

# CROSS-COUNTRY SURVEY OF THE DISCRETION OF COMPETITION AUTHORITIES IN THE COURSE OF THEIR ENFORCEMENT ACTIVITIES

Nicolas PETIT\*

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## Introduction

The discretion vested in competition authorities (“CAs”) belongs certainly to the hall of fame of the most researched competition law topics. For several decades, the legal and economic literature has indeed been replete with debates over CAs’ discretionary choices in respect of the substantive appraisal of firms’ conduct. By contrast, however, the organizational, procedural and institutional dimension of CAs’ discretion has garnered much less interest.

In this context, the purpose of this international report (the “Report”) is to assess whether competition agencies *do*, and in turn “*should [...] enjoy an unfettered discretionary power in the context of the investigation of competition law infringements*” or whether their “*margin of discretion [should] be subject to certain limits*”.<sup>1</sup> To this end, a comprehensive questionnaire (Annex I) was sent to 16 national experts in early 2009.<sup>2</sup>

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\* Lecturer in Competition Law and Economics, Co-director of the Institute for European Legal Studies (IEJE) and Director of the LL.M in Competition and IP Law, University of Liege (ULg). Executive Secretary of the Global Competition Law Centre (GCLC) of the College of Europe. The author would like to thank E. FEGATILLI, N. NEYRINCK and D. HENRY for their helpful comments.  
[Nicolas.petit@ulg.ac.be](mailto:Nicolas.petit@ulg.ac.be)

<sup>1</sup> This report has been prepared for the International congress of the Ligue Internationale de Droit de la Concurrence (“LIDC”), which will take place on 22-25 October 2009 in Vienna. It seeks to answer to Question A: “*Should a competition authority enjoy an unfettered discretionary power in the context of the investigation of competition law infringements, or should its margin of discretion be subject to certain limits?*”. This report does not intend to provide an overview of the investigative techniques available to CAs.

<sup>2</sup> The author wishes to express his gratitude to all the national experts for their excellent reports. The jurisdictions covered in this Report (and national reporters) are: Italy (Caterina GASTALDI), Austria (Ursula PIRKO), Lithuania (Lauras BUTKEVICIUS), Latvia (Ieva BERZINA-ANDERSONE), Germany (Meinrad DREHER), Japan (Masashige OHBA), China (Jiang JIANG), Czech Republic (Vlastislav KUSÁK), Spain (Javier GUILLÉN), Switzerland (Patrick L. KRAUSKOPF), Hungary (Zoltán HEGYMEGI-BARAKONYI), Belgium (Evi MATTIOLI), France (Michel PONSARD et Nizar LAJNEF),

Through descriptive rather than evaluative questions, it sought to elicit the “*revealed preferences*” of national legislation and case-law as to if, and how, the discretion of a competition authority should be framed.<sup>3</sup>

The present Report conveys the results of this empirical survey and formulates public policy recommendations. It seeks, to the extent possible, to identify a set of consensual, representative, best practices. However, it also takes the liberty to make a number of innovative proposals on unsettled issues.

This Report is divided into five sections. Section I frames the main conceptual issues arising from CAs’ discretion in the context of their investigative duties (I). Section II focuses on the discretion of CAs in the setting of their detection policy (“*detection discretion*”). Section III discusses the discretion of CAs in selecting specific enforcement targets (“*target discretion*”). Section IV reviews the discretion of CAs in initiating infringement proceedings (“*process discretion*”). Section V focuses on the discretion of CAs in terminating investigations (“*outcome discretion*”).

## **I. Conceptual Framework for the Analysis of Competition Authorities’ Discretion**

In its simplest, conventional, understanding, the concept of discretion refers to the ability of a CA to make a “*choice*” over a “*significant aspect of an issue*”.<sup>4</sup> From this definition, one may infer that CAs’ discretion is multifaceted. Most CAs enjoy, for instance, a certain degree of discretion in respect of the substantive appraisal of firms’ conduct. In addition to this, CAs may also enjoy discretion over a range of organizational (for instance, the amount of resources to allocate to a specific case), procedural (for instance,

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Sweden (Henrik NILSSON), the United Kingdom (Maya LESTER), Estonia (Kaupo LEPASEPP), Luxembourg (Gabriel BLESER and Anne DOSTERT) and the European Union (Valeria ENRICH and Carmen CAMPO).

<sup>3</sup> In line with the “*revealed preferences theory*” in the field of economics (the preferences of consumers can be revealed by their purchasing habits), the present report considers that the preferences of the lawmakers on this issue can be revealed by the applicable enforcement rules. *See*, on this theory, P. SAMUELSON, “A Note on the Pure Theory of Consumers’ Behaviour”, (1938), *Economica* 5:61-71.

<sup>4</sup> *See* J. BELL, “Discretionary Decision-Making: A Jurisprudential View” in K. HAWKINS (ed.), *The Uses of Discretion*, Oxford: Clarendon, 1992.

the hearing of interested parties), and institutional (for instance, the type of decision to adopt in a given case) matters.

The devolution of discretionary powers to CAs traditionally hinges on three different justifications. First, from a public administration standpoint, a primary reason for delegating discretion to CAs is due to their specialized knowledge or expertise, as compared to elected politicians or other governmental organs.<sup>5</sup> Put simply, CAs are deemed best-placed to make decisions in what is often described as an inscrutable discipline. Second, from a legal standpoint, the discretion of CAs is often viewed as a necessary corollary of their “*independence*”.<sup>6</sup> Entrusting CAs with discretionary powers erects roadblocks against the risks of undue interference from executive and majoritarian organs. Third, from an economic standpoint, most CAs enjoy limited financial, technical and human resources. Faced with trade-offs, they must be able to make optimally efficient decisional, procedural and organizational arrangements, *i.e.* those which achieve the greatest economic return at the lowest possible cost.<sup>7</sup>

This being said, the delegation of discretionary powers to CAs yields risks of severe institutional failures which have been denounced – sometimes with little nuance – by public choice theorists: private capture, revolving door practices, idle enforcement policy,

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<sup>5</sup> See also the point made by A. OGUS, “Regulatory Institutions and Structures”, *Annals of Public and Cooperative Economics*, Vol. 73, pp. 627-648, 2002: “*Expertise can be concentrated and accumulated in specialised agencies in a way which is not always possible with government bureaucracies; and if the agency is also responsible for enforcement, that experience can beneficially feed back into the rule-making process*”.

<sup>6</sup> See Note by the UNCTAD Secretariat, *Independence and accountability of competition authorities*, TD/B/COM.2/CLP/67, 14 May 2008: “*The degree of freedom with which the competition authority has in its daily business of enforcing competition law and taking decisions is usually interpreted to mean that the competition authority is not subject to routine direct supervision by Government and has been granted all the necessary power to fulfill its tasks*”.

<sup>7</sup> See L.-H. RÖLLER “Economic Analysis and Competition Policy Enforcement in Europe” in P. A. G. VAN BERGEIJK and E. KLOOSTERHUIS (Eds), *Modelling European Mergers: Theory, Competition Policy and Case Studies*, Edward Elgar, Cheltenham, 2005 (“*Given scarce resources, however, an agency needs to allocate its priorities such that the expected return is highest. In other words, assuming a consumer standard, resources should be devoted to cases and activities where the expected loss to consumers is highest*”.); A. SANDMO, “Towards a Competitive Society? The Promotion of Competition as a Goal of Economic Policy”, Ch. 1 in E. HOPE (ed.), *Competition Policy Analysis*, Routledge, UK: London, 2000 (“*All acts of policy interference are costly, and interference should therefore be based on a cost benefit analysis. With limited resources on the part of the competition authority, priority should be given to interference in markets where the marginal efficiency gain, relative to the marginal cost of interference, is the greatest*”).

populism-driven initiatives, etc.<sup>8</sup> To alleviate those concerns, the discretion of CAs may thus be flanked by two sets of restraining mechanism (which may apply to the entire range of parameters over which CAs' discretion unfolds). First, legislation may *ex ante* seek to influence, steer or curb CAs' discretion through substantive and procedural obligations, decisional criteria, incentives, etc.<sup>9</sup> For instance, the discretion of a CA to choose between a settlement decision and a prohibition decision (“*outcome discretion*”) may be constrained by *ex ante* mandatory substantive criteria.<sup>10</sup> Second, CAs' discretion may be controlled *ex post*, through judicial review, reporting requirements, etc.<sup>11</sup> For instance, the discretionary decision of a CA to dismiss a complaint on ground of lack of priority (“*target discretion*”) may be challenged before a court of law.

A common, noteworthy, feature of these mechanisms is that they are external in nature. Both *ex ante* and *ex post* controls originate in regulations adopted by the legislative or, as the case may be, by the executive. This is important because, as will be seen below, some CAs' measures which could be interpreted as the exercise of an internal discretionary power are in fact the consequence of external control mechanisms. This is, for instance, the case of provisions setting a limitative list of criteria for the rejection of complaints. Whilst, in rejecting complaints, the CA displays a certain sense of discretion, it often does so on the basis of mandatory criteria which limit its margin of manoeuvre.

Striking the optimal balance between discretion and control is a notoriously daunting task. To take only the example of *target discretion*, it is certainly sensible, from a public policy standpoint, to entitle a CA to allocate its limited resources to cases where the expected loss to consumers is the highest and, in turn, to dismiss *prima facie* cases of lesser economic significance. Nevertheless, as with any other body of law, competition

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<sup>8</sup> See F. McCHESNEY and W. SHUGHART II, *The Causes and Consequences of Antitrust – The Public Choice Perspective*, The University of Chicago Press, 1995.

<sup>9</sup> See M. BUSUIOC, “Accountability, Control and Independence: The Case of European Agencies”, (2009), Vol. 15, No. 5, *European Law Journal*, pp. 599-615.

<sup>10</sup> In the European Community “EC”, for instance, Regulation 1/2003 provides that commitments decisions (referred here to as “settlements”) “*are not appropriate in cases where the Commission intends to impose a fine*”. See Recital 13 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1, 4.1.2003, p. 1–25.

<sup>11</sup> *Idem*.

rules enshrine rights and duties which cover to an (almost) equal extent all markets, sectors, firms, consumers.<sup>12</sup> Every single natural and/or legal person subject to unlawful anticompetitive harm should thus be able to benefit, in equal terms (process, remedies, etc.), from the protective umbrella of the competition agencies.

To address the issue of CAs' discretion in the investigation of competition law infringements, this Report focuses on four successive areas where CAs may be entitled to make choices, *i.e.* detection of infringements, selection of enforcement targets, initiation of infringement proceedings and outcome of the case. For each of those parameters, this Report reviews whether CAs *do* enjoy discretion and then discusses whether they *should*.

## II. Competition Authorities' Discretion in Devising a Detection Policy ("Detection Discretion")

### A. Preliminary Remarks

The definition of a "*detection policy*" is the first area where CAs may enjoy a certain margin of discretion. According to a conventional presentation, CAs can follow two approaches with a view to unearthing anticompetitive practices. First, CAs may rely on complaints, leniency applications, and referrals by third parties (natural and legal persons, public authorities, other competition and regulatory agencies). This approach has been labeled the "*reactive*", "*bottom-up*" or "*ex post*" approach. Second, CAs may attempt to detect anticompetitive conduct on its own motion, through *ex officio* market monitoring based on economic criteria.<sup>13</sup> This approach has been termed the "*pro-active*", "*top-down*" or "*ex ante*" approach.

In recent years, CAs' discretion over detection policies has received increased attention from scholars and officials. Whilst those two approaches are not mutually exclusive, several observers have indeed voiced concerns that, with the success of leniency

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<sup>12</sup> Certain countries occasionally insulate entire sectors from the purview of the competition laws.

<sup>13</sup> See, on this, P. GROUT and S. SONDEREGGER, "Predicting Cartels", *Economic Discussion Paper*, (2005) OFT 773, OFT, London.

programmes, CAs could in their discretion cease to try to detect anticompetitive conduct on their own motion and “concentrate their scarce resources exclusively on the prosecution of leniency or complaint based cases”.<sup>14</sup>

B. Do CAs enjoy an Unfettered Discretion in devising their Detection Policy? – Empirical Findings

In general, CAs tend to enjoy discretion in devising their *detection policy*. All the respondents have indicated that the local CA could avail itself of both the *reactive* and the *pro-active* approaches. No mandatory rule seems to impose the selection of one detection method over the other. This finding is confirmed by the fact that, recently, several CAs have sought to recalibrate their detection policy. In Belgium, for instance, there has lately been a slight increase in the number of *ex officio* cases.<sup>15</sup>

This being said, the discretion of CAs is often curbed by indirect constraints which may tip the balance towards one type of detection policy in favour of another. In some countries, the CA may be induced to follow a reactive detection policy. This is, for instance, the case in countries where the CA is under a legal duty to respond to all complaints, subject possibly to heavy requirements to give reasons, tight deadlines and intrusive judicial review standards (for instance, Sweden, Lithuania, Latvia, Estonia).<sup>16</sup> In such jurisdictions, reactive detection techniques consume a large share of the CA’s resources,<sup>17</sup> and thus leave little scope for pro-active approaches.<sup>18</sup> Similarly, if the

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<sup>14</sup> See H-F. FRIEDERISZICK and F.-P. MAIER-RIGAUD, “Triggering Inspections Ex Officio: Moving Beyond a Passive EU Cartel Policy” (2008), *Journal of Competition Law and Economics*, Vol. 4, No. 1; J. E. HARRINGTON, Jr., “Corporate Leniency Programs and the Role of the Antitrust Authority in Detecting Collusion”, *Competition Policy Research Center Discussion Paper*, January 2006, CPDP-18-E.

<sup>15</sup> See National Report for Belgium, ¶8: “Since 2004, however, the annual reports show a substantial increase in the number of *ex officio* investigations”. However, the classification of investigations as *ex officio* is based on a disputable criterion. As explained in the report, “investigations started after a leniency application are also considered *ex officio*”. Following a similar interpretation presumably, the French report also states that with the introduction of a leniency programme, the number of *ex officio* proceedings has increased. See National Report for France, p.8.

<sup>16</sup> In the UK, a similar obligation arises in respect of “*super complaints*”. Those are complaints lodged by a designated consumer body by the OFT, to which the OFT must respond within 90 days. See National Report for the UK, p.19.

<sup>17</sup> This observation appeared in the National Report for Belgium, where it is explained that it is clearly impossible to have a pro-active competition policy, when there is an “*obligation to assess all complaints and requests when only limited resources are available*”. See National Report for Belgium, p.15.

legislation provides for referral systems (from other CAs, courts, sector-specific regulators, public entities, and, more importantly, an executive organ such as the ministry for economics), the CAs' ability to engage in pro-active detection activities may be inhibited.<sup>19</sup> Whilst it is true that, in some jurisdictions, referrals do not account for a large share of the CA's activity (for instance, in Germany and Switzerland),<sup>20</sup> they may nonetheless limit a CA's discretion if there is a duty to start a formal investigation upon referral (for instance, in Belgium and Hungary), or when the referral originates from a minister with significant political influence (for instance, in Lithuania).<sup>21</sup>

In some countries, the legislation explicitly displays a significant interest for pro-active detection, for instance in setting out *ad hoc* provisions on *ex officio* sector inquiries. The adoption of such specific rules conveys the signal that, at least in the eyes of the legislator, pro-active *ex officio* detection matters (for instance, in the UK, Germany, Spain, Sweden, Italy, Belgium, Hungary, Austria).<sup>22</sup>

Overall, and subject to the constraints discussed above, CAs thus tend to enjoy a significant discretion in setting their detection policy.

C. Should CAs enjoy an Unfettered Discretion in devising their Detection Policy? – Policy Recommendations

1. Assessment

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<sup>18</sup> This explains why some organizations qualify complaints as non discretionary work, by contrast to *ex officio* or sector inquiries, which have been labeled discretionary work. See International Competition Network, Competition Policy Implementation Working Group, *Seminar on Competition Agency Effectiveness – Summary Report*, Brussels, January 2009, p.38.

<sup>19</sup> This is actually provided for in a majority of jurisdictions (*e.g.*, Czech Republic, Germany, Belgium, Lithuania, Latvia, Estonia, Italy, the UK, France, Japan, Switzerland, etc.).

<sup>20</sup> See National Report for Switzerland, p.2, where referrals are said to represent 5% of the total number of cases. See National Report for Germany, p.2, which indicates that referrals do not play a significant role.

<sup>21</sup> See National Report for Lithuania, p.9 which takes the example of an investigation into the retail fuel sector which had been referred to by the Ministry, and which exhibited a strong political flavour. See also National Report for Belgium, p.26, which indicates that if the Minister for economics asks for a sector inquiry, the Belgian CA has the *duty* to investigate.

<sup>22</sup> This being said, most CAs are able to conduct investigations into industrial sectors regardless of the existence of *ad hoc* provisions.

In line with the concerns recently voiced in academic literature, this Report submits that the significant degree of detection discretion enjoyed by CAs is not entirely apposite. Because the regulatory framework does not incentivize, let alone require, CAs to carry out pro-active detection approaches, most CAs have – deliberately or not – focused their resources on reactive detection techniques and, in particular, to the treatment of complaints.<sup>23</sup> This is, for instance, the case of Austria,<sup>24</sup> Spain,<sup>25</sup> Italy,<sup>26</sup> France,<sup>27</sup> Belgium,<sup>28</sup> Hungary,<sup>29</sup> Lithuania,<sup>30</sup> Latvia,<sup>31</sup> Sweden,<sup>32</sup> Switzerland,<sup>33</sup> and Estonia.<sup>34</sup> This unsatisfactory state of affairs may find itself further compounded by the mushrooming of leniency programmes, which tend to place a high priority on *reactive* investigations initiated through immunity applications.<sup>35</sup> By contrast, three countries (Austria, Germany and to a lesser extent the Czech Republic) seem to heavily rely on pro-active detection techniques, and only marginally follow reactive methods.<sup>36</sup>

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<sup>23</sup> The decision of competition agencies to rely on one or the other may be influenced in each country by exogenous factors (firms and consumers' awareness to competition culture, obstacles to private enforcement, strategic litigation, duty to respond to complaints, etc.).

<sup>24</sup> See National Report for Austria, p.5.

<sup>25</sup> See National Report for Spain, p.2.

<sup>26</sup> See National Report for Italy, p.2. In Italy, only 5 cases out of 18 were prompted by *ex officio* investigations.

<sup>27</sup> See National Report for France, p.7. In 2007, 56 complaints were lodged and 3 *ex officio* investigations were initiated.

<sup>28</sup> See National Report for Belgium, p.7. As explained previously, the Report indicate that at the time being, "*a vast majority of active investigations have been opened ex officio*". Yet, in Belgium, cases started following a leniency application are classified as *ex officio* cases.

<sup>29</sup> See National Report for Hungary, p.4. In Hungary, 63% of the cartel and abuse of dominance cases are based on complaints.

<sup>30</sup> See National Report for Lithuania, p.4 and, in particular, the table showing that complaints are the main primary driver of investigations.

<sup>31</sup> See National Report for Latvia, p.3 In Latvia, only 10 out of 183 cases were prompted by *ex officio* investigations in 2007.

<sup>32</sup> See National Report for Sweden, p.2. Not unlike in Belgium, all complaints, where grounded, are taken by the CA, which closes the complaining party's file and opens a new case as if acting *ex officio*. But in general, the Report considers that there is a heavy reliance on third party complaints in competition cases.

<sup>33</sup> See National Report for Switzerland, p.2. In Switzerland, only 30% of the cases are *ex officio* and 5% are referred by other organs. Complaints are lodged in 70% of abuse cases, and in 50% of cartel cases.

<sup>34</sup> See National Report for Estonia, p 3. Whilst the report provides no accurate figure, it considers that a "*majority*" of investigations that are subsequent to complaints of competitors.

<sup>35</sup> See International Competition Network, *Anti-Cartel Enforcement Manual*, Cartel enforcement Subgroup 2 ICN Cartels Working Group, May 2007, Cape Town, p.23. In various countries, such as Belgium and Switzerland, leniency applications now take up most of the available resources of the competition authority. In Belgium, 80% of the current investigations were triggered by a leniency application. See National Report for Belgium, p.7.

<sup>36</sup> See National Report for the Czech Republic, p.2. Approximately 65% of the cases are prompted by *ex officio* investigations and 35% upon request. Quite strikingly, in Austria, despite the introduction of a leniency programme, the number of *ex officio* cases has remained equal. This could also be explained by



In our opinion, the pervasiveness of reactive detection methods threatens the efficiency of competition law enforcement. As observed by the International Competition Network (“ICN”), CAs must indeed “*show ability to pursue cases proactively so that deterrence remains a credible threat*”.<sup>37</sup> Otherwise, firms contemplating an infringement know that they are unlikely to be the target of an investigation unless they are denounced. Firms with a low degree of risk aversion may thus deliberately decide not to comply with the law.

Moreover, in jurisdictions operating a leniency programme (*i.e.*, the majority of the jurisdictions covered in this survey),<sup>38</sup> *ex officio* investigations are of critical importance. This is because each and every cartelist pondering whether to blow the whistle or not weighs the benefits of denunciation (immunity of fines) against the costs of detection through *ex officio* investigations (infliction of fines). Absent a credible threat of *ex officio* detection and punishment, cartelists may thus refrain from coming forward and applying for leniency.

In addition, most leniency programmes exhibit a selection bias in detecting cartels that are inherently weak, unstable, or on the verge of dislocation.<sup>39</sup> A degree of pro-active detection policy is thus required to catch those harmful, brazen cartels, which remain impervious to CAs’ leniency programmes.

Finally, reactive detection methods carry a risk of asymmetrical enforcement between sectors where, on the one hand, firms are well cognizant of the competition rules (because, for instance, they have previously been exposed to competition enforcement)

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the fact that the Austrian leniency programme may not be sufficiently attractive, or well-known. Yet, if this is true, this implies that the organ that adopted the programme may have again expressed its preference for *ex officio* investigations in designing/advertising the programme.

<sup>37</sup> See ICN, *Anti-Cartel Enforcement Manual*, *supra*, Chapter IV – Cartel case initiation, , ¶3.3.

<sup>38</sup> The UK, Hungary, France, Belgium, Austria, Switzerland, Italy, Spain, Czech, Japan, Latvia, Lithuania and Sweden. Estonia is contemplating the adoption of a leniency programme as well. The law enclosing the Chinese leniency programme came into force on 1 August 2008 but no implementing rule has been enacted so far.

<sup>39</sup> See, on this, H-F. FRIEDERISZICK and F.-P. MAIER-RIGAUD, *op. cit.*

and, on the other hand, sectors where firms are not equally well-informed (because, for instance, they have never been exposed to competition enforcement).

## 2. Policy Recommendations

This Report takes the view that CAs discretionarily favoring a reactive detection policy should be incentivized to increase their share of *ex officio* detection activities.<sup>40</sup> As a matter of best practice, CAs should systematically save resources for *ex officio* work when periodically setting their forthcoming enforcement strategy. In addition to this, the adoption of specific provisions for sector inquiries should be promoted. As witnessed in the EC, where the adoption of Article 17 of Regulation 1/2003 was followed by a spate of sector-wide investigations, the legislative codification of sector inquiries may encourage CAs to undertake *ex officio* work.<sup>41</sup> Finally, CAs should devote some thinking, in cooperation with academics, to the conception of reliable market screening instruments that can uncover cartels on the basis of specified economic criteria. Such instruments have been, to date, scarce.<sup>42</sup>

Of course, in jurisdictions where procedural obligations cause CAs to prioritize complaints-related work over *ex officio* work, more ambitious reforms would be

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<sup>40</sup> As far as countries where a pro-active detection bias occurs, it may well be that natural and legal persons in those jurisdictions are not sufficiently informed of the ability to lodge complaints, and, more generally, of what competition rules consist in. It is therefore of critical importance that competition agencies devote resources to competition advocacy, to trigger complaints.

<sup>41</sup> Whilst there were already informal sector inquiries in the EC, prior to Regulation 1/2003, the adoption of a specific provision to this end has been followed by a surge in the number of sector inquiries launched by the European Commission.

<sup>42</sup> See R. PORTER, "Detecting Collusion", *Review of industrial organization*, 2005, vol. 26, issue 2, pp.147-167. For instance, Coordination Failure Diagnostics ("CFD") is a model that empirically analyses real market processes with the help of time pattern analysis and investigates whether they operate efficiently. The CFD cartel-audit should enable the detection of cartels via characteristic market process patterns (because cartels cause failures in those patterns). When markets operate efficiently, five attributes processes arise "market clearing, rate of return normalization, erosion of market power, product innovation and technology innovation". The idea here is to detect failure in those processes through the monitoring of e.g. *capacity utilization, rate of return, nominal price, volatility of market shares, X inefficiency, little productivity gains*. See on this, C. LORENZ, "Screening Markets for Cartel Detection: Collusive Markets in the CFD Cartel Audit", *European Journal of Law and Economics* (2008) 26, pp.213-232. See also H-F. FRIEDERISZICK and F.-P. MAIER-RIGAUD, *op. cit.* See finally, N. PETIT, *Oligopoles, collusion tacite et droit de la concurrence*, Bruylant 2007, chapitres IV et V (suggesting a screening mechanism for the detection of tacit collusion/collective dominance).

necessary. In this context, an increase of the budgetary entitlements of CAs would be a first-order solution. However, in light of governments' current budgetary deficits, this solution appears entirely unrealistic. Moreover, any such solution could undermine the CAs independence, in exposing it to undesirable political influence.<sup>43</sup>

In the alternative, CAs may be financed through other means. Interestingly, in Italy, the CA benefits from several “*internal*” financial resources.<sup>44</sup> It receives 50,000€ of each fine inflicted in respect of misleading advertising and unfair commercial practices cases. In addition, the Italian CA collects fees on merger notifications. Whilst it is not the purpose of this Report to explore the virtues and drawbacks of such internal funding mechanisms, it ought to be noted that many sector specific regulators in network industries, as well as intellectual property offices are financed through similar internal mechanisms.<sup>45</sup> Undeniably, further research should be devoted to this issue.

By contrast, this Report does not support a tightening up of the conditions for complaints to be admissible and reviewed.<sup>46</sup> As underlined in the national Report for United Kingdom (“UK”), in countries where private enforcement is underdeveloped, it is critical for firms that are victims of anticompetitive practices to be able to lodge complaints, on pain of being foreclosed from markets.<sup>47</sup>

### **III. Competition Agencies’ Discretion in Selecting Investigation Targets – (“Target Discretion”)**

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<sup>43</sup> As explained by P. DRUCKER, to obtain budgets, one must “*make promises to anyone, or make promises in a certain sense*”. See P. DRUCKER, *Management: Tasks, responsibilities, Practices*, Harper and Row, Publ. (1973).

<sup>44</sup> See National Report for Italy, p.5. CAs may for instance be entitled to charge fees for other services provided, and sell, for instance, published reports or studies.

<sup>45</sup> See W. SMITH, “Utility Regulators – Decision-making Structures, Resources, and Start-up Strategy”, Note No 129, October 1997, *Public Policy for the Private Sector*, World Bank.

<sup>46</sup> According to some authors, the fact that the Commission tightened up the conditions for complaints to be admissible under Regulation 773/2004 has arguably led to a decrease in the number of decisions adopted upon complaints. See E. GIPPINI-FOURNIER, *The Modernisation of European Competition Law: First Experiences with Regulation 1/2003* (Report to FIDE Congress 2008). FIDE CONGRESS 2008, Vol. 2: The Modernisation of European Competition Law – Initial Experiences with Regulation 1/2003, H. F. KOECK and M. M. KAROLLUS, (eds.), Nomos / facultas.wuv, Vienna, 2008, p.20.

<sup>47</sup> See National Report for the UK, p.2.

A. Preliminary remarks

With few exceptions, most CAs are budget based and thus have *finite* financial, human, and technical resources.<sup>48</sup> Meanwhile, their duty to enforce the competition rules in the “*public interest*” encompasses an evolving, and infinite, number of sectors, markets and firms. The upshot of this is that CAs cannot possibly investigate all potentially *worthwhile* cases, on pain of being clogged up with a huge backlog and, in turn, of being unable to timely intervene where it matters most. To avoid this situation, CAs may therefore – not unlike firms –<sup>49</sup> be free to choose how best to allocate their scarce resources.<sup>50</sup> Where the competition rules allow a CA to concentrate its resources on certain sectors (or practices) and, correlatively, to stray away from other, potentially worthwhile, sectors (or practices) – it can be said to enjoy “*target discretion*”.<sup>51</sup>

To dispel from the outset any misunderstanding, this Report refers to *target discretion* as the ability of a CA to prioritize, shelve and even set-aside cases (including cases arising from complaints) on subjective, policy, grounds (for instance, following a cost-benefit analysis or in times of economic crisis),<sup>52</sup> rather than on objective grounds (for instance, incomplete submission, etc.), which most CAs are entitled to do.

Over the past decades, a strenuous debate has broken out in relation to CAs’ target discretion. First, target discretion implies a disputable choice to trade-off *equality* in return for *efficiency*. As explained previously, competition rules enshrine objective rights and duties which cover (almost) equally all market, sectors, firms, consumers. All

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<sup>48</sup> To the best of our knowledge, no study, to date, has ever quantified precisely what the optimal level of resources of a CA should be.

<sup>49</sup> Not unlike firms, competition agencies must achieve maximum output with minimum input. Quite strikingly, the concerns for efficiency that increasingly influence the substantive principles of competition law also pervade at the institutional level, within CAs.

<sup>50</sup> See P. DRUCKER, *Management: Tasks, responsibilities, Practices*, Harper and Row, Publ. (1973), explaining that prioritisation involves deciding what not to do as much as what to do.

<sup>51</sup> More simply, there is target discretion where the “*system [...] allow(s) the competition authority to concentrate its limited resources on specific priorities*”. See P. LOWE, “The design of competition policy institutions for the 21st century — the experience of the European Commission and DG Competition”, *Competition Policy Newsletter*, Number 3 – 2008, p.2.

<sup>52</sup> According to that approach, the dismissal of a complaint should occur when the social gains from administrative action are lower than its costs.

victims of unlawful anticompetitive conduct should thus *equally* benefit from the protection of the CAs.

Second, many observers have painted a grim picture of CAs' discretion in selecting investigation targets. Commenting on the state of play in the EC, I. VAN BAEL lambasted the European Commission's discretion in alluding to a situation of “*à la carte*’ enforcement” of the competition rules.<sup>53</sup> Other observers have mulled over the risk of “*populism*” in the launching of inquiries,<sup>54</sup> career-based prosecution decisions,<sup>55</sup> politically and ideologically-driven cases,<sup>56</sup> etc.

B. Do CAs enjoy an Unfettered Discretion in Selecting Investigation Targets? – Empirical Findings

A glaring finding of this Report is that in most jurisdictions, the competition rules are silent on the issue of “*target discretion*”. With the notable exception of Switzerland, Hungary, and to a lesser extent Latvia – where the law provides a legal basis for priority-setting –<sup>57</sup> in most jurisdictions the law says nothing of (i) the ability of CAs to rank cases; and (ii) the substantive criteria that should be followed for this purpose. Many national Reports nonetheless reach the conclusion that the CA enjoys a wide discretion in

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<sup>53</sup> See I. VAN BAEL, “Insufficient Control of EC Competition Law Enforcement”, in B. HAWK (ed.), *Fordham Corporate Law Institute*, 1993, pp.733 and 734.

<sup>54</sup> See I. FORRESTER, “Competition Structures for the 21st Century”, in B. HAWK (ed.), *Fordham Corporate Law Institute*, 1994, pp. 492 and 494. I. FORRESTER has talked of the Commission’s “*natural and populist interest in doing good for small or medium-sized enterprise*”.

<sup>55</sup> See S. WEAVER, *Decision to Prosecute: Organization and Public Policy In the Antitrust Division*, Cambridge, Mass.: MIT Press, 1977; R. KATZMAN, *Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy*, Cambridge, Mass.: MIT Press, 1980.

<sup>56</sup> See S. AXINN and D. KALIR, “Towards Neutral Principles in Antitrust Enforcement”, in B. HAWK (ed.), *Fordham Corporate Law Institute*, 2008, Chapter 17, p.523.

<sup>57</sup> See National Report for Switzerland, pp.6-7 (Pursuant to article 27 II of the national competition rules, the CA “*shall determine the order in which investigations that have been opened should be conducted*”. This gives the CA “*enough flexibility to change priorities*” with respect, for instance, to “*a change of the economic situation*”). See National Report for Hungary, p.3, where the law provides that “*the public interest makes the proceedings necessary*”. See National Report for Latvia, p.7, where it is indicated that “*Administrative Procedure Law*” allows the CA to close an investigation for “*lack of expediency*”. See, finally, National Report for China, p.16: China, p. 16, where there seems also to be some degree of priority-setting. The Report indeed states that “*The competition authority generally puts investigation priorities on industrial sectors controlled by the State-owned economy and relied upon by the national economy and national security or industries implementing exclusive operation and sales in accordance with the law* (emphasis added)”.

deciding to proceed as a matter of priority against a particular sector (or practice), provided it does not act arbitrarily and provides reasons.<sup>58</sup>

Whilst, in practice, it appears reasonable to assume that all CAs engage, to a certain extent, in priority-setting,<sup>59</sup> only a limited number of CAs follow specific, articulated, processes to this end. In the UK, for instance, the Office of Fair Trading (“OFT”) has voluntarily published “*Prioritisation Principles*” which explain “*how it prioritizes its work*”.<sup>60</sup> Those principles include “*the likely effect on consumer welfare, the strategic significance of the matter, the likelihood of successful outcome, and the OFT’s resources*”.<sup>61</sup> On the basis of those factors, the OFT may lawfully prioritize, delay, or close investigations and complaints.<sup>62</sup>

Similarly, in Belgium, the CA has designed and publicly disclosed a prioritization methodology known under the acronym MOSCOW (“*Must have, Should have, Could have and Waste*”).<sup>63</sup> In a nutshell, the Belgian CA assigns a priority level to each case/complaint in light of “*its impact on the economy and competition in Belgium, the interest of the consumer, [the] availability of resources, proof, precedent value, gravity of the infringement, sector: e.g. consumer goods, financial services, and liberalized sectors*”.<sup>64</sup> On this basis, each case/complaint may be classified as a priority case,<sup>65</sup> as an ongoing case which may be subject to suspension,<sup>66</sup> or as a “*standby*” case which will be put on hold until some resources become available. The Belgian CA seems, however, to

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<sup>58</sup> See National Report for Italy, p.17; National Report for Germany, p.6, National Report for Japan, p.13; National Report for Spain, p.3; National Report for Italy, p.17; National Report for France, p.20; National Report for Austria, p.5.

<sup>59</sup> As explained previously, for instance, the adoption of leniency programmes implies a certain sense of priority for cartel work.

<sup>60</sup> See National Report for the UK, p.3.

<sup>61</sup> *Idem.*

<sup>62</sup> *Id.* The OFT’s prioritization prerogative was confirmed by the High Court.

<sup>63</sup> See National Report for Belgium, p.18.

<sup>64</sup> *Idem.*, p.19.

<sup>65</sup> *Id.* With fixed administrative resources and an internal deadline.

<sup>66</sup> *Id.* Only limited resources are allocated to such cases.

enjoy a lesser degree of “*target discretion*” than the OFT, because it cannot close cases and dismiss complaints on grounds of lack of priority and available resources.<sup>67</sup>

Finally, in Hungary, a text entitled “*Principles concerning the freedom of competition followed by the Competition Authority*” sets out a list of questions which the CA systematically reviews before deciding to launch, or not, proceedings: is the effect on competition substantial, how many customers are affected, is the CA able to solve the issue, is the issue significant from a legal standpoint, may the proceedings send signals to the market, can the issue be solved through alternative means (private enforcement), etc.<sup>68</sup>

This notwithstanding, priority-setting is akin to a “*black-box*” in other jurisdictions. With the exception of intermittent disclosures in annual reports<sup>69</sup> or of informal “*comity*” principles in markets subject to sector specific regulation,<sup>70</sup> the question whether and how other CAs engage into priority-setting remains shrouded in mystery.

### C. Should CAs enjoy an Unfettered Discretion in Selecting Investigation Targets? – Policy Recommendations

Perhaps the only way to address the above question is to assume, preliminarily, that CAs are indeed subject to a pinch as far as resources are concerned. In fact, although no study ever measured the resources necessary to deliver an effective competition policy, there are good reasons to believe that CAs indeed face such constraints. First, most CAs are dependent on fixed budgetary entitlements and may thus, at certain periods of time, have

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<sup>67</sup> *Id.* p.15. This being said, a draft law introducing this possibility is currently being discussed in the Belgian Parliament.

<sup>68</sup> See National Report for Hungary, p.17.

<sup>69</sup> See National Report for Latvia, p.14, which indicates that the CA explained that it selected sectors to inquire in light of “*consumer impact and market liberalization*”. See also National Report for Belgium, p.19, which explains that the CA defined publicly, in 2008, a comprehensive list of priorities in its annual report. See also National Report for Switzerland, p.6, reporting that the CA placed a priority on “*bid rigging cases*” in its annual report for 2008.

<sup>70</sup> See National Report for Germany, p.6 (indicating that the CA will not investigate with priority cases subject to sector specific regulation); National Report for Sweden, p.7; National Report for Austria, p.5; National Report for Switzerland, p.7. However, in a number of other countries, no such principles are applied. See National Report for France, p.19; See National Report for Estonia, p.8.

to cope with a shortage in resources (see table hereafter).<sup>71</sup> Second, with the propagation of complex economic reasoning in all fields of competition law, CAs are now routinely faced with myriads of submissions and hordes of lawyers, economists, expert consultants, etc. Dealing with an investigation has thus become increasingly voracious in terms of administrative resources.

		COUNTRY											
		United Kingdom*	France	Sweden	Hungary	Switzerland**	Belgium	Austria	Estonia	Latvia	Lithuania	Japan***	
B U D G E T	Date	2007-2008	2007	2009	2009	2008	2008	2008	2008	2008	2007	2008	
	Budget in local currency (in million)	£ 20.3 million	€ 14 million	€ 12.4 million	HUF 1652,4 million	CHF 7.8 million	€ 4 million	€ 2 million	EEK 30,7 million	LVL 1,158,204	LTL 4 million	JPY 8.446 million	
	Budget in standard currency (€)	<b>€ 18.06 million</b>	<b>€ 14 million</b>	<b>€ 12.4 million</b>	<b>€ 5.8 million</b>	<b>€ 5.22 million</b>	<b>€ 4 million</b>	<b>€ 2 million</b>	<b>€ 1.96 million</b>	<b>€ 1.65 million</b>	<b>€ 1.2 million</b>	<b>€ 53 736</b>	
			China	Luxembourg	Germany	Czech	Italy	Spain					
	Budget in local currency (in million)	Not mentioned	Not mentioned	Not mentioned	Not mentioned	Not mentioned	Not mentioned	Not mentioned					
* Estimation of the exchange rate Euro/Pounds Sterling: 1€= 0,89 £ (on 1st December 2008) ** Estimation of the exchange rate Euro/Franc Suisse: 1€ = 0,67 CHF (on 31st December2008) *** JPY 8,446,000,000 = approximately USD 85,000.00 ==> Conversion with exchange rate of 30th June 2008 (1 €= 1,5818 USD)													

Against this background, this Report contends that CAs should benefit from a degree of *target discretion* in order to engage in effective priority setting.<sup>72</sup> As previously surmised, the idea that CAs can equally and efficiently deal with all complaints, markets, and practices is unrealistic from a practical standpoint.<sup>73</sup> In addition, the treatment of all

<sup>71</sup> This table is based on the answers received to Question 1.2. Whilst the UK seems to enjoy the most important budgetary entitlements, it is however subject to a performance target. As explained in the National Report for the UK, pp.3-4, the OFT “has agreed with the HM Treasury that it will deliver ‘measured benefits to consumers of five times its annual budget over the period 2008-2011’”.

<sup>72</sup> Similarly to the solution that prevails in other legal disciplines (e.g. environmental law, consumer protection, product safety regulation, etc.).

<sup>73</sup> In some countries, where resources are limited, CAs have been *de facto* obliged to exercise some sort of “target discretion”. In Belgium, for instance, where there is a formal obligation to review all complaints,



cases/complaints is not necessarily suitable. Research by criminal lawyers on the principle of “*prosecutorial discretion*” indeed casts light on the fact that a perfectly uniform enforcement policy that applies equally across the board may have more drawbacks than benefits. For instance, pursuing persons with an insignificant criminal record, with a legitimate – non criminal – motive, or practices that cause little social harm, send erroneous signals to society at large and may undermine the overall legitimacy of the rules (as an immoral, overly restrictive, body of rules).<sup>74</sup>

However, this Report also considers that the principle that a CA enjoys *target discretion* should be enshrined, and framed, in the CA’s constituent legislation (or in an equally ranking, binding, legal instrument). Indeed, *target discretion* entails trading-off the principle that all cases, markets, practices, firms and consumers are *equal* for other interests (e.g., economic significance of the impugned conduct, development of the case-law in new markets, costs of establishing an infringement,<sup>75</sup> etc.). The setting of priorities might thus lead CAs to violate general principles of law (e.g. the non-discrimination principle) in differentiating between equally worthwhile cases. A clear, publicized, legal basis for priority setting (and, possibly, prioritization criteria) thus appears warranted to eradicate risks of arbitrary discrimination.<sup>76</sup> This solution prevails in Hungary, where the law provides that (i) the CA’s discretion to select/dismiss cases on

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the CA has often had to wait for the limitation period of a case to lapse, so as to avoid dealing with it. See National Report for Belgium, p.15.

<sup>74</sup> See C. JANSSEN et J. VERVAELE, *Le ministère public et la politique de classement sans suite*, Centre national de criminologie, Bruxelles, Bruylant, 1990, pp.65-131. Moreover, as explained by MONTESQUIEU in *L’esprit des lois*, it avoids whistleblowers willing to harm other on groundless, misguided, motives, to achieve their goal, in allowing competition authorities to reject willful, malicious, complaints. See MONTESQUIEU, *De l’Esprit des lois*, Première partie (livres I à VIII), 1748: “À Rome , il était permis à un citoyen d’en accuser un autre. Cela était établi selon l’esprit de la république, où chaque citoyen doit avoir pour le bien public un zèle sans bornes, où chaque citoyen est censé tenir tous les droits de la patrie dans ses mains. On suivit, sous les empereurs, les maximes de la république; et d’abord on vit paraître un genre d’hommes funestes, une troupe de délateurs. Quiconque avait bien des vices et bien des talents, une âme bien basse et un esprit ambitieux, cherchait un criminel dont la condamnation pût plaire au prince; c’était la voie pour aller aux honneurs et à la fortune, chose que nous ne voyons point parmi nous. Nous avons aujourd’hui une loi admirable: c’est celle qui veut que le prince, établi pour faire exécuter les lois, prépose un officier dans chaque tribunal, pour poursuivre, en son nom, tous les crimes: de sorte que la fonction des délateurs est inconnue parmi nous; et, si ce vengeur public était soupçonné d’abuser de son ministère, on l’obligerait de nommer son dénonciateur”.

<sup>75</sup> See National Report for Hungary, p.23, which reports cases that were dismissed because the proceedings were assessed as particularly expensive in light of its potential results.

<sup>76</sup> See International Competition Network, Anti-Cartel Enforcement Manual, *supra*, p.17: “publishing such criteria may further demonstrate openness, objectivity and accountability”.

grounds of “*public interest*” must be based “*on facts*” that are “*transparent*” and “*provable*”; and (ii) the Metropolitan courts can review the decision to dismiss a complaint and coerce the CA to open a formal investigation.<sup>77</sup>

In addition, this legal basis should be as neutral, objective and accurate as possible.<sup>78</sup> In this context, some inspiration could be drawn from the EC, where a number of objective appraisal principles were appended to the abstract concept of “*Community interest*”,<sup>79</sup> or from other jurisdictions, such as the UK, where the criteria are based on a cost-benefit analysis.<sup>80</sup> Moreover, as a matter of “*good administration*”, interested parties (*e.g.* complainants) should be informed of the degree of priority assigned to their case and given an opportunity to comment. In Japan, for instance, the Japan Fair Trade Commission (“JFTC”) established in 2000 an internal system for re-examining the case upon requests from complainants.<sup>81</sup> On top of this, CAs should constantly reassess whether the prioritization criteria are fulfilled and possibly downgrade high priority cases (if, for instance, the impugned conduct’s effect has become minor) or upgrade low priority cases (if, for instance, the impugned conduct’s effect has become important).<sup>82</sup>

Finally, CAs should be periodically required to clarify what their concrete enforcement priorities are, through various communications mediums (for instance, in reports, press

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<sup>77</sup> See National Report for Hungary, p.17.

<sup>78</sup> See S. AXINN and D. KALIR, *supra*, p.548. In practice, the drafting of the legal basis seems to matter. In the UK, for instance, “*practitioners criticise the fact that the principles are drafted and applied in such a way that they result in a number of complaints not being investigated*”. See National Report for the UK, p.4.

<sup>79</sup> See CFI, *Automec v. Commission*, Rec.1992, p.II-2223, ¶85; Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, Official Journal C 101, 27 April 2004 pp.65- 77 at ¶44 (availability of alternative action before national courts, significance of the infringement for the common market, stage of investigation, etc.). See, also, ¶28: “*The Commission is entitled to give different degrees of priority to complaints made to it and may refer to the Community interest presented by a case as a criterion of priority. The Commission may reject a complaint when it considers that the case does not display a sufficient Community interest to justify further investigation*”.

<sup>80</sup> See National Report for the UK, p.3, and the factors discussed above. More generally, cost-benefit analysis is used to identify the best option, namely which option exhibits the greatest net monetary benefits. See, on this, M. ADLER, “Rational Choice, Agenda-Setting, and Constitutional Law: Does the Constitution Require Basic or Strengthened Public Rationality?” in C. ENGEL and A. HERITIER, (eds), *Linking Politics and Law*, Baden-Baden: Nomos Verlagsgesellschaft, 2003.

<sup>81</sup> See National Report for Japan, p.7.

<sup>82</sup> See National Report for Japan, p.20.

releases, speeches of high-level officials, etc.).<sup>83</sup> This is likely to help improve CAs' detection efficiency in inducing oblivious victims of competition law infringements to come forward. In addition, setting clear enforcement priorities keeps CAs' staff focused, and eradicates enforcement dispersion. Finally, publicized enforcement objectives limit the risks of hasty, unexpected, “*enforcement swings [which] create an unstable market for capital investment*”,<sup>84</sup> and thus generate “*coherence and predictability for business*”.<sup>85</sup>

#### **IV. Competition Agencies' Discretion in Initiating Infringement Proceedings (“Process Discretion”)**

##### **A. Preliminary Remarks**

Once, following preliminary investigative measures, a specific enforcement target (*i.e.*, a certain market or practice) or complaint is found to raise serious suspicions, CAs will typically *proceed* with the case. Whilst, up to this stage, CAs operated more or less under the radar,<sup>86</sup> the decision to open infringement proceedings generally triggers the applicability of several mechanisms which serve primarily the purpose of protecting the parties' defense rights and limit CAs' “*process discretion*”. First, the decision to open infringement proceedings may be subject to specific adoption rules. Second, CAs may be under a duty to observe information requirements, ranging from the mere disclosure of the existence of the investigation to interested parties, to the right to be heard (including access to the file). Third, the decision to open proceedings may be subject to judicial review, and the CA may be under a duty to provide adequate reasoning. Fourth, following the opening of proceedings, CAs may be obliged to act within reasonable

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<sup>83</sup> In so doing, however, it must be made clear that CAs will nonetheless devote resources to other, non priority sectors/practices.

<sup>84</sup> See S. AXINN and D. KALIR, *supra*, p.546.

<sup>85</sup> See also P. LOWE, *supra*, p.2. Prioritization criterions often take the form of open-textured concepts (*e.g.* public interest, cost-benefit analysis) which do not allow to draw inferences on a CA's concrete enforcement priorities.

<sup>86</sup> In a majority of the jurisdictions surveyed, CAs operate secretly, with no duty to inform interested parties, during the stage of the “*preliminary investigation*”. See, for instance, National Report for the UK, p.8; National Report for the Czech Republic, p.2; National Report for Germany, p.2; National Report for Spain, p.3; National Report for Hungary, p.7; National Report for Switzerland, p.3.

timeframes in adopting decisions on pain of violating general rules of sound administration.<sup>87</sup>

Interestingly, in several jurisdictions, this stage of investigation where “*serious doubts*” are leveled against a company is labeled the “*formal investigation*” (e.g., EC, Luxembourg), as opposed to the “*preliminary investigation*”. However, this demarcation misrepresents the situation of a number of other jurisdictions, where:

- All investigations are said to be formal, and there is thus no divide between “*formal*” and “*preliminary*” investigations (Austria, Germany);<sup>88</sup> or
- This distinction exists but relates primarily to the intensity of the investigation weaponry enjoyed by the CA (Italy, Japan, France and UK). During the “*preliminary investigation*”, the CA does not enjoy strong investigative powers (for instance, compliance of firms with CAs may only be voluntary). It may enjoy more intrusive powers in the context of the “*formal investigation*”;<sup>89</sup> and
- The CA’s institutional structure is bifurcated and based on the one hand, on adjudication<sup>90</sup> with a specific investigator and, on the other hand, on an independent decision-making body (possibly, a court – e.g., in Austria – or a college of high-level officials – e.g., in France, Belgium, Luxembourg, Japan, Spain, Switzerland). In the latter case, if there are “*serious doubts*”, the investigator will typically *close* the formal procedure and either (1) convey its finding to the decision-making body (in a report proposing to adopt a prohibition, for instance); or (2) lodge an action before a court.

For the sake of clarity, this section focuses on the initiation of infringement proceedings (either internally, or through the referral of the case to a court/specific decision-making body), regardless of the qualifications adopted in national laws. At this stage, the bulk of the investigative measures (requests for information, inspections, etc.) have been carried out, and the CA formulates allegations of unlawful, anticompetitive conduct.<sup>91</sup> The procedure thus becomes more “*prosecutorial*” and “*adversarial*” than “*investigative*”

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<sup>87</sup> And of placing companies under unduly long opprobrium. Other authors also view deadlines as a limit to a CA discretion. See C. DAMRO, “Capture and Control – The Institutional Dynamics of EU Regulatory Independence”, mimeo, p.5.

<sup>88</sup> See National Report for Austria, p.2.

<sup>89</sup> See National Report for Italy, p.17; National Report for Japan, p.11-13; and National Report for France, p.20.

<sup>90</sup> See National Report for France, pp.4-5; and National Report for Belgium, pp.5-6.

<sup>91</sup> The CA may, of course, take complementary, investigative, measures, the bulk of its work is now analytical.

with the firm(s) under investigation being called upon to actively respond to the CAs allegations.<sup>92</sup>

B. Do CAs enjoy an Unfettered Discretion in Handling Infringement Proceedings? – Empirical Findings

1. Who takes the decision to open infringement proceedings?

Within the CA, the level at which the decision to open proceedings must be adopted – and the applicable procedures to this end – provides, in and of itself, information on the degree of discretion entrusted by the legislator to the CA. Such rules are indeed akin to internal checks and balances imposed by the legislator on the CA's decision-making power.

In several jurisdictions, the decision to open infringement proceedings must systematically involve the CAs' highest ranking official(s). This is the case, notably, of Sweden, Italy, Lithuania, Latvia and Estonia, where the heads of the authorities will themselves take the decision.<sup>93</sup> In other jurisdictions, this decision may be adopted at a lower level. In this variant, civil servants/operational units may be entitled to take alone the decision to open proceedings (*e.g.*, in the UK),<sup>94</sup> or subject to prior approval of the hierarchy (*e.g.*, in Hungary and Switzerland).<sup>95</sup> Finally, in jurisdictions where the institutional structure is bifurcated and based on adjudication, the decision may be taken

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<sup>92</sup> See National Report for the UK, p.3.

<sup>93</sup> In Sweden, the decision is taken by the Director General of the CA himself. See National Report for Sweden, p.5. In Italy, this decision is taken by the Collegiate Body and then signed jointly by the Chairman and the General Secretary. See National Report for Italy, p.4. In Lithuania, the Competition Council as a collegial body decides whether to open a formal investigation or not. See National Report for Lithuania, p.7. In Latvia, the decision is also adopted by the Competition Council. The decision is adopted if it is supported by at least 3 Council members (out of 5). See National Report for Latvia, p.6. In Estonia, the Director General of the CA takes this decision. See National Report for Estonia, p.6.

<sup>94</sup> In the UK, this decision is taken by the Board, *or* by a person or body to whom powers have been *delegated* in writing. See National Report for the UK, pp.9-10.

<sup>95</sup> In Hungary, according to the internal procedural rules of the Competition Authority, upon the recommendation of the case handler, the leader of the given professional unit (head of department) shall decide whether a competition supervision proceeding should be opened, and this decision shall be approved by the vice-president of the Competition Authority. See National Report for Hungary, p.10. In Switzerland, the Secretariat opens an investigation with the consent of a member of the CA's presiding body. See National Report for Switzerland, p.5.

by the highest ranking prosecutor (*e.g.*, in France),<sup>96</sup> or more discretionarily by the prosecutor in charge (*e.g.*, in Belgium) or the investigative office, unit, directorate (*e.g.*, in Spain).<sup>97</sup>

2. Are CAs subject to information requirements when opening infringement proceedings?

There are two important senses in which information requirements may limit a CA's discretion. First, in lifting the smoke screen surrounding an ongoing investigation, such requirements reduce the ability of a CA to carry out a stealthy, unilateral, inquiry and, in turn, permit the firm(s) suspected of an infringement to start devising a defense strategy. Second, the public disclosure of a decision to open proceedings increases CAs' accountability. It may, for instance, dissuade some of them from taking further steps in cases which have not reached a sufficient degree of maturity.

Interestingly, whilst most jurisdictions seem to condition the opening of proceedings on the adoption of a formal decision addressed to the firm under investigation (*e.g.*, Hungary, Latvia, Spain, Sweden, Lithuania, Luxembourg, for instance),<sup>98</sup> only a few of them require the CA to notify this information to complainants (*e.g.*, Latvia, Lithuania, Belgium),<sup>99</sup> and other interested third parties (*e.g.*, Italy, Hungary, Japan).<sup>100</sup>

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<sup>96</sup> See National Report for France, pp.4-6.

<sup>97</sup> See National Report for Belgium, p.12. In Spain, this decision may be taken by the Council of the CNC or by the Directorate of Investigation. See National Report for Spain, p.4.

<sup>98</sup> To the exception of Germany, where under the German competition law ("ARC") the authority is not required to document/communicate its intention to open proceedings. Yet, if the authority has initiated proceedings against an undertaking it will sooner or later inform it in order to guarantee the right to be heard. See ¶56 (1) ARC: "The cartel authority shall give the parties an opportunity to comment." See National Report for Germany, p.5. To the exception, also of Switzerland, where a letter is sent to the parties subject to investigation. A letter will be sent informing the parties being subject to Comco's investigation. According to case-law, this is not a formal decision (source: DPC 1998/4, p. 665 s.; DPC 2004/2. p. 636 s.). See National Report for Switzerland, p.5. To the exception of the Czech Republic, where a statement is made to the entity under investigation. See National Report for the Czech Republic p.3.

<sup>99</sup> In Belgium, the former will be informed on the filing of the report and – if deemed necessary by the Council chamber hearing the case – will receive a non-confidential version of this report. See National Report for Belgium, p.12.

<sup>100</sup> In Japan, the CA informs interested parties, complainants, experts, witnesses. See National Report for Japan, p.8.

Also, there is a lot of variance amongst CAs in respect of publication requirements. In most jurisdictions, the publication of the decision to open proceedings is optional.<sup>101</sup> Whilst some CAs only occasionally publish it on their websites (amongst others, Spain, Czech, Sweden), other CAs have a more systematic approach (e.g., Italy).<sup>102</sup> By contrast to those countries, in only a limited number of jurisdictions, CAs seem to be subject to mandatory publication requirements. In Switzerland, for instance, a notice is given for official publication.<sup>103</sup>

### 3. Is the decision to open infringement proceedings subject to judicial review?

CAs' discretion in opening infringement proceedings may be further restrained by judicial mechanisms. For instance, the decision to open infringement proceedings may be appealed and fully reviewed on the merits by a court of law. To allow the court to ensure an effective review, the CA may be obliged to state reasons when adopting its decision to open infringement proceedings.

Against this background, the surveyed jurisdictions seem to promote heterogeneous solutions. Countries with a bifurcated enforcement structure, as well as other countries such as Latvia, Czech Republic, Hungary, Luxembourg and Switzerland have excluded the ability to challenge CAs decisions to open infringement proceedings.<sup>104</sup> By contrast, in other countries such as Estonia, Spain, Lithuania, the UK and Italy, the decision to open infringements proceedings is amenable to judicial review.<sup>105</sup> Most Reports are, however, silent on the practical relevance of such judicial remedies and on the standard of review applied by the courts. A notable exception to this is Italy where the report

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<sup>101</sup> In Latvia, the decision to open formal proceedings is not made public, as it is as yet only an interim decision (there will be a final decision on either finding a breach or closing the procedure). *See* National Report for Latvia, p.6. In Luxembourg, the decision is not published. *See* National Report for Luxembourg p.5. In Lithuania, neither. *See* National Report for Lithuania, p.7.

<sup>102</sup> The decision to open proceedings seems to be systematically published in the CA's Bulletin and website *See* National Report for Italy, p.12.

<sup>103</sup> *See* National Report for Switzerland, p.5.

<sup>104</sup> *See*, amongst others, National Report for Luxembourg, p.5. In Switzerland, the case-law has set the principle that an undertaking cannot challenge the decision to open proceedings against it because there are no formal decisions with legal effects (source: DPC 1998/4, p. 665; DPC 2004/2, p. 636). *See* National Report for Switzerland, p. 5.

<sup>105</sup> *See* National Report for the UK, p.10.

indicates that CA's decisions to open proceedings can be scrutinized under a "*new reviewing approach*", which entails a review of the technical and economical aspects of the decision.<sup>106</sup>

#### 4. Are CAs subject to timelines once they open infringement proceedings?

A firm faced with cumbersome and dragging competition law procedures may see itself beset by undue reputational, operational and financial damage. In connection with this, one cannot exclude that CAs may be tempted to strategically keep "*weak*" cases – those which are unlikely to lead to a negative decision – dormant, to induce firms to come forward with settlement proposals, and close the proceedings. It is thus often considered "*good practice*" to establish deadlines for reaching a decision.<sup>107</sup>

Our survey demonstrates, however, that the greater part of CAs enjoys significant discretion as regards procedural timelines. In most jurisdictions, the law does not require CAs to comply with deadlines,<sup>108</sup> and where it does, CAs face protracted time horizons (in Belgium, the law sets a time limit of 5 years for the entire investigation).<sup>109</sup> Of course, in those jurisdictions, CAs' inertia can in principle (i) be challenged on the basis of conventional "*failure to act*" proceedings;<sup>110</sup> or (ii) be brought to the attention of an ombudsman;<sup>111</sup> and/or (iii) trigger actions for damages.<sup>112</sup> However, most national Reports consider such actions to be devoid of any practical interest. In Spain, there is apparently a *specific* action for failure to act against the competition authorities, but the report provides no further details on its practical relevance.

This being said, in three of the countries covered by the survey, the CA is bound to respect stringent deadlines following the opening of infringement proceedings. In Hungary, Lithuania and Latvia, CAs must respectively bring the procedure to a term

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<sup>106</sup> See National Report for Italy, p.12.

<sup>107</sup> See, for instance, ICN, *Anti-Cartel Enforcement Manual*, *supra*, ¶5.3.2.

<sup>108</sup> See National Report for Germany, p.6, National Report for China, p.6, National Report for France, p.18, National Report for Luxembourg, p.5, and National Report for Switzerland, p.6.

<sup>109</sup> See National Report for Belgium, p.14.

<sup>110</sup> This is the case in most countries.

<sup>111</sup> See National Report for Sweden, p.6.

<sup>112</sup> *Ibid.*



within 180 days, 5 months, and 6 months (with possible extensions).<sup>113</sup> In Estonia, despite the absence of similar mandatory timelines, the CA has in practice sought to limit the time frame of its investigations to a year.<sup>114</sup>

C. Should CAs enjoy an Unfettered Discretion in Handling Infringement Proceedings? – Policy Recommendations

There are significant discrepancies in the degree of *process discretion* enjoyed by CAs. Rather than attempting to reach firm, definite, answers on the optimal degree of *process discretion* that ought to be entrusted to CAs, this Report stresses the various trade-offs arising in respect of each of the parameters outlined above and, where possible, formulates policy proposals.

1. Who should take the decision to open infringement proceedings?

As far as the first parameter is concerned, the delegation to individuals – or to a small group of individuals – of the discretionary authority to open proceedings generates well-known risks of opportunistic behavior identified by Principal-Agent theory (specific acts of self-interest, for instance). Such risks are, we believe, particularly acute in large CAs, where individuals, or small groups of individuals, may be able to operate in relative opacity, insulated from top-down oversight. This risk is further exacerbated by the fact that, in pro-active CAs with a large output, a decision to open proceedings might be considered a trite procedural development and thus go relatively unnoticed. Finally, one could argue that the more individualized the delegation, the cheaper it becomes for the suspected firms and/or complainants to seek to influence the individual official in

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<sup>113</sup> In Hungary, the proceedings can be extended twice by the same amount. See National Report for Hungary, p.12. In Lithuania, the 5 months term can be extended by 3 months. See National Report for Lithuania, p.9. In Latvia, the 6 months term can be extended to one or two years. See National Report for Latvia, p.7.

<sup>114</sup> See National Report for Estonia, p.8.

charge.<sup>115</sup> A few years ago, the EC Merger Task Force's ("MTF") demise provided a resounding illustration of those problems.<sup>116</sup>

Yet, the adoption of rules involving other officials in the opening of infringement proceedings (for instance, prior approval procedures) is not necessarily a panacea. First, it multiplies avenues of influence for firms and complainants. Second, where the other officials belong to the high ranking staff of the CA, one may not exclude a greater degree of politicization of decisions.<sup>117</sup> Third, a multiplication of reviews and proceedings will consume time and resources. Finally, where the decision must be adopted collegially, its adoption may ultimately rest on collegial bargaining considerations, or be polluted by diverse interests, alien to the nub of the case.<sup>118</sup>

2. Should CAs be subject to formal requirements when opening infringement proceedings?

As far as the second parameter is concerned, all CAs seem to be subject to basic notification requirements as regards the firm(s) under investigation. The question whether they should benefit from more, or less, discretion is thus primarily relevant as regards the *notification* to third parties with an interest in the case (*e.g.* complainants).

On close examination, the trade-off between less and more discretion seems a little less balanced. Of course, on the one hand, systematic information of third parties may further strain the CAs administrative resources. Yet, on the other hand, because complainants often invest significant efforts in writing complaints, it is good practice to keep them "in the loop", and provide them with information on the procedure they helped triggering.<sup>119</sup>

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<sup>115</sup> See K. GATSIOS and P. SEABRIGHT, "Regulation in the European Community", *Oxford Review of Economic Policy*, 5, 2, p.37.

<sup>116</sup> See C. DAMRO, *op. cit.*, p.38. It was later reported that the MTF was criticized within DG COMP for overly relying on information submitted by third parties.

<sup>117</sup> Because high-ranking officials are closer to political circles. Their appointment, and career, might be subject to ministerial decisions and thus hinge on political considerations.

<sup>118</sup> Some members of the college that do not support the decision to open proceedings, may for instance sell their support in exchange for the future support of others in subsequent cases.

<sup>119</sup> See, for instance, ICN, *Anti-Cartel Enforcement Manual*, *supra*, p.27: "It is considered good practice for agencies to provide information to complainants outlining how their complaint will be evaluated and the agency's expectations of them".

Complainants might otherwise be dissuaded to inform the CA of anticompetitive problems in subsequent cases.<sup>120</sup> This, in turn, may backfire on the CA, which will no longer be able to rely on complainants' input in the future, and thus will face increased informational costs.

In addition, in jurisdictions where third parties enjoy a certain number of procedural rights (access to the file, participation in an oral hearing, etc.), the notification of the opening of infringement proceedings offers an opportunity to inform them of those rights.

The systematic information of third parties contributes, furthermore, to improving the efficiency of administrative proceedings in placing the CA under increased scrutiny from third parties (this may, for instance, mitigate risks of unduly long investigations, etc.).

Finally, even if the CA opens proceedings on issues (*e.g.*, markets, practices, etc.) that were not at the core of the complaint, the complainant's sector-specific knowledge might help the CA refine its understanding of the case. In such cases, complainants should not be left behind the scenes and should be given the ability to comment.

Another area where CAs' discretion might be discussed relates to the *publication* of the decision to open infringements proceedings. This publication is certainly advantageous from a public accountability standpoint. Moreover, it may induce new, interested, parties to come forward (customers, competitors, suppliers, etc.), thereby enriching the CA's informational expertise of the case.<sup>121</sup> This notwithstanding, the publication of the decision to open infringement proceedings may adversely, and unduly, impact the firm(s) under investigation. Although there is to date no empirical support in economic literature for the following proposition, firms may be harmed by the negative publicity that

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<sup>120</sup> From a mere economic standpoint, legal proceedings are part of a firm's operational costs. It is thus important that firms' legal personnel is, similarly to other employees, able to report in a timely manner to executive management, shareholders, financial investors, etc., on pain of not being supported in future legal endeavors.

<sup>121</sup> Yet, the CA may become exposed to strategic behavior. *See* our remarks below.

accompanies the opening of formal proceedings.<sup>122</sup> Customers might ostracize a firm potentially guilty of a competition law infringement. Shareholders and investors might be reluctant to support a firm virtually subject to penalties.<sup>123</sup> It is thus of critical importance that the decision to open infringements proceedings unambiguously indicates that the firm(s) under investigation is (are) not guilty until so proven.

### 3. Should the decision to open proceedings be subject to judicial review?

The judicial review of administrative agencies' acts is a popular subject, which has been well explored in legal literature. In a nutshell, whilst judicial review is crucial to meet the demand for accountability and transparency in contemporary public affairs,<sup>124</sup> there is a broad consensus about the fact that certain acts of a mere provisional value, should not be subject to judicial review.<sup>125</sup> Any other solution is indeed likely to trigger torrents of intermediary appeals, and in turn hinder CAs' decisional activity (in particular if judicial proceedings are suspensive).<sup>126</sup> In addition, since the final decision of a CA is generally amenable to judicial review, irregularities of earlier acts can be sanctioned at this stage.

This being said, the decision to open infringements proceedings must be well-reasoned, so the courts can gauge whether the CA was right – its suspicions were founded – to adopt it.<sup>127</sup> As explained previously, this is important because the decision to open infringement proceedings is likely to affect the financial, economic, and legal situation of the firm(s) to which it is addressed.

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<sup>122</sup> See G. LANGUS and M. MOTTA, "On the Effect of EU Cartel Investigations and Fines On the Infringing Firms' Market Value", *Proceedings of 2006 EU Competition Law and Policy Workshop*, EUI-RSCAS, (available at <http://www.eui.eu/>) who do not find a significant effect of the decision to open proceedings on the firm's share valuation.

<sup>123</sup> *Idem*, p. 8

<sup>124</sup> See A. ASHWORTH, *op. cit.*, at p.1561; D. CURTIN, "Delegation to EU Non-majoritarian Agencies and Emerging Practices of Public Accountability, in D. GERADIN, N. PETIT and R. MUNOZ (Eds.), *Regulation Through Agencies in the EU*, Edward Elgar, Cheltenham, 2005, p.109; K. P. EWING, *Competition Rules for the 21st Century: Principles from America's Experience*, Kluwer Law International, The Hague, 2003, pp.240-241.

<sup>125</sup> Also, it is often considered that provisional acts should not be subject to judicial review, because this may flood the courts with issues that are not yet disputes.

<sup>126</sup> See P. DUFFY, "Quelles réformes pour le recours en annulation", 5-6 *Cahiers de droit européen*, 553 (1995).

<sup>127</sup> Of course, a primary explanation for the duty to state, and reason, objections, is for the parties to fully exercise their right to be heard.

4. Should CAs be subject to timelines once they open infringement proceedings?

Setting mandatory, stringent, deadlines for the completion of the proceedings has pros and cons. On the one hand, the increased celerity of proceedings exhibits features of a “win-win-win” situation. Victims of anticompetitive conduct obtain timely, effective, redress. CAs’ officials stay focused on important issues, avoid being dragged into discussions of ancillary importance, and cannot maintain “weak” cases under investigation with a strategic purpose (extract commitments from the parties, for instance). The firm(s) under investigation minimize(s) the direct costs (*e.g.*, lawyers’ fees, etc.) and indirect costs (*e.g.*, disruption of daily business activities with management being diverted from its core activities, reputational damage arising from negative publicity, etc.) arising from lengthy proceedings.

On the other hand, the setting of mandatory, stringent, deadlines also has drawbacks. First, as explained previously, there is a widespread view that all administrative agencies, and in particular CAs, face information asymmetries.<sup>128</sup> Imposing on CAs an additional constraint through the setting of a mandatory deadline might further magnify this problem. For lack of time, CAs may inevitably overlook, or lack, certain pieces of relevant information and thus adopt decisions out of imperfect information. In the alternative, CAs might be tempted to rely excessively on third-party information.<sup>129</sup> Whilst this is not, in and of itself, a problem, CAs should treat third party information with caution. Third parties, and in particular complainants, often exhibit a pro-prosecution bias, which may lead to the submission of self-serving information.<sup>130</sup>

Second, the firm(s) under inquiry may turn the tight constraints imposed by the deadlines to its advantage, in flooding the CA with complex, and possibly, useless information. It is for instance reported that, in the context of the regulatory review of the *Sony/BMG*

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<sup>128</sup> See R. VAN DEN BERGH and P. CAMESASCA, *European Competition Law and Economics – A Comparative Perspective*, Intersentia, 2001, p.131.

<sup>129</sup> See A. SANDMO, *op. cit.*

<sup>130</sup> Which the CA cannot verify, due to the existence of the deadline.

merger, the merging parties managed to undermine the Commission's case in submitting "an enormous amount of incredibly detailed evidence".<sup>131</sup>

Third, not all competition law cases look alike. The degree of sophistication of the relevant markets, the number of interested third parties (customers, rivals, suppliers), the intrinsic complexity of the impugned practice, the amount of tangible evidence available, etc. might significantly differ from one case to another. Hence, CAs might not be equally able to meet a "one size fits all" deadline in all cases.

In light of the respective drawbacks and virtues of mandatory, uniform, timelines, this Report takes the view that CAs should draw inspiration from the practice of the Italian CA and, to a lesser extent, from the European Commission. To eliminate, demonstrably, parts of the concerns ascribed to dormant cases, the Italian CA is required by regulation to set, on a *case-by-case basis*, a deadline in its formal containing the statement of objections.<sup>132</sup> According to P. LOWE, the European Commission also experienced a similar mechanism for the first time in the 2004 *Microsoft* case.<sup>133</sup>

## V. Competition Agencies' Discretion in Terminating Proceedings ("outcome discretion")

### A. Preliminary remarks

Not all competition cases lead to a negative decision (*i.e.*, a decision finding an infringement and, as the case may be, imposing a penalty). Legislative frameworks may indeed entrust CAs with a toolbox of distinct legal instruments which can be used as alternatives to bring a case to an end. A prime example of this consists in closing cases in exchange of certain commitments ("*settlement*" approach), rather than formally finding

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<sup>131</sup> See "Commission Shifts Stance on Music Industry", *Global Competition Review*, 16 July 2004.: "Six years of pricing data was requested of the five majors-involving 25 million data items. The two-day hearing wrapped up on 17 June. Says Philippe Chappatte of Slaughter and May, who represented BMG: "We gave the Commission an enormous amount of incredibly detailed evidence".

<sup>132</sup> See National Report for Italy, p.14. A Procedural Decree imposes on the Italian CA a duty to close the case within the date indicated by the CA in the statement of objections. The CA may, however, extend the procedure.

<sup>133</sup> See oral remarks of Mr. P. LOWE, 5<sup>th</sup> Annual Conference of the GCLC, 11 and 12 June 2009.

an infringement (“*negative enforcement*” approach). A related illustration of this consists in adopting positive, reasoned and publicized decisions acknowledging the absence of an infringement (“*positive enforcement*” approach), rather than discretely closing meritless cases, or more generally focusing on finding infringements (“*negative enforcement*” approach).<sup>134</sup> The CA’s ability to *terminate* proceedings on the basis of a variety of diverse legal instruments is what we refer to as “*outcome discretion*”.

In recent years, CAs have increasingly espoused the view that they ought not to use a hammer when they need a screwdriver and have – sometimes with little nuance – praised the virtues of such alternative enforcement techniques and, in particular, of settlements.<sup>135</sup> Settlements are said to permit a CA to correct market failures in a timely fashion,<sup>136</sup> to devise innovative remedies that could not otherwise be achieved, and to tailor, as time lapses, the remedies to the evolving market situation.<sup>137</sup> By contrast, positive enforcement seems to have attracted lower interest from CAs. Its merits appear nonetheless significant. Positive enforcement provides *ex ante* guidance to firms, which can comply voluntarily with the law, thereby limiting the amount of *ex post* intervention required on the part of CAs.

Against this background – and besides practitioners’ quarrels in respect of settlements –<sup>138</sup> CAs’ *outcome discretion* generates several difficult legal issues. First, *outcome*

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<sup>134</sup> Positive decisions may also be adopted *ex officio*, should a CA for instance wish to clarify an area of the law, or upon request of companies.

<sup>135</sup> Settlements may be seen as a means of case selection, because they entail the decision not to prosecute further certain types of cases. See, for instance, ICN, *Anti-Cartel Enforcement Manual*, *supra*, p.23.

<sup>136</sup> Whilst this seems true in a number of jurisdiction such as Italy (see National Report for Italy, p.24), and Switzerland (where negotiated procedures are said to reduce the duration by more than 30%), in other countries, the settlement procedures have not led to significant administrative benefits (see National Report for Belgium, p.26, or National Report for Latvia, p.26 – where it is reported that procedures leading to commitment decisions exhibit a longer duration than conventional antitrust proceedings – or National Report for Hungary, p.28).

<sup>137</sup> See J.-F. BELLIS, “Foreword”, in C. GHEUR and N. PETIT (ed.), *Alternatives enforcement techniques in EC competition law*, Bruylant, Brussels, 2009, p.6.

<sup>138</sup> Whilst most practitioners have welcomed those alternative mechanisms, some have expressed the fear that in the context of settlements, parties would be subject to possible abuses from the CA. Parties are indeed generally only faced with a “*preliminary assessment*” of their conduct, which falls short of a proper, detailed, statement of objections. As a result, parties may encounter difficulties in devising appropriate remedies, and in turn, be the victims of undue CAs’ pressure to disproportionately increase their commitments offers. See D. WAELBROECK, “The development of a new “settlement culture” in competition cases. What is left to the Courts ?” in C. GHEUR and N. PETIT (ed.), *Alternatives*

*discretion* may lead to discrimination between infringers, with CAs promoting settlements in some cases, and adopting negative decisions in other, equivalent, cases.<sup>139</sup> To take an example from the EC decisional practice, one may question why in cases of abusive loyalty rebates such as *Intel* a hefty fine was deemed the right approach, whilst in other similar cases like *Coca-Cola*, the Commission considered a settlement to be appropriate.<sup>140</sup> Of course, there might be legitimate reasons for the adoption of different approaches in those cases. However, they should certainly be clarified *ex ante* to eradicate risks of arbitrary discrimination.

Second, CAs enjoying *outcome discretion* may be tempted to neglect their punitive (and corrective) duties. Settlements indeed allow CAs to increase their decisional output (in terms of cases brought to completion); reduce their administrative strain (because the evidentiary burden on the CA is lower than in standard decisional procedures);<sup>141</sup> and intrusively regulate markets through behavioral and structural commitments. Accordingly, in a regime of full *outcome discretion*, certain CAs might demonstrate a pro-settlement bias, and select/push cases for settlements which are ill-suited for such procedures.<sup>142</sup> For instance, in cases where customers have endured cartelistic or abusive conduct for a significant amount of time, settling a case for the future is tantamount to a denial of justice. The commitments have only corrective effects for the future. They fail entirely to punish (through a fine, for instance) past anticompetitive conduct. Moreover, because they do not lead to a decision finding an infringement, they are unlikely to be of any help to customers seeking compensation for past competitive harm before courts (through requests for profit-disgorgement orders, actions for damages, etc.) This problem

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*enforcement techniques in EC competition law*, Bruylant, Brussels, 2009, pp.234-235. In addition, practitioners have criticized the fact that settlements are unlikely to be subject to judicial review. It would arguably be difficult for parties to challenge decisions to which they, at least seemingly, gave their consent. *Ibid.*, pp.235-236.

<sup>139</sup> See, also, I. VAN BAEL, *op. cit.*, p.735 for other examples.

<sup>140</sup> See Commission Decision of 22 June 2005, Case COMP/A.39.116/B2 – *Coca-Cola*, OJ L 253 , 29 September 2005 p.21; Commission Decision of 13 May 2009, COMP/C-3 /37.990 – *Intel*, not yet published.

<sup>141</sup> Parties are indeed generally only faced with a “*preliminary assessment*” of their conduct, which falls short of proper, detailed, objections. As a result, parties may encounter difficulties in devising appropriate remedies, and in turn, be the victims of undue CAs’ pressure to disproportionately increase their commitments offers. See D. WAELBROECK, *op. cit.*

<sup>142</sup> See I. FORRESTER, *op. cit.*



is only rendered even more acute in the thriving context of regulatory competition that prevails amongst CAs. Settlements may indeed be seen as a convenient instrument to raise a CAs' profile on the international competition enforcement scene.

Third, *outcome discretion* may generate concerns when used as an “*exit strategy*” by CAs. The hypothesis here is that a CA does not have sufficient evidence to reach a negative decision. However, by virtue, for instance, of a prosecutorial bias (or for other reasons, such as the CAs' willingness to avoid wasting the resources already invested in the case), the CA nonetheless want to achieve an outcome. To increase the pressure on the parties to offer commitments, the CA may leave the case in a state of provisional limbo. This risk is particularly relevant in jurisdictions where CAs are not subject to deadlines (or other timelines) and are not required to state precisely their objections. In such settings, CAs may be able to push meritless cases to a settlement.

Finally, echoing the remorse recently voiced by former Commissioner MONTI in respect of the *Microsoft* case, one may wonder whether CAs' should be free to suddenly shift advanced cases from the settlement track to the negative enforcement track, simply because they realize they wish to “*achieve a precedent*”.<sup>143</sup> At this stage, the firm(s) under inquiry may have (i) invested significant resources in the negotiation; and/or (ii) conceded the existence of an infringement only for the purpose of encouraging the settlement. Procedural u-turns of this kind may thus frustrate a firm's legitimate expectations or its privilege against self-incrimination.<sup>144</sup>

In the same vein, the question arises whether CAs should be free to engage in what may be labeled “cumulative”, or more controversially “schizophrenic”, proceedings. Those concepts encapsulate the situation where on the one hand settlement negotiations are taking place with top-ranking officials (in this context, the firm(s) under investigation does not challenge the possible existence of an infringement) and, on the other hand, the

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<sup>143</sup> See, on this, M-Lex, 14 September 2009, “Monti warns of threat to competition policy 'from within'”, D. LUMDSEN.

<sup>144</sup> See, on this, W. WILS, “Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis”, *World Competition*, Vol 26, No 4, 2003, pp. 567-588.

normal, adversarial, procedure continues (in this context, the firm(s) under investigation challenges the existence of an infringement). A procedural setting of this kind tends to alter the equality of arms between the parties and the CA. Almost inevitably, the firm's defense in the standard procedure is weakened as a result of its decision to refrain from challenging the CA's preliminary findings in the settlement procedure. In addition, the multiplication of parallel procedures inflates the costs of proceedings for the firm(s) under investigation.

B. Do CAs enjoy an Unfettered Discretion in Terminating Infringement Proceedings? – Empirical Findings

Perhaps a good starting point to discuss CAs *outcome discretion* is to distinguish the issues of settlements on the one hand (1), and of positive enforcement, on the other hand (2).

1. Settlements

Apart from Japan, Lithuania and Estonia, where the legislation does not enable CAs to reach settlements,<sup>145</sup> all the CAs covered by this survey *can* settle cases in exchange for commitments.<sup>146</sup> In a significant number of jurisdictions, however, this power was only bestowed upon CAs recently, and there is thus a limited track record.<sup>147</sup> By contrast, in other countries such as France, the CA has seemed particularly eager to enter into settlements (with a staggering number of 27 decisions, since its adoption in 2004).<sup>148</sup>

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<sup>145</sup> See National Report for Japan, p. 15. However, in Lithuania (See National Report for Lithuania, p. 12) and Estonia (See National Report for Estonia, p. 10), the CAs have developed informal settlement practices.

<sup>146</sup> See National Report for UK, p.15; National Report for Italy, p. 19; National Report for Belgium, p.21; National Report for Austria, p.6; National Report for Switzerland, p.9; National Report for France, p.21; and National Report for Sweden, p.10.

<sup>147</sup> See National Report for Czech Republic, p.6; National Report for Germany, p.8; National Report for Hungary, p.9 (where only two cases are reported, regarding long term contracts in the gas sector), National Report for China, p.9 (where no decision has been issued to date); National Report for Latvia, p.12 (reporting two cases); and National Report for Luxembourg, p.9 (where no decision has been issued to date).

<sup>148</sup> See National Report for France, p.21; See also National Report for Sweden, p.10 (to date, five cases have been closed following the acceptance of structural commitments by the CA). Finally, in the EU, 9 commitments decisions were adopted between 1 April 2004 and 31 December 2007. See E. GIPPINI-FOURNIER, *op. cit.*, p.40.

With this in mind, the question whether CAs enjoy *outcome discretion* boils down to the issue whether CAs *can freely* decide to settle *any* case and divert from the standard decisional procedure (a preliminary condition is, obviously, that the parties voluntarily submit commitments).<sup>149</sup> Our survey indicates that there is a great deal of heterogeneity amongst jurisdictions.

A first group of jurisdictions endorses a liberal approach, whereby no cases are *a priori* excluded from settlements. In those jurisdictions, the CA can be said to enjoy ample outcome discretion.<sup>150</sup> A good illustration of this can be found in Hungary, where in all cases, the CA abides by the principle of the “*smallest necessary intervention-principle*”.<sup>151</sup> This implies that the CA should, as a matter of principle, not favor the heavy-handed, negative enforcement, approach, but as much as possible promote easy, fast, and complete resolution of competition cases.<sup>152</sup>

By contrast, in a second, larger, group of countries, CAs enjoy less discretion because certain cases are excluded from settlements and *must* accordingly lead to a decision. Those jurisdictions, however, follow a variety of approaches. In a first subset of countries, certain *types* of cases cannot be subject to settlement. In the European Union and Austria, settlements cannot be implemented in cases which might give rise to a fine.<sup>153</sup> In the same vein, in the UK, the CA will “*not accept commitments in cases*

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<sup>149</sup> For the sake of exhaustiveness, it ought to be noted here that a CA may settle cases with certain parties, but not with others and take action. *See*, for instance, National Report for the UK, p.17. A related area where CAs might enjoy a varying degree of “*outcome discretion*” lies in the selection of commitments. Most countries leave choice as to behavioral or structural remedies. However, in Sweden (National Report for Sweden, p.10) and in Austria (National Report for Austria, p.8), there seems to be a clear preference for structural remedies. By contrast, in many countries, a mere commitment to observe the rules will suffice (however, this not sufficient in Italy, *see* National Report for Italy, p.22). Other commitments were also adopted before other countries (in Lithuania, commitments are mostly non discrimination requirements, *see* National Report for Lithuania, p.13).

<sup>150</sup> *See* National Report for Spain, p.7, where it is reported that the CA has a wide margin of appreciation.

<sup>151</sup> *See* National Report for Hungary, p.24. The Principles emphasize that the Competition Authority is not interested first and foremost in sanctioning, but in a more successful (e.g. easier, faster, or completer) manifestation of the goals of the Competition Authority (point 2.51 of the Principles).

<sup>152</sup> *See*, on this principle, K. P. EWING, *op. cit.*, p.241, talking of the principle of “*minimalist intervention*” and explaining that it “*means tailoring any intervention or remedy to be as little intrusive as possible, both in extent and in time*”.

<sup>153</sup> *See* Recital 13 of Regulation 1/2003, “*Commitments decisions are not appropriate in cases where the Commission intends to impose fines*”. *See* also Austria (where the Cartel Court do not take up commitment negotiations for hardcore cartels) National Report for Austria, p.7.

*involving secret cartels, including price-fixing, bid-rigging, output restrictions or quotas, and market sharing, nor in cases involving serious abuse of a dominant position*".<sup>154</sup>

In a second subset of countries, such as Belgium, Estonia, the Czech Republic and to a lesser extent, France, only those cases that do not involve *long-lasting* restrictions of competition seem to be subject to settlements. In Belgium, the CA has clarified that cases where third parties have suffered already a significant damage are excluded from settlements.<sup>155</sup> In Estonia, a case may only be brought to a settlement provided the conduct "*did not result in a significant harm*".<sup>156</sup> In the Czech Republic, a condition for a settlement is that "*there was no significant impediment to competition*".<sup>157</sup> In France, the restriction of competition must be "*actual*" for a case to be settled.<sup>158</sup>

Finally, other countries promote original criteria. In Sweden, for instance, a case that belongs to the CAs' enforcement priorities cannot qualify for a settlement. Commitments may indeed only be accepted if "*further action [is] no longer of sufficient priority*".<sup>159</sup>

## 2. Positive enforcement

Most national Reports are terse on the issue of positive enforcement. This is because, in general, national rules simply do not allow CA to take positive decisions in individual cases. In the UK, Germany, EU and Italy, however, cases may be closed through formal, positive, decisions which are referred to as "*inapplicability decisions*" or "*non infringement*" decisions.<sup>160</sup>

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<sup>154</sup> See National Report for the UK, p.15.

<sup>155</sup> See National Report for Belgium, p.23.

<sup>156</sup> See National Report for Estonia, p.10.

<sup>157</sup> See National Report for the Czech Republic, p.6.

<sup>158</sup> See National Report for France, p.23 (and that can be brought to an end quickly). See by contrast, National Report for Sweden, p.10, where the infringement must be terminated for a case to be subject to settlement.

<sup>159</sup> See National Report for Sweden, p.10.

<sup>160</sup> Interestingly, in Sweden, this possibility has apparently disappeared. No positive decision was adopted since 2004. See National Report for Sweden, p. 9. In Germany, there has been to date only one inapplicability decision. See National Report for Sweden, p.8. In Italy and the UK, the CAs seem to have a more significant practice of positive enforcement (the official terminology in those jurisdictions is "*non infringement*" decisions). See National Report for Italy, p.19 and National Report for the UK, p.14. Whilst

Overall, it thus seems that CAs generally do not enjoy much *outcome discretion* in so far as positive enforcement is concerned. Faced with a groundless case, CAs must dismiss it according to conventional procedures and cannot *choose* to take a positive decision.

C. Should CAs enjoy an Unfettered Discretion in Terminating Infringement Proceedings? – Empirical Findings

It is the submission of this Report that CAs “*outcome discretion*” should be reduced, in so far as settlements are concerned (1) and enhanced, in so far as positive enforcement is concerned (2).

1. Settlements

Commitments are offered, and possibly imposed, to meet present and future concerns. Decisions accepting commitments thus do not punish (like fines), let alone correct (like remedies), the effects of past anticompetitive conduct. National competition regimes allowing CAs to settle cases involving protracted, past, anticompetitive conduct hence enshrine a great sense of leniency with respect to infringers of the competition rules. This, in turn, may (i) lead to sub-optimal deterrence of competition law infringements; (ii) leave complainants and victims of the anticompetitive behavior disgruntled, with a sense of denial of justice; and (iii) may not facilitate the task of ordinary courts of law called upon to assess claims for damages, absent a decision finding an infringement.

To alleviate those concerns, several competition regimes have circumscribed CAs’ margin of discretion by excluding some cases – those involving long-lasting restrictions of competition – from the ambit of settlements. This Report submits that this exclusion is appropriate and should be generalized.

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not covered by this Report, the US Department of Justice’s (“DoJ”) business review procedure, is also a further example of positive enforcement. See <http://www.usdoj.gov/atr/public/busreview/letters.htm>

By contrast, this Report contends that other competition regimes have inappropriately excluded cases *likely to lead to fines* from the settlement procedure (e.g. the European Union). Whilst, from a deterrence policy perspective, it is certainly adequate to exclude blatant competition law infringements from settlements,<sup>161</sup> the reference to cases “*involving fines*” is somewhat strange, and overly inclusive. As explained by D. WAELBROECK, it is the very essence of the settlement procedure to apply in cases where fines may be inflicted.<sup>162</sup> Should firms face no prospects of being sanctioned, they would never offer commitments in exchange for a termination of the procedure. As a matter of principle, exclusions should thus not formally focus on “*fines*”, but rather define the types of competition law violations that are not covered (as, for instance, in the UK).

## 2. Positive enforcement

It is almost undisputed that with the ever-intrusive penalties and remedies imposed by CAs, firms’ *ex ante* compliance with competition rules has become critical. Moreover, the growing influence of antitrust economics has significantly impoverished the predictability of the competition rules.

Against this background, this Report considers that CAs *should* be able to perform positive enforcement activities rather than discretely closing meritless cases (for instance in dismissing a complaint) or focusing on finding infringements (“*negative enforcement*” approach). CAs’ margin of *outcome discretion* should be increased by enabling CAs (i) to adopt positive decisions in competition cases; but also (ii) to issue publicized, individual guidance, on certain practices/sectors upon requests from operators/on their own motion. This latter possibility exists, for instance, possible in the UK and in the EC.

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<sup>161</sup> If infringers can anticipate that they have chances to settle at any rate, they are not dissuaded of violating the law.

<sup>162</sup> See D. WAELBROECK, *op. cit.* p. 235.

The OFT and the European Commission can respectively issue “*opinions*” and “*guidance letters*”.<sup>163</sup>

In addition, this Report considers that, as a matter of good administrative practice, all CAs should effectively devote a share of their resources to positive enforcement activities. First, reasoned, positive, decisions can play an important role in shaping competition policy and encouraging business practices which are capable of improving consumer welfare.<sup>164</sup> By contrast, bodies of “*negative*” case-law send erroneous signals. Faced, only, with infringement decisions, firms may fictitiously exhibit a disproportionate degree of risk aversion and, in turn, abstain from welfare-enhancing conduct (type I errors).<sup>165</sup>

Second, from the standpoint of resource-constrained CAs, the adoption of positive decisions may improve firms’ *ex ante* compliance with the competition rules and, in turn, limits the costs incurred by CAs’ for *ex post* enforcement activities. In addition, once the sunk costs of investigating a – groundless – case have been incurred, the incremental cost of adopting a reasoned positive decision is likely to be low in comparison with its future compliance returns.

Of course, one may argue that similar virtuous effects might be achieved through the adoption of general soft law instruments (*e.g.*, guidelines, communications, etc.). However, whilst this Report views soft law instruments as useful working tools, their precedential value is by definition limited, since they: (i) cannot anticipate everything, and in particular, they cannot keep abreast of all commercial and technological development; (ii) cannot be adapted, and changed, as swiftly as individual decisions; (iii)

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<sup>163</sup> See National Report for the UK at p.14; See, in the EU, Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases, [2004] OJ C 101/78.

<sup>164</sup> See C. HUMPE, I. LIANNOS, N. PETIT and B. VAN DE WALLE DE GHELCKE, “The Directly Applicable Exception System – Positive Enforcement and Legal Certainty” in D. WAELBROECK and M. MEROLA (Eds.), *Towards an Optimal Enforcement of Competition Rules in Europe – Time for a Review of Regulation 1/2003*, Forthcoming, Bruylant, 2010.

<sup>165</sup> See, on the concept of Type I error, A. CHRISTIANSEN and W. KERBER, “Competition Policy with Optimally Differentiated Rules instead of ‘Per se Rules vs. Rule of Reason’”, (2006) 2 *Journal of Competition Law and Economics*, 215.

rely on general, abstract, wording that often gives rise to interpretative difficulties; (iv) are not necessarily based on experience acquired as a result of real cases and regular interactions with private parties but may also be based on more theoretical and general views.

In sum, this Report considers that CAs should enjoy more wiggle room and resources in respect of positive enforcement. This would require, in most cases, entrusting CAs with the ability to adopt reasoned, publicized, positive decisions.

## **VI. Conclusions**

This Report has only provided a top of the iceberg overview of CAs' discretion in the context of their enforcement activities. At this stage, however, we believe that a number of clear, indisputable conclusions can be reached. First, the concept of CAs' discretion is a polymorphous, multifaceted, notion that embraces many aspects of CAs' activities ranging from the selection of a detection policy, to the choice of enforcement targets or of decisional instruments, etc. Second, all CAs' seem to enjoy a fluctuating degree of discretion and there can thus be no single, clear-cut, answer to the question whether CAs should – or not – enjoy an unfettered discretionary power.

Whichever the right, optimal, CA model may be, this report has attempted to formulate a number of pragmatic policy recommendations. It is possible to regroup those proposals in four categories and, for each of them, to indicate whether they entail a decrease (▼), or an increase (▲) of CAs' discretion. First, CAs favoring reactive detection policies should be incentivized to increase their share of *ex officio* detection activities (▼) and, where necessary, should be entrusted with additional resources to this end.

Second, CAs should be entitled to engage in effective priority setting (▲), on the basis of clear, well-defined, criteria (▼). CAs should in addition be requested to clarify publicly their enforcement priorities on a regular basis (▼).



Third, CAs should be requested (i) to inform all interested third parties when opening proceedings; and (ii) to publish their decision (▼). In addition, at the stage of the opening of proceedings, CAs should be compelled to set mandatory deadlines for their review (▼). Those deadlines should be established on a case-by-case basis.

Fourth, in so far as settlements are concerned, CAs should be precluded from negotiating commitments in cases involving long-lasting restrictions of competition (▼). By contrast, in so far as positive enforcement is concerned, national legislations should enable CAs to adopt “*inapplicability*” decisions and to provide individual guidance to firms (▲).

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## ANNEX I – QUESTIONNAIRE SENT TO NATIONAL REPORTERS

LIDC, VIENNA INTERNATIONAL CONGRESS, OCTOBER 2009

**Question A: Should a competition authority enjoy an unfettered discretionary power in the context of the investigation of competition law infringements, or should its margin of discretion be subject to certain limits?**

*Preliminary Remark – The scope of this questionnaire is limited to infringements of Articles 81-82 EC and equivalent national law provisions. It thus does not cover (i) State Aid rules; (ii) infringements of procedural rules; (iii) infringements of merger control rules; and (iv) other competition-law related infringements.*

### 1. General Questions

- 1.1 Please state your name and the country to which your report refers.
- 1.2 How many competition authorities in your country are entrusted with the task of *investigating* infringements of competition law? Please indicate the names of these authorities and describe their functions and the types of competition law infringements they can investigate. Please describe the institutional structure of these authorities and provide figures regarding their human and financial resources.
- 1.3 Please indicate whether the investigating authorities (i) are also competent to take decisions finding, terminating and sanctioning infringements; (ii) must refer the results of their investigation to a different administrative entity which, in turn, holds the duty to decide the case, and sanction infringements; or (iii) shall act otherwise (*e.g.* bring proceedings before a court).
- 1.4 Do competition authorities start investigations at the request of a complainant, *ex officio* or both? Could you estimate the respective shares of investigations upon request and of *ex officio* investigations?
- 1.5. If your country operates a leniency programme for hardcore cartel infringements: has the backlog of pending cartels cases increased since the introduction of the leniency programme? To what extent has the leniency programme reduced the number of *ex officio* investigations started by the competition authority?
- 1.6 Can you list the various methods of referral to the authority of your country and, where applicable, provide details of the most common referral methods (third party complaints, applications for immunity by parties to an agreement, notification of a cooperation agreement by the parties, bounties for corporate individuals, referral by an executive body (Minister, etc.), referral by another

authority (authority of a third country - ECN or other - or sectoral regulator))?

## **2. The Preliminary Investigation – Procedural Issues**

- 2.1 Does the competition authority systematically carry out a preliminary investigation before the opening of a formal investigation? If so, do the interested parties (for instance, the complainant or the company under investigation, or any affected third party) know about the existence and scope of the preliminary investigation, or does it remain it completely secret?
- 2.2 What powers does the competition authority enjoy in the context of a preliminary investigation?
- 2.3 Must the competition authority start a preliminary investigation by means of a formal decision? If so, who is the addressee of this decision? Must the competition authority inform other bodies, entities, authorities, of its decision to launch a preliminary investigation? Is this decision published (publication of a press release, for example)? Is the press generally informed of such decisions?
- 2.4 Under which circumstances can competition authorities close a preliminary investigation? Is the investigation closed by a formal decision or an informal letter? Is the competition authority required to state the reasons for its decision to close a formal investigation? Are parties interested to the preliminary investigation (for instance, the complainant, the company under investigation or any affected third party) informed before the adoption of such decision and, where this is the case, are they given an opportunity to formulate observations? Is this decision made public? Can this decision be challenged (through appeal or annulment proceedings, for example)? If this is the case, before which authority/court and by who can this decision be challenged? What is the review standard applicable to the decision to close a preliminary investigation (marginal or extensive review)?
- 2.5 Can the competition authority keep the records of a preliminary investigation dormant? Could you provide an estimate of the number of dormant files pending before your authority? Can the competition authority be sued for failure to act if it fails investigate a potential infringement for too long a time?

## **3. The Opening of the Formal Investigation – Procedural Issues**

- 3.1 Must the competition authority open a formal investigation by means of a formal decision? If so, who is the addressee of this decision? Within the competition authority, which officials are ultimately competent to adopt such decisions? Is

this decision made public? Can this decision be challenged, (through appeal or annulment proceedings, for example)? If this is the case, before which authority/court and by who can this decision be challenged? What is the review standard applicable to the decision to open a formal investigation (marginal or extensive review)?

3.2 Under which circumstances can the authorities close a formal investigation? Is the investigation closed by a formal decision or an informal letter? Are the competition authorities required to state the reasons for their decision to close a formal investigation? Are the interested parties (for instance, the complainant, the company under investigation or any affected third party) informed before the adoption of such decision and, where this is the case, are they given an opportunity to formulate observations? Is this decision made public? Can this decision be challenged (through appeal or annulment proceedings, for example)? If this is the case, before which authority/court and by who can this decision be challenged? What is the review standard applicable to the decision to open a formal investigation (marginal or extensive review)?

3.3 Can the competition authority keep the records of a formal investigation dormant? Could you provide an estimate of the number of dormant files pending before your authority? Can the competition authority be sued for failure to act if it leaves the formal investigation pending for too long a time?

#### **4. Substantive Criteria Governing the Initiation/Termination of a Preliminary Investigation**

4.1 Does the law or the case-law lay down criteria that should guide the competition authority's decision to initiate a preliminary investigation? Is there any formal or informal guidance in this regard?

4.2 To what extent may a change in the prevailing economic conditions (including the emergence of an economic crisis), induce the competition authority to (i) reshuffle its sectoral investigation priorities; and (ii) recalibrate the intensity of its interventions on the basis of the competition rules (hardening or softening)?

4.3 Does the existence of a sector-specific regulatory and institutional framework (e.g. the regulation of electronic communications) influence, in one way or another, the investigation priorities of the competition authority?

4.4. Does the competition authority have to give reasons for the opening or closing of a preliminary investigation?

- 4.5 Does the law or the case law lay down the criteria that should guide the authorities' decision to close or discontinue a preliminary investigation (or, in the alternative, the decision to open a formal investigation file)? Is there any formal or informal guidance in this regard?
- 4.6 What are those criteria? To what extent are they discretionary? If so, how is discretion defined in your country? Does your national law distinguish between a discretionary and an arbitrary decision, or similar?
- 4.7 What are the limits to any such discretionary powers?

**5. Substantive Criteria Governing the Opening/Termination of a Formal Investigation Procedure**

- 5.1 Does the law or the case-law provide for criteria that should guide the competition authority's decision to start a formal investigation? Is there any formal or informal guidance in this regard?
- 5.2 Must the competition authority open or close a formal investigation procedure in all circumstances?
- 5.3 Must the competition authority provide reasons for opening or closing a formal investigation procedure? What is the rationale behind the opening of the formal investigation procedure (evidence gathered is deemed sufficient, priority-setting, etc.)?
- 5.4 Does the law or the case-law provide for criteria that should guide the competition authority's decision to close or discontinue a formal investigation procedure? Is there any formal or informal guidance in this regard?
- 5.5 What are those criteria? To what extent are they discretionary? If so, how is discretion defined in your country? Does your national law distinguish between a discretionary and an arbitrary decision, or similar?
- 5.6 What are the limits to the competition authority's discretionary powers?
- 5.7. Can the competition authority close formal investigations by taking *positive decisions* that declare the competition rules inapplicable, whether by formal decision or through *sui generis* acts (guidance letters, etc.)? Has the competition authority ever made use of this possibility?

**6. Negotiated Termination of Proceedings – Settlements and Commitments**

- 6.1 Does your national legal order provide for the negotiated termination of investigation proceedings?
- 6.2 Is such a system of negotiated termination of proceedings based on (i) the adoption of a formal decision finding an infringement with a discounted fine in exchange for a guilty plea (so-called “*settlement*” procedure); (ii) the adoption of a decision terminating proceedings (no finding of infringement) in exchange for certain commitments previously negotiated with the authority (so-called “*commitments*” decisions); (iii) both; or (iv) other?
- 6.3 What are the requirements and limits for such negotiated termination? What is the authorities’ margin of discretion to accept or refuse to engage in either of these negotiated termination procedures?
- 6.4 In the context of a procedure leading to the negotiation of *commitments*, what types of remedies may the parties offer to eradicate concerns of unlawful agreement and/or abuse of dominance (behavioral and/or structural)? Can you please provide an overview of the record of your competition authority in the field of commitments decisions?
- 6.5 In the context of a procedure leading to the negotiation of *commitments*, does the decision to accept commitments limit the competition authority’s subsequent freedom to re-open proceedings? How does the competition authority ensure compliance with its commitments decisions (*e.g.* reporting obligations, etc.)?
- 6.7 Is the decision to negotiate the termination of proceedings made public?
- 6.8 To what extent must the final decision be reasoned in the context (i) of a settlement procedure; and (ii) of a commitments procedure? Is the final decision published and, if so, does it provide an accurate, and exhaustive, factual and legal analysis?
- 6.9 To what extent can such decisions be challenged, by whom and on what grounds? What is the review standard applicable to such decisions (marginal or extensive review)? Have such decisions already been challenged? Can you give an overview of the key judgments in this area?
- 6.10 Negotiated procedures are often said to generate significant administrative efficiency benefits. Can you provide figures of the average duration of (i) settlement and (ii) commitments procedures, as opposed to conventional antitrust procedure?

## **7. Sector Inquiries**

- 7.1 Does your law establish a sectoral inquiry procedure which targets certain branches of industry as a whole? Which authority is competent to conduct a sectoral inquiry?
- 7.2 Are there mandatory criteria for the initiation of a sectoral inquiry? What is the margin of discretion of the authority when it comes to the launching of a sectoral inquiry (for example, does it have to carry out an *ex ante* impact study)? Can the decision to open a sectoral inquiry be challenged (through appeal or annulment proceedings, for example)? If this is the case, before which authority/court and by who can this decision be challenged? What is the review standard applicable to such decisions (marginal or extensive review)?
- 7.3 Can you indicate which sectors have so far been the subject of such inquiries and, if so, whether it is possible to draw general conclusions as to the markets that are prone to be subject to a sectoral inquiry?
- 7.4 What powers of investigation does the competition authority have within the framework of a sectoral inquiry? Do companies have to comply with measures taken pursuant to an inquiry?
- 7.5 What types of measures does the competent authority take upon completion of a sector inquiry (publication of reports, adoption of formal decisions, remedial orders, legislative/regulatory proposals, etc.)? In practice, have sector inquiries in your country been followed by public intervention, be it on the basis of the competition rules, or on other grounds?
- 7.6 Could you identify the main practical shortcomings/advantages of sector inquiries for firms and their counsels, as well as for competition authorities?

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