las que se enfrentan las partes en un proceso contencioso administrativo esta relacionada con la duración del mismo, que puede tomar aproximadamente cinco años desde la presentación de la demanda. Esta dilación en la resolución del caso en sede judicial genera que las partes incurran en mayores costos. Además, dada la extensión del proceso, las partes no ven satisfechas sus pretensiones de manera oportuna.

De otro lado, también se presentan problemas en la resolución de los casos debidos a la falta de especialización de los jueces en los temas de libre competencia.

Adicionalmente, en vista de que los jueces que resulten las demandas contenciosas administrativas no solo resuelven aquellas que sean presentadas en contra de las decisiones adoptadas por el Tribunal, sino que también tienen a su cargo la revisión de las decisiones de los demás Tribunales Administrativos u órganos administrativos. Este hecho genera que los jueces no puedan especializarse en temas de libre competencia y que tampoco cuenten con gran experiencia en dicha materia.

## Portugal

### *1. Questions on appropriate sanctions and remedies:*

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

If the Portuguese Competition Authority (PCA) concludes that a restrictive practice has occurred, it may, besides ordering that the infringement comes to an end, impose fines both on companies and on individuals. If the seriousness of the infringement and the liability of the offender so justify, the PCA shall, in addition to the fine, impose ancillary penalties, which may be the following:

- publication in the official gazette or in a Portuguese newspaper with national, regional or local circulation, at the offender's expense, of the relevant parts of a decision finding an infringement;
- deprivation of the right to participate in procurement proceedings if the infringement has occurred during or as a consequence of such proceedings, for a maximum period of two years.

Whenever deemed necessary, the PCA may impose a periodic penalty payment (of up to 5% of the average daily turnover of the infringing undertaking in the last year for each day of delay) in cases of non-compliance with a decision imposing a penalty or ordering the application of certain measures.

Legal persons shall be responsible for the offences provided for in the Competition Act when the facts have been carried out on their behalf or on their account or in the exercise of duty by members of their corporate bodies, their representatives or their employees.

The directors of legal persons and equivalent bodies held responsible under the Competition Act shall be subject to the penalty prescribed to the author, especially attenuated, when they knew or should have known of the infringement yet fail to take the appropriate measures to terminate it immediately, unless a more serious penalty is applicable in pursuance of another legal provision.

Undertakings which are part of an association of undertakings that is subject to a fine or a periodic penalty payment are jointly and severally responsible for payment of such sanction.

Concerning control of concentrations, as far as remedies are concerned, the notifying parties may submit to the PCA commitments with a view to rendering the concentration compatible with the

common market. These “remedies” may be of a structural or of a behavioral nature. If the PCA agrees with the “remedies” proposed, the PCA includes conditions and/or obligations in the final decision, in order to ensure compliance with the “remedies” submitted by the notifying parties.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

The following fines are applicable in case of prohibited agreements or concerted practices, decisions of associations of undertakings and abuse of dominant position:

- Undertakings: fine not exceeding 10% of the previous year’s turnover for each of the undertakings participating in the infringement;
- Associations of undertakings: fine not exceeding 10% of the aggregate annual turnover of the associated undertakings that have engaged in the prohibited behavior;
- Board members: sanctioned with the fine imposed to the undertaking / association of undertakings, especially attenuated.

When setting the amount of the fine in those cases, the PCA takes into account, among others, the following criteria:

- the seriousness of the infringement;
- the economic benefits that the offending undertaking have enjoyed as a result of the infringement;
- the repeated or occasional nature of the infringement;
- the extent of participation in the infringement;
- co-operation with the PCA, until the close of the administrative proceedings;
- the offender’s behavior in eliminating the prohibited practices and repairing the damage caused to the competition.

Concerning procedural breaches, a fine not exceeding 1% of the previous year’s turnover for each of the undertakings may be imposed for:

- Failure to notify a concentration subject to prior notification;
- Failure to supply or the supply of false, inaccurate or incomplete information in response to a request by PCA in the exercise of its powers of sanction or supervision;



- Failure to co-operate with the PCA or obstruction of its exercise of its investigation and inspection powers.

Daily penalty payment up to 5% of the average daily turnover in the last year for each day of delay may be imposed for:

- Non compliance with a decision of the PCA imposing a penalty or ordering the application of certain measures;
  - Failure to notify a concentration subject to prior notification;
  - Failure to supply or the supply of misleading information when notifying a concentration of undertakings.
- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

When evaluating if a set of remedies proposed by the notifying parties of a concentration is acceptable, in terms of its adequacy and effectiveness, the PCA takes into account the risks that may be encountered in their execution, as they may hinder the accomplishment of their objectives.

As such, besides the evaluation required to infer whether the set of remedies, once implemented, would eliminate the competition concerns identified throughout the competitive review, the PCA also assesses the remedies from the standpoint of their ability to be effectively implemented within a short period of time.

In the case of structural remedies, the major concerns of the PCA, regarding the feasibility and effectiveness of the set of commitments are to ensure that: (i) the assets to be divested have, *per se*, sufficient economic interest to attract a potential buyer, as well as the potential to be a viable alternative and exert an effective competitive pressure in the relevant market; (ii) the “buyer” of the divested business is capable and has the incentives to operate the assets in the market in a competitive way; (iii) the assets/companies to be divested are preserved and managed, until the conclusion of the divestment, in such a way as to maintain their viability and marketability; and (iv) there are no legal and/or regulatory obstacles (e.g. acquisition or transmission of licences) to the completion of the divestment.

Regarding behavioural remedies, the main risks comprise the possibility of the undertakings circumventing them, namely when their design is not sufficiently clear and specific. Often, behavioural remedies imply detailed monitoring which, if not complete and sufficiently accurate, might create the opportunity for the undertaking to bypass them. Furthermore, the PCA also highlights its concern with eventual undesirable distortions in the functioning of the market that may arise as a side effect of some behavioural remedies.

As a result, considering the higher exposure of behavioural remedies to some of the risk mentioned above, in addition to the challenge that monitoring their observance might represent for the PCA, particularly when sector specific regulatory expertise is required, the PCA considers that structural remedies are preferable, as long as they are found adequate to solve the competitive concerns identified. As such, the acceptance, by the PCA, of behavioural remedies is only limited to very specific and exceptional circumstances.

The risks associated with both structural and behavioural remedies are, in general, higher the longer is the time frame established for their implementation. Consequently, the length of time associated to the implantation of the proposed remedies is an important element for the PCA's assessment. As such, shorter time frames are favoured in detriment of longer durations and the latter are only acceptable if undoubtedly necessary and when, nonetheless, their design offers a greater degree of certainty regarding their effective implementation.

In order to ensure that the commitments adopted are fully executed, some guarantee mechanisms and obligations are required, whenever found necessary: (i) periodic reporting obligations; (ii) the need for the approval, by the PCA, of the potential buyer and of the divestment agreement; and (iii) the appointment of a monitoring and/or a divestment trustee. In the exercise of evaluating a proposed buyer and the underlying agreement, the characteristics of the buying entity, namely in what concerns both its legal and economic independence, as well as the conditions of the underlying agreement, are subject to intense scrutiny by the PCA, in order to assess, with all certainty, that the divested business will represent an effective competition pressure in the relevant market(s) at stake.

## 2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

As far as restrictive practices are concerned, the Portuguese Competition Authority's (PCA) sanctioning decisions are subject to appeal to judicial courts, under the Portuguese Competition Act and General Regime for Administrative Offences, subsidiarily applicable.

The appeal may be lodged by any natural or legal person affected by the decision, and that shall be done within 20 working days from the day the appellant becomes aware of the decision.

Until recently, the competent court to handle the appeals of the PCA's decisions was the Lisbon Commercial Court. Under a new regime which came into force as of 14 April 2009 and carried out a reform of the organization and functioning of the judicial courts, the competence to handle the appeals of the PCA's decisions is entrusted to the commerce section of the territoriality competent court or, in absence of it, to the Lisbon Commerce Court.

This court makes a full review of the PCA's decision, making its own analysis of the facts and reviewing the legality of the decision.

Appeals that refer to decisions applying fines or other penalties provided for by the law shall suspend the enforcement of such decisions. Appeals against other decisions, orders and measures have a purely devolutive effect.

The decisions of the commerce section of the territoriality competent court or of the Lisbon Commercial Court which are appealable, in accordance with the General Regime for Administrative Offences, may be challenged in the Lisbon Court of Appeal, whose ruling shall be final.

Except for limited circumstances provided for by the law, the Lisbon Court of Appeal limits its review to the legality of the first instance courts' decision, not making a new analysis of the facts.

In what refers decisions of the PCA adopted in concentration control proceedings, such decisions may be appealed to judicial courts, under the Administrative Court Procedural Code regulations on objections to administrative acts, being such appeals treated as special administrative actions.

The competent court to handle these appeals also is the commerce section of the territoriality competent court or, in absence of it, the Lisbon Commercial Court.

These appeals have a purely devolutive effect, unless they are granted, exclusively or cumulatively with other provisional measures, suspensive effect by way of the order covering the provisional measures.

Judicial appeals against the court of first instance in these administrative actions shall be brought before the Lisbon Court of Appeal. The decisions of the Lisbon Court of Appeal shall be appealed to the Supreme Court of Justice, being the appeal limited to matters of law and having a devolutive effect. If the judicial appeal solely concerns matters of law, it may be lodged directly with the Supreme Court of Justice, with devolutive effect.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

As stated above, the PCA decisions on restrictive practices as well as the decisions adopted in merger control proceedings are subject to appeal and judicial review by the Lisbon Commercial Court, respectively, under the Portuguese Competition Act, the General Regime for Administrative Offences and the Administrative Court Procedural Code.

In both cases, although applying different legal regimes, the court of first instance makes its own analysis of the facts and reviews the legality of the PCA's decision, thus performing a review of both legal and factual assessment.

Before assessing the merits of the case, the court must decide on the existence of any procedural nullities or legal grounds which may result in a dismissal of the case prior to any judgment on the merits.

The Defendants, the PCA and the Public Prosecutor may submit in court evidence that was not filed in the PCA proceedings, whether documentary, testimonial or expert evidence. The court, upon request or *ex officio*, may conduct inspections, for example, to the undertakings accounts or facilities, as well as summon and hear witnesses and experts that were not appointed by the parties.

As far as restrictive practices are concerned, the Lisbon Commercial Court rulings may be appealed and shall be brought before the Lisbon Judicial Court of Appeal, whose decision is final.

Except for limited circumstances provided for by the law, the Lisbon Court of Appeal limits its review to a legality assessment of the first instance courts' decision and is not able to reassess the facts of the case.

In what refers to merger control proceedings, the Lisbon Commercial Court decisions are also subject to appeal and may be challenged by the Lisbon Court of Appeal. The decisions of the Lisbon Court of Appeal, which conduct a legal and factual assessment review, shall be appealed to the Supreme Court of Justice, being this appeal limited to matters of law.

Provided that all legal requirements are met, the Defendants, the PCA and the Public Prosecutor may file an appeal to the Constitutional Court in order to obtain a decision on the conformity or non-conformity of a particular legal provision or of an interpretation made by the courts or by the PCA with the Constitution of the Portuguese Republic.

Any aggrieved party will not be entitled to receive any indemnity as the result of the judicial review mentioned above but may only recover damages in an autonomous civil proceeding before the Portuguese judicial courts.

Furthermore, the Portuguese legal regime does not recognize a right of appeal of any aggrieved party, or of any third party with a legitimate interest, namely against a decision of dismissal of the case or of approval of a merger control proceeding issued by the PCA.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

As far as PCA is concerned, one of the main challenges it faces in the judicial review process is the lack of clarification of the Public Prosecutor role during the process.

Also the title under which the case handlers are supposed to intervene in the judicial review process is a difficulty faced by the PCA.

Concerning the evidence produced during the audience, its record has never been authorized by the courts, which is due to the doubts arising from the unclear legal regime.

As far as the appellant is concerned, a challenge he faces is the time limits provided for in the law to answering to the decision of the PCA, which are deemed too short considering the complexity of the matters involved.

As far as third parties are concerned, one main difficulty concerns the accusing party and refers to the lack of rights he has during the judicial review. The accusing part has neither a right to appeal the decision of the PCA nor a right to intervene in the judicial review process. Concerning victims of the infringement, they haven't been recognized by the courts as having "legitimate interests", which would otherwise allow them to have access to the files.

Concerning challenges faced by the courts, its lack of specialization and the fact that the PCA decisions are reviewed by single judges, without having the help of technical assistants, may difficult the appreciation of this kind of competition cases. Also the fact that appeals from non-final decisions issued by the PCA within one single case may be reviewed by different judges makes the judicial process more difficult than it would be if all the appeals concerning one case were centralized in one single judge.

# République Centrafricaine

## 1. Questions sur les sanctions et les mesures correctives :

- *Prière de décrire le régime de sanction et/ou de mesures correctives prévu par la loi sur la concurrence de votre pays et donner des indications sur la façon dont il est mis en application.*
- *Prière d'indiquer comment les sanctions et/ou les mesures correctives sont déterminés lors de l'examen d'un cas spécifique.*
- *Prière d'indiquer les obstacles que vous devez surmonter dans l'application des sanctions et/ou de mesures correctives.*

La République Centrafricaine qui est un pays enclavé, a opté pour la libéralisation du commerce et de la prestation de service depuis 1992 ; matérialisée par la loi 92.002 du 26 mai 1992 portant réglementation de la concurrence et son Décret d'application n°06.229 signé le 11 juillet 2006.

Certes le commerce et les prix sont libéralisés mais cela n'exclut pas un droit de regard de l'Etat sur le secteur. C'est ainsi que certains produits dits de première nécessité ont été ciblés et ont fait l'objet d'un Décret n°068.204, instituant la surveillance des produits de première nécessité donnant ainsi à l'Etat le droit d'intervenir pour réguler les prix afin d'éviter d'éventuelle hausse de prix organisée par les opérateurs économiques véreux..

Il est à noter qu'un Comité National d'Homologation de prix a été mis en place afin de fixer par consensus (Etat, Secteur privé et organisation des consommateurs) ; les prix des produits de première nécessité et soumis à surveillance.

**Art.28** : « Les infractions prévues au titre II articles 3 ,4 et 5 au titre III articles 8, 9, 11, 12, 13,14 et 15 sont punies d'un emprisonnement d'un mois à six mois et d'une amende de 1 000 000 à 100 000 000 de francs CFA ou l'une de ces deux peines seulement indépendamment du retrait de l'Agrément délivré par le Ministère du Commerce.

En cas de récidive, les peines seront doublées »

**Art.29** : « Les infractions prévues au titre IV article 16 sont punies d'un emprisonnement de trois ans et d'une amende de 1 000 000 à 100 000 000 de francs CFA ou l'une de ces deux peines seulement.

En cas de récidive, les peines seront doublées.

En cas de condamnation, le Tribunal peut ordonner la confiscation au profit de l'Etat de tout ou partie des biens saisis.

En cas de saisie fictive, la confiscation porte sur tout ou partie de la valeur estimative ».

Il faut remarquer que ces peines sont extrêmement lourdes et de ce fait difficilement applicables par rapport au niveau de l'économie de la RCA ou du pouvoir d'achat moyen des auteurs des infractions. Il faut également préciser que les ententes et les abus et les abus de position de dominance ne sont pas réprimés car leurs constatations pose un sérieux problème, car les infractions relèvent de la compétence du Comité National de la Concurrence et de la Consommation.

Les sanctions ou les mesures correctives sont déterminées en fonction des de deux éléments :

- la classification des entreprises selon qu'il s'agisse d'une entreprise individuelle, d'une société Unipersonnelle à Responsabilité Limitée(SARL) ,ou d'une Société Anonyme(SA) et ;
- le chiffre d'affaires de l'entreprise.

Les obstacles à surmonter dans l'application des sanctions ou des mesures correctives sont d'ordre technique, car les choses évoluent et les textes ne sont pas réactualisés .Certaines dispositions posent parfois problème pendant leur application.

L'uniformisation des textes sur les pratiques anticoncurrentielles au plan régional et sous-régional dans les pays membres de l'OHADA, de la CEMAC et de la CEEAC reste un problème majeur.

## 2. Questions sur le recours :

- *Prière de décrire les procédures de recours ou d'appel prévu par votre loi et leur application par l'autorité de concurrence et les autorités de régulation sectorielles de votre pays.*
- *Quelle est la fréquence des recours dans les affaires de concurrence dans votre juridiction (recours portant sur l'examen des aspects juridiques des affaires ; recours requérant des preuves additionnelles) ?*
- *Quels sont les obstacles à surmonter par l'organe d'appel, les requérant, les tierces parties dans l'examen des recours ?*

Il est à noter qu'en République Centrafricaine l'autorité de concurrence chargée de recevoir et statuer sur les recours liés aux questions sur les pratiques anticoncurrentielles est le Comité



National de la Concurrence et de la Consommation instituée par la loi 92.002. Malheureusement, cette institution n'a pas vu le jour.

La procédure prévoit la possibilité pour l'auteur de l'infraction d'adresser un recours en contestation au Ministère en charge des questions de la concurrence.

A défaut de transaction ; le Ministre Chargé du Commerce transmet le dossier au parquet. S'en suit alors une procédure de droit commun depuis la première instance jusqu'à la Cour de Cassation.

Comme il est établi dans les pratiques judiciaires, on dit que la lenteur est une vertu pour les juridictions. Cette lenteur pose souvent problème aux requérants dans le domaine commercial, car le monde des affaires on dit je cite : « *time is money* » en d'autres termes, « *le temps c'est de l'argent* » Alors si une affaire commerciale doit durer plus d'un an pour connaître un aboutissement, cela n'arrange pas les opérateurs économiques.

Il faut surtout noter que la compétence *ratione materiae* est déterminée selon la nature de l'infraction : contravention, délit ou tout simplement préjudice causé à un tiers exigent une réparation.

L'autorité nationale de la concurrence est un organe consultatif, en son absence c'est la Direction Générale du Commerce de la Concurrence et de la Consommation qui régule la concurrence.

Il y a quelques secteurs qui sont libéralisés et comportent les autorités de régulation sectorielles, notamment : **l'Agence de Régulation des Télécommunications (ART), l'Agence de Régulation du Secteur de l'Electricité en Centrafrique (ARSEC) , l'Agence de Régulation du Prix des Produits Pétroliers (ARSP) et l'Agence de Régulation des Marchés Publics (ARMP).**

Aussi surprenant que cela puisse paraître, après 20 ans d'application, la République Centrafricaine n'a connu aucune jurisprudence en matière de concurrence.

# Singapore

## 1. Questions on appropriate sanctions and remedies:

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

The Competition Act (“Act”) provides that the Competition Commission of Singapore (CCS) may impose a financial penalty for an infringement of the prohibitions under the Act; or issue such directions as it considers appropriate to bring the infringement to an end, and where necessary, require a person to take such action as is specified in the direction to remedy, mitigate or eliminate any adverse effect of such infringement.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

When setting the amount of any penalty, CCS will take into account the factors set out as follows:

- The seriousness of the infringement;
  - The turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking’s last business year;
  - The duration of the infringement;
  - Other relevant factors e.g. deterrent value; and
  - Any further aggravating or mitigating factors.
- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

N/A

## 2. Questions on judicial review:

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

Any party to an agreement in respect of which CCS has made a decision, may appeal to the Competition Appeal Board (CAB) against, or with respect to, that decision. The Competition Appeal Board is an independent tribunal.

A decision by the CAB can be further appealed to the High Court and then to the Court of Appeal on a point of law or the amount of financial penalty imposed. Such an appeal can only be made by a party to the proceedings in which the decision of the CAB was made.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

The grounds of appeal may include questions of law or fact, or breaches of procedural requirements.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

The first appeal to CAB is only expected in June 2010. So far, the experience has been a positive one for CCS.

## South Korea

### *1. Questions on appropriate sanctions and remedies:*

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

The KFTC enforces against violation of Monopoly Regulation and Fair Trade Act (MRFTA), the competition law of Korea, by the means of corrective order, surcharge payment order, filing of complaints to the prosecutor's office for criminal sanctions, warning, corrective recommendation or imposition of administrative fines.

Corrective order, which is prescribed in Article 5, 16, 21, 24, 27, 30, 31 and 34, is divided into further specific types: a prohibition order of the concerned unlawful behavior to remedy violations, an order to prohibit similar acts and a declaration order aimed to inform competitors, trading partners and the public of the violation through media and other ways.

Regarding surcharge payment order, Article 6, 17, 22, 24-2, 28, 30, 31-2 and 34-2 of the MRFTA apply. The decision on whether to impose surcharges is made based on full consideration of types, seriousness and frequency of violation, the period violation occurs and unlawful monetary gains generated from the infringement. However, in the case where a violation egregiously inhibits fair competitive order, harms consumers or generates illegal monetary gains, surcharge is imposed in principle. The ceiling on surcharge is 3% of the relevant turnover for market dominance abuse cases, 10% for unlawful concerted acts and 2% for other unfair business practices.

The KFTC may file a complaint with the Prosecutor General for criminal sanctions under Article 71 of the MRFTA if deemed necessary as a violation is obvious and grave to the extent that it could seriously harm competitive order. In this case, the offender may face fines of up to 200 million won or be sentenced to imprisonment not exceeding three years.

Warning is issued when seriousness of a violation is negligible, or corrective measure does not have substantial effect as the violation is voluntarily corrected in the course of an investigation or the committee proceedings. Corrective recommendation is made in the case where an offender admits committing a legal violation and expresses clear intention to correct it. Administrative

finances are imposed for a failure to comply with duties to conduct such as disclosure or merger notification obligation.

To sum up, corrective order is issued in principle where a violation has occurred. Surcharges are imposed based on the relevant turnover if the concerned violation meets the certain standard of the Notice on Surcharge Imposition. And a case is referred to the prosecution if the violation is obvious and has serious harm on competition.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

In the case where an Examiner of the KFTC believes that legal violation has occurred after investigation and examination, he/she produces an Examination Report that includes his/her opinions on remedies or sanctions for the alleged violation and present it to the Committee according to the 「Guideline on Operation of Corrective Measures」. Then, the Committee receives written opinions from defendants of the case for review. Finally, if the Committee finds that there is a violation of law; hearing and deliberation are conducted to determine remedies or sanctions.

An Examiner in charge of a case can suggest what kind of corrective order should be issued to address violations and create deterrence under the 「Guideline on Operation of Corrective Measures」, whether to impose surcharge, if so, how much under the 「Notice on Surcharge Imposition」 and whether to bring the case to the prosecution under the 「Guideline on Filing Complaints to the Prosecution」. He/She produces an Examination Report by including the abovementioned aspects and submits it to the Committee.

After the Committee's review on the Examination Report and written opinions on the report from a defendant, hearing is conducted where the Examiner and defendant attend to present oral arguments for finding of illegality and determination on sanction/remedy and its degree. Then the Committee makes a final decision on measures to be taken based on the relevant legal provisions, precedents of similar cases and other guidelines mentioned above.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

There are two main challenges in enforcing remedies/sanctions.

First, there is a difficulty in specifying illegal behaviors which will be the target of the future prohibition order. If the behavior is broadly defined, it could lead to disputes in legal interpretation when deciding on compliance with corrective order and the subsequent filing of a complaint to the prosecution. Too-narrowly-defined behavior, on the other hand, is less effective in preventing repetition of violations.

The second challenge is related to calculating the relevant turnover for surcharge imposition. The KFTC sometimes has trouble making exact estimation of the turnover relevant to the concerned violation, which often leads to a ruling against the KFTC on the size of the imposed surcharge.

## *2. Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

Those who are dissatisfied with the KFTC's decision can make a request for re-hearing to the KFTC or file an appeal to the Seoul High Court within 30 days from receipt of the written decision from the KFTC according to Article 53 of the MRFTA.

Regarding the re-hearing request, the KFTC should hold a new hearing and make a decision within 60 days after the request is filed. The defendant can file an administrative suit to the Seoul High Court to appeal the re-hearing decision within 30 days from the receipt of the re-hearing result.

In the case where a defendant intends to skip the re-hearing procedure and appeal to the appellate court directly, he/she shall file an administrative suit to the Seoul High Court within 30 days after the KFTC's written decision is received.

Where the defendant is dissatisfied with the decision by the High Court, he/she can file an appeal to the Supreme Court, a court of the last resort.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

New evidence can be accepted in the process of Seoul High Court as both legal and factual assessments are conducted in the High Court. The Supreme Court process, however, does not include examination of new evidence which was not suggested in the High Court, as it is in charge of legal review only.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

As most of the judges who handle competition cases majored in law, it is sometimes hard to provide easy explanation and make them understood on economic theories and terms.

It takes especially enormous effort and time to make them understood on economic analysis aspects such as models, formulas, results of econometric analysis, statistical significance.

## Surinam

### 1. *Questions on appropriate sanctions and remedies:*

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

The Caribbean Community Competition Commission (The Commission) is established and operates under Chapter VIII of the Revised Treaty of Chaguaramas (See Chapter attached). Sanction and remedies are set out under Art. 174.4

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

The Commission had not yet carried out an investigation or held a hearing.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

The Chapter anticipates that national authorities will cooperate with The Commission and the Commission must carry out its investigations in accordance with national laws. One challenge arises out of the fact that not all national laws contain provisions that recognize the Commission or provides for the Commissions decisions to be enforced in the domestic jurisdiction. Further, some of the remedies available to the Commission e.g. levying fines, are not available to national competition authorities.

### 2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

As a regional competition agency the Commissions decisions are appealable to the Caribbean Court of Justice (CCJ). See Art. 175.12

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

This is yet to be tested but generally the Courts are not quick to substitute its evaluation of facts for that of a specialized body such as the Competition Commission.



- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

The main challenges would be in respect of costs, questions of convenient forum, language differences among parties, different systems of law (Civil vs. Common Law) and diverse geographic locations.

## Switzerland

### 1. *Questions on appropriate sanctions and remedies:*

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

#### **Direct administrative penalties**

The possibility for the ComCo to impose direct administrative sanctions was introduced in 2003, when the Cartel Act was last revised (the revision entered into force on April 1, 2004). Article 49a paragraph 1 CartA mentions that an undertaking that participates in an unlawful agreement, in terms of Article 5 paragraphs 3 and 4 CartA, or that behaves unlawfully in terms of Article 7 CartA, will be required to pay a sanction of up to 10 per cent of its turnover in Switzerland within the previous three business years. The amount of the sanction depends on the duration and severity of the unlawful behavior. The a priori profit thereby achieved by the enterprise will also be taken into consideration (cf. answer to question 1b).

As a result, the legislative requirements for imposing sanctions, according to the CartA, depend on the nature of the violation. As mentioned above, only violations of Article 5 paragraphs 3 and 4 (e.g. horizontal or vertical agreements fixing prices or quantities and agreements allocating geographical markets or customer groups) and Article 7 CartA (e.g. abuse of dominant position) are sanctioned according to Article 49a paragraph 1 CartA.

Direct sanctions under Article 49a paragraph 1 CartA are regulated under the section “administrative sanctions” of the Act, they contain, however, some penal elements; the procedure for setting fines set in the CartA must thus comply with additional guarantees spelled out in Article 6 of the European Convention on Human Rights.

#### **Indirect administrative penalties**

According to Article 50 CartA, an enterprise that contravenes to its profit an amicable settlement, a legally enforceable decision of the competition authorities or a decision of an appeals body shall be required to pay an amount of up to 10 per cent of the turnover achieved in Switzerland in the last three business years. When assessing the amount, the a priori profit made by the enterprise, as a result of the unlawful behaviour, is to be taken into appropriate consideration.

Additionally, Article 52 CartA stipulates that undertakings, which fail to fulfill their obligation to provide information or to produce documents or complies only partially therewith shall be required to pay an amount up to CHF 100 000.

### **Criminal penalties**

Currently the CartA does not provide for direct criminal fines for violating the competition law. Amendments providing such sanctions are under consideration.

Indirect pecuniary sanctions, however, may presently be imposed on specific individuals in cases, where they intentionally violate an amicable settlement, a legally enforceable decision of competition authorities, or a decision of an appeals body. Any person who intentionally fails to comply, or complies only partially with a decision of the competition authorities, concerning the obligation to provide information or carries out a concentration of enterprises without giving due notice thereof, or violates decisions relating to concentrations of enterprises, shall be required to pay a fine (Articles 54 ff. CartA, see below).

According to Article 54 CartA, any person who intentionally violates an amicable settlement, a legally enforceable decision of the competition authorities or a decision of an appeals body shall be required to pay a fine of at most CHF 100 000.

Under Article 55 CartA any person who intentionally fails to comply, or complies only partially with a decision of the competition authorities concerning the obligation to provide information or carries out a concentration of enterprises, without giving due notice thereof or violates decisions relating to concentrations of enterprises shall be required to pay a fine of at most CHF 20 000.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

The CartA is completed by the Federal Council's Ordinance on Sanctions (hereinafter "OS") of April 1, 2004, which regulates the assessment criteria for the imposition of sanctions in accordance with Article 49a paragraph 1 CartA.

In general the amount of the fine is calculated in accordance to the duration and gravity of the infringements. The profit that the enterprise is thereby presumed to have achieved is to be given appropriate consideration. In determining the sanction, the principle of proportionality is to be observed (Article 2 OS).

The OS provides the assessment criteria for the imposition of sanctions under Article 49a paragraph 1 CartA. The procedure is the following:

- First step: Basic amount

Depending on the seriousness and nature of the infringement, the basic sanction shall amount to a maximum of 10 per cent of the turnover achieved by the undertaking concerned in the relevant markets in Switzerland during the preceding three financial years (Article 3 OS).

- Second step: Adjustment of the amount in consideration of the duration of the infringement.

If the infringement of competition law has lasted for one to five years, the basic amount shall be increased by up to 50 per cent. If the infringement has lasted for longer than five years, the basic amount shall be increased by an additional sanction of up to 10 per cent for each additional year (Article 4 OS).

- Third step: Adjustment for further aggravating and mitigating factors

Where there are aggravating circumstances such as repeated infringements of the CartA, achievement of particularly high profits, refusal to cooperate with the authorities, initiating or leading role in the restraint of competition etc., the basic amount will be increased (Article 5 OS). In the case of mitigating circumstances, such as a passive role of an undertaking in a cartel, the amount shall be reduced (Article 6 OS).

However, in no case shall the sanction exceed 10 per cent of the turnover achieved by the undertaking *in Switzerland* during the preceding three financial years (so-called **Maximum Sanction**; Art. 49a para. 1 Cartel Act in connection with Art. 7 OS).

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

A correct attribution of liability for antitrust infringement is an essential part of the ComCo's enforcement policy; in particular in case of a *group of undertakings* involved in cartels and other antitrust infringements it plays a significant role. Fines described above are basically imposed on the company itself. The term "undertaking" contained in Article 2 paragraph 1<sup>bis</sup> CartA is an economic notion and encompasses every entity engaged in an economic activity, regardless in

general of its legal status. Therefore, a group of undertakings as a whole must be considered as one entity in the meaning of the CartA. Nevertheless, for practical reasons, the ComCo held that enforcement decisions can only be addressed to legal persons and not to an undertaking in the broad sense of the term (group of undertakings). Given an infringement is committed by an undertaking in the broad sense of the term, it is often difficult to determine the legal person to whom an infringement must be attributed.

Basically, direct or indirect parent companies are responsible for violations committed by their subsidiaries. In the majority of its decisions, the ComCo took the view that if the wholly-owned subsidiaries lacked commercial autonomy, the authority is entitled to address its decision to the parent company. The praxis on this topic is, however, still not clear. As a consequence of the liability of parent companies for antitrust infringements of their subsidiaries, possible fines are calculated on the basis of (much) higher turnovers.

*Associations* are not explicitly mentioned in the CartA. Nevertheless, infringements may also be committed by them. If the association itself (alone or together with its members) operates as an economic actor, it is also considered to be an undertaking in terms of the CartA.

## 2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

Decisions made by the ComCo may be challenged before the Federal Administrative Tribunal and then before the Federal Tribunal. The Federal Administrative Tribunal was created in 2007 and replaced the Appeals Commission for Competition Matters. The Federal Administrative Tribunal has jurisdiction over different matters, i.e. it is not specialised in competition matters.

### Appeals to the Federal Administrative Tribunal:

The ComCo's final decisions (e.g. prohibition of a concentration, decision to impose sanctions) may be appealed within 30 days to the Federal Administrative Tribunal. Certain interim decisions may also be appealed, if they might result in a damage that could not be repaired (e.g. denial of the right to access files).

Addressees of the decision may file an appeal. Third parties, provided that they participated in the investigation or that they are particularly concerned by the decision as well as associations and consumer organisations may also have a right of appeal.

Appeals to the Federal Administrative Tribunal have in principle a suspensive effect, which implies that the ComCo cannot enforce its decisions while an appeal is pending. Provisional measures may be ordered.

Since the Federal Administrative Tribunal has been created only recently, few cases concerning competition law have been brought to it so far and it still has to develop its jurisprudence in the field of competition.

#### Appeals to the Federal Tribunal:

Decisions of the Federal Administrative Tribunal on competition matters may be appealed within 30 days to the Federal Tribunal, Switzerland's Supreme Court. Appeals may be filed by the same categories of persons as those entitled to file an appeal to the Federal Administrative Tribunal.

The ComCo is also entitled to appeal the judgment of the Federal Administrative Tribunal to the Federal Tribunal. Comco's right of appeal is today provided for in the Ordinance on the organisation of the Federal Department of Economic Affairs. However, as a result of the reform of the federal judicial system that took place in 2007, such right should in future be included in a federal law.

Appeals to the Federal Tribunal normally do not have a suspensive effect, but the investigating judge may grant such effect. The Tribunal may also order provisional measures.

#### Exceptional authorisation:

In addition to the appeal procedure, if the ComCo has found a competition restraint or practices of enterprises having a dominant position unlawful, or has prohibited a concentration, the parties involved may request that the Swiss Government (Federal Council) exceptionally authorises the agreement or the concentration based on compelling public interests. An authorisation may also be requested after an (unsuccessful) appeal procedure. However, the Swiss Government has so far never made use of this possibility.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

#### Appeals to the Federal Administrative Tribunal:

The Federal Administrative Tribunal may review findings of facts and law as well as the use of its discretionary power by the authority.

The Federal Administrative Tribunal may confirm or modify the decision appealed against to the benefit of a party or - under certain circumstances - to the detriment of a party (e.g. if the decision violates federal law and provided that the party concerned could give its views). The Tribunal is not bound by the claims presented by the parties. The proceedings are based on the inquisitorial system, which means that the Tribunal investigates the facts and examines evidence *ex officio*. The parties must participate in the determination of facts and the applicant needs to set out the grounds for its appeal. New evidence is admissible before the Federal Administrative Tribunal.

The Tribunal's power of review may however be mitigated by the fact that, in practice, it has to rely on the technical analysis made by the ComCo and therefore might not be in a position to modify its decision.

#### Appeals to the Federal Tribunal:

The Federal Tribunal may in principle only review findings of law. It bases its decision on the facts determined by the previous court and may only rectify or supplement them if the determination was obviously inaccurate or violated the law. The Tribunal applies the law *ex officio* and may not go beyond the claims of the parties. If the Federal Tribunal accepts the appeal, it may decide the case itself or send it back to the lower court or authority.

New facts and new evidence are not admissible before the Federal Tribunal, except if they result from the decision of the lower court. For instance, if the Federal Administrative Tribunal based its decision on new legal arguments, the applicant may present new facts in order to demonstrate that the legal arguments of the Tribunal are contrary to the law. The parties may not present new claims before the Federal Tribunal.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

The CartA has been subject to important changes (mainly the introduction of direct sanctions) which entered into force only five years ago. Since then, several important cases were decided by the ComCo and then appealed by the parties. Because of the complexity of the cases, the entire procedure (from the opening of the investigations to a decision by the final appellate body, the Swiss Federal Tribunal) is time-consuming. As a result, there is only little case law in Switzerland and many provisions of the CartA therefore lack a definitive, judicially confirmed interpretation. The final decisions on some of the cases presented below (cf. session III, 1.) will

hopefully provide law practitioners with valuable guidelines. In the mean time, authorities and parties must rely on the law, the corresponding parliamentary deliberations, the opinions of experts and foreign case law.



# Syria

## 1. Questions on appropriate sanctions and remedies:

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*
- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*
- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

### A- Penalties system

Decisions are to be taken against the violators of the law by the Competition Council after being investigated by members of the Commission judicial brigade, and submit its finding with the proposals to the commission council by the General Director.

The Council shall meet at least every month when needed, to consider the issues and to take decisions by majority.

The council of competition shall penalize whoever:

- Practices the activities prohibited herein.
- Violates the resolutions of the Council stipulating the ceasing of activities.
- Undertook or participated in an economic concentration process with which the Council must have been notified, but he/she has not done so and continued the procedures of economic concentration subsequent to notification, before there solution was issued by the Council, or continued the procedures after the Council's resolution of concentration prevention was issued.
- Undertook or participated in an economic concentration process which violates the conditions stipulated in the resolution of the Council issued for approval on concentration.
- Provided false information to the Council, refused to provide information thereto or deliberately obstructed the work of the Council.

### B- Determining penalties

A) With a fine at the rate of no less than 1% and not more than 10% of the total annual sales of the commodities revenues of the services for the breaching party, which shall be calculated as follows:

- 1) On the basis of his/her total annual sales of commodities/total revenues of services in the market as included in the financial statements for the previous fiscal year due to commitment of branch
- 2) On the basis of his/her total annual sales related to the products subject of breach if the activity of the infringer covers many products and the breach is restricted to some of them.
- 3) On a basis to be determined by the Council if the activity of the infringer covers many products and the breach is restricted to some of them, and if it is not possible to determine the total sales related to the products subject of breach.

With a fine of no less than 100.000 Syrian Pounds and not more than 1.000.000 Syrian Pounds if sales or revenues are undetermined.

In addition to the before-mentioned penalties, The council might sentence the establishment breaking articles /5/ and /6/ of this Act, by preventing them from one to three years from starting commercial relations what so ever with the public bodies.

About how to determine appropriate penalties, there is no practical and realistic case that the commission is newly formed and has resorted to adopted policy dissemination of competition culture and awareness without taking penalties for building trust and credibility between the Authority and economic activities.

## 2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*
- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*
- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

### **The Judicial remedy:**

- Issued decisions by the Council can be appealed in front of the higher administrative court in the State Council within 60 days of the decision notification date, and the court shall consider the appeal without delay.
- Article 15, gave the right of the parties involved in, the defence or justification, in paragraph c.
- Investigations should be done, and to listen for the benefit of any person suspected by doing against the provisions of this law. Paragraph /a/.

**Compensation:**

- Those who were subject to the damage caused by the activities, deemed forbidden by this Act, shall have the right to appeal to the civil court of first instance as to get a compensation from the infringing company. The damaged parties' right to raise compensation law suits shall lose effect after three years of the date of the forbidden activities occurrence.
- Paragraph /d/of Article 10 gives the third party the right to express his opinion on the proposed concentration.

“The Council shall announce in two local newspapers the application for economic concentration submitted pursuant to the provisions of paragraph /a/ of this article, at the expense of the applicant, provided that the announcement would include a summary of the subject of application, and an invitation for whoever has an interest in providing his/her opinion within no later /30/ days of announcement date”

**Remedies for the public interest:**

The Minister appoints his representative at the Council, who is in charge of defending public interest in the issues related to the set fourth competition violating practices. Article /18/

**Judicial review:**

Decisions shall be taken by majority of the attendees of the competition council and in case votes were equal, the chairman side shall be considered predominant. No member shall have the right to participate in deliberations or voting concerning an issue brought before the Council in which he/she bears any personal interest or he/she has family relations with any party down to the fourth degree or in case he/she is representing any party. Issued decisions by the Council within 60 days of the decision notification date, and the court shall consider the appeal without delay (article 19)

Conducting the necessary detections and hearing of the affidavit of any person suspected to be violating the provisions of this Act (paragraph 4-a- of article 15), the Council may call upon any person who has or is suspected to have or information related to the violation of the provisions

hereof, either to hear his/her testimony or to provide whatever that may be in his/her possession (Article 15/paragraph C)

Here, we want to indicate to the confidentiality of information, records, documents, commission work, and it's not allowed to disclose, circulation, or delivered information to any party is not concerned.

And about (paragraph b,c) there isn't any case before till because the modernity of the commission.

## Tunisie

### 1. Questions sur les sanctions et les mesures correctives :

- *Prière de décrire le régime de sanction et/ou de mesures correctives prévu par la loi sur la concurrence de votre pays et donner des indications sur la façon dont il est mis en application.*
- *Prière d'indiquer comment les sanctions et/ou les mesures correctives sont déterminés lors de l'examen d'un cas spécifique.*
- *Prière d'indiquer les obstacles que vous devez surmonter dans l'application des sanctions et/ou de mesures correctives.*

### **Sanction et mesures correctives appropriées:**

A- le système de sanctions et mesures correctives existant en vertu du droit de la concurrence de votre pays ainsi que son application dans la pratique;

Le droit tunisien de la concurrence a opté pour une politique graduelle des sanctions. En 1991, le texte de la loi parlait d'une réparation du dommage causé à l'économie moins qu'une sanction à une faute anticoncurrentielle...

Depuis l'année 99, la tendance est pour un régime de sanction plus dissuasif à l'encontre des pratiques anticoncurrentielles. Le droit tunisien de la concurrence instaure son propre système de sanctions et de mesures correctives à savoir :

#### **-Les amendes :**

L'article 34 de la loi relative à la concurrence prévoit que les pratiques anticoncurrentielles sont passibles d'une amende pouvant atteindre 5% du chiffre d'affaire réalisé en Tunisie au cours du dernier exercice écoulé. Pour les personnes morales et les organisations n'ayant pas d'activité marchande, le montant de l'amende varie entre 1000 et 50.000 dinars. Ces amendes peuvent varier selon le type d'infraction ou selon que l'infraction a été commise intentionnellement ou par négligence, et/ou calculées par rapport aux gains réalisés à la suite de l'infraction.

Le montant de la sanction prononcée n'est pas versé à l'acteur économique « victime » du comportement anticoncurrentiel en cause mais recouvré par le Trésor Public. Les sanctions prononcées par le conseil de la concurrence ont en effet vocation à refléter le dommage causé à l'économie en général et non à réparer le préjudice subi par les parties. Pour obtenir réparation de ce préjudice, les entreprises victimes peuvent cependant se tourner vers le juge civil pour demander des dommages et intérêts

Les sanctions pécuniaires décidées par l'Autorité de la concurrence ont une double nature : punitive et préventive. Punitif tout d'abord car elles sanctionnent un opérateur qui a enfreint le droit de la concurrence. Préventive ensuite dans la mesure où leurs montants visent à dissuader l'agent économique sanctionné de récidiver et les autres acteurs économiques d'adopter un tel comportement.

#### **-L'emprisonnement :**

Une peine de prison peut être infligée à toute personne physique ayant pris une part déterminante dans la violation des interdictions de l'article 5 de la loi relative à la concurrence

Le pouvoir de prononcer des peines d'emprisonnement est normalement confié à l'autorité judiciaire. Ces peines peuvent atteindre une année.

#### **- les injonctions :**

Ce sont des mesures correctives de nature comportementale ou structurelle imposés au terme de la procédure et qui consistent à enjoindre à l'auteur des pratiques de cesser les pratiques anticoncurrentielles incriminées ou, de façon positive, de modifier son comportement afin de se conformer au droit de la concurrence.

#### **Injonction de publication de la décision:**

Afin de donner une publicité suffisante à la décision, le conseil de la concurrence a la faculté d'en ordonner la publication par voie de presse. Généralement, il s'agit de publier un extrait de la décision expliquant la raison de la condamnation. L'objectif est alors d'informer les entreprises du secteur et le grand public de la nocivité du comportement illicite

#### **-les mesures conservatoires :**

Ce sont des injonctions de suspendre une pratique ou de revenir à l'état antérieur en cas de préjudice éminent touchant l'intérêt général.

Ces mesures peuvent être adressés par exemple, en cas d'exploitation abusive d'une position dominante a la suite d'une opération de concentration.

#### **-L'annulation de certaines clauses :**

La nullité des accords est confiée au juge civil qui peut se prononcer sur toute clause ou accord se reportant aux pratiques prohibées par les paragraphes 1 et 2 de l'article 5 de la loi relative à la concurrence et aux prix.

### **-La Procédure de la clémence :**

C'est une disposition qui permet d'améliorer l'efficacité de la poursuite des infractions relatives aux pratiques anticoncurrentielles en incitant les entreprises à venir se dénoncer en contrepartie d'une immunité totale ou partielle de l'amende.

En 2003, Cette disposition a été introduite dans le droit tunisien, instaurant la procédure de clémence.

L'originalité de ce concept consiste à son universalité qui touche les ententes et toutes autres pratiques anticoncurrentielles.

Il convient de noter que le texte ne précise ni la qualité et la quantité d'informations à fournir, ni le déroulement précis des différentes phases de la procédure.

### **-La Procédure de transaction**

Il serait utile de parler d'une procédure similaires a celle de la clémence qui en est adopté ultérieurement. Il s'agit de la procédure de transaction qui vise à accélérer une procédure déjà engagée.

L'article 59 de la loi n° 91 - 64 relatif à la concurrence et aux prix prévoit la possibilité au ministre du commerce de conclure une transaction sur les infractions prévues à loi relative à la concurrence. La transaction peut intervenir tant que l'affaire est pendante devant les juridictions et n'ayant pas encore fait l'objet d'un jugement définitif

La transaction annule toutes les sanctions et le versement de la somme fixée par l'acte de transaction éteint l'action publique et celle de l'administration.

La transaction lie irrévocablement les parties et n'est susceptible d'aucun recours pour quelque cause que ce soit.

### **B- comment la sanction /mesure corrective est décidée dans une affaire de concurrence :**

Selon la jurisprudence du Conseil, l'amende est calculée sur la base de quatre critères : la gravité des infractions commises, l'importance du préjudice subi par l'économie, la position de l'entreprise dans le marché et les profits réalisés du fait de ces pratiques. Toutefois, le Conseil s'est reconnu le droit d'atténuer la sanction à l'égard des entreprises ayant manifesté leur bonne foi, par leur collaboration lors de l'instruction, lui fournissant les preuves et documents utiles.

A l'inverse, le Conseil a manifesté plus de sévérité à l'encontre de l'instigateur, ou l'auteur principal de la pratique anticoncurrentielle ou ceux qui refusent de collaborer avec le conseil de la concurrence au cours de l'instruction.

## 2. Questions sur le recours :

- *Prière de décrire les procédures de recours ou d'appel prévu par votre loi et leur application par l'autorité de concurrence et les autorités de régulation sectorielles de votre pays*
- *Quels sont les obstacles à surmonter par l'organe d'appel, les requérant, les tierces parties dans l'examen des recours ?*
- *Quelle est la fréquence des recours dans les affaires de concurrence dans votre juridiction (recours portant sur l'examen des aspects juridiques des affaires ; recours requérant des preuves additionnelles) ?*

## C-examen par les tribunaux :

### a- le système d'examen par les tribunaux /la procédure de recours :

Le système d'examen est un système multidisciplinaire se répartissant entre plusieurs intervenants afin de garantir l'efficacité et l'effectivité de la loi relative à la concurrence.

Les affaires en matière de concurrence font l'objet en dernier ressort, d'un contrôle juridictionnel. Le législateur tunisien a choisi de confier le contrôle des décisions du Conseil de la Concurrence à la juridiction administrative, et plus précisément aux chambres d'appel du Tribunal Administratif le recours en appel, et aux chambres de cassation de ce même tribunal le pourvoi en cassation.

### Le juge administratif garant de l'égalité :

L'atteinte à la concurrence, ne provient pas exclusivement des pratiques ou des comportements imputables aux entreprises économiques, elle peut aussi être attribuée à des décisions administratives réglementaires ou individuelles.

La loi tunisienne sur la concurrence a accordé au ministre chargé du commerce un ensemble de prérogatives en la matière. Il peut notamment prendre par arrêté, et pour une durée n'excédant pas six mois, des mesures temporaires contre des hausses excessives de prix, soit suite à une crise ou à une calamité, soit dans des circonstances exceptionnelles ou d'une situation manifestement anormale dans un secteur déterminé (Art.4).

Il peut autoriser, le cas échéant, des accords ou pratiques ayant pour effet un progrès technique ou économique et procurant aux consommateurs des avantages (Art. 6) ; Enfin, il détient le



pouvoir d'autoriser ou non les opérations de concentrations soumises à autorisation et ce après consultation du conseil de la concurrence (Art.7 ,7 bis et 8 nouveaux) .

Toutes les décisions, prises par le ministre chargé du commerce, sont des actes administratifs exécutoires et faisant grief, soumis de ce fait au contrôle du juge administratif, statuant en excès de pouvoir.

Par ailleurs, les dispositions de l'article 2 de la loi sur la concurrence qui dispose que « les prix de biens, produits et services sont librement déterminés par la concurrence », se trouvent appuyées par la jurisprudence constante du juge administratif qui a toujours affirmé que la liberté du commerce et de l'industrie était un principe général

Le principe d'égalité concurrence, quelque soit le statut de l'opérateur, prévaut aujourd'hui dans le droit tunisien, puisque la libre concurrence est une source de la légalité administrative.

Le Conseil de la concurrence tunisien, a déclaré qu'il n'était pas compétent pour se prononcer sur la régularité des procédures de délégation de service public, ou de dévolution de marchés publics, organisées par une personne publique. Le contentieux de ces actes administratifs, qui mettent en œuvre des prérogatives de puissance publique, relève de la compétence exclusive du juge administratif. Néanmoins, le conseil de la concurrence conserve sa compétence à l'égard des comportements des entreprises candidates à l'attribution d'un marché public.

A l'inverse, la compétence revient au juge administratif dès lors qu'il s'agit d'apprécier la légalité des pratiques imputables à l'Etat ou aux collectivités publiques, comme le refus de se soumettre aux dispositions des marchés publics. Cette position jurisprudentielle traduit la complémentarité qui existe entre l'autorité de la concurrence et le juge de l'excès de pouvoir dans leurs tâches respectives afin de faire respecter les règles de la libre concurrence.

Au-delà des règles régissant le droit de la concurrence, deux grands principes généraux de droit, en l'occurrence la liberté et l'égalité, continuent à servir le droit économique en général, et contribuent au renforcement du droit et la politique de concurrence.

### **L'apport du juge civil au droit de la concurrence :**

L'appui du juge civil au droit de la concurrence est considérable ; Le droit civil consolide le droit de la concurrence, dans la mesure où les opérateurs économiques qui subissent un préjudice, du fait de la violation d'une règle de droit de la concurrence, disposent de la possibilité de s'adresser au juge civil pour obtenir réparation des dommages subis .Aussi le dernier alinéa de l'article 5 (nouveau) de la loi relative à la concurrence et aux prix dispose : "Est nul, de plein droit tout engagement, convention ou clause contractuelle se rapportant à l'une des pratiques prohibées ».

Mais le conseil de la concurrence a toujours estimé, qu'il n'était pas compétent pour prononcer la nullité des contrats et que cette compétence revenait au juge du contrat. Ce juge peut être le juge judiciaire pour les contrats de droit privé, mais également le juge administratif lorsqu'il s'agit d'un contrat administratif.

Ainsi les tribunaux jouent un rôle essentiel, d'appui au droit de la concurrence, puisqu'il leur revient de prononcer la nullité des contrats ou des clauses, comportant des stipulations anticoncurrentielles et d'accorder des indemnisations aux entreprises victimes des pratiques anticoncurrentielles.

### **Le juge pénal assure l'efficacité du droit de la concurrence :**

La loi tunisienne sur la concurrence permet au conseil de la concurrence de transmettre le dossier au parquet, afin qu'il puisse engager éventuellement des poursuites pénales, contre les personnes physiques qui, par des moyens détournés, auraient pris une part déterminante, dans la violation des interdictions édictées par l'article 5 de la dite loi. Ces personnes encourent des peines d'emprisonnement allant de seize jours à une année et d'une amende de 2000 dinars à 100.000 dinars ou de l'une de ces deux peines seulement. De ce fait, le juge pénal exerce un rôle dissuasif de premier ordre pour assurer l'efficacité du droit de la concurrence.

En outre, les entreprises qui sont coupables d'enfreindre les dispositions législatives, régissant les opérations de concentrations ou qui ne respectent pas les engagements s'y rapportant, encourent une amende dont le montant ne peut dépasser 5 % du chiffre d'affaires, réalisé sur le marché national. Cette complémentarité entre la mission du Conseil de la Concurrence et celle du juge pénal est fondamentale pour la réussite de la politique de la concurrence.

### **b- le degré d'intensité de l'examen par les tribunaux/la procédure de recours :**

Instaurant le principe du double degré de juridiction, les décisions rendues par le conseil de la concurrence font l'objet d'appel devant le juge administratif. Le juge d'appel, juge de fond, exerce un pouvoir de réformation sur les faits et le droit.

Il examine le marché dans sa globalité sans être lié ni par les demandes, ni par les moyens ou les parties de la requête. Il a donc la possibilité d'étendre le litige à d'autres personnes, ou d'autres pratiques révélées par l'instruction ou requalifier les faits invoqués.

**c- les principales difficultés auxquelles se heurtent l'instance de surveillance de la concurrence, le demandeur, les tierces parties et l'organe d'examen lui-même dans le processus d'examen par les tribunaux :**

-1/ les notions spécifiques du droit de la concurrence sont difficiles à cerner par un juge généraliste. Bien que les textes relatifs au droit de la concurrence soient rédigés de manière que le droit emporte, la théorie économique vient de déborder le cadre juridique, et il appartient donc aux tribunaux de déterminer les principes posés, d'interpréter et appliquer ces normes à des situations concrètes, laissant ainsi aux juges une grande marge d'appréciation. Aussi, à travers le sens qu'il donne à la règle juridique, par le fait que sa jurisprudence va obligatoirement lier l'autorité de la concurrence, et que les garanties formelles qu'il pourra imposer à l'administration pourra entraver son efficacité et freiner son action, le juge peut freiner la promotion de droit de la concurrence.

- 2/ Absence des formations spécialisées en la matière au profit des juge ce qui rend difficile le recours à l'analyse économique indispensable dans les affaires de concurrence

-3/ Le manque de la culture de la concurrence et l'ignorance des procédures et les moyens spécifiques de preuve

-4/ L'insuffisance des lois nationales pour lutter contre des pratiques anticoncurrentielles, et en particulier celles qui émanent des sociétés transnationales.

## Turkey

### *1. Questions on appropriate sanctions and remedies:*

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

In Turkey, the Turkish Competition Authority (TCA) is vested with the task of enforcing the Law on Protection of Competition No 4054 (the Competition Act), a task which the TCA has been fulfilling since November, 1997.

The Competition Act is primarily in line with the European Union competition law system and therefore prohibition of anticompetitive agreements, concerted practices and decisions (Article 4), abuses of dominant position (Article 6) and anticompetitive mergers and acquisitions (M&As) creating or strengthening dominant position and lessening competition significantly (Article 7) constitute its main pillars.

The system of **sanctions/remedies** in Turkey is comprised of remedies and monetary fines and it may be outlined as follows:

Article 9 of the Competition Act empowers the Turkish Competition Board (the Competition Board), the decision-making organ of the TCA, to notify the undertakings or associations of undertakings concerned of the decision encompassing those behaviours to be fulfilled or avoided so as to establish competition and maintain the situation before the infringement if the Competition Board establishes that Articles 4, 6 and 7 of the Competition Act are infringed. Therefore, it follows that the Competition Board is able to impose remedies on undertakings or associations of undertakings as long as those remedies are retained within the boundaries of establishing competition and maintaining the situation before the infringement. Before taking such a decision, the Competition Board informs in writing the relevant undertakings or associations of undertakings of its opinions concerning how to terminate the infringement. Moreover, where the occurrence of serious and irreparable damages is likely until the final decision is taken, the Competition Board may take interim measures which have a nature of maintaining the situation before the infringement. The reasoning of the article provides that interim measures can be taken if there are strong indications that there will be serious and irreparable damages. However, it should be emphasized that the suffering parties can not be

placed in a better or worse position than they were before the anti-competitive practice as a consequence of the Competition Board's measures.

The Competition Act provides for an ex-ante merger control system by stipulating that M&As exceeding certain thresholds be notified to the Competition Board for an authorization before being realized. According to Article 10, after the receipt of a M&A notification, the Competition Board has to either authorize the transaction upon a preliminary examination to be completed within fifteen days or if it decides to deal with this transaction under final examination, duly notify, with its preliminary objection letter, those concerned of the fact that the merger or acquisition transaction is suspended and cannot be put into practice until the final decision, together with other measures deemed necessary by it.

Moreover, where a merger or acquisition transaction subject to notification requirement is not notified to the Competition Board, Article 11 obliges the Competition Board to deal with this transaction on its own initiative as soon as it is informed of the transaction. Based on its assessment, in case the Competition Board establishes that the merger or acquisition creates or strengthens a dominant position as a result of which competition is significantly decreased, Article 11 stipulates that

- the merger or acquisition in question be terminated, together with fines (which are explained in detail below);
- all *de facto* situations committed contrary to the law be eliminated;
- any shares or assets seized be returned, if possible, to their former owners, whose terms and duration shall be determined by the Competition Board, or if not possible, these be assigned and transferred to third parties;
- the acquiring persons may by no means participate in the management of undertakings acquired during the period until these are assigned to their former owners or third parties, and that other measures deemed necessary by it be taken.

The Competition Act does not provide any criminal penalties for violations. The Competition Act establishes two types of administrative fines. Article 16 specifies one-time fines for committing various wrongful acts. In case of anticompetitive agreements, anticompetitive mergers and abuses of dominant position, Article 16 of the Competition Act enables the

Competition Board to impose an administrative fine **up to** 10% of the annual gross revenue on the undertakings and associations of undertakings concerned. In addition, when the aforementioned fines are imposed, the managers and employees of those undertakings or associations of undertakings who have had a decisive role in the infringement are imposed administrative fines **up to** 5% of the fine imposed on the undertaking or the associations of undertakings concerned.

Article 16 provides for the imposition of an administrative fine of %0,1 of annual gross revenue on the undertakings and associations of undertakings concerned in cases where;

- M&As that are subject to authorization are realized without authorization of the Competition Board,
- false or misleading information or document is provided in exemption and negative clearance applications or in authorization applications for M&As,
- incomplete, false or misleading information or document is provided or information or document is not provided at all or within the specified period of time, despite the Competition Board's request of information or during the on-the-spot inspections.

The administrative fine is %0,5 of the annual gross revenue in case on-the-spot inspection is hindered or complicated.

Article 17, on the other hand, provides for daily, accumulating fines (of %0,05 of annual gross revenue) for failures to comply with obligations imposed by the Competition Board or commitments made or requests for information and documents to be submitted in due time, and for hindrance of on-the-spot inspection.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

As far as fines are concerned, it can be seen from the abovementioned that for infringements of Articles 4, 6 and 7, the Competition Act sets some maximum amount of fines rather than exact amounts leaving the appropriate amount of fine to be determined in each case up to the Competition Board. On the other hand, the Competition Act provides some principles to guide the Competition Board in its determination of the appropriate amount of fine. According to the Competition Act, when determining an administrative fine in relation to an infringement of

Articles 4, 6 and 7, the Competition Board shall take into consideration issues such as the repetition of infringement, its duration, market power of undertakings or associations of undertakings, their decisive influence in the realization of infringement, whether they comply with the commitments given, whether they assist with the examination, and the severity of damage that takes place or is likely to take place.

Moreover, to those undertakings or associations of undertakings or their managers and employees making an active cooperation with the TCA for purposes of revealing contrariness to the Competition Act, fines mentioned above may not be imposed or reductions may be made in fines to be imposed taking into consideration the quality, efficiency and timing of cooperation.

Apart from the explanations in the Competition Act, the Competition Board adopted two implementing regulations regarding fines and leniency.

The implementing regulation on fines provides for the procedures and principles while fixing the fine to be imposed for violations under Article 4 (which prohibits anti-competitive agreements, concerted practices and decisions) and Article 6 (which prohibits abuse of dominant position) of the Competition Act. For instance, the implementing regulation includes explanations on fixing the basic amount of fine to be imposed on undertakings and associations of undertakings, aggravating and mitigating factors and fines to be imposed on the managers and employees.

Moreover, the implementing regulation on leniency provides for the procedures and principles in terms of non-imposition and reduction of fines for undertakings or their managers and employees involving in cartels.

As far as the structural or behavioral remedies are concerned, it should be mentioned that the appropriate remedy is determined on a case-by-case analysis taking account of the specificities of the each case.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

As explained in the answer to question 1.a., Article 17, provides for daily, accumulating fines (of %0,05 of annual gross revenue) for failures to comply with various Competition Board orders

and conditions. Therefore, it may be argued that fines are deterrent enough to ensure compliance with remedies imposed.

As to the collection of fines, it is not relevant to give an answer as the TCA is not the body responsible for it.

## 2. Questions on judicial review

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

According to Article 55 of the Competition Act “*Nullity suits against final decisions, measure decisions and administrative fine decisions of the Competition Board shall be heard at the Council of State as the court of first instance. Appealing against decisions of the Competition Board shall not cease the implementation of decisions, and the follow up and collection of administrative fines.*” The Council of State is the supreme administrative court. Therefore, Competition Board decisions against which appeals may be made include determinations of legal violations, assessment of fines, interim measures, issuance or withdrawal of individual exemptions, block exemptions and negative clearances, and rejections of complaints. These decisions, which allow for a right of appeal, are the only instances that there is the possibility of judicial intervention.

Appeals are initially made to Chamber 13 of the Council of State which is a specialized Chamber for competition and regulatory matters, composed of members with varied backgrounds. Therefore, Chamber 13 not only hears appeals against Competition Board decisions but also against decisions of other regulatory authorities. The Chamber’s decision may later be reviewed by the Council of State’s Plenary. The Council of State can only confirm or reverse the decision, based on legality issues (deciding whether fines, for instance, were legally imposed or not) and the observance of procedural rules, but it can not increase or decrease the fine imposed. Chamber 13’s decision may be appealed further to a second “plenary chamber” within the Council of State consisting of 29 judges, none of whom is from Chamber 13.

The appealing party only needs to have an interest in the Competition Board’s decision.

Private parties have several options for pursuing complaints. According to Article 42 of the Competition Act, a party who is disappointed by the Competition Board’s rejection of its



application, or by the Competition Board's failure to take action<sup>12</sup> with respect to it, may appeal to the Council of State.

Article 58 of the Competition Act authorizes parties (but not class actions) injured by conduct violating the Competition Act to **sue the perpetrator in civil court for damages**.

Parties can sue for damages even if the Competition Board has not issued a decision in the matter. In seeking such damages, the party will invoke the Competition Act. As a consequence, the judge in civil court, in deciding damages, will also make a decision in regard to the section of the Competition Act that has been invoked.

To date, there have been a limited number of cases that have been brought through such private actions. Also, to date, the decisions made by the civil court in regard to competition matters have had limited impact on competition policy.

- *What is the level of intensity of the judicial review in competition cases? (review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

The jurisdiction of the Council of State is limited to legality of the decision of the Competition Board.

To date, in the majority of instances where the Council of State has reversed a decision of the Competition Board, it has been on the basis of procedural grounds, rather than on the basis of substantive grounds. For example, the Council of State overruled decisions of the Competition Board due to participation of Competition Board members in both the investigation and adjudication stages during enforcement of the Competition Act. The Competition Act was later amended to terminate participation of members of the Competition Board in investigations.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

The predominantly administrative nature of the Competition Act and the interdisciplinary character of competition law imply that the Council of State, composed of judges who do not

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<sup>12</sup> Under general principles of administrative law, applications are deemed to have been rejected if not acted upon by the Competition Board within 60 days.

necessarily have backgrounds in law and may be graduates of various other disciplines such as economics and political science, is better suited to review decisions of the TCA than other judicial bodies. However, it could be argued that lack of training and expertise in competition law and policy issues on the part of the judiciary still persists to some extent. Heavy workload of the Council of State is also a factor having a negative impact on the judicial review process.

Moreover, as there is the strict separation of powers among the organs of the state in Turkey and therefore courts and judges are independent in discharge of their duties, it is considered inappropriate to have direct contact between the TCA and the judiciary. However, the TCA is determined to contribute to the judiciary's knowledge of competition law and policy and hence to the efficiency of the judicial review process. To that end, it resorts to means, such as conferences, academic seminars, and other methods deemed appropriate, to provide information to the judiciary on competition law and policy, and to make known that the TCA would welcome more training provided to judges on competition matters.

## United States of America

### 1. *Questions on appropriate sanctions and remedies:*

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

Our response draws a clear distinction between sanctions (penalties) and remedies, which reflects separate objectives. Remedies are intended to restore competition on a prospective basis when it has been distorted through anticompetitive practices. Sanctions, on the other hand, are needed to deter knowing and willful anticompetitive practices that are of a sort whose anticompetitive nature is obvious.

In the United States, remedies are imposed for civil antitrust violations. “Sanctions” – or “penalties,” the term more commonly used – consisting of fines and jail time are reserved for cartel offenses. The Clayton Antitrust Act provides a private right of action for persons injured by anticompetitive conduct. The law provides that such persons, upon prevailing in court, are entitled to recover treble damages (*i.e.*, three times the amount of established losses), together with costs and attorneys’ fees.<sup>13</sup>

*Civil Remedies:* When violations of the antitrust laws in the United States are established, the primary goal is to impose remedies that seek to “unfetter a market from anticompetitive conduct,” to terminate anticompetitive conduct, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in anticompetitive conduct in the future.<sup>14</sup> The law provides two basic remedies: injunctions to ameliorate the negative effects of the anticompetitive conduct, and damages to compensate those injured by the anticompetitive behavior. Civil penalties and further injunctive relief can be imposed as a sanction for violation of FTC orders and rules, and civil (and criminal) contempt can be imposed for violations of DOJ decrees.<sup>15</sup>

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<sup>13</sup> There are limited exceptions to the treble damage rule, such as in the case where a cartel participant has received leniency in return for cooperating with the government, in which case only single damages may be recovered. The legislation providing the exceptions, the Antitrust Criminal Penalty Enhancement and Reform Extension Act (“ACPERA”), was extended to 2020 by Congress in May, 2010 and signed by the President on June 9, 2010.

<sup>14</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 103 (D.C. Cir. 2001) (en banc) (citations omitted) (quoting *Ford Motor Co. v. United States*, 405 U.S. 562, 577 (1972) and *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 250 (1968)).

<sup>15</sup> In addition, disgorgement of profits obtained as a result of unlawful conduct may be obtained in appropriate cases. See *FTC v. Mylan Labs, Inc.*, <http://www.ftc.gov/opa/2000/11/mylanfin.shtm> (alleged monopolization; stipulated judgment included \$100 million restitution); *United States v. Keyspan Corporation* (S.D.N.Y. 2010). Information

Statutorily, American courts are invested with broad jurisdiction to grant injunctions to prevent and restrain violations, which has been construed to grant courts broad power to craft appropriate remedies.<sup>16</sup> Similarly, the Federal Trade Commission (FTC) is empowered to issue administrative cease and desist orders to prohibit unfair methods of competition.<sup>17</sup> Except in criminal proceedings, courts are not authorized to punish antitrust violators, and relief must not be punitive.<sup>18</sup>

The typical antitrust remedy is an injunction (or cease and desist order, in the case of the FTC) consisting of one or more prohibitory provisions framed to prevent the anticompetitive effects of the unlawful conduct. Such provisions generally prohibit the specific conduct found unlawful as well as like conduct with similar anticompetitive effects. A purely prohibitory injunction is not always sufficient to accomplish these goals and may be supplemented by mandatory remedial provisions that impose affirmative duties that are reasonably necessary to prevent or cure the particular anticompetitive effects the unlawful conduct was found to produce. For example, an injunction requiring divestitures in a merger case may include provisions to ensure that the divested business is maintained as a viable competitor during the divestiture period. It should be noted that drafting such an injunction must be done carefully.

Drafting injunctions to remedy anticompetitive conduct should, on the one hand, offer “an effective deterrent to a repetition of the unlawful conduct” that, on the other hand, does “not stand as a barrier to healthy growth on a competitive basis.”<sup>19</sup> Although conduct not itself unlawful may appropriately be prohibited as part of a remedial decree, great care must be taken to avoid overly broad prohibitory provisions that stifle competition by preventing the dominant competitor from innovating, enhancing efficiency, or offering better value to customers. The prohibitions should therefore be limited to conduct closely related to the anticompetitive conduct at issue.

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on this recent case may be obtained at [www.usdoj.gov/atr/cases/keyspan.htm](http://www.usdoj.gov/atr/cases/keyspan.htm) . See also See also FTC Policy Statement on Monetary Equitable Remedies in Competition Cases, <http://www.ftc.gov/os/2003/07/disgorgement.shtm> .

<sup>16</sup> See *International Salt Co. v. United States*, 332 U.S. 392, 400 (1947).

<sup>17</sup> 15 U.S.C. §53(b). In appropriate cases, this can even include orders to pay redress to consumers.

<sup>18</sup> *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961). See also *International Salt*, 332 U.S. at 401 (“the end to be served is not punishment of past transgressions”); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409 (1945) (a court “may not impose penalties in the guise of preventing future violations”).

<sup>19</sup> *United States v. Crescent Amusement Co.*, 323 U.S. 173, 186 (1948).

*Sanctions for Cartels:* As Christine Varney, Assistant Attorney General for Antitrust, put it recently:

“The Antitrust Division has sought criminal antitrust fines and imprisonment of culpable individuals in response to anticompetitive conduct that is always harmful to competition and consumers, clearly defined, and difficult to uncover. Hard-core cartels engage in the kind of insidiously anticompetitive conduct that implicates many of our enforcement objectives, including punishment of culpable parties. Agreements to fix prices, allocate markets or customers, or restrict output are among the categories of conduct that present no such benefits for consumers. In other words, such conduct is unambiguously harmful.”<sup>20</sup>

Upon conviction for such conduct, individuals may be sentenced to 10 years’ imprisonment and fined up to \$1 million, and firms may be fined up to \$100 million or up to twice the gain or loss from a cartel. There are no sanctions of this sort imposed in civil or administrative cases.

Because these penalties are severe and are expressly intended to deter hard core anticompetitive behaviour, it is noteworthy that the United States does not apply them in cases other than those described above.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

Criminal penalties are imposed by the trial court after a jury renders a verdict finding the defendant guilty. Criminal sentences may be determined by reference to the Federal Sentencing Guidelines. The Guidelines set forth a system for government attorneys to use when determining the criminal fines and jail terms of corporate and individual defendants. The current version of the Sentencing Guidelines Manual is located at <http://www.uscourts.gov/guidelin.htm>. While numerous factors have a bearing on the length of the sentence, at present the average jail sentence in antitrust cases is 24 months. The guidelines were originally intended to be binding

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<sup>20</sup>Christine Varney, “Striving for the Optimal Balance in Antitrust Enforcement: Single Firm Conduct, Antitrust Remedies, and Procedural Fairness,” Remarks as Prepared for the Council on Foreign Relations, New York, October 8, 2009.

on sentencing judges, but the Supreme Court has established that they are only advisory in nature.<sup>21</sup>

The calculation of fines and jail time for antitrust violations is, as noted, guided by the Federal Sentencing Guidelines. The defendant's volume of commerce is the starting point, and it is defined as the defendant's volume of commerce in goods or services that was affected by the violation. In general, we use 20% of the corporate defendant's volume of U.S. affected commerce as a proxy for the pecuniary loss caused by the defendant and as that defendant's base fine. The base fine is then multiplied by minimum and maximum multipliers, as determined from the defendant's culpability score. For individual defendants, the fine range is one to five percent of the defendant's employer's volume of affected commerce. That volume also results in enhancements that help determine an individual defendant's prison range. Departure from the Guidelines fine ranges are possible based on a defendant's substantial assistance with an investigation or prosecution or inability to pay a fine with the Guidelines range.

Once a civil violation of the antitrust law is established in a court proceeding (whether in a case initiated by one of the enforcement agencies or a private plaintiff), the task of devising an appropriate remedy is assigned to the discretion of the judge who tried the case. The court takes into account the nature of the anticompetitive conduct at issue, the harm created thereby, and what will be needed to restore competition to the condition that would have existed absent the violation. The parties are given an opportunity to present their views about what would constitute an appropriate remedy. The injunction is included as part of the court's final resolution of the case. In cases brought before the FTC, a similar procedure is followed in the administrative adjudicatory process.

When the DOJ concludes a civil antitrust investigation by settlement or consent decree, the Tunney Act<sup>22</sup> requires a complaint, proposed settlement, and a competitive impact statement to be filed in federal district court. The Act provides for wide publication of the details of any proposed settlement, and for a period of public comment on the proposal. The statute requires DOJ to consider those comments, and the court must ultimately determine that the settlement is in the public interest before it can take effect. Similarly, when the FTC concludes an

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<sup>21</sup> *United States v. Booker*, 543 U.S. 220 (2005).

<sup>22</sup> 15 U.S.C. § 16.

investigation through an administrative consent order, it places the proposed order on the public record for a period of thirty days and invites comments and views from any interested person.<sup>23</sup>

In private antitrust cases, a jury sets damages after hearing economic evidence produced by the parties about the extent of economic injury. Only “antitrust injury” is compensable. Antitrust injury is injury that was caused by conduct of the sort the antitrust laws were intended to prevent. Once the jury renders a verdict, the court triples the damages and enters judgment in that amount for the plaintiff.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

Crafting any form of civil remedy beyond simply enjoining specific prior unlawful acts may pose challenges because the agency may have to identify specific conduct in which a firm is permitted to engage, which involves a complex, forward-looking assessment. For example, if a dominant firm cuts prices below any reasonable cost benchmark in excluding competition, a remedy may need to set out a specific rule governing future pricing, but that rule must be flexible enough to accommodate a variety of competitive conditions.

Mandatory affirmative provisions can be very useful, but also should be carefully crafted. For instance, compelling a dominant firm to supply an input to rivals may have the short-run effect of making the rivals more effective competitors, but it may also have the long-run effect of undermining rivals’ incentives to self-provide or design around the need for the input. In some situations, it may be more beneficial to consumers over the long run for rivals to develop competing standards or networks than to have additional competitors for a given standard or network, and providing competitors with access to existing standards and networks may effectively reduce competition among standards and networks. In addition, it can be quite resource intensive, and there can be practical difficulties for antitrust agencies and courts to administer such provisions.<sup>24</sup>

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<sup>23</sup> 16 C.F.R. 2.34(c).

<sup>24</sup> *See, e.g., Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 510 U.S. 398 (2001). To avoid doing more harm than good by preventing the firm from engaging in legitimate competition, a remedial decree may have to identify specific conduct in which the defendant is or is not permitted to engage. A remedy must be designed to provide both the defendant and its rivals with incentives to compete aggressively for the benefit of consumers.

Injunctive remedies should prohibit (or require) conduct that is easily monitored. Provisions that, for example, require certain specified affirmative disclosures or prohibit certain exclusive arrangements can be monitored fairly easily. Provisions that prohibit certain conduct depending upon the intent of the party are much more difficult to enforce. Both U.S. agencies actively monitor the compliance of firms subject to remedial decrees to assure that they meet their obligations, and vigorously challenge conduct that violates those orders. Accordingly, the agencies and courts require that those obligations are straightforward and clear.

As for structural remedies, divestiture is the preferred remedy in many Section 7 cases involving mergers and acquisitions. In a case in which single-firm conduct is at issue, however, structural remedies potentially can create inefficiencies. Firms are not always neatly amenable to being dissected, and divestiture might destroy efficiencies that were achieved by the integrated company. As the court of appeals explained in *Microsoft*, structural remedies in Section 2 cases are generally limited to those cases in which there is a close causal connection between the anticompetitive conduct and the firm's dominant position in the market (e.g., the conduct created the firm's monopoly power).<sup>25</sup>

## 2. Questions on judicial review

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

Competition cases in the United States are, in most cases, decided by the United States District Courts, which is the court of first instance in the federal court system.

Antitrust cases brought by the U.S. Department of Justice (DOJ) are filed in the Federal District Courts. Both civil and criminal charges are tried in the District Courts, using the same Federal Rules of Evidence and Federal Rules of Civil or Criminal Procedure applicable in other Federal cases.

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<sup>25</sup> See *United States v. Microsoft Corp.*, 253 F.3d 34, 106-07 (D.C. Cir. 2001) (en banc) (holding that absent such a "causal connection," the firm's unlawful behaviour should be remedied by conduct prohibitions).



Criminal verdicts of acquittal against the DOJ's charges are not appealable in ordinary circumstances, due to the Constitutional guarantee against "double jeopardy." Criminal convictions are appealable by those convicted. Appeals by defendants are as of right and are heard in one of the eleven geographically established U.S. Courts of Appeals. Leave to appeal from the Courts of Appeals may be sought from the United States Supreme Court, which may be granted at the Supreme Court's discretion. In civil antitrust cases, either party may appeal to the appropriate Court of Appeal.

In addition, the Federal Trade Commission has the authority to bring cases administratively. In those cases, the Commission makes an initial decision as to whether there is sufficient evidence that the law has been violated and that the public interest necessitates the bringing of a case. The case is then tried before an Administrative Law Judge. The Administrative Law Judge, although employed by the FTC, is subject to statutory safeguards to ensure that the FTC cannot exert control over his or her decisions. Decisions of the Administrative Law Judge may be appealed by the respondent or the FTC staff to the Commission itself, which hears an appeal of the Administrative Law Judge's decision.<sup>26</sup> The respondent – but not the FTC staff – may then appeal the Commission's decision to the Court of Appeals. As above, decisions of the Court of Appeals may be reviewed on a discretionary basis by the Supreme Court.

The FTC also has the authority to seek preliminary injunctions and, in particular circumstances, permanent injunctions in District Court. These are subject to the same judicial review as described for the DOJ, above.

While outside the scope of this question, U.S. antitrust laws allow for private rights of action. Such cases are civil, not criminal, and use the same courts and procedures as those described for government cases.

- *What is the level of intensity of the judicial review in competition cases? (review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

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<sup>26</sup> It should be noted that when the Commission decides that a case should be brought, it applies a different standard than it applies when it hears an appeal from an Administrative Law Judge's decision. In the former case, the Commission only decides that there is reason to think the law may have been broken and that a proceeding to make a determination to that effect would be justified. In the latter case, the Commission decides the case on the merits, based on the evidence and legal arguments presented.

Judicial review covers both legal and factual issues addressed at the lower level. Questions of law are addressed *de novo* by the Court of Appeals, whereas factual decisions by the trial judge or a trial jury are not disturbed unless “clearly erroneous.” Decisions on the admissibility of evidence may be of a legal or factual nature, and are reviewed according to the same standard of review. At the Supreme Court level, review is limited to particular issues identified by the Supreme Court when it agrees to hear the case.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

One recurring challenge is the volume of litigation in U.S. courts and the need to conserve judicial resources. This is a challenge that the U.S. courts and the agencies generally meet and work well with in government antitrust cases.

Another challenge is the factual and theoretical complexity of some antitrust litigation and the need to present and explain complex technical and economic concepts to non-specialist judges. Successfully presenting a non-cartel competition case to a judge requires effectively communicating economic analysis in a manner understandable to someone who has not necessarily had special training in economics, and who may have no prior experience with competition law. This is often a difficult task. Although the best practices in any particular case will depend on the particularities of the case and applicable procedural rules, the experience of the U.S. enforcement agencies suggests three general principles for efficiently and effectively presenting complex economic analysis to judges.

First, economic analysis should be fully integrated into the presentation of the case. It generally is counterproductive to treat economic analysis as a separate and discrete element of proof. Second, economic analysis should be fully and carefully explained in terms that are understandable, or a judge is not likely to rely on it. Third, the opinions of economists should be firmly grounded in the models and methods of economics and, when appropriate, be empirically validated. Economists are most persuasive when they do not stray outside their areas of expertise and do not adopt an advocacy posture in particular litigation.

## Uzbekistan

### 1. *Questions on appropriate sanctions and remedies:*

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

Competition law in Uzbekistan contains certain provisions in the articles that describe the fining and sanction policies. Additionally there is a government decree that describes the legal procedures that need to be followed during the imposition of the sanctions. All sanctions that are imposed by the Competition authority go through the court system. Only in the cases when the infringing company agrees to the amount of fine, the case does not have to go through the court. The fining system imposes sanctions on judicial and physical persons, including the administrative penalty mechanism.

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

Sanctions are determined by the inspector and approved the by the members of the board.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

Since the fines are very low there are not really any challenges that authorities face while enforcing them. Too bad we don't have the turnover fines, which could efficiently prevent the companies from infringing the competition law. In the current form the competition policy is too weak to confront the large companies. New draft law on competition envisages a lot of nuances to improve the work such as leniency programs, gradual (although from the low base) increase of the fines and etc.

### 2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

Competition cases can be appealed in the court, before the dates shown in the decisions.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

Since there is no special competition courts or tribunals in the country. Every case is a different case (no precedent ruling practiced) and maybe looked up by different judges, which may or may not understand the specifics of competition cases. Therefore the level of intensity depends on the qualification and experience of the judges.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

Lack of political will in the country for the stronger competition policy.

## Zambia

### 1. *Questions on appropriate sanctions and remedies:*

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*

### **Remedies for Mergers and Acquisitions**

The Commission's enforcement efforts target either structural or behavioral (conduct) market issues. The structural relates primarily to mergers which substantially lessen competition or create or strengthen a dominant position. Such structural remedies include; divestiture of an existing, viable, stand-alone business (carve-out) or those that are based on intellectual property rights such as granting non-discriminatory and transparent access to key infrastructure, networks, key technology (including patents, know-how, or other intellectual property rights), and essential inputs. On the other hand, behavioral remedies include measures that facilitate horizontal rivalry (e.g. the Commission imposed behavioral remedies on a monopoly firm in the cement sector after a takeover by giving a condition that the firm should not foreclose the market by entering into exclusive distributorship agreements; controlling outcomes by giving conditions that prohibit parties from operating, engaging or entering into any form of anti-competitive restraints; modifying relations with end-customers (the Commission, as a remedy after a takeover in the cement sector, gave a condition, and the monopoly firm undertook, not to refuse to supply an existing customer without objective justification for the behavior and that refusal to supply should not be used to bring about an unlawful vertical restraint); restricting effects of vertical relationships (in the said cement case, the Commission, as a remedy, gave a condition, and the firm undertook to, not operate, engage or enter into any form of anti-competitive vertical restraints as provided for under Section 7(2) of the Act, without formal notification of such an agreement or arrangement with the Commission).

In Zambia, the law requires that before a merger is consummated, the parties to the merger should seek for authorisation from the Commission.

As a sanction, mergers concluded without authorisation can be nullified upon the Commission moving the Court seeking a nullity. A further sanction is that the parties to such a merger are liable upon conviction to a fine not exceeding K10 million or to five years imprisonment or to

both. The Competition and Fair Trading Act provides for control of mergers and takeovers under Section 8. This section provides that:

“8(1) Any persons who in the absence of authority from the Commission whether as a principal or agent and whether by himself or his agent, participate in effecting-

- (a) a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar goods or providing substantially similar services;
- (b) a takeover of one or more such enterprises by another enterprise, or by a person who controls another such enterprise;

Shall be guilty of an offence and shall be liable, upon conviction, to a fine not exceeding ten million (K10m) or imprisonment not exceeding five years or to both.

Where a merger is authorized on the basis of public interest despite it raising competition concerns, the Commission, on the basis of Section 6(2)(h) of the Act which empowers it **“to do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions...”**, as a way of providing a remedy, demands for undertakings from the merging parties in order to monitor business practices to prevent anti-competitive practices. The Commission may also impose conditions which provide for behavioral or structural remedies.

- In summary, remedies may come in the form of
  - (i) Conditions imposed by the Commission
  - (ii) Undertakings/promises given by the parties to a merger
- Remedies may in turn be:
  - (i) Behavioral
  - (ii) Structural

## **Remedies for Abuse of Dominance**

In cases of abuse of dominant position of market power, the Commission has to establish whether the dominant enterprise has unilateral market power, and if yes, whether the enterprises is “abusing” such market power. The Commission has handled a number of cases under abuse relating to the marketing activities of *Zambian Breweries PLC* and *Zambia Bottlers Limited* by imposing a remedy by way of directing them to cease the abusive conduct.

In a recent case where one firm has been repeatedly abusing its dominant position of market power through imposing territorial restrictions on its distributors, the Commission has recommended its prosecution. As a sanction, the said firm shall be guilty of an offence and liable upon conviction, to a fine not exceeding K10 million or imprisonment not exceeding five years (in case of its directors or officers) or to both. This is the sanction applicable for the offence as stated under the Act.

Section 7(2) provides that:-

**“...enterprises shall refrain from the following acts or behaviour if through abuse or acquisition of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition, or have or are likely to have adverse effect on trade or the economy in general: (e) imposing restrictions where or to whom or in what form or quantities goods supplied or other goods may be sold or exported.”**

The above section does not provide for any sanctions or remedies but Section 16(1) (a) of the Act provides that:-

**“Any person who contravenes or fails to comply with any provisions of this Act or any regulations made hereunder, or any directive or order lawfully given, or any requirement lawfully imposed under this Act or any regulations made hereunder, for which no penalty is provided shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding ten million kwacha or imprisonment for a term not exceeding five years or to both.”**

**Take note that subsection (2) provides that “if the offence is committed by a body corporate, every director and officer of such body corporate,...shall be guilty of that offence provided that no such director, officer...shall be guilty of the offence if he proves on a balance of probability that such offence was committed without his knowledge or consent, or that he exercised all due diligence to prevent the commission of the offence.”**

The Commission’s interpretation of the above provision is that the law gives it discretion on whether to award a remedy, (in the form of an order or directive whose disregard attracts a criminal sanction) or to move the Court for a sanction where a prohibition under the Act has no penalty. In using this discretion the Commission considers various factors such as the market power of the offender, whether the breach (by a particular offender) is of first instance or a repeat as well as the ability of the measure employed to cure the harm caused to the market.

### **Sanctions for Horizontal Agreements**

Conduct prohibited outright under this segment of the *Zambian competition law* are all forms of cartel activity, which include price fixing, market/customer allocation, bid-rigging, production/sales quota arrangements, etc.

Section 9 of the Act provides that:-

**9(1) It shall be an offence for enterprises engaged on the market in rival or potentially rival activities to engage in the practices appearing in subsection (2) where such practices limit access to markets or otherwise unduly restrain competition:**

**Provided that this subsection shall not apply where enterprises are dealing with each other in the context of a common entity wherein they are under common control or where they are otherwise not able to act independently of each other.**

**(2) This section applies to formal, informal, written and unwritten agreements and arrangements.**

**(3) For the purposes of subsection (1), the following are prohibited:**



- (a) trade agreements fixing prices between persons engaged in the business of selling goods or services, which agreements hinder or prevent the sale or supply or purchase of goods or services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services.**
- (b) Collusive tendering;**
- (c) market or customer allocation agreements;**
- (d) subject to the Coffee Act, 1989, allocation of quota as to sales and production;**
- (e) collective action to enforce arrangements;**
- (f) concerted refusals to supply goods and services to potential purchasers; or**
- (g) collective denials of access to an arrangement or association which is crucial to competition.**

As this section creates an offence but does not provide sanctions against offenders, the Commission relies on Section 16(1) (a) of the Act for sanctions which provides that:-

**“Any person who contravenes or fails to comply with any provisions of this Act or any regulations made hereunder, or any directive or order lawfully given, or any requirement lawfully imposed under this Act or any regulations made hereunder, for which no penalty is provided shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding ten million kwacha or imprisonment for a term not exceeding five years or to both.”**

**Take note that subsection (2) provides that “if the offence is committed by a body corporate, every director and officer of such body corporate,...shall be guilty of that offence provided that no such director, officer...shall be guilty of the offence if he proves on**

**a balance of probability that such offence was committed without his knowledge or consent, or that he exercised all due diligence to prevent the commission of the offence.”**

The Commission can apply to court to have any of the above agreements nullified as a remedy following a successful prosecution. As Section 9 clearly creates an offence, It is doubtful whether the Commission has, under this provision, discretion on the basis of Section 16(1)(a) to either award a remedy( in the form of an order or directive, or move the Court for a sanction. The Commission is of the view that an offender under Section 9 is liable to criminal prosecution.

### **Remedies for Vertical Agreements**

While vertical arrangements are prohibited in principle, they may be harmful to both consumers and other businesses if not monitored and controlled. They need to be authorised under the authorisation and or notification process to the Commission on the basis of Section 13(1) of the Act which provides that:-

**“The Commission may authorise any act which is not prohibited outright by this Act, that is, an act which is not necessarily illegal unless abused if that act is considered by the Commission as being consistent with the objectives of this Act.”.**

As a way of providing a remedy, the Commission may, upon authorizing a vertical agreement which is justifiable (based on public interest, efficiency gains, etc), modify the agreements; impose conditions of implementing the agreements or demand that the parties give Undertakings on the basis of Section 6(2)(h) of the Act which empowers the Commission **“to do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions...”** and Section 16(1)(a) from which inference can be drawn that the Commission can give orders or directives as remedies. It is on this basis that as a remedy, such arrangements have been modified or prohibited by the Commission in the clear beer and soft drinks industries.

The Commission can, when it deems appropriate, prosecute a dominant firm which enters into a vertical agreement with its distributor(s) which results in:

- (a) making the supply of goods or services dependant upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;**

- (b) making the supply of particular goods or services dependant upon the purchase of other goods or services from the supplier to the consignee;**
- (c) imposing restrictions where or to whom or in what form or quantities goods supplied or other goods may be sold or exported.**

As Section 7(2) which provides for the above prohibitions does not provide sanctions and remedies, the Commission relies on Section 16(1) (a) of the Act for sanctions which provides that:-

**“Any person who contravenes or fails to comply with any provisions of this Act or any regulations made hereunder, or any directive or order lawfully given, or any requirement lawfully imposed under this Act or any regulations made hereunder, for which no penalty is provided shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding ten million kwacha or imprisonment for a term not exceeding five years or to both.”**

**Take note that subsection (2) provides that “if the offence is committed by a body corporate, every director and officer of such body corporate,...shall be guilty of that offence provided that no such director, officer...shall be guilty of the offence if he proves on a balance of probability that such offence was committed without his knowledge or consent, or that he exercised all due diligence to prevent the commission of the offence.”**

It is important to note here that the Commission has taken cognizance of the fact that imposing criminal sanctions may not be an appropriate measure in dealing with vertical agreements as they may, in certain circumstances be justifiable. The Commission has proposed that the appropriate sanctions for vertical agreements should be fines imposed by the Commission.

Remedies would be appropriate where a party suffers loss as a result of a vertical agreement and in that case the party should institute a claim for damages before a court of competent jurisdiction.

## **Remedies and Sanctions for unfair trading practices – Section 12 of the Act**

### **Remedies**

Unfair trading practices are those that lead to violating consumer rights as provided for under Section 12 of the Act. In order to facilitate quick resolutions to matters, remedies for unfair trading practices may be determined by the Commission on the basis of Section 6(1)(a) which, on inference, gives it discretion to award remedies in the form of orders and directives and Section 6(2)(h) of the Act which, empowers the Commission “**to do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions...**”. For instance in the numerous cases handled by the Commission involving the sale of defective products, the Commission has ordered the trader to either refund the consumer or provide a replacement of the defective product. Such orders or directives have a legal basis emanating from the discretion given to the Commission under Section 16(1)(a) of the Act.

Where traders become adamant and deny liability for a defective product, the Commission may, on the basis of the above sections, refer cases to the Small Claims Court, which has the power to order a refund where the claim amounts to K20 million (approximately USD 4,000) or less and payment of any legal costs incurred as a remedy.

### **Sanctions**

The Commission can, where it deems appropriate (especially in cases where an order or directive will not suffice), prosecute parties that engage in unfair trading practices in which case the court imposes sanctions. One such example is where a consumer suffers injury to health after proper use of a product supplied on the market.

Section 12 of the Act which provides for prohibition against unfair trade practices provides that a person shall not:-

- a) **withhold or destroy producer or consumer goods, or render unserviceable or destroy the means of production and distribution of such goods, whether directly or indirectly, with the aim of bringing about a price increase;**

- b) exclude liability for defective goods;**
- c) in connection with the supply of goods or services, make any warranty-**
  - (i) limited to a particular geographically area or sales point;**
  - (ii) falsely represent that products are of a particular style, model or origin;**
  - (iii) falsely represent that the goods are new or of specified age; or**
  - (iv) represent that products or services have any sponsorship, approval, performance and quality characteristics, components material, accessories, uses or benefits which they do not have;**
- d) Engage in conduct that is likely to mislead the public as to the nature, price, availability, characteristics, suitability for a given purpose, quantity or quality of any products or services; or**
- e) Supply any product which is likely to cause injury to health or physical harm to consumers, when properly used, or which does not comply with a consumer safety standard which has been prescribed under any law.**

As this section does not provide sanctions and remedies, the Commission relies on Section 16 (1) (a) of the Act for sanctions which provides that:-

**“Any person who contravenes or fails to comply with any provisions of this Act or any regulations made hereunder, or any directive or order lawfully given, or any requirement lawfully imposed under this Act or any regulations made hereunder, for which no penalty is provided shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding ten million kwacha or imprisonment for a term not exceeding five years or to both.”**

**Take note that subsection (2) provides that “if the offence is committed by a body corporate, every director and officer of such body corporate,...shall be guilty of that offence provided that no such director, officer...shall be guilty of the offence if he proves on**

**a balance of probability that such offence was committed without his knowledge or consent, or that he exercised all due diligence to prevent the commission of the offence.”**

- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*

Based on Section 8 of the Act which provides that:

**“8(1) Any persons who in the absence of authority from the Commission whether as a principal or agent and whether by himself or his agent, participate in effecting-**

- (c) a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar goods or providing substantially similar services;**
- (d) a takeover of one or more such enterprises by another enterprise, or by a person who controls another such enterprise;**

**shall be guilty of an offence and shall be liable, upon conviction, to a fine not exceeding ten million (K10m) or imprisonment not exceeding five years or to both;**

**The sanction for consummating a merger without authority from the Commission is determined by the Court (in line with the above cited legal provision) at the conclusion of a successful prosecution by the Commission.**

An applicable sanction is that the parties to such a merger are liable upon conviction to a fine not exceeding K10 million or to five years imprisonment or to both.

Where a merger is authorized on the basis of public interest despite it raising competition concerns, the Commission, as a way of providing a remedy, imposes conditions which the merging parties undertake to abide by. The authority’s power to impose conditions and accept undertakings from the merging parties as a remedy is based on Section16(1)(a) which, on inference, gives it discretion to award remedies in the form of orders, directives or requirements

and Section 6(2)(h) of the Act which empowers the Commission “**to do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions...**”

### **Remedies and Sanctions for Abuse of Dominance**

The appropriate remedy/sanction for abuse of dominance is determined by taking into account various factors such as whether the breach is of first instance by the erring party or whether the party is a repeat offender, the extent of the erring party’s market power as well as the extent to which a measure implored by the Commission will bring the wrong to an end. The Commission thus exercises its discretion, based on Section 16(1)(a) in deciding whether to award a remedy, (in the form of an order or directive) or to move the Court for a sanction as the Act does not provide a penalty for this prohibition.

In case of a breach of first instance, the Commission may for instance rely on Section 16(1)(a) which, on inference, gives it discretion to award remedies in the form of orders and directives **and Section 6(2)(h) of the Act which, empowers the Commission “to do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions...”** in imposing remedies.

For instance, the Commission has, in the case of an initial breach, provided remedies by directing erring parties to cease the abusive behavior.

The Commission may, where it deems appropriate, refer cases of abuse of dominance to Court for prosecution. In such cases the court imposes a sanction of a fine not exceeding K10 million or imprisonment not exceeding five years (in case of its directors or officers) or both.

### **Remedies and Sanctions for Vertical Agreements**

An appropriate remedy for vertical agreements is determined by taking into account whether a proposed agreement is justifiable based on grounds advanced by the parties. As a way of providing a remedy, the Commission may, upon authorizing a vertical agreement which is justifiable (based on public interest, efficiency gains, etc), modify the agreements; impose conditions of implementing the agreements or demand that the parties give Undertakings. Section 13(1) of the Act provides that:-

**“(T)he Commission may authorise any act which is not prohibited outright by this Act, that is, an act which is not necessarily illegal unless abused if that act is considered by the Commission as being consistent with the objectives of this Act.”**

Where a proposed agreement is not justifiable and is contrary to the provisions of the Act under Section 7(2) in that it results in:-

- (a) making the supply of goods or services dependant upon the acceptance of restrictions on the distribution or manufacture of competing or other goods; or**
- (b) making the supply of particular goods or services dependant upon the purchase of other goods or services from the supplier to the consignee; or**
- (a) imposing restrictions where or to whom or in what form or quantities goods supplied or other goods may be sold or exported;**

the Commission may prosecute the erring parties and the Court determines the sanction in line with what the law provides.

As Section 7(2) which provides for the above prohibitions does not provide sanctions and remedies, the Commission relies on Section 16(1) (a) of the Act for sanctions which provides that:-

**“Any person who contravenes or fails to comply with any provisions of this Act or any regulations made hereunder, or any directive or order lawfully given, or any requirement lawfully imposed under this Act or any regulations made hereunder, for which no penalty is provided shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding ten million kwacha or imprisonment for a term not exceeding five years or to both.”**

Subsection (2) provides that **“if the offence is committed by a body corporate, every director and officer of such body corporate,...shall be guilty of that offence provided that no such director, officer...shall be guilty of the offence if he proves on a balance of probability that such offence was committed without his knowledge or consent, or that he exercised all due diligence to prevent the commission of the offence.”**



## **Remedies and Sanctions for unfair trading practices – Section 12 of the Act**

Sanctions for unfair trading practices are determined by the Court upon a successful prosecution by the Commission. The applicable sanction is a fine not exceeding K10 million or imprisonment not exceeding five years or both.

In order to facilitate quick resolutions to matters, remedies for unfair trading practices may be determined by the Commission on the basis of Section 16(1)(a) which, on inference, gives it discretion to award remedies in the form of orders and directives and Section 6(2)(h) of the Act which, empowers the Commission “**to do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions...**”. For instance in the numerous cases handled by the Commission involving the sale of defective products, the Commission has ordered the trader to either refund the consumer or provide a replacement of the defective product.

Where traders become adamant and deny liability for a defective product, the Commission may, on the basis of the above sections, refer cases to the Small Claims Court, which has the power to order a refund where the claim amounts to K20 million (approximately USD 4,000) or less and payment of any legal costs incurred as a remedy.

- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

### **(i) Challenges in enforcing sanctions**

#### **a. Anti-Competitive/Restrictive Business Practices**

Under the Act, anti-competitive trade practices are enumerated but no specific sanctions are provided for in dealing with particular conduct and as such reliance is placed on the general provision on sanctions, i.e. Section 16, with the effect that discretion must be exercised by the Commission in either awarding a remedy or moving the Court to impose a sanction. The Commission must therefore exercise this discretion in such a way that remedies are awarded in appropriate cases while criminal prosecution should only be undertaken when appropriate upon looking at each case on its own merit and when there is sufficient evidence as the burden of

proof in criminal matters is high, i.e. beyond all reasonable doubt. Further, the final outcome should ensure that complainants receive satisfactory and appropriate redress.

The Commission has proposed that it should have power to impose fines on erring parties so as to give it more enforcement powers.

#### **b. Mergers and takeovers**

Currently the Act makes it mandatory under Section 8(1) for any persons participating in effecting a merger/takeover or acquisition to obtain authority from the Commission before such takeover is actually effected. Because this section does not prescribe any notification thresholds and is general in nature without providing for categories such as small mergers, intermediate mergers, and big mergers, our understanding as a Commission is that any merger or takeover taking effect in Zambia is subject to notification regardless of market share. However, the current Zambian Competition law does not provide a definition for the terms “merger, takeover or “acquisition” and this has caused uncertainty for parties as they transact in the market and many times the Commission has had to provide arguments to convince parties for the need for authorization in given transactions.

#### **(ii) Challenges in enforcing remedies**

The current law does not clearly provide what remedies may be awarded for violations of the Act except that inference is drawn from Section 16(1)(a) that where no penalty is provided for a specific violation, the Commission may give orders or directives and may make requirements as remedies. The Commission has thus relied on this section in awarding remedies in the form of cease and desist orders, orders for refunds or replacements in the case of sale of defective products or imposing conditions to certain authorized mergers.

#### *2. Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*

Section 15 of the Act provides that:

**“Any person aggrieved by a decision of the Commission made under this Act or under any regulations made hereunder may, within thirty days after the date on which a notice of that**

**decision is served on him, appeal to the High Court subject to a further appeal to the Supreme Court.”**

Based on the above provision, a decision of the Commission can only be challenged by way of appeal to the High Court, subject to a further appeal to the Supreme Court. This position was entrenched in the case of **BP Zambia Plc and Zambia Competition Commission** 2007/HPC/1023 in which the aggrieved party sought relief from the High Court by way of judicial review. The Judge held that as statute had provided that an aggrieved party may appeal; judicial review was not an appropriate mode to challenge the decision of the Commission.

A party who is however dissatisfied with a decision of the Commission may prior to appealing to the High Court, ask for the Commission to review its decision. The Commission has on a number of occasions reviewed its decision at administrative level.

- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*

As already stated above, judicial review is not applicable in competition and consumer cases handled under the Competition and Fair Trading Act at the High Court level in Zambia.

A number of cases have however been reviewed at administrative in relation, especially to the Commission’s lapse in adhering to the principles of natural justice in the course of investigations. In such cases the Commission has taken appropriate measures to remedy its errors so as not to prejudice the parties’ rights under the principles of natural justice.

Perhaps it was the intention of the legislature to ensure that the judicial process was administratively done at the Commission level where there is a two-tier institutional structure, being, the Secretariat, which is the investigating wing, and the Board of Commissioners, which is the adjudicative wing. The Board is expected to refer a case back to the investigating wing to do a proper investigation and/or obtain further information, or comply with a due process before the investigation report is finally re-submitted to the Board for adjudication. Once this process has been administratively exhausted, the position of the legislature is thus that the option for the aggrieved would be to appeal against the decision as opposed to seeking a review of the decision. However, even in the event that both the Secretariat and the Board do not follow, e.g. the principles of natural justice in the investigation and adjudication process respectively, the High

Court may in the worst case, order that the Commission reviews its decision. In the quoted case of **BP Zambia PLC v Zambia Competition Commission**, the applicant went by way of judicial review and claimed, inter alia, that the Commission had not given the complainant the right to be heard. The Court however dismissed the judicial review application on a technicality that the mode of commencing the grievance was not as provided for under Section 15 of the Competition and Fair Trading Act. Following this, it would not be far fetched that the proper place for the complainant would have been to apply to the Commission itself to review its decision by affording the complainant a hearing. All this review process, we reckon, should be exhausted administratively.

- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

As decisions by the Commission are reviewed at administrative level, the procedure, rights and obligations of all parties to the review process should be provided for by the Commission in order to ensure transparency, certainty and fairness.

The challenge is that the Commission has not yet devised nor published regulations on the procedure for review and as such there is no indication as to the time frame within which an application for review should be made after an initial decision; on what grounds an application for review will be granted; or the time frame within which the Commission concludes the review process, which is an additional challenge.

The lack of regulations on the procedure for review could be a ground for challenging the review of a case by the Commission, although again, as expressly provided for under paragraph 4(1) of the First Schedule to the Act, the Commission can legally “regulate its procedure” And in so doing, the Common Law understanding is that it would be alive to the rules of natural justice as it enforces the law.

# Zimbabwe

## 1. *Questions on appropriate sanctions and remedies:*

- *Please describe the system of sanctions and remedies available under the competition law in your country as well as its application in practice.*
- *Please explain how the appropriate sanction/remedy is determined in a given competition case.*
- *Please describe any challenges that may be encountered when enforcing sanctions/remedies in competition cases.*

## 2. *Questions on judicial review:*

- *Please describe the system of judicial review/appeal procedure of decisions in competition cases taken by the competition authority or sector regulators in your country.*
- *What is the level of intensity of the judicial review in competition cases? (Review of legal assessment only, review of legal and factual assessment, admissibility of new evidence, etc.)*
- *What are the main challenges faced by the competition authority, the appellant, third parties and the review body itself in the judicial review process?*

In Zimbabwe, competition law has been applied in virtually all sectors, namely: beverages; dry cleaning and laundry; mining; financial services; agriculture; transport; health services (ambulance, medical aid, kidney dialysis, pharmaceutical); tobacco; utility; cement; timber; retail; furniture; telecommunication; text book; clothing; hospitality; cotton; music industry; petroleum; bread industry; milling industry; stationery; fast foods; real estate and publication. This report centers mainly on sanctions and remedies used in Zimbabwe.

For effectiveness of competition law, it is essential to have sanctions for breaches of the same law. The Competition Act [*Chapter 14:28*] of Zimbabwe provides for measures to be taken against a number of anti-competitive practices and other situations like failure to honour undertakings given to the Commission and also failure to comply with orders made by the Commission. However, there is no clear cut position regarding treatment of issues such as: an enterprise/person failing to supply documents or information within the set time; and provision of information which is false/misleading to some material degree, to the Commission.

## Objectives

The purposes of sanctions and remedies include among other things: stopping anti-competitive practices from continuing or an anti-competitive merger from proceeding; penalizing perpetrators of offences; deterring other firms from engaging in similar anti-competitive conduct;

ensuring no repetition of the offence by the same companies; and correction of misleading information provided to the public by the perpetrators.

The type of sanction imposed depends with the nature of the offence at stake. Therefore, it is imperative to appropriately match sanctions and remedies to corresponding offences.

The Competition Act [*Chapter 14:28*] provides for the following sanctions for suspected breaches of competition law:

- Fines
- Imprisonment
- Interim or staying orders
- Cease and desist orders
- Divestiture

### Remedial Orders

The Commission, at any time after embarking on an investigation, may in terms of section 29 publish a notice doing either or both of the following-

- Prohibiting or staying any restrictive practice or merger that is subject of the investigation;
- Directing that any action be taken which in the Commission's opinion will prevent or stay any restrictive practice or merger that is the subject of the investigation.

### Orders against Restrictive Practices in Terms of Section 31(1) of the Act

- Prohibiting any person named in the order, or any class of persons, from engaging in the restrictive practice or from pursuing any other course of conduct which is specified in the order and which, in the Commission's opinion, is similar in form and effect to the restrictive practice.
- Requiring any party to the restrictive practice to terminate the restrictive practice, either wholly or to such extent as may be specified in the order, within such time as is specified therein.
- Requiring any person named in the order, or any class of persons, to notify prices to the Commission, with or without such further information as may be specified in the order.
- Regulating the price which any person named in the order may charge for any commodity or service (provided that the Commission shall not make such order unless it is satisfied that the price being charged by the person concerned is essential to the maintenance of the restrictive practice to which the order relates).

- Prohibiting any person named in the order, or any class of persons, from notifying persons supplying any commodity or service of a price recommended or suggested as appropriate to be charged by those persons.
- Generally, making such provision as, in the opinion of the Commission is reasonably necessary to terminate the restrictive practice or alleviate its effects.

Orders made by the Commission as remedial action on anti-competitive concerns arising from mergers and monopoly situations [section 31(2) refers] are varied and are outlined below:

- Declaring it to be unlawful, except to such extent and in such circumstances as may be provided by or under the order, to make or to carry out any agreement or arrangement which is specified in the order and which, in the Commission's opinion, will lead to or maintain the merger or monopoly situation.
- In the case of a monopoly situation, requiring any person who exercises control over the business or economic activity concerned to take such steps as are specified in the order to terminate the monopoly situation within such time as is specified in the order.
- Prohibiting or restricting the acquisition by any person named in the order of the whole or part of any undertaking or assets, or the doing by that person of anything which will or may result in such an acquisition, if the acquisition is likely, in the Commission's opinion, to lead to a merger or monopoly.
- Requiring any person to take steps to secure the dissolution of any organization, whether corporate or unincorporated, or the termination of any association, where the Commission is satisfied that the person is concerned in or a party to the merger or monopoly situation.
- Requiring that, if any merger takes place or any monopoly situation exists, any party thereto who is named in the order shall observe such prohibitions or restrictions in regard to the manner in which he carries on business as are specified in the order.
- Generally, making such provision as, in the opinion of the Commission is reasonably necessary to terminate or prevent the merger or monopoly situation, as the case may be, or alleviate its effects.

An order made in respect of a merger or monopoly situation may provide for any of the following matters-

- (i) transfer or vesting of property, rights, liabilities or obligations;

- (ii) The adjustment of contracts, whether by their discharge or the reduction of any liability or obligation or otherwise;
- (iii) The creation, allotment, surrender or cancellation of any shares, stocks or securities;
- (iv) The formation or winding up of any undertaking or the amendment of the memorandum or articles of association or any other instrument regulating the business of any undertaking.

Any order shall be in writing and served on every person named therein. If the order applies to persons generally or in case where it is impractical to serve the order individually on all persons, the Commission shall cause the order to be published in the *Gazette*.

For enforcement purpose, orders issued by the Commission on restrictive practices can be lodged with the High Court of Zimbabwe to have the effect of a civil judgment of the High Court. Failure to comply with the provisions of an order attracts a fine or imprisonment.

#### *Case Example*

The Commission at its 31<sup>st</sup> Ordinary Meeting held on 28 March 2008 approved the acquisition of Burley Marketing Zimbabwe Limited (BMZ), one of three tobacco auction floors in Zimbabwe, by Farm-a-Rama (Private) Limited on condition that Farm-a-Rama divests itself from Chemco Holdings Limited, which has ownership and directorship linkages with Tobacco Sales Floor Limited, another tobacco auction floor, and sever any direct or indirect linkages.

Farm-a-Rama's shareholding and directorship in Chemco Holdings linked it to Tobacco Sales Floor through TSL Limited, the majority owner of Chemco Holdings and 100% owner of Tobacco Sales Floor. That would create an anti-competitive relationship between BMZ, through its acquisition by Farm-a-Rama, and Tobacco Sales Floor.

The need to impose conditions on the approval of the acquisition of BMZ by Farm-a-Rama to address the real competition concerns that would arise from such acquisition therefore still existed. What could be considered was the principle of proportionality as applied in competition analysis. The proportionality principle concerns remedies that may be taken against violations of competition law. Under the principle, any remedial action (structural or behavioral) should be optimal, i.e., should be proportional to the violation and should not over-punish or under-punish the offender.



The objective of the Commission's conditions on the approval of the acquisition of BMZ by Farm-a-Rama was to ensure that BMZ continues to operate independently from Tobacco Sales Floor without influences from Farm-a-Rama's shareholding and directorship links with Chemco Holdings and TSL Limited, the owners of Tobacco Sales Floor. The Commission's condition on the approval of the merger was therefore that Farm-a-Rama should divest itself from Chemco Holdings Limited and severs any direct or indirect shareholding or directorship linkages with Tobacco Sales Floor. The question therefore was whether by stipulating that Farm-a-Rama should completely divest itself from Chemco Holdings the condition over punishes Farm-a-Rama vis-à-vis what it aims to achieve.

The condition on the approval of the merger was amended to read that Farm-a-Rama (Private) Limited should immediately reduce its shareholding in Chemco Holdings Limited to a level that does not entitle it to seat on the Board of Directors of Chemco Holdings Limited, and maintain that shareholding at that level.

For proceeding to implement the merger, a penalty of two per centum (2%) of both of the merging parties' annual turnover in Zimbabwe as reflected in the accounts of the parties' for the preceding financial year was imposed on Farm-a-Rama (Private) Limited in terms of section 34A(4) of the Competition Act [*Chapter 14:28*]. The penalty levied taking into account that it was deterrent enough penalty on the breach of the merger notification provisions of the Act.

The Zimbabwe Competition Commission considers both the public interest issues and competition concerns when determining the appropriate sanctions/remedies in any given case. It takes into account everything it considers relevant in the circumstance and has regard to the desirability of-

- (i) Maintaining and promoting effective competition between persons producing or distributing commodities and services in Zimbabwe; and
- (i) Promoting the interests of consumers, purchasers and other users of commodities and services in Zimbabwe, in regard to the prices, quality and variety of such commodities and services; and
- (ii) Promoting through competition, the reduction of costs and the development of new techniques and new commodities, and of facilitating the entry of new competitors into existing markets.

In the event of a breach of the merger notification provisions of the Competition Act [*Chapter 14:28*] of Zimbabwe the following considerations are taken into account in terms of section 34A (5) of the Act when determining the appropriate sanction or remedy:

- The nature, duration, gravity and extent of the contravention
- Any loss or damage suffered as a result of the contravention;
- The behavior of the parties concerned;
- The market circumstances in which the contravention took place;
- The level of the profit derived from the contravention;
- The degree to which the parties have co-operated with the Commission; and
- Whether the parties have previously been found in contravention of the Competition Act.

Current fine levels which are determined by the High Court are not high enough to act as deterrent measures to the anti-competitive conducts. The following sections of the Act [*Chapter 14:28*] refer:

- For violating a prohibition/staying order: section 29(7) - fine not exceeding level seven or imprisonment for a period not exceeding one year or both such fine and such imprisonment.
- Concerning enforcement of orders: Section 33(7) – fine not exceeding level nine or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.
- Failure to apply for Authorization of a restrictive practice to the Commission: Section 35(3) – fine not exceeding level seven or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.
- Unfair Business Practices: section 42(3) for an individual – fine not exceeding level twelve or to imprisonment for a period not exceeding two years or to both of the two; for an organization – fine not exceeding level fourteen
- For failure to furnish the Commission with information: section 45(2) – fine not exceeding level six or to imprisonment for a period not exceeding six months or to both

- On powers of entry and inspection: section 47(3) – fine not exceeding level six or to imprisonment for a period not exceeding six months or both.
- *Exception* where merging parties fail to notify the Commission and proceed to consummate the merger: section 34A (4) a penalty not exceeding ten *per centum* of either or both of the merging parties’ annual turnover in Zimbabwe for the preceding financial year.

#### JUDICIAL REVIEW:

According to section 40 of the Competition Act:

- (1) Any person who is aggrieved by a decision of the commission under Part IV IVA, IVB or V may appeal against it to the Administrative Court.
- (2) Any appeal under subsection (1) shall be made within such period and in such form and manner as may be prescribed in rules made under the Administrative Court, 1979 (No. 39 of 1979).

Since the inception of the Commission, there has been one challenge to the Commission’s order.

In particular, the staying order issued against Cimas in May 2010. In this case Cimas medical aid society was refusing to reimburse claims for the dialysis treatment received from B. Braun Avenues Centre, a private institute, whilst paying for treatment of members at Harare Haemodialysis Centre (HHC), its own which is also a private institute. Cimas admitted that it was not paying for haemodialysis treatment at B. Braun Avenues Centre citing as one of the reasons that it was not obliged according according to Statutory Instrument 330 of 2000.

The Commission published in the Government Gazette, dated 7 May 2010, a prohibition notice prohibiting the alleged restrictive practice at the same time calling on Cimas to immediately reimburse medical claims made by its members for dialysis procedures done at B. Braun Avenues Centre using applicable rates pending the outcome of full-scale investigation.

On 10 May 2010 Cimas wrote to the Commission demanding the revocation of the prohibition order in terms of section 29 (4) of the Competition Act [*Chapter 14:28*]. On 13 May 2010, through the High Court, they filed an urgent chamber application to stay the Commission’s prohibition order on the following grounds:

- (i) That the prohibition order is illegal in that ,in issuing the same the Commission exercised powers which are not conferred upon it by the Competition Act;

- (ii) That there was procedural impropriety in that the Commission in handling this matter has effectively issued what is a final order on the basis of what it refers to as “ preliminary investigations” and what it saw as a “prima facie case”; and
- (iii) That the Commission in issuing the prohibition order effectively assumed the role of a court of law.

On 18 May 2010 the Commission filed an opposing affidavit with the High Court. On 19 May 2010 the Urgent Chamber Application was set down before Justice J. Musakwa. The Judge ruled in favour of the Commission. Cimas has appealed at the Supreme Court against the High Court ruling.