TESIS DOCTORAL

Competition Law Enforcement & Compliance across the World: Systems, Institutions and Proceedings

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Getafe, mayo 2014

Contents

List of Competition Authorities

ALBANIA

Albanian Competition Authority

http://www.caa.gov.al/

ARGENTINA

Comisión Nacional de Defensa de la Competencia

http://www.cndc.gov.ar/

ARMENIA

The State Commission for the Protection of Economic Competition of the Republic of Armenia

http://www.competition.am/

AUSTRALIA

Australian Competition & Consumer Commission

http://www.accc.gov.au/

AUSTRIA

Austrian Competition Authority

http://www.en.bwb.gv.at/

BARBADOS

Fair Trading Commission of Barbados

http://www.ftc.gov.bb/

BELGIUM

Belgian Competition Authority

http://economie.fgov.be/en/entreprises/competition/

BOSNIA AND HERZEGOVINA

Council of Competition

http://bihkonk.gov.ba/

BOTSWANA

Competition Authority

http://www.competitionauthority.co.bw/

BRAZIL

Conselho Administrativo de Defesa Econômica

http://www.cade.gov.br/

BULGARIA

Commission for the Protection of Competition

http://www.cpc.bg/

CANADA

Competition Bureau

http://www.competitionbureau.gc.ca/

CHILE

Fiscalía Nacional Económica

http://www.fne.cl/

Tribunal de Defensa de la Competencia

http://www.tdlc.cl/

CHINA

State Administration for Industry and Commerce

http://www.saic.gov.cn/

Anti Monopoly Bureau, Ministry of Commerce

http://english.mofcom.gov.cn/

National Development and Reform Commission

http://en.ndrc.gov.cn/

COLOMBIA

Superintendencia de Industria y Comercio

http://www.sic.gov.co/

COSTA RICA

Comisión para Promover la Competencia

http://www.coprocom.go.cr/

CROATIA

Croatian Competition Agency

http://www.aztn.hr/

CYPRUS

Commission for the Protection of Competition

http://www.competition.gov.cy/

CZECH REPUBLIC

Czech Office for the Protection of Competition

http://www.uohs.cz/

DENMARK

Danish Competition and Consumer Authority

http://www.kfst.dk/

DOMINICAN REPUBLIC

PROCOMPETENCIA, Comisión Nacional de Defensa de la Competencia

http://procompetencia.gov.do/es/

EGYPT

Egyptian Competition Authority

http://www.eca.org.eg/

EL SALVADOR

Superintendencia de Competencia

http://www.sc.gob.sv/

ESTONIA

Estonian Competition Authority

http://www.konkurentsiamet.ee/

EUROPEAN UNION

Competition Directorate

http://ec.europa.eu/competition/

FIJI

Fiji Commerce Commission

http://www.commcomm.gov.fj/

FINLAND

Finnish Competition and Consumer Authority

http://www.kkv.fi/

FRANCE

Autorité de la Concurrence

http://www.autoritedelaconcurrence.fr/

GERMANY

Bundeskartellamt

http://www.bundeskartellamt.de/

GREECE

Hellenic Competition Commission

http://www.epant.gr/

HONDURAS

Comisión para la Defensa y Promoción de la Competencia en Honduras

http://www.cdpc.hn/

HUNGARY

Hungarian Competition Authority

http://www.gvh.hu/

ICELAND

Icelandic Competition Authority

http://www.samkeppni.is/

INDIA

Competition Commission of India

http://www.cci.gov.in/

INDONESIA

Commission for the Supervision of Business Competition

http://eng.kppu.go.id/

IRELAND

Competition Authority

http://www.tca.ie/

ISRAEL

Israel Antitrust Authority

http://www.antitrust.gov.il/

ITALY

Autorità Garante della Concorrenza e del Mercato

http://www.agcm.it/

JAMAICA

Fair Trading Commission

http://www.jftc.com/

JAPAN

Japan Fair Trade Commission

http://www.jftc.go.jp/

KAZAKHSTAN

Agency for Competition Protection

http://azk.gov.kz/

KENYA

Competition Authority of Kenya

http://www.cak.go.ke/

KOSOVO

Kosovo Competition Commission

http://ak.rks-gov.net/

KOREA

Fair Trade Commission of the Republic of Korea

http://ftc.go.kr/

LATVIA

Competition Council of the Republic of Latvia

http://www.kp.gov.lv/

LITHUANIA

Competition Council of the Republic of Lithuania

http://kt.gov.lt/

LUXEMBOURG

Conseil de la Concurrence

http://www.concurrence.public.lu/

MACEDONIA

Commission for Protection of Competition of the Republic of Macedonia

http://www.kzk.gov.mk/

MALAYSIA

Malaysia Competition Commission

http://www.mycc.gov.my/

MALTA

Malta Competition and Consumer Affairs Authority

http://mccaa.org.mt/

MAURITIUS

Competition Commission of Mauritius

http://www.ccm.mu/

MEXICO

Comisión Federal de Competencia Económica

http://www.cfc.gob.mx/

MOLDOVA

Competition Council of the Republic of Moldova

http://www.ncu.moldova.md/

MONTENEGRO

Agency for Protection of Competition

NAMIBIA

Namibian Competition Commission

NETHERLANDS

Authority for Consumers & Market

https://www.acm.nl/

NEW ZEALAND

Commerce Commission

http://www.comcom.govt.nz/

NICARAGUA

PROCOMPETENCIA, Instituto Nacional de Promoción de la Competencia

http://www.procompetencianic.org/

NORWAY

Norwegian Competition Authority

http://www.konkurransetilsynet.no/

PAKISTAN

Competition Commission of Pakistan

http://www.cc.gov.pk/

PANAMA

Autoridad de Protección al Consumidor y Defensa de la Competencia

http://www.autoridaddelconsumidor.gob.pa/

PAPUA NEW GUINEA

Independent Consumer & Competition Commission

http://www.iccc.gov.pg/

PERU

INDECOPI

http://www.indecopi.gob.pe/

POLAND

Office of Competition and Consumer Protection

http://www.uokik.gov.pl/

PORTUGAL

Autoridade da Concorrência

http://www.concorrencia.pt/

QATAR

Competition Protection and Anti-Monopoly Committee

http://www.mec.gov.qa/

ROMANIA

Competition Council

http://www.consiliulconcurentei.ro/

RUSSIA

Federal Antimonopoly Service of the Russian Federation

http://en.fas.gov.ru/

SERBIA

Commission for Protection of Competition

http://www.kzk.org.rs/

SEYCHELLES

Seychelles Fair Trading Commission

http://www.ftc.sc/

SINGAPORE

Competition Commission of Singapore

http://www.ccs.gov.sg/

SLOVAK REPUBLIC

Antimonopoly Office of the Slovak Republic

http://www.antimon.gov.sk/

SLOVENIA

Slovenian Competition Protection Agency

http://www.varstvo-konkurence.si/

SOUTH AFRICA

Competition Commission

http://www.compcom.co.za/

Competition Tribunal

http://www.comptrib.co.za/

SPAIN

Comisión Nacional de los Mercados y la Competencia

http://www.cnmc.es/

SRI LANKA

Consumer Affairs Authority

http://www.caa.gov.lk/

SWEDEN

Swedish Competition Authority

http://www.kkv.se/

SWITZERLAND

Competition Commission

http://www.weko.admin.ch/

TAIWAN

Fair Trade Commission

http://www.ftc.gov.tw/

TANZANIA

Fair Competition Commission

http://www.competition.or.tz/

THAILAND

Office of Thai Trade Competition Commission

http://otcc.dit.go.th/

TUNISIA

Competition Council

http://www.commerce.gov.tn/

TURKEY

Turkish Competition Authority

http://www.rekabet.gov.tr/

UKRAINE

Antimonopoly Committee

http://www.amc.gov.ua/

UNITED KINGDOM

Office of Fair Trading

http://www.oft.gov.uk/

Competition Commission

http://www.competition-commission.org.uk/

UNITED STATES

Antitrust Division of the Department of Justice

http://www.justice.gov/atr/

Federal Trade Commission

http://www.ftc.gov/

URUGUAY

Comisión de Promoción y Defensa de la Competencia

http://www.mef.gub.uy/competencia.php

VENEZUELA

Superintendencia para la Promoción y Protección de la Libre Competencia (PROCOMPETENCIA)

http://www.procompetencia.gob.ve/

VIETNAM

Vietnam Competition Authority

http://www.vca.gov.vn/

ZAMBIA

Zambia Competition and Consumer Protection Commission

http://www.ccpc.org.zm/

ZIMBABWE

Ministry of State Enterprises Anti-corruption and Anti-monopolies

http://www.zim.gov.zw/

Table of Legislations

ALBANIA

- Law No. 9121 date 18.07.2003 “On Competition Protection”, 2003.

ALGERIA

- Competition Ordinance No. 95-06, 25 January, 1995.

ARGENTINA

- Civil and Commercial Code, 1871.
- Law for Defense of Competition, No. 25.156, 1999.

ARMENIA

- The Law of the Republic of Armenia on Protection of Economic Competition, 2007.

AUSTRALIA

- Federal Court of Australia Act, 1976.
- Evidence Act, 1995.
- Competition and Consumer Act, 2010.

AUSTRIA

- Civil Code, 1811.
- Civil Procedure Act, 1895.
- Consumer Protection Act, 1979.
- Criminal Code Act, 1995.
- Cartel Act, 2005
- Federal Act against Unfair Competition, 2007.

BARBADOS

- Fair Trading Commission Act, 2001

BELARUS

- Law on Counteraction to Monopolistic Activities and Development of Competition, No. 2034-XII of December 10, 1992.

BELGIUM

- Civil Code, 1804.
- Act on the Protection of Economic Competition, 2009.

BOSNIA AND HERZEGOVINA

- Competition Act, 2005.

BOTSWANA

- Competition Act, 2009.

BRAZIL

- Federal Constitution of Brazil, 1988.
- Consumer Defense Code, 1990.
- Antitrust Law, No. 12,529/2011, 2012.

BULGARIA

- Constitution of the Republic of Bulgaria, 1991.
- Law on Protection of Competition, 2008.

CANADA

- Criminal Code, 1985.
- Ontario Class Proceedings Act, 1992.
- Competition Act, 2010.

CHILE

- Antitrust Act, Decree Law 211, 2009.

CHINA

- People's Republic of China Invitation and Submission of Bids Law, 2000.
- People's Republic of China Anti-monopoly Law, 2007.

COLOMBIA

- Law No. 1340/09 for the Protection of Competition, 2009.

COSTA RICA

- Competition and Effective Consumer Defense Act, Law No. 7472, 1994.

CROATIA

- Consumer Protection Act, 2003.
- Competition Act, 2009.

CYPRUS

- The Protection of Competition Law, N0. 207 of 1989, 1999.

CZECH REPUBLIC

- Civil Procedure Code, 1963.
- Commercial Code, 1991.
- Act on the Protection of Competition, 2009.

DENMARK

- Administration of Justice Act, 1996.
- Competition Act, 2010.

EGYPT

- Law on the Protection of Competition and the Protection of Monopolistic Practices, No. 3 of 2005.

EL SALVADOR

- Competition Law, Decree No. 528, 2007.

ESTONIA

- Public Information Act, 2000.
- Competition Act, 2012.

EUROPEAN UNION

- EC Regulation 17/1962.
- EC Regulation 1/2003.
- EC Regulation 139/2004.
- Treaty on the Functioning of the European Union, 2007.

FIJI

- Commerce Commission Decree, 2010.

FINLAND

- Act on the Openness of Government Activities, 1999.
- Act on Class Actions, 2007.
- Competition Act, No. 948/2011.

FRANCE

- Civil Procedure Code, 1975.
- Law on Free Access to Administrative Documents, 1978.
- Consumer Code, 2005.
- Commercial Code, 2006.

GERMANY

- Criminal Code, 2000.
- Act against Restraints of Competition, 2004.
- Lawyers Fee Act, 2004.
- Civil Procedure Code, 2005.
- Law on the Freedom of Information, 2005.

GREECE

- Civil Code, 1946.
- Consumer Protection Law, 1994.
- Antimonopoly Act, Law 3959/2011.

HONDURAS

- Law for the Defense and Promotion of Competition, Decree No. 357-2005.

HUNGARY

- Competition Act, LVII of 1996, 2008.

ICELAND

- Competition Law, No. 44/2005, 2008.

INDIA

- Code of Civil Procedure, 1908.
- Competition Act, No. 12 of 2003.

INDONESIA

- Law Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, 1999.

IRELAND

- Interception of Postal Packets and Telecommunications Messages Act of 1993
- Competition Act, 2002.
- Freedom of Information Act, 2003.

ISRAEL

- Restrictive Trade Practices Law, 1988.
- Freedom of Information Law, 1998.
- Class Action Law, 2006.

ITALY

- Civil Code, 1942.
- Competition and Fair Trading Act, Law no. 287 of 10 October 1990.
- Consumer Code, 2005.
- Industrial Property Code, 2005.
- Product Liability Law, 2006.

JAMAICA

- Fair Competition Act, 1993.

JAPAN

- Civil Code, 1896.
- Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, No. 54 of April 14, 1947.
- Whistleblowers Protection Act, 2004.

KAZAKHSTAN

- Law of the Republic of Kazakhstan on Competition, 2008.

KENYA

- Competition Act, Chapter 504, 2011.

REPUBLIC OF KOREA

- Civil Procedure Act, 1960.
- Monopoly Regulation and Fair Trade Act, 2011.

KOSOVO

- Law on Protection of Competition, No. 03/L-229, 2010.

LATVIA

- Competition Law, 2009.

LITHUANIA

- Constitution of the Republic of Lithuania, 1992.
- Law on Commercial Arbitration, 1996.
- Civil Code, 2000.
- Law on Competition, No. VIII-1099 of 1999, 2009.

MACEDONIA

- Law on the Protection of Competition, 2007.

MALAYSIA

- Competition Act, 2010.

MALTA

- Competition and Consumer Affairs Authority Act, 2010.

MAURITIUS

- Competition Act, No. 25 of 2007.

MEXICO

- Federal Law on Economic Competition, 2011.

MOLDOVA

- Law on the Protection of Competition, No. 1103-XIV from 30.06.2000.

NETHERLANDS

- Dutch Civil Code, 1992.
- Dutch Code of Civil Procedure, 1986.
- Dutch Competition Act, 1997.

NEW ZEALAND

- Commerce Act, 1986.

NICARAGUA

- Law for the Promotion of Competition, No. 601, 2006.

NORWAY

- Competition Act, No. 12 of 5 March, 2004.

PAKISTAN

- Competition Act, No. XIX of 2010.

PANAMA

- Law for the Protection of Consumer and Defense of Competition, No. 45, 31 October, 2007.

PAPUA NEW GUINEA

- The Independent Consumer and Competition Commission Act, 2002.

PERU

- Civil Procedure Code, 1993.
- Political Constitution of Peru, 1993.
- Legislative Decree 1033, 2008.
- Antitrust Law, Legislative Decree 1034, 2008
- Law on Fair Competition, Legislative Decree 1044, 2008.

POLAND

- Civil Code, 1964.
- Act on Competition and Consumer Protection, 2007.

PORTUGAL

- Constitution of the Portuguese Republic, 2005.
- Competition Act, Law No. 19/2012.

QATAR

- Law on the Protection of Competition and Prohibition of Monopolistic Practices, No. 19 of 2006.

ROMANIA

- Competition Law, No. 21/1996, 2003.

RUSSIA

- Constitution of the Russian Federation, 1993.
- Code of Criminal Procedure of the Russian Federation, 2001.
- Federal Law of the Russian Federation on Protection of Competition, No. 135-FZ of July 16th 2006, 2011.

SERBIA

- Law on Protection of Competition, No. 51/2009.

SEYCHELLES

- Fair Trading Commission Act, 2009.
- Fair Competition Act, 2009.

SINGAPORE

- Competition Act, 2006.

SOUTH AFRICA

- Competition Act, 2001.

SLOVENIA

- Civil Procedure Act, 1999.
- The Access to Public Information Act, 2003.
- Act on the Prevention of the Restriction of Competition, No. 36/2008.

SPAIN

- Spanish Constitution , 1978.
- Civil Procedure Act, 2000.
- Law on Defense of Competition, No. 15 of 3 July, 2007.
- Royal Decree 261/2008 of 22 February 2008, approving the Defense of Competition Regulation.

SRI LANKA

- Consumer Affairs Authority Act, No. 9 of 2003.

SWEDEN

- Code of Judicial Procedure, 1942.
- Act on Protection of Trade Secrets, 1990.
- Arbitration Act, 1999.
- Group Proceedings Act, 2002.
- Competition Act, 2008.
- Publicity and Secrecy Act, 2009.

SWITZERLAND

- Federal Act on Cartels and other Restraints of Competition, 1995.

TAIWAN

- Consumer Protection Law, 1994.
- Code of Civil Procedure, 1930.
- Fair Trade Act, 2011.

TANZANIA

- Fair Competition Act, 2003.

TURKEY

- Code of Civil Procedure, 1927.
- Act on the Protection of Competition, No. 4055 7/12/1994.
- Code of Obligations, 2011.

UNITED KINGDOM

- Competition Act, 1998.
- Enterprise Act, 2002.

UNITED STATES

- Sherman Act, 1890.
- Clayton Act, 1914.
- Federal Trade Commission Act, 1914.
- Robinson-Patman Act, 1936.
- Antitrust Civil Process Act, 1962.
- Freedom of Information Act, 1966.
- Hart-Scott-Rodino Antitrust Improvement Act, 1976.
- Foreign Trade Antitrust Improvement Act, 1982.
- Antitrust Modernization Commission Act, 2002.
- Antitrust Criminal Penalty Enhancement and Reform Act, 2004.

VENEZUELA

- Law for the Promotion and Protection of Free Competition, No. 34.880 of 13 January 1992.

VIETNAM

- Competition Law, December 3, 2004.

ZAMBIA

- Competition and Consumer Protection Act, No. 24 of 2010.

Table of Cases

ARGENTINA

- Supreme Court, judgment of 8 May 2007.
- Supreme Court, judgment of 5 June 2007.
- Comisión Nacional de Defensa de la Competencia, Decision No. 243, 6 May 1997.
- Comisión Nacional de Defensa de la Competencia, Decision No. 314, 22 March 1999.
- Comisión Nacional de Defensa de la Competencia, Decision No. 324, 16 September 1999.
- Comisión Nacional de Defensa de la Competencia, Decision No. 510, 8 July 2005.
- Comisión Nacional de Defensa de la Competencia, Decision No. 513, 25 July 2005.

AUSTRALIA

- ACCC v Australian Safeway Stores Pty Ltd [1997] FCA 450.
- ACCC v George Weston Foods Ltd [1999] FCA 858.
- ACCC v George Weston Foods Ltd [2000] FCA 690.
- ACCC v Visy Industries Holdings Pty Limited (No. 3) [2007] FCA 1617.
- ACCC v. Australian Safeway Stores Pty Ltd (No. 4) [2008] FCA 21.
- Campbells Cash & Carry Pty. Ltd. v. Fostif Pty. Ltd. (2006) 229 CLR 386.
- Hubbards Pty Ltd v Simpson Ltd (1982) 41 ALR 509.
- Sellars v. Adelaide Petroleum NL (1994) 179 CLR 332, 355-6.

AUSTRIA

- Austrian Supreme Court, 16 Ok 14/04, Judgment of 11 October 2004.
- Austrian Supreme Court, 16 Ok 10/02, Judgment of 16 December 2002.
- Austrian Supreme Court, 4 Ob 53/98, Judgment of 24 February 1998.

BELGIUM

- Brussels Court of Appeal, June 22, 2009, Case 2008/MR/7, Belgacom/Telenet.
- Brussels Court of Appeal, February 2, 2009, Cases 2005/MR/3 and 2005/MR/4, Occasiemarkt bvba/ERX nv/Delta Motorcycles nv vs. Honda Motor Europe et Maaskant Motors nv.
- Brussels Court of Appeal, February 11, 2009, Case 2008/MR/1, Tecteo/Belgacom.

BRAZIL

- CADE Administrative Procedure No. 08000.015337/1997-48.
- CADE Administrative Procedure No. 08012.009088/1999-48.
- CADE Administrative Procedure No. 08012.004897/2000-23.
- CADE Administrative Procedure No. 08012.002127/2002-14.
- CADE Administrative Procedure No. 08012.005328/2009-31.

BULGARIA

- Commission for the Protection of Competition, Decision No. 190 of 25.11.2003.
- Commission for the Protection of Competition, Decision No. 219 of 18.12.2003.
- Commission for the Protection of Competition, Decision No. 163 of 11.07.2006.
- Commission for the Protection of Competition, Decision No. 1150 of 27.12.2007.
- Commission for the Protection of Competition, Decision No. 274 of 08.03.2011.

CANADA

- Alfresh Beverages Canada Corp v. Hoechst AG et al., [2002] O.J. No. 79 (S.C.J.).
- Axiom Plastics Inc. v. E.I. DuPont Canada Co., [2007] O.J. No. 3327 (S.C.J.).
- Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452.
- Currie v. McDonald's Restaurants of Canada Ltd., [2006] Carswel l Ont 1213 (S.C.J.).
- Dugal v. Manulife Financial Corporation, [2011] ONSC 1785.
- Irving Paper Ltd. V. Atofina Chamicals Inc. [2009] O.J. No. 4021 (S.C.J.).
- Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited v. Groupe Westco Inc. and Groupe Dynaco, Coopérative Agroalimentaire and Volailles Acadia S.E.C. Volailles Acadia Inc./and Acadia Poultry Inc., [2009] Comp. Trib. 6, CT-2008-004.
- Pro-Sys Consultants Ltd. v. Microsoft Corporation, [2011] BCCA 186.
- R. v. Nova Scotia Pharmaceutical Society, [1992], 43 C.P.R. (3d).
- Sun-Rype Products ltd. v. Archer Daniels Midland Company, [2011] BCCA 187.
- Sutherland v. Boots Pharmaceutical PLC, [2002] O.J. No. 1361 (S.C.J.).

CHILE

- Supreme Court, judgment of 26 October 2005.
- Supreme Court, judgment of 28 January 2008.
- Fiscalía Nacional Económica v. Fuel Companies, Decision No. 18 of 10 June 2005.
- Fiscalía Nacional Económica v. Milk Producers, Decision No. 7 of 5 August 2004.

CYPRUS

- Papakokkinou & others vs Kanther (1982) Cyprus Law Reports p.65.

CZECH REPUBLIC

- Decision of the Chairman of the Office for Protection of Economic Competition ref. No. R 059-070, 075-078/2007 (GIS Cartel).

DENMARK

- Eastern High Court, 22 Mach 2002, GT-Linien under konkurs v. De Danske Statsbaner DSB and DSB Rederier A/S.
- Maritime and Commercial Court, 3 October 2002, Ekko A/S v. Brandt Group Norden A/S Blomberg A/S, AM Hvidevarer A/S and GRAM A/S.
- Supreme Court, 20 April 2005, Case 387/2002.

ESTONIA

- Decision of the Supreme Court, Case No 3-3-1-66-02.
- Decision of the Tallinn Circuit Court, No. 2-3/129/2004.

EUROPEAN UNION

- Case 27/76, United Brands Company and United Brands Continental v Commission [1978] ECR 207.
- Case 85/76, Hoffmann-La Roche & Co. v Commission [1979] ECR 461.
- Case 102/81, Nordsee Deutsche Hochseefischerei Gmb H v Reederei Mond Hochseefischerei Nordstern AG & Co KG (102/81) [1982] E.C.R. 1095.
- Case 374/87 Orkem v. Commission [1989] ECR 3283.
- Case C-62/86, AKZO Chemie BV v Commission [1991] ECR I-3359.
- Case C-2/88 Zwartveld [1990] ECR I-3365.
- Cases T-68/69 etc Societá Italiano Vetro SpA v Commission [1992] II ECR 1403, [1992] 5 CMLR 302.

- Case T-24/90, Automec v Commission [1992] ECR II-2250.
- Case C-333/94, P. Tetra Pak International SA v Commission [1996] ECR I-5951
- Joined Cases T-68/69, T-77/89 and T-78/89, Societá Italiano Vetro SpA v Commission [1992] II ECR 1403.
- Case T-102/96, Gencor Ltd v Commission, [1999] E.C.R.
- Case C-126/97, Eco Swiss China Time Ltd v Benetton International NV (C-126/97) [1999] E.C.R. I-3055.
- Case 344/98, Masterfoods Ltd v HB Ice Cream Ltd [2000] E.C.R. I-11369.
- Case C-453/99, Courage Ltd v Bernard Crehan [2001] ECR 1-6297.
- Joined Cases T-125/03 and T-253/03, Akzo Nobel Chamicals Ltd and Akcros Chemicals Ltd v. Commission of the European Communities [2007] ECR II-03523.
- Joined Cases C-295/04 to C-298/04 Vincenzo Manfredi et al v Lloyd Adriatico Assicurazioni SpA et al [2006] ECR 1-6619.
- Case T-587/08, Fresh Del Monte Produce Inc v European Commission.
- Case C-360/09, Pfleiderer AG v Bundeskartellamt.
- Decision 78/253, Campari, December 23, 1977, [1978] O.J. L70/69.
- Case No. IV/30.178 Napier Brown - British Sugar OJ [1988] L284/41.
- Decision 89/467, UIP, July 12, 1989, [1989] L226/25.
- Decision 93/403, EBU/Eurovision, June 11, 1999, [1993] O.J. L179/23.
- Case No. IV/F-3/33.708 - British Sugar plc, Case No. IV/F-3/33.709 - Tate & Lyle plc, Case No. IV/F-3/33.710 - Napier Brown & Company Ltd, Case No. IV/F-3/33.711 - James Budgett Sugars Ltd. OJ [1998] L76/1.
- Decision 99/329, P&I Clubs, April 12, 1999, [1999] O.J. L125/12
- Decision 99/781, British Interactive Broadcasting/Open, September 15, 1999, [1999] O.J. L312/1.
- Commission Decision, 24.1.2007, Case COMP/F/38.899-Gas insulated switchgear.
- Commission Decision, 15.10.2008, Case COMP/39188-Bananas.
- Commission Decision, 22.7.2009, COMP/39.369-Calcium carbide and magnesium based reagents for the steel and gas industries.
- Commission Decision, 24.5.2011, Case COMP/39.796 – Suez Environnement breach of seal.

FINLAND

- Decision of the Supreme Administrative Court, 12.4.2006/883.

FRANCE

- Apple v France Telecom, CA Paris, 4 February 2009.
- Arkopharma v Roache and Hoffmann-La Roche, Nanterre Commercial Court, 11 May 2006.
- Doux Aliments v Ajinomoto Eurolyne, Supreme Court Decision No. 09-15.816., 15 June 2010.
- Juva Santé et Juva Production SED c/ Société Hoffman La Roche AG, CC Paris, 26 January 2007.
- S.A. Mors v. S.A. Labinal, CA Paris, 30 September 1998.
- SNCF v Campenon, Administrative Supreme Court, 19 December 2007.
- SNCF v Fougerolle Ballot and SNCF v. Dumez, Administrative Supreme Court, 19 March 2008.
- Société Aplix v Société Velcro, CA Paris, 14 October 1993.
- Syndicat des pharmaciens de Faveyron, CA Paris, 17 March 1998.
- Thalès Air Defense BV v GIE Euromissile, CA Paris, November 18 2004.
- Autorité de la Concurrence, Decision n°08-MC-01, 17 December 2008.
- Autorité de la Concurrence, Decision nº 10-MC-01, 30 June 2010.
- Autorité de la Concurrence, Decision nº 10-D-29 of the 27 September 2010.

GERMANY

- Federal Court of Justice, KZR 2/93, 8 February 1994.
- Federal Court of Justice, KZR 75/10, 28 June 2011.

- Oberlandesgericht Düsseldorf, WuW/E DE-R 569, 2 August 2000.
- Landgericht Dortmund, 13 O 55/02, 1 April 2004.
- Oberlandesgericht Düsseldorf, KRB 2/05, 28 June 2005.
- Amtsgericht Bonn, Case 51 Gs 53/09, 18 January 2012.

IRELAND

- Attorney General (Ruddy) v. Kenny (1960) 94 I.L.T.
- Jim Blemings v David Patton Ltd. and others [2001] 1 IR 385.
- Paribas Bank Ltd. V AAB Export Finance Ltd [1990] 1 IR 473.
- Patrick Dunlea &Sons v Nissan (Ireland) Ltd, [1992] ECC 169.
- Smurfit Paribas Bank Ltd. V AAB Export Finance Ltd [1990] 1 IR 473.
- Smurfit Paribas Bank Ltd. V AAB Export Finance Ltd (No 2) [1991] 2 IR 19.

ISRAEL

- Supreme Court, CA 345/03 Dan Reichart v. The Heirs of Moshe Shemesh [2007] ISRDC.
- CrimC (TA) 7873784, State of Israel v. Bank Leumi, [1986] ISRDC 5746(3) 368.
- CrimC (Jer) 417/97 State of Israel v. Israel Phoenix Ins. Co. [2001] ISRDC, Antitrust 5000788.
- CrimA 4855/02 State of Israel v. Burovitch [2005] ISRSC, 59(6) 776.

ITALY

- Corte di Cassazione, 21.8.1996, Nº 7733, Telecolor SpA v Technocolor SpA, 47 Giust. Civ. I-1373.
- Corte di Cassazione, 4.3.1999, No. 1811, Montanari c. Cassa Risparmio Genova e Imperia.
- Corte di Cassazione, 9.12.2002, No. 17475, Axa Assicurazioni c. Larato.
- Corte di Cassazione (Sezioni Unite), 4.2.2005, Nº 2207, Unipol Assicurazioni c. Ricciardelli.
- Corte di Cassazione, 2.2.2007, Nº 2305, Fondiaria-SAI Assicurazioni c. Nigriello.
- Corte di Cassazione, 12.2.2009, Nº 3640, Associazione nazionale consulenti del lavoro c. INAZ Paghe.
- Corte di Cassazione, 13.2.2009, Nº 3638, Certel et al. c. ENTEL.
- Corte d'Appello di Milano, 18.7.1995 and 24.12.1996, Telsystem c. SIP-Telecom Italia.
- Corte d'Apello di Roma, 20.1.2003, Albacom c. Telecom Italia.
- Corte d'Appello di Milano, 11.7.2003, Bluvacanze c. Viaggi del Ventaglio, Turisanda e Hotelplan Italia.
- Corte d'Appello di Milano, 2.3.2004, Nº 926, Gemeaz Cusin/ICA.
- Corte d'Appello di Milano, 3.2.2005, Nº 280, , Codacons/ICA.
- Corte d'Appello di Milano, 23.7.2005, Farmacie Petrone c. Pharmacia Italia e Pfizer Italia.
- Corte d'Appello di Milano, 10.3.2006, Nº 1271, ICA/Telecom Italia.
- Corte d'Appello di Milano, 16.3.2006, Nº 1397, Assobiomedica/ICA.
- Corte d'Appello di Milano, 16.9.2006, Avir c. ENI.
- Tribunale di Milano, 8.5.2009, ENI et al. c. Pirelli Tyre et al.
- Turin Court of Appeal, 6.7.2000, Indaba Incentive co. v. Società Juventus F. C. SpA.
- Administrative Tribunal of Lazio, 7.3.2006, Nº 1713.
- Giudice di Pace di Bitonto, 21.5.2007, Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA.
- Autorità Garante della Concorrenza e del Mercato, 15.6.2005, A364-Merck-Principi Attivi.
- Autorità Garante della Concorrenza e del Mercato, 11.5.2011, A415-SAPEC AFRO/BAYER-HELM.
- Autorità Garante della Concorrenza e del Mercato, 11.1.2012, A431-RATIOPHARM/PFIZER.

JAPAN

- Supreme Court, Case No. Showa 60 (O) 933, MINSHU vol. 43, No. 11, p. 1259, 8 December 1989.

LUXEMBURG

- Tribunal d'arrondissement Luxemburg, 9 March 1990, Wintergarden Feddersen/Soluver.

NETHERLANDS

- Pres. Rechtbank Utrecht, 11 February 1992, FNK/SCK.
- Rotterdam Court of First Instance, 7 March 2007, CEF/Bestuurders, LJN BA 0926.
- Netherlands Competition Authority, 19 February 1999, Case No. 1006/15.
- Netherlands Competition Authority, 15 September 2004, Case No. 3576/55.
- Netherlands Competition Authority, 18 February 2008, Case No. 5985.

NEW ZEALAND

- Air New Zealand v. Commerce Commission, No. 6 11 TCLR 347 (2004).
- Bomac Lanoratories Ltd. v. F. Hoffmann-La Roche Ltd., / NZBLC 103 (2002).
- Brambles New Zealand Ltd. v. Commerce Commission, 10 TCLR 868 (2003).
- Commission Decision No. 393 of 15 May 2000, Team Talk Ltd. and Telecom New Zealand Ltd.
- Commission Decision No. 473 of 30 September 2002, Electricity Governance Board Ltd.

PERU

- Asociación Peruana de Agencias de Viaje y Turismo v. Alitalia, Linee Aeree Italiane, et al. Decision No. 043-2004-INDECOPI/CLC, 19.07.2004.
- Carlos León Madalengoitia v. Colegio Químico Farmacéutico del Perú, et al. Decision No. 068-96-INDECOPI-CLC, 17.09.1996.

POLAND

- Supreme Court, Judgment of 10 August 2006, ref. no. V CSK 237/06.
- Decision of the President of UOKiK of 28 June 2007, No. DOK-86/2007.

PORTUGAL

- Supreme Court of Justice, 24 April 2002, Case No. 417/01.
- Lisbon Court of Commerce, Case No. 22/2006.
- Lisbon Court of Commerce, Case No. 1/2008.
- Competition Authority, Case No. 7/2005.
- Competition Authority, Case No. 21/2005.

SINGAPORE

- Lim Lie Hoa and another v. Ong Jane Rebecca [1997] 1 SLR(R) 775.
- Competition Commission, Visa International, 400/001/06.
- Competition Commission, Qantas/British Airways, 400/002/06.

SPAIN

- Judgment of the Tribunal Supremo of 26 April 2005, case 2597/2005
- Judgment of the Tribunal Supremo of 8 June 2007, case 625/2007.
- Judgment of the Tribunal Supremo of 2 October, 2008, case 870/2008.
- Audiencia Provincial de Valladolid, Judgment of 9 October 2009.
- Audiencia Provincial de Madrid, Judgment of 10 April 2010.
- Audiencia Provincial de Madrid, Judgment of 3 October 2011.
- Juzgado de lo Mercantil Madrid, Judgment of 11 November 2005.
- Juzgado de Primera Instancia N. 4 de Madrid, Judgment of 7 June 2005.

- Juzgado de Primera Instancia N. 11 de Valladolid, Judgment of 20 February 2009.
- Competition Authority, Decision of April 15 1999.
- Competition Authority, Decision of 22 July 2002.

SWEDEN

- Svea Court of Appeal, 27 April 2001, Decision T 33-00, Staten genon Luftfartsverket v. Scandinavian Airlines System.
- Stockholm City Court, 9 October 2002, Decision T 8122-00, Weba Kemi AB v. Aria ekonomisk forening.
- Stockholm City Court, 14 July 2003, Decision Ä 10773-03, Konkurrensverket v. Nynäs AB et al.
- Court of Appeal for Western Sweden, 29 December 2003, Decision T 4366-02, Dirland Télécom SA v Telecom AB.
- Swedish Competition Authority, Decision of 25 August 2010 (Ekfors).

SWITZERLAND

- Tribunal Fédéral Suisse, 28 April 1992; [1992] ASA Bull 368.
- Competition Commission, Affichage Holding-JC Decaux, RPW/DPC 2001/2.
- Competition Commission, Hoffmann-La Roche AG, Rhône-Poulenc, BASF AG, RPW/DPC 2000/2.
- Competition Commission, Système de distribution Citroën, RPW/DPC 2002/3.

TURKEY

- Supreme Court, 19th Civil Law Chamber, 1 November 1999, E:1999/3350 K:1999/6364.
- Supreme Court, 19th Civil Law Chamber, 29 November 2002, E:2002/2827 K:2002/7580.
- Competition Board, 16 March 2007, Decision No. 07-24/236-76.
- Competition Board, 27 March 2008, Decision No. 08-26/283-91.
- Competition Board, 17 November 2011, Decision No. 11-57/1473-539.

UNITED KINGDOM

- Accentuate Ltd v ASIGRA Inc. [2009] EWHC 2655.
- American Cyanamid Co v Ethicon [1975] AC 396.
- Arkin v Bouchard Lines Ltd. [2005] 1 WLR 3055.
- Attheraces Ltd v British Horseracing Board Ltd [2005] EWHC 1553.
- Broome v. Cassell & Co. Ltd. [1972] AC 1072, 1073.
- Cutsforth v Mansfield Inns [1986] All.ER 577 (QB).
- Devenish Nutrition Limited v. Sanofi-Aventis SA (France) & Others [2007] EWHC 2394 (Ch).
- ET Plus SA v Jean-Paul Welter & The Channel Tunnel Group Ltd [2005] EW HC 2115 (Comm).
- Fiona Trust & Holding Corp v Privalov [2007] EWCA Civ 20; [2007] 1 All E.R. (Comm) 891.
- National Grid Electricity Transmission Plc v ABB Ltd and Others [2012] EWHC 869 (Ch).
- Provimi Limited v Aventis Animal Nutrition and SA & Ors [2003] EWHC 961 (Comm).
- Rookes v. Banard [1964] AC 1129, 1226.
- Healthcare at Home Ltd v Genzyme Ltd, Case No. 1060/5/7/06, [2006] CAT 29.
- Emerson Electric Co and Others v Morgan Crucible Company PLC, Case No. 1077/5/7/07, [2007] CAT 30.
- Consumers' Association v JJB Sports PLC, Case No. 1078/7/9/07 [2009] CAT 3.
- Office of Fair Trading, Hasbro Ltd., Argos Ltd. and Littewoods Ltd. CA 98/8/2003.
- Office of Fair Trading, Lladró Comercial S.A. CA 98/04/2003.
- Office of Fair Trading, Aluminiun Spacer Bars, CA 98/04/2006.

UNITED STATES

- Albercht v. Herald Co. 390 U.S. 145 (1968).

- Allied Accessories & Auto Parts Co. v. Gen. Motors Corp., 901 F.2d 1322, 1326 (6th Cir. 1990).
- AlliedSignal, Inc. v B.F. Goodrich Co., 183 F.3d 568, 573 (7th Cir. 1999).
- Alstom Power LTD v Eraring Energy (2004) ATPR 42-009.
- American Pipe & Construction Co v. Utah, 414 US 538, 559 (1974).
- American Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821, 825 (2d Cir. 1968).
- Apollo Theater Foundation Inc. v. Western International, United States District Court of New York, 02 Civ 10037 (DLC), May 5th 2005.
- AT&T Techs., Inc. v Communications Workers of Am., 475 U.S. 643, 650 (1986).
- Bigelow v. RKO Radio Pictures, Inc., 327 US 251, 264, 66 S. Ct. 574 (1946).
- Brooke Group v. Brown & Williamson Tobacco, 509 U.S. 209 (1993).
- Brown Shoe Co., Inc. v. United States – 370 U.S. 294 (1962).
- Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. – 429 U.S. 477 (1977).
- Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 720, 724 (1988).
- California v. ARC Am. Corp., 490 US 93, 97 (1989).
- Carpet Group International; Emmert Elsea v. Oriental Rug Importers Association, Inc.; Bashian Bros., Inc.; Alfandari and Etessami Oriental Rug Co., Inc.; Moussa Etessami & Sons Corp.; Noonoo Rug Co.; Pande Cameron & Co. of New York; Kelaty Rugs International; Daniel Hodges; George Newman; Isaac Etessami,carpet Group International Corporation and Emmert Elsea, Appellants., 227 F.3d 62, 77 (3d Cir. 2000).
- Catlin v. Wash. Energy Co., 791 F2d 1343, 1350 (9th Cir. 1986).
- Citizens Publishing Co. v. United States, 39 U.S. 131 (1969).
- Chavez v. Netflix, Inc., 162 Cal.App. 4th 43, 75 Cal.Rptr. 3d 413, 418 (Cal.App. 2008).
- Conwood Co. v. US Tobacco Co., 290 F.3d 768, 793 n.8 (6th Cir. 2002).
- Cooperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).
- Coors Brewing Co. v Molson Breweries, 51 F.3d 1511, 1516 (10th Cir. 1995).
- Crown, Cork & Seal Co v. Parker, 462 US 345 (1983).
- Dr. Miles Medical Co. v. John D. Park & Sons. Co. 220 U.S. 373 (1911).
- Eichron v. AT&T Corp., 248 F.3d 131 (3d Cir. 2001).
- Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc., 213 F.3d 198,207 n.17 (5th Cir. 2000).
- Esco Corp. v. United States, 340 F.2D 1000, 1007 (9th Cir. 1965).
- F. Hoffmann-La Roche Ltd. v. Empagran S.A., 123 S.Ct. 2359 (2004).
- Fishman v. Estate of Wirtz, 807 F.2d 520, 561 (7th Cir. 1986).
- Fruehauf Corp. v. FTC, 630 F.2d 345 (2d Cir., 1979).
- Grip-Pak, Inc. v. Illinois Tool Works, Inc, 649 F2d 466, 475 (7th Cir. 1982).
- Hannover Shoe, Inc. v. United Shoe. Mach. Corp., 329 US 481 (1968).
- H.J. Inc. v. Flygt Corp., 925 F.2d 257, 261 (8th Cir. 1991).
- Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).
- In re Dynamic Random Access Memory (DRAM) Antitrust Litigation, Appeal No. 08-16478 (9th Cir).
- In Re Insurance Antitrust Litigation, 723 F. Supp. 464 (N.D. CA 1989); reversed, 938 F. 2d 919 (9th Cir. 1991); affirmed sub nom Hartford Ins. Co. v. California, 509 U.S. 764 (1993).
- In re Aluminum Phosphide Antitrust Litg., 839 F.Supp. 1497, 1507 (D.Kan. 1995).
- In re Warfarin Sodium Antitrust Litig., 214 F.3d 395, 399-401 (3d Cir. 2000).
- In re Auction Houses Antitrust Litig., 164 F. Supp. 2d 345 (S.D.N.Y. 2001), aff'd, 2002 U.S. App. LEXIS 15327 (2d Cir. 2002).
- In re Linerboard Antitrust Litig., 305 F3d 145, 160 (3d Cir 2002).
- In re Currency Conversion Fee Antitrust Litigation, 265 F.Supp. 2d 385, 415 (S.D.N.Y. 2003).
- In re Visa Check/Master Money Antitrust Litig., 297 F. Supp. 2d 503, 522 (Dec. 19, 2003).
- In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 531 (3d Cir. 2004).
- In Re Visa Check/MasterMoney Antitrust Litigation, a/k/a Wal-Mart Stores, Inc. et. al v. Visa U.S.A. Inc. and MasterCard International Inc., 396 F. 3d 96, 114 (2d Cir. 2005).
- In re Linerboard Antitrust Litig., 504 F. Supp. 2d 38, 64-66 (E.D. Pa. 2007).
- In re Scrap Metal Antitrust Litig., 527 F3d 517, 536-38 (6th Cir 2008).

- J.T. Gibbons, Inc. v. Crawford Fitting Co., 790 F.2d 1193, 1194-95 (5th Cir. 1986).
- Kruman v. Christie's International PLC, 284 F.3d 384 (2d Cir. 2002).
- Kansas v. Utilicorp United, Inc., 497 US 199, 207 (1990).
- Lehrman v. Gulf Oil Corp., 500 F.2d 659, 667 (5th Cir. 1974).
- Loeb v. Eastman Kodak co. 183 F. 704 (3d Cir. 1910).
- Louis Dreyfus Negoce, S.A. v Blystad Shipping & Trading Inc., 252 F.3d 218, 225 (2d Cir. 2001).
- Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 435-36 (2d Cir. 2007).
- Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F. 2d 573, 591-92 (3d Cir. 1979).
- Mitsubishi Motors Corp v Soler Chrysler Plymouth, 473 U.S. 614 (1985).
- Natural Gas Antitrust Cases I, II, III & IV. Sweetie's, v. El Paso Corporation, No. 319840 (S.F. Super. Ct.); Continental Forge Company v. Southern California Gas Co., No. BC237336 (L.A. Super. Ct.); Berg v. Southern California Gas Co., No. BC241951 (L.A. Super. Ct.); City of Long Beach v. Southern California Gas Co., No. BC247114 (L.A. Super. Ct.); City of L.A. v. Southern California Gas Col, No. BC265905 (L.A. Super. Ct.); Phillip v. El Paso Merchant Energy LP, No. GIC 759425 (San Diego Super. Ct.); and Phillip v. El Paso Merchant Energy LP, No. GIC 759426 (San Diego Super. Ct.). (El Paso).
- Northern Pacific Railway Co. v. United States, 356 US 1 (1958).
- Perrigon v. Bergen Brunswig Corp., 77 F.R.D. 455, 458 (D.C. Cal. 1978).
- Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1238 (3d Cir. 1993).
- PhilCo Corp v. RCA, 186 FSupp 155, 161-62 (ED Pa 1960).
- Reibert v. Atl. Richfield Co., 471 F.2d 727, 731 (10th Cir. 1973).
- SAS of P.R. v. P.R. Tel. Co., 48 F.3d 39, 44 (1st Cir. 1995).
- SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991).
- Spectrum Sports, Inc. v. Mc Quillan, 506 U.S. 447, 456 (1993).
- Standard Oil Co. v. United States, 221 U.S. 1, 60, 61-64 (1911).
- Standard Oil Co of California v. United States, 337 U.S. 293 (1949).
- Timken Roller Bearing Co. v. United States, 341 U.S. 593 at 603, 71 S.Ct. 971 (1951).
- THI-Hawaii, Inc. v. First Commerce Fin. Corp., 627 F.2d 991, 996 (9th Cir. 1980).
- United States Football League v. National Football League, 704 F.Supp. 474 (S.D.N.Y. 1989).
- United States v. Frank Peake, Case No. 3:11-cr-00512, U.S. Dist. Ct., DPR.
- United States v. Socony-Vacuum Oil Co. 310 U.S. 150 (1940).
- United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).
- United States v. Penn-Olin Chemical Co., 378 U.S. 158, (1964).
- United States v. Grinnell, 384 U.S. 563, 570-71 (1966).
- United States v. Topco Associates, Inc., 405 U.S. 596 (1972).
- United States v. Marine Bancorporation, 418 U.S. 602 (1974).
- United States v. El Paso Natural Gas Co., 1995-2 Trade Cases (CCH) para. 71, 118 (D.D.C. 1995).
- United States v. Ecast, Inc. and NSM Music Group, Ltd., December 16 (2005).
- Use Techno Corp. v. Kenko USA, Inc., 515 F. Supp. 2d 1086, 1088 (N.D. Cal.2007).
- Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004).
- Willmar Poultry Co v. Morton-Norwich Products, Inc., 520 F2d 289 (8th Cir 19

CHAPTER ONE
Introduction

1. Introduction

Today, it is widely accepted that competition law constitutes a fundamental instrument for competitiveness, economic growth, and consumer welfare. In particular, the main objective of competition law and policy is the attainment of competitive markets with the ultimate purpose of allocating resources efficiently and, as a consequence, to ensure that consumers will obtain goods and services at the lowest possible prices. The growing number of national and regional competition law regimes evidences the global acknowledgement of the importance of this branch of public law for economic development. A few decades ago, only a bunch of countries had implemented competition law provisions, all of them with well developed economies. Currently, this situation has substantially changed provided that over a hundred jurisdictions, with different legal traditions and levels of economic development, have introduced some kind of competition law provisions in their national legislations[1].

This proliferation of competition law has been remarkably fast and has taken place in different contexts depending on the jurisdictions in question and on the specific characteristics of these (economic, social and political). Particularly, the proliferation of competition law entails that the implementation of competition law provisions is no longer exclusive for developed countries that have a long tradition of free-market economies; on the contrary, the expansion of this branch of law includes the adoption of competition law provisions by developing countries with different levels of experience with market processes.

In great part, the economic context of nations has provoked the establishment of new competition law systems. Traditionally, the support for the development of competition law and policy has been associated with the levels of economic development, thus, developed countries came first to recognize the desirability of competition policy[2]. Accordingly, in jurisdictions that have a long tradition of free-market economies the implementation of competition law regimes has occurred at an earlier stage than in jurisdictions with centrally planned economic systems and with significant control of the

[1] Mehta, Pradeep S. & Evenett, Simon J. (2006), 'Promoting Competition Around the World: A Diversity of Rationales and Approaches'. In: Mehta P.S. *Competition Regimes in the World: A Civil Society Report*. CUTS International.
[2] Edwards, Corwin D. (1974), 'The Future of Competition Policy: A World View', 14 *California Management Review*.

government over the economic activity, e.g. in 1950, the United States alone had a robust antitrust system, conversely, countries like China that have been characterized for their strong government control have implemented competition law policies more recently[3]. Consequently, economic reforms, political liberalization and the increase of the level of development have constituted important drivers for the establishment of competition law systems across the world[4], provided that the enactment of antitrust provisions has been a fundamental component of the legal reforms that developing countries have adopted to move from central planning to market processes[5].

In addition, the expansion of competition law and the subsequent establishment of new competition law regimes have occurred, in many cases, due to the encouragement by and pressure from Western countries, multinational donors and advisory bodies[6]. The participation of these in shaping the fundamental commands and institutions of new competition law regimes has taken place at different instances. For example, Eastern European countries aspiring for EU membership were required to implement competition law provisions into their national legislations, in such cases; advisors from the United States and the European Union have helped candidate countries in drafting their competition acts[7]. Similarly, the willingness of developing countries to participate in bilateral trade agreements has motivated these nations to adopt competition law provisions, for instance, in 2004; Chile was required to reform its competition act in order to sign a free trade agreement with the U.S. More recently, in 2011, the *Trade Agreement between the European Union and Colombia and Peru* required the parties to ban through their national and regional legislation the most harmful anticompetitive practices. At a regional level, the countries which are members of multinational organizations have committed themselves to adopt competition law provisions in their national legislations in order to provide market operators with a reliable competition environment; such is the case of the ASEAN countries or the members of the Andean Community. Finally, in some cases, the implementation of competition law regimes in developing countries has been promoted by international organizations and donors, such as the United Nations Development Program or the World Bank, in exchange for credits and funds.

With regard to the overall application of the competition law provisions, the proliferation of this branch of law has produced two major issues. On the one hand, the expansion of competition law across the world has created a vast spectrum of competition law systems with different types of enforcement. On the other hand, even though competition law regimes have flourished over the last decades, this increase has not brought along proportional rates of enforcement given that in great part of the adopting countries the competition law provisions are rarely and/or erratically applied.

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[3] Huang, Yong & Jiang, Shan (2010), 'Thirty Years of PRC Anti-Monopoly Law under 'State-Market' Yardstick: From Retrospective and Prospective Viewpoints'. In: Zäch, Heiemann, and Kellerhals, *The Development of Competition Law: Global Perspectives*. Cheltenham: Edward Elgar Pub.

[4] Palim, Mark R.A. (1998), 'The Worldwide Growth of Competition Law: An Empirical Analysis'. *The Antitrust Bulletin*, Spring 1998, vol. XLIII, Nº 1.

[5] Kovacic, William E. (1998A), 'Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies', 66 *U. Cin. L. Rev*. 1997-1998.

[6] Kovacic, William E. (2000), 'Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy'. *St. John's Law Review,* Volume 74, Issue 2.

[7] Mastalir, Roger W. (1993), 'Regulation of Competition in the "New" Free Markets of Eastern Europe: A Comparative Study of Antitrust Laws in Poland, Hungary, Czech and Slovak Republic, and their Models', 19 *N.C. J. Int'l L. & Com. Reg*.

The present investigation intends to address these two issues: by analyzing how competition law is enforced across jurisdictions; and by trying to identify what characteristics have determined the success of certain competition law systems and what others have influenced the under-enforcement of the competition law provisions in some jurisdictions, mainly those of developing countries. The ultimate purpose of the investigation is to provide the reader with a comprehensive study about the overall enforcement of competition law across the world and to identify the main obstacles that new competition law regimes have faced in enforcing effectively the substantive commands of competition law.

One of the main features of competition law is its possibility to be enforced by a variety of persons in different proceedings[8]. This feature is due to the fact that a single competition law infringement can harm a variety of persons in different ways. In this sense, depending on the jurisdiction in question, administrative proceedings against undertakings suspected of having infringed the competition law provisions may be initiated by the relevant public authority. Moreover, the parties affected by the anticompetitive behavior of infringing undertakings may bring civil claims seeking damages, injunctive relief, or a declaration. In the most stringent jurisdictions, the individuals involved in hard-core cartels may be criminally prosecuted and sentenced to jail if found guilty. Finally, in an increasing number, competition law disputes may also be resolved via arbitration[9].

Additionally, besides the traditional enforcement of competition law, public and private, which is intended to accomplish the goals and objectives of competition law and policy and to assure compliance with the law, the willingness of undertakings and individuals to abide by the law, or self-enforcement, can also help to achieve the objectives of competition law and assure compliance. Provided that the voluntary compliance of the antitrust provisions by market participants can play a fundamental role in increasing the levels of deterrence and compliance[10], the present investigation will also study the case for antitrust compliance programs and their interaction with the enforcement of competition law.

In relation to the different types of competition law enforcement, the present investigation will review a variety of jurisdictions in order to provide the reader a clear picture of the different types of competition law enforcement found across the world. To provide a global perspective of how competition law is enforced in different jurisdictions, the study will review a variety of competition law regimes. The reviewed competition law systems will be chosen by taking into consideration certain conditions that make the study of these regimes interesting for illustrating the overall enforcement of competition law. In this sense, jurisdictions with strong and successful competition law regimes, mainly those of the U.S. and the EU, will serve as a benchmark to compare the rates of competition law enforcement of young competition law regimes. Finally, to review a fair sample of competition law regimes, the proposed investigation will study jurisdictions with different legal traditions (common law and civil law countries), different levels of economic development (developed countries, transition economies, and developing countries), and from every continent in the world.

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[8] WILS, Wouter P,J. (2009), 'The Relationship between Public Enforcement and Private Actions for Damages', 32 *World Competition*.

[9] NAZZINI, Renato (2004A), 'Concurrent Proceedings in Competition Law: Procedure, Evidence and Remedies. Oxford: Oxford University Press.

[10] LEVI, Margaret, TYLER, Tom & SACKS, Audrey (2009), 'The Reasons for Compliance with the Law'. The United States Studies Centre at the University of Sydney, Working paper.

Probably the most important result of the current investigation is that despite the vast expansion of competition law and policy in the last decades, this phenomenon does not imply a proportional increase on the rates of competition law enforcement. This is the situation in great part of the recently implemented competition law regimes; moreover, this current state of under-enforcement is notoriously evident in the jurisdictions of developing countries.

Competition law provisions are not self-enforced; accordingly, the mere existence of a competition law system in a determined country does not guarantee on its own the achievement of the professed goals and objectives of competition law. In this sense, in order for competition law and policy to produce their desired effects on the economy, they have to be effectively implemented. Hence, in practice the only way to accomplish the competition law goals and objectives is through the optimal enforcement of the competition law provisions; otherwise, if competition law only exists on paper it has no important value.

Overall, the optimal enforcement of competition law is concerned mainly with five aspects. First, it requires the establishment of clear provisions that govern the commercial practices of the recipients of the law and defines the competition law policies. Second, it also requires the creation of strong institutions with effective means responsible for the enforcement of the competition law provisions. Third, since competition law is compulsory by nature, every competition law regime shall establish appropriate sanctions and remedies in case the substantive commands of competition law are infringed. Fourth, competition law should provide private parties that have been injured by the infringement of the competition law provisions the possibility to enforce the antitrust provisions to receive compensation in cases where the public authorities will not prosecute an alleged violation of the law for priority reasons or lack of resources. And fifth, in order to avoid the unlawful and abusive application of the competition law provisions by the public authorities responsible for their application, the availability of effective review mechanisms is fundamental for the creation of a strong and credible competition law regime.

The exercise of reviewing several competition law regimes allows evidencing that most jurisdictions, especially those of developing countries, have borrowed heavily from the experienced nations in designing the fundamental commands and institutions of their respective competition law systems. In many cases, the rules, practices and theories developed in successful competition law regimes (mostly in the U.S. and the EU) have been *forced down the throat of developing countries*, often with the aid of international organizations[11]. This practice has constituted a dangerous trend to indiscriminately transpose the provisions and institutions of experienced competition law regimes into the legislation of the adopting countries. This one size fits all trend has caused the inability of young competition authorities to enforce their respective competition laws efficiently, provided that these foreign provisions have failed to address all of the realities of the jurisdictions they are called upon to regulate[12]. Accordingly, in practice, most young competition law regimes have experienced serious difficulties while trying to apply their competition statutes, these are mainly concerned with: the lack of economic and human resources of young competition agencies to execute complex legal commands; a strong economic

[11] Dabbah, Maher M. (2010), International and Comparative Competition Law. Cambridge; New York: Cambridge University Press.
[12] ICN, *Lessons to Be Learnt From the Experiences of Young Competition Agencies,* 2006.

and political opposition, and deficient judicial systems that have little or no experience in the adjudication of competition law matters[13].

From the abovementioned, the objective of the present investigation is to produce a comprehensive study that provides the reader an ample description of the different competition law regimes, their institutions and types of enforcement, in order to identify the best practices of successful regimes. Therefore, the ultimate objective is to provide guidance on how new competition regimes can be designed and implemented effectively by learning from the experience of other countries that have succeeded in building effective competition law regimes.

2. Methodology

As evidenced in the previous section, competition law has expanded vigorously over the last couple of decades across the world. This phenomenon has caused the establishment of a variety of different competition systems worldwide. The diversity of most competition regimes is due to the differences found across jurisdictions with regard to the legal, social, political and economic traditions of the jurisdictions where the antitrust provisions have been implemented. Moreover, such diversity is also reflected by the vast spectrum of objectives that competition law and policy are intended to attain. In our globalized economy, great part of the commercial activities has an international dimension; accordingly, the anti-competitive effects of the majority of these activities may have a direct impact in several jurisdictions. In such cases, a single anti-competitive conduct can be scrutinized by more than just one set of competition law provisions; hence, it is important to acknowledge the abovementioned diversity of competition law systems in order to set the standards of an effective international application of competition law. In this sense, this diversity found in the enforcement of competition law across jurisdictions has inspired this investigation.

According to the preceding, the present is an international comparative study intended to shed some light on how the competition law provisions are enforced across the world and to identify the main obstacles that new competition law regimes have faced in enforcing effectively the substantive commands of competition law. To accomplish such an arduous endeavor several approaches will be utilized.

Firstly, as mentioned above, many jurisdictions with different backgrounds will be reviewed. An effort has been made to cover as many jurisdictions as possible, which represent a fair sample of the current state of competition law enforcement across the world. For this purpose the criteria used to determine the reviewed jurisdictions was to study the competition regimes of countries with different traditions and backgrounds. Thus, numerous jurisdictions from every continent will be reviewed to provide a widespread geographic sample. This comparative study will cover countries with different legal traditions (common law and civil law countries); different economic systems (capitalism and socialism); and even different religious beliefs (Arabic countries and Western countries). This comparison will also

[13] Kovacic, William E. (1998B), 'Getting Started: Creating New Competition Policy Institutions in Transition Economies'. *Brooklyn Journal of International Law,* vol. XXIII, No 1.

cover the competition systems of both jurisdictions with a long tradition of free market economies and competition law enforcement, and jurisdictions that have recently moved from central planned economies and recently adopted competition law provisions in their national legislations. Moreover, the competition regimes of countries with different levels of economic development will be reviewed, i.e. developed countries, transition economies, and developing countries, to determine the impact on their economies of the implementation of competition law provisions.

Secondly, to study the competition regimes of the reviewed jurisdictions, the internet constitutes a fundamental tool to obtain most of the relevant international materials. For instance, the websites of most competition authorities provide insightful information of their competition system. These include useful materials, such as: competition acts, publications, enforcement policies, guidelines, annual reports, Q&A sections, among others. Moreover, there are specialized websites that offer comparative legal information on competition law enforcement[14]. Similarly, on the websites of international organizations there are reports and studies about competition law enforcement that are fundamental for this investigation, for example, visit the websites of the: Andean Community of Nations[15], European Union[16], International Competition Network[17], Organisation for Economic Co-operation and Development[18], or the United Nations Conference on Trade and Development[19].

And thirdly, since a lot has been written about the national and international enforcement of the competition law provisions in the last few years, the relevant literature on the topic is abundant and valuable for the present investigation. Accordingly, the study will include a diversity of materials from various authors and on different topics, such as books, journals, conference papers, and reports to determine the current state of the theory on the subject matter of the investigation.

Even though the present investigation tries to cover several jurisdictions to provide a clear picture of competition law enforcement globally, the reader is advised that the present study is not an exhaustive analysis of every jurisdiction reviewed, provided that some competition regimes have been studied more thoroughly than others in virtue of their special characteristics or peculiarities, and also, with regard to the availability of information. Moreover, there are of course certain limitations regarding the number of jurisdictions chosen for this comparative study. These are mainly concerned with the lack of information available about some competition law regimes, language barriers, and with the research timeline, given that reviewing every existing competition law regime would take a tremendous amount of work and time. At the end, including regional competition law regimes, the proposed study will review over ninety different jurisdictions in different extents. The thoroughness of the review will vary depending on the information available and on the characteristics of the concerned jurisdictions, for instance, is impossible to study antitrust class actions in jurisdiction where this possibility is not available.

[14] www.iclg.co.uk/; or www.concurrences.com/
[15] http://www.comunidadandina.org/competencia.htm
[16] http://ec.europa.eu/competition/index_en.html
[17] http://www.internationalcompetitionnetwork.org/
[18] http://www.oecd.org/competition/
[19] http://unctad.org/en/Pages/DITC/CompetitionLaw/Competition-Law-and-Policy.aspx

Due to the pace at which countries are adopting new competition law regimes, or reformulating existing regimes, most materials are quickly outdated. In this sense, an updated investigation like the present study is always welcomed; therefore, an effort has been made to include the most recent changes to existing legislation and the adoption of new competition acts. In this sense, with regard to the research timeline, the closing date of the investigation is June 2013.

The present study is composed of five chapters. Chapter one is an introductory part that establishes the aim of the study and introduces the subject that will be further reviewed in the following sections of the present investigation along with the basic concepts of competition law enforcement. Chapter two is concerned with the public enforcement of competition law, the application of the competition law provisions by public authorities. This chapter provides an introduction that deals with the fundamental issues of the public enforcement of competition law, such as a definition of public enforcement and the objectives and benefits of this type of enforcement. Moreover, this chapter reviews the fundamental provisions that govern the public enforcement of competition law, and then analyzes the institutions that are responsible for the public application of competition law and how these effectively enforce the antitrust provisions by analyzing the powers and attributions granted to these public institutions. Finally, this chapter studies the sanctions and remedies available in public procedures for the infringement of competition law and the review mechanisms against the decisions of the public institutions responsible for the public enforcement of competition law. Chapter three of the study deals with the private enforcement of the competition law provisions, the application of the competition law provisions by private parties in private proceedings seeking remedies of a private nature. The introductory part of this chapter provides a definition of private enforcement of competition law and analyzes the objectives and benefits of this type of competition law enforcement. This chapter then analyzes the fundamental issues of the private enforcement of competition law, such as the statutory basis for the private antitrust enforcement, the main procedural issues of private antitrust litigation, the remedies available for private plaintiffs in competition law cases, and the interaction between private and public proceedings for the infringement of competition law. In addition, Chapter three also deals with a further type of private enforcement, the arbitration of competition law disputes. Chapter four is about the voluntary compliance of the antitrust provisions by individuals and undertakings. This part reviews the most relevant literature on law compliance and self-enforcement and examines the drivers that encourage compliance and non-compliance with the antitrust provisions. Lastly, this chapter elaborates on which are the essential features of effective antirust compliance programs and illustrates on the interaction of compliance programs and competition law enforcement. Finally, Chapter five presents the conclusions of the present comparative study. This chapter provides for some general conclusions to the current state of competition law enforcement, and in addition, it provides specific conclusions to the public and private enforcement chapters addressing the main obstacles faced by these two types of competition law enforcement.

3. Origins of Competition Law

Restrictive trade practices by individuals trying to obtain certain advantage through the interference in the competition process are as old as trade itself. Accordingly, the origins of competition law can be traced back to the ancient Egypt, where papyri related to the existence of private monopolies in wool and cloth were found, which are dated from about 3000 B.C.[20]. Furthermore, the first documented antitrust case has appeared in the antique Greece; the case involved a group of grain dealers who infringed the laws by regulating the corn trade[21]. Nevertheless, the first comprehensive legislation against monopolies and restrictions to trade was promulgated in Rome. Around 50 B.C., the *Lex Julia de Annona* established sanctions for combinations aimed at raising the prices of corn. Similarly, around A.D. 301, the *Edict of Diocletian* prohibited buying up merchandise, the concealment of foodstuffs, and the artificial creation of scarcity. In the same vein, the Constitution of Zeno of A.D. 483, which was aimed at protecting consumers from the artificial increase in the price of foodstuffs and other articles of everyday use, contained provisions against the joint action of monopolistic organizations and covered all possible types of private monopolies, and even monopolies operating under the exclusive grant of the Emperor[22].

Later on, in the Medieval Europe, a law of Athelstane was passed around A.D. 930 in England, this law established the offense of *foresteel*, which consisted in keeping goods from a market with the purpose of increasing the price; at that time this offense was punished by the imposition of a fine. Subsequently in England, conspiracies to monopolize were amounted to a criminal offense in 1529 by Henry VIII's Star Chamber. In the same period, similar provisions against forestalling and ingrossing were enacted in other European countries such as France or Germany. Finally, in 1599 the first recorded case related to English common law on monopolies was decided, which declared certain types monopolies as illegal[23].

Notwithstanding the preceding, the flourish of competition law and policy as we know it today has taken place between the end of the Nineteenth Century and the beginning of the Twenty-First Century. At the end of the Nineteenth Century the growth and proliferation of trade and commerce in determined countries resulted in the adoption of some kinds of competition law systems. More specifically, the end of the Civil War in the U.S. produced a revolution in transportation and communications, which allowed the expansion of trade within the U.S. territory. The augmentation of commerce and trade, at the same time, resulted in the emergence of significantly large enterprises that got more powerful as they expanded over the U.S. territory[24]. The appearance of these large enterprises produced negative effects in the economy, such as the displacement of small enterprises trough massive price cuts, which imposed a tremendous pressure on the capacity of small local enterprises to compete

[20] WILBERFORCE, Richard Orme (1966), 'The Law of Restrictive Trade Practices and Monopolies'. 2nd Edition. London: Sweet and Maxwell.
[21] KOTSIRIS, Lambros E. (1988), 'An Antitrust Case in Ancient Greek Law'. *The International Lawyer,* Spring 1988, vol. 22, Nº 1, p. 451-458.
[22] WILBERFORCE (1966), p. 21; and MILLER, Frederic P. (2011), 'History of Competition Law'. Mauritius: Alphascript Publishing, p. 2.
[23] *Davenant v. Hurdis* (1599), in: LETWIN, William L. (1954), 'The English Common Law Concerning Monopolies'. *The University of Chicago Law Review*, Vol. 21, p. 359.
[24] For a brief recapitulation of the expansion of the US economy, the growth of enterprises and the subsequent enactment of the Sherman Act, see: MOTTA, Massimo (2004), 'Competition Policy: Theory and Practice'. Cambridge: Cambridge University Press, pp. 1-5; and STIGLER, George J. (1985), 'The Origin of the Sherman Act'. 14 *Journal of Legal Studies*.

effectively. Furthermore, as a result of their growth these large enterprises began to acquire a more than significant economic power, and eventually this situation led to a reasonable fear that the economic power of these enterprises will also produce a form of political power that would eventually enable large enterprises to control important parts of the economy, and ultimately, to control the apparatus of the government itself. These changes in trade and commerce and the emergence of these large enterprises eventually resulted in the adjustment of the legislative framework through the adoption of competition law provisions that regulate, *inter alia*, the actuation of these large enterprises. In this way, it was in 1890 when the Sherman Act was passed in the U.S., which constitutes probably the most important antitrust legislation of the modern era. Eventually, both Section 1 and Section 2 of the Sherman Act, against restrictive agreements and monopolization, respectively, have provided the two central principles of modern antitrust policy throughout the world[25]. Finally, provided that the Sherman Act did not address mergers and acquisitions, which were likely to create high levels of market power, in 1914 the U.S. Congress passed the Clayton Act, which contained the foundations for modern merger control.

However, on the other hand, some free market economists proclaim a more obscure origin of the Sherman Act. Government regulation is not usually enacted to protect the public interest, but rather to benefit private interests, thus, ill-conceived antitrust legislation and/or its inadequate practice, do not protect the public interest –competitive markets in the case of competition law- as it may be anticompetitive because of the objectives pursued by the law. In this sense, opponents to the public-interest-origins of the Sherman Act argue that the passing of the Act was never intended to protect competition, as it was a blatantly protectionist act designed to protect smaller and less efficient businesses from their larger and more efficient competitors[26]. In addition, they provide evidence that the passing and enforcement of the Sherman Act have reduced industrial competitiveness, provided that the trusts that the Act was intended to eliminate caused output to expand faster than other sectors of the economy, and as a result, the prices of the allegedly monopolized industries fell[27].

Irrespective of the original intention of the legislators of the Sherman Act, the adoption of this antitrust legislation led to the implementation of competition law regimes across the world throughout the Twentieth Century. In the first half of this Century only a few countries had implemented some type of competition law system, however, after World War II some competition regimes were formed in countries like Japan and the United Kingdom in the late 1940's. Between 1950 and 1975 the basic foundations of competition law appeared in Asia, Europe and Latin America. Over this period of time, especially in Europe, the proliferation of competition law systems occurred after the adoption of the Treaty of Rome which created the European Economic Community, in the 1950's. The fact the Treaty of Rome contained strong competition law provisions enforceable in all Member States has served as the foundation of most of the competition law provisions in the majority of the European countries.

[25] RUBINFELD, Daniel L. (2001), 'Antitrust Policy'. *International Encyclopedia of the Social and Behavioral Sciences*, Vol. 1: 553-60.
[26] DILORENZO, Thomas J. (1990), 'The Origins of Antitrust: Rhetoric vs. Reality'. *Regulation*, Vol. 13, No. 3, p. 27.
[27] DILORENZO, Thomas J. (1985), 'The Origins of Antitrust: An Interest-Group Perspective'. 5 *International Review of Law and Economics*, p. 87.

Furthermore, during this quart of the Century countries like Brazil and Colombia, in Latin America[28], or South Korea, in Asia, adopted competition law systems. In addition, the dissolution of the former Soviet Union brought the implementation of competition regimes in Central and Eastern Europe. With the fall of this last bastion, only a few jurisdictions refused to implement free-market processes in their economies along with competition law and policy. In the Arab World, the process of privatization and liberalization undertaken to develop their economies and catch up with the rest of the world, has included the implementation of new laws and policies to further this process, competition law and policy constituted an important part of this reform[29]. This meant that with the beginning of the new Century the proliferation of competition law systems has truly became global with the adoption of competition law systems in Africa, Asia and Latin America.

4. Proliferation of Competition Law

As stated above, the end of the Twentieth Century has brought enormous attention to competition law and policy across the globe. As the number of countries that adopt free-market principles for their economies grows, more jurisdictions are enacting competition law provisions in line with these free-market principles. This proliferation has not been seen in any other branch of law, because it has been very vast and it happened in a relatively short period of time[30]. In practice, what this proliferation of competition law entails is that the adoption of competition law regimes is no longer exclusive for developed nations that have a long tradition of free-market economies; on the contrary, this expansion of competition law also includes the implementation of competition law provisions and policy by developing nations with different levels of experience with market processes.

In part this process of proliferation has been possible thanks to the recognition of the favorable effects that the adoption of a competition law regime has on economic efficiency and consumer welfare. Furthermore, another factor that has widely supported the expansion of competition law and policy is related to the economic context of the jurisdictions that have adopted competition law systems in last decades. In most jurisdictions that have a long tradition of free-market economies the adoption of competition law systems has occurred at an earlier stage than in jurisdictions with centrally planned economic systems and with significant control of the government over the economic activity. Consequently, as these jurisdictions shed their control over the economic activity, the implementation of legislative frameworks and institutions that keep markets competitive became necessary. In this sense, the establishment of competition law systems began to spread as the market-based systems gained force among these nations. Thus, the most common explanations for the proliferation of competition law systems are the economic reforms, the political liberalization and the increase of the level of development in the countries implementing competition law provisions in their national legislations[31].

[28] To read about the emergence process of competition law systems in Latin America, see: DE LEÓN, Ignacio (2001), 'Latin American Competition Law and Policy: A Policy in Search of Identity'. The Hague: Kluwer Law International.
[29] DABBAH, Maher M. (2007), 'Competition Law and Policy in the Middle East'. Cambridge, New York, et al: Cambridge University Press.
[30] DABBAH (2010), p. 1.
[31] PALIM (1998), p. 111.

From the global perspective of competition law enforcement, the proliferation of competition law regimes across the world has raised two different scenarios. On the one hand, the fact that most countries where competition law has been implemented have different social, economic and political backgrounds has resulted in that the competition law systems adopted in these countries vary widely from one jurisdiction to another. On the other hand, some jurisdictions that have recently adopted competition law systems have used as foundations for their national legislations the provisions of countries with a longer tradition on competition law enforcement, in such cases, this has caused that the newer competition law systems resemble, at least in the principal features, to the competition law systems of these other countries. Ultimately, the existence of such vast number of competition law legislations entails that the enforcement of competition law varies heavily depending on the jurisdiction. Even though this feature is not exclusive of competition law, as other branches of law also vary when applied in different jurisdictions, nevertheless, the fact that competition law is turning global due to the globalization process of trade and commerce has drawn the attention of academics and practitioners to the enforcement of competition law in different jurisdictions.

5. Goals and Objectives of Competition Law

A fundamental concern of the implementation of a competition law system and the subsequent enforcement of its legal commands is that of the goals and objectives that competition law is intended to accomplish. In practice, the economic goals of a certain jurisdiction in conjunction with the goals of competition law usually determine the role of competition law and policy in the economy. These fundamental goals of competition law will ultimately determine the intention of the antitrust provisions; how these provisions shall be interpreted; and lastly, how to be enforced. Hence, from the perspective of the enforcement of competition law, the substantive provisions and commands of a determined competition law regime should be interpreted and enforced in a way that furthers the fulfillment of these goals and objectives. Accordingly, in practice, the provisions of competition law cannot be effectively enforced until their goals and objectives are clearly determined[32].

From a global point of view, the fact that over one hundred jurisdictions have implemented some kind of competition law provisions in their national legislations has resulted in a multiplicity of competition law goals and objectives, which vary from one jurisdiction to the next. Nonetheless, the existence of these differences is not surprising given that, as with any other branch of public law, competition law is linked to distinctive contexts and circumstances, which are unique in every jurisdiction. This means that the implementation and the development of competition law and policy in different countries are related to the diverse historical, social, political, economic, and even religious backgrounds of the jurisdictions in question. In this sense, such divergence translates in the multiplicity of competition law goals and objectives across the world, provided that these different circumstances have generated different scenarios for the implementation and evolution of competition law and policy. Furthermore, even though most newly established competition systems have borrowed knowledge from

[32] BORK, Robert H. (1993), 'The Antitrust Paradox: A Policy at War with Itself'. New York: The Free Press, p. 50.

the most advanced competition regimes when designing their legal commands and competition agencies, the objectives of the antitrust provisions and eventually its application will be ultimately determined by the specific circumstances of the concerned jurisdictions. For instance, most developing countries face different obstacles in order to attain competitive markets when compared to developed economies, thus, the antitrust provisions in these developing nations will have to deal with issues such as the government's intervention in the market process or the creation of strong public institutions responsible for the enforcement of competition law[33].

Notwithstanding the abovementioned, despite the fact that the circumstances and backgrounds of the countries establishing competition systems differ greatly among each other, there are vast similarities with regard to the goals and objectives of competition law among competition regimes. In particular, it is considered that competition law is a public interest law, like having private property, enforcement of contracts, and suppression of crime[34]. In this sense, due to the public nature of this branch of law, among its fundamental objectives there is the protection of the public interest, as competitive markets may constitute a public good. Furthermore, there is wide acceptance across jurisdictions, and an ongoing debate, that among the main objectives of competition law there is the enhancement of economic efficiency[35] and the maximization of consumer welfare[36].

With respect to the enhancement of economic efficiency, this is mainly concerned with: allocative efficiency, which is allocating resources to their most valued use; productive efficiency, which is producing goods at the lowest cost; and dynamic efficiency, which is developing better goods and services through innovation. In this regard, competition law and policy are aimed at encouraging market participants to enhance efficiency by: promoting economic growth; encouraging the creation of new products and services by promoting rivalry between competing undertakings; increasing productivity; reducing costs; increasing choice; improving product quality; and stimulating innovation to gain the favor of consumers[37].

As to the maximization of consumer welfare, competition law and policy are intended to maximize consumer welfare by lowering prices, raising output, increasing consumer choice and the quality of goods and services, and driving technological development and innovation[38]. As a consequence, in practice, according to some commentators, the fundamental goal of competition law is the protection of consumers from paying higher prices to firms that have unfairly gained or maintained market power[39]. Nevertheless, there is a contested matter on the consumer welfare objective approach among jurisdictions, on the one hand, some regimes associate consumer welfare with total welfare –

[33] JUNG, Youngjin & HAO Qian (2003), 'The New Economic Constitution in China: A Third Way for Competition Regime?'. 24 *Northwestern Journal of International Law & Business.*
[34] STIGLER (1985).
[35] POSNER, Richard A. (2001), 'Antitrust Law'. Second Edition. Chicago; London: The University of Chicago Press, p. 29.
[36] HOVENKAMP, Herbert. (2005), 'The Antitrust Enterprise: Principle and Execution'. Cambridge; London: Harvard University Press, p. 1.
[37] BORK, Robert. (1966), 'Legislative Intent and the Policy of the Sherman Act'. 7 *Journal of Law & Economics*.
[38] SCHWARTZ, Louis B. (1979), 'Justice and other non-economic goals of antitrust'. 127 *University of Pennsylvania Law Review*.
[39] KIRKWOOD, John, & LANDE, Robert (2008), 'The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency'. *Notre Dame Law Review*, Vol. 84:1, p. 196.

producer and consumer welfare – in such cases, the transfer of wealth from consumers to producers resulted from higher prices, lower output, or any other variable affecting demand, are not taking into account. On the other hand, other regimes consider that the consumer welfare goal should prioritize the welfare and interests of consumers over those of producers. Particularly, the consumer welfare objective is more evident in jurisdictions where the competition law provisions also contain consumer protection rules. Accordingly, in some of these jurisdictions, the competition authority is also responsible for the fulfillment of consumer protection policies; at the end, this is due to the fact that the competitive process itself is intended to deliver benefits to consumers.

As stated above, there are other competition law goals and objectives among jurisdictions besides the previously seen that have an economic dimension. For instance, a further objective of competition law in some jurisdictions is concerned with the dispersal of economic power and the redistribution of wealth, which focuses on the promotion of economic equity instead of economic efficiency. This antitrust objective seeks to prevent the concentration of resources in monopolists, multinational corporations and conglomerates, given that such concentration could threaten the very notion of democracy, individual freedom of choice and economic opportunity[40]. In this sense, it has been argued that the redistribution objective of competition law, unlike the economic efficiency and consumer welfare objectives, has a social dimension[41]. An additional competition law objective with a social dimension is that related to the protection of competitors. In particular, this antitrust goal is intended to safeguard the opportunities and interests of small and medium-size enterprises from more powerful competitors[42]. However, there are some who are against this "uncritical sentimentality in favor of the small guy"[43], and argue that the main objective of competition law should be concerned with economic efficiency. Accordingly, competition law should not prevent a dominant firm from eliminating a smaller competitor from the market by superior performance, in this sense, the most efficient competitors will succeed and the weak and inefficient will be forced out of the market.

Additionally, some competition law regimes make reference to other goals and objectives pursued by their competition law systems that are not strictly related to consumer welfare, economic efficiency, or the competitive process. For instance, in some jurisdictions, competition law and policy are intended to promote regional integration by preventing anticompetitive conducts in one country to affect the integration of markets by isolating domestics markets, and by encouraging trade between the countries through the facilitation of international transactions[44].

It has been stated that based on their history, culture and context, competition law and policy in developing countries tend to protect competitors from competition. Therefore, traditionally in developing

[40] WHISH, Richard, BAILEY, David (2012), 'Competition law'. Seventh Edition. Oxford: Oxford University Press, p. 21.
[41] DABBAH (2010), p. 41-42. The author classifies the goals pursued by the different competition law systems in: economic goals, social goals, and broader (political) goals.
[42] For example, Section 1.1 of the Canadian Competition Act provides that the purpose of the Act, *inter alia*, is to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy.
[43] BORK (1993).
[44] This regional integration objective of competition law can be evidenced in the European Union, where competition law seeks to accomplish a fundamental objective of the Union, which is single market integration.

countries, the protection of small and indigenous undertakings from foreign competitors is included among the objectives of competition law and policy[45].

Furthermore, in many jurisdictions, other subjects have been considered as goals and objectives pursued by competition law, these may include: public interest (Indonesia); unemployment (Japan); the position of historically disadvantaged people (South Africa); traditional community economies (Bolivia); unfair trade (Armenia); unity of economic space (Kazakhstan); the social function of property (Brazil); local and foreign investment (Kenya); competiveness of national undertakings in international markets (Kenya); creative initiative of enterprises (Korea); harmonization of national competition law provisions with regional provisions (Lithuania); freedom of economic activity (Russia); trading order (Taiwan); efficient utilization of society's resources (Norway); or the development of the socialist market economy (China); among others.

Despite the variety of objectives that may be pursued through the implementation of a determined competition law system, the conventional wisdom of antitrust academics and practitioners suggest that among the fundamental goals of competition law there is the enhancement of economic efficiency and the maximization of consumer welfare. From both perspectives, competition law would condemn practices involving economic inefficiencies and the transfer of wealth from consumers to the antitrust offenders, respectively. In practice, however, even though there is discrepancy with regard to the ultimate objective of competition law, most antitrust infringements are concerned with both economic inefficiencies and transfer of wealth from consumers, e.g. horizontal cartels. In this sense, anticompetitive practices that involve allocative inefficiencies and transfers of wealth, such as cartels, could be condemned by the antitrust provisions despite the ultimate objective of competition law in a certain jurisdiction[46]. Alternatively, other anticompetitive practices that involve economic inefficiencies or transfers of wealth could be treated differently depending on the antitrust objectives of the jurisdictions in question, thus, ultimately leading to an uneven application of the competition law provisions across jurisdictions.

6. The Legal Framework of Competition Law

The first step in the implementation of a competition law regime is the establishment of a statutory basis that governs competition law and policy. Due to their importance for free markets and economic development, the enactment of competition law provisions is fundamental for the establishment of competitive markets and the attainment of other social and economic objective, in this sense, in some cases the antirust provisions have been awarded near-Constitutional status[47]. As will be seen in the following chapters of this study, there are certain differences and similitudes with regard to the legal

[45] FOX, Eleanor M. (2003), 'We Protect Competition, You Protect Competitors'. *World Competition*, Vol. 12:2, p. 163.
[46] BAXTER, William F. & KESSLER, Daniel P. (1995), 'Toward a Consistent Theory of the Welfare Analysis of Agreements'. 47 *Stanford Law Review.*
[47] The U.S. Supreme Court has described the antitrust provisions as the "Magna Carta of free enterprise" and "as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms" (*United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972)).

framework of competition law across jurisdictions. These are mainly concerned with the foundations of the competition law provisions, the nature of these and the substantive commands of competition law.

Regarding the nature of the competition law provisions, virtually in all competition law systems, the legal framework of competition law is incarnated as public laws. Accordingly, legislators have chosen a public approach with regard to competition law and policy; this means the enactment of public laws to protect the competitive process. In practice, the adoption of public laws and the intervention of the government in the market process have resulted from the inability of markets to control themselves and especially from the tendency of market participants to affect or restraint the competitive process in their favor.

As stated above, the legal framework of competition law may vary depending on the jurisdiction. In that sense, in some competition regimes, the foundations of the statutory basis of competition law can be found on the precepts of the national constitution. In addition, other competition law systems have found their legal framework on the provisions of multilateral treaties. However, in most countries where competition law systems have been instituted, these regimes have as statutory basis national public laws that govern this branch of law. Finally, and in a fewer extend, in some countries the legal basis of competition law is contained in ministerial regulations.

As to the substantial commands of competition law, most competition law systems share similar provisions in relation to the practices policed by competition law. In nature, competition law is mainly prohibitory, which means that the fundamental provisions of competition law establish certain prohibitions that the recipients of the law have to obey. Thus, the substantial commands of competition law of all competition law systems prohibit certain practices that are considered to be contrary to the goals and objectives of competition law. In practice, most competition law regimes provide for provisions that prohibit restrictive agreements and the abusive behavior of dominant undertakings. Furthermore, competition law is also regulatory in nature, in this regard; the substantive provisions of competition law of some jurisdictions control certain practices that may be contrary to the goals and objectives of competition law. Thus, even though in a lesser extent, the substantial provisions of some competition law systems provide for control mechanisms aimed at preventing certain transactions that would harm the competitive process if these were implemented without the scrutiny of the competition authorities, such is the case of mergers and acquisitions that create or reinforce a dominant position.

Finally, due to the fact that the commercial practices regulated by the competition law provisions are in constant evolution, most legislators have drafted extremely broad antitrust provisions in order to be applicable to most anticompetitive practices. Accordingly, it has been stated, that in some competition systems the principal antitrust legislation may even fit on a single piece of paper[48]. In this sense, the legislators have delegated the application and interpretation of the competition law provisions to the enforcers of the law.

[48] WALLER, Spencer W. (2003), 'The Incoherence of Punishment in Antitrust'. 78 *Chicago Kent Law Review*, 207, p. 209.

7. Practices Subject to the Control of Competition Law

As stated before, one of the main characteristics of competition law is that this public branch of law is mainly prohibitory in nature[49]. Accordingly, part of the fundamental antitrust provisions establishes prohibitions against certain conducts or practices that are contrary to the goals and objectives of competition law. In practice, this prohibitory nature of competition law results in the control and police by the relevant governmental agencies of certain practices or conducts performed by the recipients of the law which may raise competition law issues. Thus, the typical provisions of competition law of most jurisdictions contain prohibitions against conducts and practices that are harmful to the competitive process. In practice, every competition system should prohibit restrictive business practices as these can adversely affect international trade, particularly that of developing nations, and the economic development of these[50].

On the one hand, by looking at the provisions of the numerous competition law regimes today, one can observe that there is a great deal of diversity in certain aspects across jurisdictions, however, on the other hand, there are vast similarities in the anticompetitive practices that fall under the scrutiny of competition law. Therefore, virtually every competition law system contains typical provisions prohibiting multilateral restrictive or anticompetitive agreements and monopolization or the abuse of a dominant position.

In addition to the prohibitory nature of competition law, some antitrust provisions may also have a regulatory nature. In this regard, some practices that may raise competition law issues are not prohibited *per se* by the provisions of competition law, but are subject to a control by the relevant authority in order to determine if such practices are contrary, or not, to the antitrust provisions. Even though, in a lesser extent than jurisdictions with prohibitions against restrictive agreements and the abuse of dominance, most competition law regimes are concerned with the anticompetitive effects of certain mergers and acquisitions, and consequently, have established control mechanism to determine the effects of such transactions and their compatibility with the competitive process.

Accordingly, in practice, while the language, the procedures and the institutions vary vastly from one competition system to the next, nearly every single competition regime contains provisions against restrictive agreements and monopolization or abuse of dominance. Additionally, in jurisdictions where merger control mechanisms have been introduced, the latter are aimed at preventing undertakings to collude and harm competition (restrictive agreements), or to create or enhance market power (monopolization/abuse of dominance). Therefore, the fundamental pillars of competition law and policy across the world are the prohibitions against restrictive agreements and monopolization or abuse of dominance[51].

Finally, the provisions of some competition law regimes additionally govern other conducts besides the abovementioned anticompetitive practices. For instance, in some competition regimes, the

[49] With the exception of merger control provided that mergers are not prohibited *per se*, but are subject to governmental review.
[50] UNCTAD, *The United Nations Set of Principles and Rules on Competition*, Geneva, 2000.
[51] STEUER, Richard M. (2012), 'The Simplicity of Antitrust Law'. *U. of Pennsylvania Journal of Business Law*, Vol. 14:2.

competition law provisions deal with the control of unfair competition[52]. Moreover, some jurisdictions have included in their competition law provisions consumer protection rules[53]. Furthermore, other competition law legislations have provisions related to state aid[54]. And finally, in some competition regimes, the competition law provisions include the protection of intellectual property rights[55].

7.1. Multilateral Anti-Competitive Agreements

The cornerstone of competition law is the prohibition against restrictive agreements that affect the competitive process in a determined market. Provided that the role of competition law is to foster the competitive process, agreements between market participants that restrict competition are considered to be contrary to the provisions of competition law practically in all jurisdictions. Accordingly, agreements that have as their object or effect the harm, restriction or distortion of competition are considered anticompetitive and unlawful, and as a consequence, these are prohibited by the competition law provisions, however, in some jurisdictions the prohibition is not applicable to agreements that have some redeeming virtue like the enhancement of economic efficiency[56].

In general, the anticompetitive agreements prohibitions are applicable to agreements concluded by natural or juridical persons, which are involved in commercial activities, and irrespective of whether these are created or controlled by private parties or by the State. Nonetheless, traditionally, these provisions do not apply to the agreements between undertakings that are under common ownership or control[57], provided that these are considered to be a single economic entity that acts as one market participant[58]. Hence, given that for antitrust purposes, a parent and its wholly owned subsidiary are considered as a single entity, the restrictive agreements prohibition cannot be applied due to the requirement of an agreement between two or more undertakings[59]. Additionally, in some jurisdictions, the anticompetitive agreements prohibitions may not be applicable to agreements or acts concluded by a government[60], or to acts concerned with the management of public utilities[61].

Overall, there are further restrictions to the application of the anticompetitive agreements across jurisdictions. For instance, some competition regimes have provisions that allow competition authorities

[52] In Bulgaria, Chapter Seven of the Law on Protection of Competition has prohibitions against unfair competition. In Hungary, Chapter II of the Competition Act deals with unfair competition. In Latvia, Chapter V of the Competition Law has prohibitions against unfair competition. In Lithuania, Chapter III of the Law on Competition has provisions on unfair competition. In Moldova, Article 8 of the Law on Protection of Competition has prohibitions against unfair competition. In Nicaragua, Chapter V of Law on the Promotion of Competition has prohibitions against unfair competition.

[53] In Papua New Guinea, Part VII of the Independent Consumer and Competition Commission Act deals with consumer protection. In Poland, Title IV, Chapter 1 of the Act on Competition and Consumer Protection has provisions on the protection of consumers.

[54] In Armenia, Chapter 5-1 of the Law on Protection of Economic Competition deals with state aid. In Estonia, Chapter 6 of the Competition Act has prohibitions against state aid. In Kazakhstan, Chapter 5 of the Law on Competition has provisions on state aid.

[55] In Peru, Legislative Decree Nº 1033 has provisions on the protection of intellectual property, free competition and consumer; it also has prohibitions against unfair competition.

[56] Such is the case in the EU where according to the provisions of Article 101.3 of the TFEU, restrictive agreements that contribute to improving the production or distribution of goods or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, are exempted of the provisions of the Article.

[57] The U.S. Supreme Court determined that a parent and its wholly owned subsidiary are incapable of conspiring for purposes of the Sherman Act (Cooperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)).

[58] In Zambia, Section 13 of the Competition and Consumer Protection Act establishes that the prohibitions on horizontal and vertical restrictive agreements do not apply to agreements between interconnected bodies which form a single economic unit.

[59] O'CONNOR, John T. (1985), 'Copperweld Corporation v. Independence Tube Corporation: The Death of a Doctrine'. 5 *Pace Law Review*, p. 896.

[60] In Tanzania, according to Section 6(2) of the Fair Competition Act, the State shall not be liable to any fine or penalty under the provisions of the Act or be liable to be prosecuted for an offense against the Act.

[61] See Article 9 of the Egyptian Competition Law. See Article 2 of the Algerian Competition Ordinance.

to grant individual exemptions from the prohibitions to particular agreements, or to grant block exemptions to agreements that fall within a particular category of agreements[62]. In some jurisdictions, certain agreements do not fall within the prohibitions by virtue of their insignificant impact on competition[63], or because of the low market share of the participants[64]. Moreover, in some competition systems, the agreements related to certain sectors or markets are exempted from the prohibitions[65]. Similarly, in some jurisdictions, the agreements concerned with the exercise of intellectual property rights are not prohibited by the competition provisions[66]. Finally, in some competition regimes, certain agreements may not be prohibited when allow consumers a fair share of the resulting benefits and contribute to improving the production or distribution of goods or promote technical or economic progress[67].

1. Types of Restrictive Agreements

Multilateral restrictive agreements can be basically of two types[68]. Horizontal agreements, which are agreements between two or more competing undertakings operating at the same level in the market and engaged in broadly the same activities, i.e. agreements among producers, wholesalers or retailers. Or vertical agreements, which are agreements between two or more undertakings at different levels of the production or distribution chain in the market, i.e. agreements between manufacturers of components and manufacturers of products, between producers and wholesalers, or between producers, wholesalers and retailers. The main difference between these two kinds of agreements when enforcing competition law is that, traditionally, certain horizontal restrictive agreements have been deemed as being always harmful to competition, and consequently, illegal. Conversely, vertical agreements have not been considered always anticompetitive, moreover, some vertical agreements have proven to be procompetitive due to the benefits they provide to competition and consumers.

Even though most competition law regimes prohibit both horizontal and vertical anticompetitive agreements, there are different approaches with regard to the anticompetitive agreements provisions. In the competition regimes with the broadest provisions, a single provision governs both horizontal and vertical restrictive agreements[69], even more, there are jurisdictions where anticompetitive agreements

[62] In the UK, the OFT is empowered to grant both individual and block exemptions pursuant to Sections 4 and 6 of the Competition Act.
[63] In the Czech Republic, agreements with insignificant impact on competition shall not be prohibited (Article 3 of the Act on the Protection of Competition).
[64] In Armenia, the agreements of economic entities shall not be deemed as anticompetitive if the total share of the participants does not exceed 20% of the given product market (Article 5.6 of the Law on Protection of Economic Competition).
[65] In Estonia, the anticompetitive agreements prohibitions do not apply to the agreements between agricultural producers which concern the production or sale of agricultural products (Section 4(6) of the Competition Act). In Finland, in general, the provisions of the Competition Act do not apply to agreements concerned with the labor market, additionally, the anticompetitive agreements provisions do not apply to the agriculture sector (Section 2(1) and (2) of the Competition Act). In Israel, agreements related to international air or sea transportation are not prohibited by the anticompetitive agreements provisions (Section 3(7) of the Restrictive Trade Practices).
[66] In Israel, the agreements involving restraints related to the exercise of intellectual property rights are not deemed to be restrictive agreements according to Section 3(2) of the Restrictive Trade Practices Law).
[67] In Germany, see Section 2 of the Act Against Restraints of Competition.
[68] In Kazakhstan, according to the provisions of Article 9 of the Law on Competition, anticompetitive agreements can be of two types: horizontal or vertical.
[69] For instance, in the US, Section 1 of the Sherman Act may be applied to both horizontal and vertical agreements. Similarly at the European Union level, Article 101 of the TFEU is applicable to horizontal and vertical agreements. In Germany, Section 1 of the Act Against Restraints of Competition regulates horizontal and vertical agreements. In the UK, Section 2 of the Competition Act is applicable to horizontal and vertical agreements.

(horizontal and vertical) and abusive practices by dominant undertakings are governed by one single provision[70]. Instead, in other competition law regimes, the legislators have chosen to insert separate provisions for horizontal and vertical restrictive agreements[71]. And finally, there are jurisdictions with general provisions on horizontal agreements and specific provisions dealing independently with most vertical agreements[72].

A further issue related to the content of the restrictive agreements provisions is the type of prohibited practices that are scrutinized by these provisions. In some competition systems, there is a broad prohibition that is applicable to most anticompetitive agreements, in those cases, the enforcers of the competition provisions are supposed to determine which practices shall be subject to the application of these broad prohibitions[73]. Conversely, other competition systems have opted to provide for a general prohibition followed by a non–exhaustive list of prohibited agreements[74].

(a) Horizontal Agreements

The broad definition of horizontal anticompetitive agreements includes any anticompetitive agreement between two or more competing undertakings operating at the same level in a determined market. A strict interpretation of the preceding definition allows to evidence that horizontal agreements are fundamentally concluded by actual competitors; however, there are some jurisdictions that make reference on their restrictive agreements provisions to the possibility of applying the restrictive agreements prohibition against agreements between potential competitors[75].

In general, horizontal anticompetitive agreements can be divided in two types: hard-core cartels and other types of horizontal anticompetitive agreements. Hard-core cartels are agreements between competitors that have proven to be always anticompetitive and are usually presumed to be illegal without any further enquiry. Conversely, the other types of horizontal agreements have not been considered as intrinsically illegal due to the fact that some of these agreements may provide some benefits to consumers.

1. Hard-Core Cartels

The true nature of competition in a market is that competitors should compete with one another for customers and profits; accordingly every competition regime should prevent and punish any attempt of competitors to cooperate with one another to distort competition in a given market. Generally speaking,

[70] In Argentina, Article 1 of Law 25.156 for Defense of Competition prohibits both anticompetitive agreements and the abusive behavior of dominant undertakings.
[71] In El Salvador, Chapter I of the Competition Law handles agreements between competitors (horizontal agreements), and Chapter II agreements between non-competitors (vertical agreements). In Kenya, Section 21(2) (a) and (b) regulate horizontal and vertical agreements. In South Africa, Sections 4 and 5 deal with horizontal and vertical agreements respectively.
[72] In Canada, Section 45 and 90.1 of the Competition Act deal with anticompetitive horizontal agreements. Additionally, Sections 76 and 77 refer to price maintenance, and exclusive dealing, tied selling and market restriction, respectively.
[73] In the US, Section 1 of the Sherman Act includes a broad prohibition applicable to anticompetitive agreements that restraint trade or commerce.
[74] In Seychelles, Section 11(1) of the Fair Competition Act provides for a broad prohibition for anticompetitive agreements, additionally, Subsection (2) of the same section provides for a list of anticompetitive practices caught under the prohibition.
[75] In Kazakhstan, see Article 9 of the Law on Competition.

hard-core cartels are horizontal anticompetitive agreements between competitors that have as the main purpose to fix prices, divide markets, restrict output, or to fix the output of competitive tenders.

Traditionally, this type of agreements has been deemed so harmful to competition that they have been referred to as the *"supreme evil of antitrust"*[76]. Furthermore, the provisions governing these kinds of agreements have been determined as the *"core"* of the competition law provisions[77]. The nature and effects of these kinds of agreements have led some competition systems to consider them as being always anticompetitive and unlawful without the need of any further inquiry[78]. As a consequence, in some jurisdictions, hard-core cartels have been declared as illegal *per se*[79]; have been listed as particularly harmful in the competition provisions[80]; or have been presumed to have an appreciable adverse effect on competition[81]. Hence, hard-core cartels are contrary to the antitrust provisions regardless of the market power of the cartel participants, their motives, or purported business justifications[82].

Cartels are the main focus of competition law and policy and this type of anticompetitive practice are legally condemned by virtually all competition systems around the globe. Accordingly, given that hard-core cartels are so harmful for the competitive process and that due to their secretive nature are very difficult to detect, this type of behavior is significantly offensive to society and its prevention and punishment demand the expenditure of a considerable quantity of resources. These special characteristics of hard-core cartels increase the gravity of the offense, in this sense, in order to deter individuals from engaging in hard-core cartel activity, the enforcement authorities increase the size of punishment and devote additional resources to detect and punish cartel behavior with the ultimate purpose of increasing deterrence and compliance with the law[83]. Accordingly, in practice, the intrinsically unlawful nature of hard-core cartels has led some competition regimes to increase the sanctions imposed on cartel participants, for instance by including criminal penalties in their sanctioning systems, such as the imprisonment of individuals who participated in cartel activity. Moreover, enforcement authorities usually devote most part of their resources in the investigation of hard-core cartels.

1.1. Types of Hard-Core Cartels

As stated before, there are different types of cartels that are subject to the application of the competition law prohibitions against anticompetitive practices. In a broad sense, most competition regimes prohibit the following types of cartels.

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[76] *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).
[77] The Canadian Supreme Court described the criminal provisions against cartel behavior of Section 45 as the core of the Competition Act (*R. v. Nova Scotia Pharmaceutical Society* (1992), 43 C.P.R. (3d) at 32).
[78] The United States Supreme Court has determined that these kinds of agreements are almost always anticompetitive and for that reason should be declared illegal without any further inquiry (*Northern Pacific Railway Co. v. United States*, 356 US 1 (1958)).
[79] The *per se* term has been established in the USA antitrust case law to declare illegal without any further inquiry hard-core cartels. There are, however, other jurisdictions that have borrowed this term to also declare illegal hard-core cartels in their respective jurisdictions, for instance, Article 6 of the Egyptian Competition Law declares hard-core cartels illegal *per se.* Additionally, some other jurisdictions have established their own terminology that corresponds to the *per se* concept, for instance, in Costa Rica, hard-core cartels fall within the category of *absolute monopolistic practices*, which is similar to the *per se* category (Article 11 of the Costa Rican Law on the Promotion of Competition and Consumer Protection).
[80] In the EU, Article 101 of the TFEU prohibits all agreements that prevent, restrict or distort competition within the internal market, and in particular hard-core cartels. Most EU Member States have similar provisions, e.g. Article 5 of the Finnish Competition Act is identical to Article 101 TFEU.
[81] In India, according to Section 3 of the Competition Act, hard-core cartels are presumed to have adverse effects on competition.
[82] *United States v. Socony-Vacuum Oil Co.* 310 U.S. 150 (1940).
[83] STIGLER, George T. (1970), 'The Optimum Enforcement of Laws'. *Journal of Political Economy*, Vol. 78, No. 3, p. 528.

(i) Cartels to Fix Prices

These are horizontal agreements between competitors to raise, fix or maintain the price of a product or service in a determined market. Overall, price fixing cartels are the main target of most competition provisions, the harmful effects that these agreements have on competition and their anticompetitive nature have led most competition regimes to focus on these practices. In practice, the detection and prosecution of price fixing cartels constitutes the bulk of competition law enforcement in most competition regimes[84].

The scope and the wording of the competition provisions against price fixing cartels vary depending on the jurisdiction. For example, the competition regimes with the simplest provisions prohibit agreements that fix prices[85]. Alternatively, in other systems these provisions are more elaborated and besides the general prohibition to fix prices, these rules contain prohibitions against agreements intended to increase or decrease prices[86]; to control prices[87], or to manipulate prices[88]. Moreover, some of these jurisdictions make reference to the types of prices, like purchase prices and selling prices[89], or to other trading conditions besides prices[90]. Finally, in some countries, the provisions against price fixing cartels prohibit the exchange of information between competitors with the purpose of fixing prices[91].

(ii) Cartels to Share Markets

These are horizontal anticompetitive agreements where competitors divide markets among themselves and agree not to compete with each other in those markets. Similar to the rules against price fixing cartels, the provisions on cartels to share markets may vary from one country to another. For instance, these provisions are different across jurisdictions in relation to how the markets can be shared. For example, in some competition regimes the provisions will prohibit the simple allocation of markets between competing undertakings. In other jurisdictions, however, the competition provisions may prohibit the division of markets in a variety of ways, like dividing the market by: sources of supply[92]; volume of purchases or sales[93]; types of products[94]; geographical areas[95]; customers[96]; seasons or periods of time[97]; or by any other mean[98].

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[84] In Korea, according to the Statistical Yearbook 2010, from the beginnings of the 1980's to 2010, 71% of the cases where the Fair Trade Commission imposed some kind of correction were related to price fixing violations (Statistical Yearbook 2010 of the Fair Trade Commission, available at: http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=51&pageId=0303). In the US, more than $1.7 billion in fines have been imposed for price fixing cartels in the air transportation industry (Department of Justice Press Release of 30 November 2010, available at: www.justice.gov/atr/index.html).
[85] See Article 8 of the Vietnamese Competition Law.
[86] See Article 6 of the Egyptian Law on the Protection of Competition and the Prohibition of Monopolistic Practices.
[87] See Section 45 of the Canadian Competition Act.
[88] See Article 9 of the Mexican Federal Law on Economic Competition.
[89] See Section 41 of the Malaysian Competition Act.
[90] See Article 4 of the Albanian Law on Competition Protection.
[91] See Article 9 of the Mexican Federal Law on Economic Competition.
[92] See Article 4 of the Albanian Law on Competition Protection.
[93] See Article 25 of the Salvadoran Competition Law.
[94] *Idem.*
[95] See Article 6 of the Egyptian Law on the Protection of Competition and the Prohibition of Monopolistic Practices.
[96] See Section 45 of the Canadian Competition Act.
[97] See Article 9 of the Mexican Federal Law on Economic Competition.
[98] See Section 4 of Pakistani Act No XIX of 2010.

(iii) Cartels to Restrict Output

These are horizontal anticompetitive agreements between competitors to restraint the production or the sales of a certain product in a determined market with the sole purpose of raising the prices by artificially limiting supply. Depending on the competition regime, output restrictions may include agreements between competitors on the restriction of: production[99], sales[100], markets, supply or demand[101], quality or types of assets[102], transportation and delivery[103], distribution[104], technical development[105], investment[106], or purchases[107], among others.

(iv) Cartels to Fix the Output of Competitive Tenders

These are horizontal anticompetitive agreements in which competing undertakings making tenders agree among themselves to fix or control the result of public tenders. There are some peculiarities related to collusive tendering and how such practices are regulated across jurisdictions. For instance, in most competition regimes collusive tendering is regulated by the anticompetitive agreements provisions[108], however, in other competition regimes, these practices are not regulated by these provisions, instead, the legislators have devoted separate sections, within the competition provisions, that govern this type of anticompetitive practices separately[109]. Alternatively, in other jurisdictions, there are specialized legislations on tendering that regulate these practices[110]. Finally, in some countries, these kinds of agreements are prosecuted more actively[111], or punished more severely than other horizontal restrictive agreements due to the fact that such agreements affect the public interests by wasting the public resources, accordingly, some regimes with no criminal sanctions for other anticompetitive agreements punish criminally individuals that take part in these fraudulent practices[112].

(v) Other Cartels

Besides the previously seen anticompetitive agreements, there are other practices that are also treated as hard-core cartels in some competition systems. For example, in some jurisdictions, the agreements between competing undertakings not to do business with targeted individuals or businesses are prohibited

[99] See Section 2 of the UK Competition Act.
[100] See Article 13 of the Chinese Anti-monopoly Law.
[101] See Article 4 of the Turkish Act on the Protection of Competition.
[102] See Section 2 of the Israeli Restrictive Trade Practices Law.
[103] See Article 19 of the Korean Monopoly Regulation and Fair Trade Act.
[104] See Article 9 of the Mexican Federal Law on Economic Competition.
[105] See Article 5 of the Romanian Competition Law.
[106] See Section 17 of the Jamaican Fair Competition Act.
[107] See Article 5 of the Swiss Federal Act on Cartels and other Restraint on Competition.
[108] In Argentina, Article 2(d) of the Law for Defense of Competition. In Australia, Section 44ZZRA(d) of the Competition and Consumer Act. In Kenya, Section 21(3)(c) of the Competition Act. In India, Section 3(3)(d) of the Competition Act.
[109] In Canada, Section 45 of the Competition Act deals with horizontal restraints to competition, nevertheless, Section 47 of the Act separately prohibits bid rigging. In Mauritius, Section 45 of the Competition Act regulates horizontal agreements related to price fixing, market sharing, and output restriction; however, bid rigging is regulated separately by Section 42 of the Act.
[110] In China, the Bidding Law prohibits bidders from colluding to set bidding prices, or to exclude other bidders (Article 32 of the Bidding Law).
[111] In Japan, during 2010, out of 20 cases by the Japanese Fair Commission, 12 were related to bid rigging (See the JFTC 2010 Annual Report, available at: http://www.jftc.go.jp/en/about_jftc/annual_reports/index.html).
[112] For instance, in Germany, pursuant to paragraph 298 of the Criminal Code, bid rigging is expressly prohibited. There are no other restrictive agreements in Germany that are sanctioned with criminal penalties. Similarly, in Austria, Section 168b of the Criminal Code sanctions individuals involved in bid rigging practices with up to three years of imprisonment.

under the restrictive agreements prohibitions[113], these agreements, usually know as group boycotts, are used to coerce the market participant that are not members of the cartel in question. These kind of restrictive agreements may be horizontal, i.e. cartel members that agree not to sell or buy from certain customers; or vertical, i.e. market participants at different levels of the production or distribution agreeing not to deal with a third party.

2. Other Horizontal Restrictive Agreements

As seen before, most competition regimes have provisions with lists that govern the most traditional and harmful anticompetitive agreements (hard-core cartels), nonetheless, these lists are illustrative and non-exhaustive, thus, these provisions are applicable to other kinds of horizontal agreements that might restrict competition, but are not expressly included in those lists.

The other horizontal restrictive agreements that do not fall inside the category of hard-core cartels are those which are not deemed as anticompetitive by their object, like hard-core cartels, but are illegal by their negative effects on competition. Contrary to the *per se* illegality of hard-core cartels, these other horizontal agreements are usually examined under the *rule of reason*[114]. In practice, unlike hard-core cartels, where their injurious characteristics make them almost always contrary to competition, these other horizontal restrictive agreements will be scrutinized under the *rule of reason*, provided that these may not always be harmful to competition. Accordingly, in the *rule of reason* approach the procompetitive effects of a certain conduct have to be compared with the anticompetitive effects, thus, such an approach requires a case-by-case analysis of potential anticompetitive behavior.

There are certain agreements signed among competing undertakings that can lead to substantial economic benefits, especially when these allow the undertakings to share risks, save costs, enhance investments, poll know-how, increase product quality and variety, or improve innovation. Nonetheless, some of these horizontal agreements may raise competition issues when they allow undertakings to maintain, gain or increase market power, and as a consequence, to affect prices, output, product quality and quantity, or innovation. For these reasons, the scrutiny of these types of horizontal agreements is made on a case by case basis regarding at the specific effects that a particular agreement has on competition.

Accordingly, besides from hard-core cartels, there are certain horizontal agreements that may raise competition issues. For instance, joint purchasing or selling agreements intended to fix the price to pay, or to purchase, e.g. agreements between purchasers determining with whom they will deal. These agreements may fall within the restrictive agreements prohibition if they have a substantial effect on

[113] In China, boycott transactions among competing business operator are prohibited by the provisions of Article 13 of the Anti-monopoly Law. In Germany, undertakings and associations of undertakings cannot request other undertakings or association of undertakings to refuse to sell or purchase, with the intention of unfairly harming targeted undertakings (Section 21 of the Against Restraints of Competition).

[114] Just like with the term *per se*, the term *rule of reason* is a concept forged in the US antirust case law. Accordingly, in 1911, the US Supreme Court determined the use of the "rule of reason" under the Sherman Act, whereby "the standard of reason [is]… the measure [to be] used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided" (Standard Oil Co. v. United States, 221 U.S. 1, 60, 61-64 (1911)). However, this standard is widely used worldwide in the enforcement of competition law and also among practitioners and academics as a method to examine the anticompetitive effects of a certain conduct, where the latter is declared unlawful by its effects on competition and not by its object.

competition. Likewise, the agreements between sellers to refuse to deal with certain customers may have an appreciable effect on competition.

Moreover, the agreements between competing undertakings to share and exchange information may also raise competition issues. While in some cases exchanging information may lead to pro-competitive collaboration, it can sometimes increase the possibility of collusion. Accordingly, these kinds of agreements may have a substantial effect on competition, and particularly, agreements to exchange information on prices, costs, transaction terms and conditions[115].

Similarly, agreements between competitors restricting advertising, whether related to the amount, nature or form of advertising may have potential anticompetitive effects. However, agreements aimed at curbing misleading advertising, or at ensuring that advertising is legal, truthful and decent are improbable to have anticompetitive effects.

Standardization agreements, which are agreements between competitors concerned with technical or design standards may, in some circumstances, lead to an enhancement in production by reducing costs or raising quality, or promote economic interpenetration among competitors, and encourage the development of new and improved products. These agreements, however, may give rise to restrictive effects on competition by creating entry barriers, restricting price competition and restricting or controlling productions, markets, innovation or technical development.

Finally, in some cases, research and development agreements between competing undertakings may be pro-competitive and produce significant benefits by combining complementary skills, assets and know-how, thus resulting in improved or new products and technologies being developed and marketed more rapidly and efficiently. On the contrary, joint research and development agreements can lessen or affect competition by reducing or slowing down innovation, leading to fewer or worse products, reducing competition between the parties outside the scope of the agreement, increasing prices by making anticompetitive coordination between the parties, and restricting the exploitation of products developed through the cooperation.

(b) Vertical Agreements

Vertical agreements are arrangements between undertakings at different levels of the production or distribution chain in a certain market. For example, these can be agreements between a producer and its distributors, or between a wholesaler and its retailers. Even though not as extensively regulated as horizontal agreements, some jurisdictions make specific reference to vertical agreements in their competition provisions.

When applying the restrictive agreement prohibitions to vertical agreements, most jurisdictions examine these practices using the *rule of reason* approach, provided that, unlike hard-core cartels, vertical

[115] In some jurisdictions, the exchange of price information is likely to be regarded as giving rise to an anticompetitive price-fixing agreement. The European Commission has considered that the exchange of price information between competitors allows them to coordinate the setting of prices (Commission decision of 15 October 2008, on appeal Cases T-587/08 etc. *Fresh Del Monte Produce v Commission*).

agreements are not always anticompetitive[116]. In practice, given that not every vertical agreement will raise competition issues, competition authorities will not investigative most of these agreements, especially since some vertical agreements may create efficiencies and benefits to competition and consumers.

As to the provisions regulating these kinds of agreements, different approaches have been chosen across jurisdictions. On the one hand, there are many jurisdictions that have one single general provision that is applicable to both horizontal and vertical restrictive agreements[117]. Additionally, in some competition regimes, there is a single general prohibition that is followed by a non-exhaustive list of anticompetitive agreements that contains both horizontal and vertical anticompetitive agreements[118]. On the other hand, in some competition regimes, there are independent provisions that regulate horizontal agreements and vertical agreements separately. In most of these jurisdictions, there is a provision that contains a general prohibition against restrictive agreements among competing undertakings that is followed by a similar provision on agreements between undertakings operating at different levels in the chain of production or distribution[119]. Finally, other competition regimes have independent provisions that prohibit specific forms of vertical agreements[120].

Irrespective of the way in which vertical restrictive agreements are regulated and how the effects of these agreements on competition are assessed, there are certain vertical arrangements that are more prone to raise competition issues. Firstly, resale price maintenance agreements are arrangements by the virtue of which a supplier specifies the resale price of a determined product, this kind of agreements, like most agreements concerned with the fixing of prices, may restrict competition to an appreciable extent. Secondly, exclusive dealing agreements, where a buyer agrees to purchase all his requirements from only one seller, or a seller agrees to sell its products to only one firm, are likely to restrict competition by limiting the undertaking's choice of buyers or suppliers. Thirdly, exclusive distribution agreements, where a supplier agrees to sell its products to only one distributor for resale in a particular territory, may restrict competition by reducing intra-band competition and by partitioning markets. Fifthly, tying agreements, where the manufacturer makes the purchase of one product (tying product) conditional on the purchase of a second product (tied product), may restrict competition by restricting the ability of the purchaser to buy the tied product from another manufacturer.

[116] In Mexico, Article 9 of the Federal Law on Economic Competition establishes that certain restrictive agreements among competing undertakings (price fixing, output restrictions, market sharing, and bid rigging) are absolute monopolistic practices, and that the involved parties shall be sanctioned for infringing the competition law provisions. On the contrary, Article 10 establishes that restrictive practices among non-competing undertakings are relative monopolistic practices and subject to the fulfillment of certain conditions.

[117] In the US, Section 1 of the Sherman Act is applicable to both horizontal and vertical restraints. Similarly, in Germany, Section 1 of the Act Against Restraints of Competition regulates horizontal and vertical agreements.

[118] In Armenia, Article 5 of the Law on Protection of Economic Competition begins with a general prohibition against restrictive agreements that is coupled with a non-exhaustive list of anticompetitive practices and ends explaining that anticompetitive agreements can be signed by economic entities on the same product market (horizontal agreements) and economic entities on different product markets (vertical agreements).

[119] In China, Section 13 of the Anti-monopoly Law establishes a general prohibition against horizontal agreements, plus a non-exhaustive list of examples. Furthermore, Section 14 establishes a general prohibition against agreements among business operator and their trading parties (vertical agreements), which is coupled with a list that expressly prohibits fixing the price of commodities for resale to a third party, or restricting the minimum price of commodities for resale to a third party.

[120] In Canada, there is a general prohibition against restrictive agreements between competitors (Section 45 of the Competition Act), additionally, there are specific provisions against: resale price maintenance (Section 76), exclusive dealing, tying, and market restriction (Section 77).

7.2. Single Firm or Unilateral Anti-Competitive Conduct

Along with the prohibition against restrictive agreements, the provisions against monopolization or abuse of dominance constitute the fundamental elements of competition law and policy in practically all the jurisdictions in the world that have antitrust provisions. Monopolization or the abuse of dominance occur when a dominant undertaking in a market, or a dominant group of undertakings, engages in conduct that is intended to eliminate or discipline a competing undertaking or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially. Due to the ability of this kind of anticompetitive practices to harm competition, most competition law regimes have introduced specific provisions in their legislations that prohibit this type of conducts.

In general, the wording of the monopolization or abuse of dominance provision is quite similar in most jurisdictions, with a few exceptions. Thus, the majority of competition regimes have established a general prohibition against the abuse of a dominant position which is generally followed by a non-exhaustive list of anticompetitive practices that amount to the abusive behavior of dominant undertakings.

Overall, there are two main issues that are treated differently from one jurisdiction to another; these are concerned with the determination of dominance and the conducts that are considered to be abusive. Thus, on the one hand, the provisions and/or the enforcers of competition law have to determine when a certain undertaking or group of undertakings is dominant in the relevant market. And on the other hand, there is the establishment of which specific practices amount to the abusive behavior of a dominant undertaking or group of undertakings in the relevant market. Accordingly, the main differences found across jurisdictions are related to these two subjects.

As to the determination of dominance, it has been defined as a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers[121]. Nonetheless, in some jurisdictions, according to the relevant case law, it has been determines that the mere possession of a dominant position is not considered to be anticompetitive; there must be an element of unacceptable conduct to achieve or maintain that position[122]. Similarly, the acquisition of a dominant position through competition on the merits does not constitute a violation of competition law[123].

In practice, competition regimes across the world handle differently the determination of whether an undertaking is dominant in the relevant market or not. For instance, in some jurisdictions, a definition of dominance has been introduced in the competition law provisions with the purpose of facilitating the

[121] Case 27/76 *United Brands Company and United Brands Continental v Commission* [1978] ECR 207, para 65; and Case 85/76 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, para 38.
[122] The US Supreme Court determined that the Sherman Act does not contain any direct prohibition against monopoly in concrete, and that without unlawful conduct, mere size, aggregated capital, power and volume of business are not monopolizing in a legal sense (*Standard Oil Co. v. United States*, *supra* note 114).
[123] In the US, it has been determined that the Section 2 of the Sherman Act prohibits acquiring or maintaining monopoly power only through improper means (*Spectrum Sports, Inc. v. Mc Quillan*, 506 U.S. 447, 456 (1993); *United States v. Grinnell*, 384 U.S. 563, 570-71 (1966)).

enforcers of the antitrust rules the application of the abuse of dominance provisions[124]. Instead, in other jurisdictions that do not have a definition of dominance, given that the antitrust statute is silent on this point, the competition law enforcers are responsible for the determination of dominance. In such cases, the enforcement authorities will analyze every case and arrive at a conclusion by looking at the available case law and assessing several factors[125]. For instance, when determining if an undertaking has or not a dominant position, the enforcement authorities may take into consideration: the market shares; the barriers to entry; the potential competition; the economic and financial power of the undertakings; the economic dependence of the suppliers and purchasers; the countervailing power of buyers/customers; the development of the undertaking's distribution network, and access to the sources of supply of products; and the undertaking's connections with other undertakings; among others[126].

Despite the preceding, most competition regimes have established certain mechanisms to facilitate the determination of dominance. As a way of guidance, some competition regimes have introduced in their competition provisions certain factors that the competition authorities have to consider in order to determine if an undertaking is dominant or not[127]. Another approach chosen in some competition systems is related to the use of market share thresholds. For instance, in some countries, if a certain undertaking does not have a predetermined market share, it will not be regarded as dominant in the relevant market and its practices shall not raise competition issues, oppositely, if the undertaking possesses a higher market share than the pre-established, then the competition authority will further investigate to see if the undertaking is dominant and if its conduct is abusive[128]. Similarly, in other

[124] In Belgium, see Section 1(1°) of the Competition Act. In Bulgaria, see Article 20(1) of the Law on Protection of Competition. In China, see Article 17 of the Anti-monopoly Law. In India, see Section 4 of the Competition Act. In Estonia, see Article 13 of the Competition Act. In Finland, see Section 4(2) of the Competition Act. In the Netherlands, see Article 1(1) of the Dutch Competition Act. In Russia, see Article 5(1) of the Federal Law on Protection of Competition. In Switzerland, see Article 4(2) Cartels and Other Restraints of Competition Act. In Zambia, see article 2 of the Competition and Consumer Protection Act.

[125] For instance, in the US, the competition provisions do not include a definition of dominance, as a result, courts in the application of the monopolization rules have defined dominance as *the power to control market prices or exclude competition* (*United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)). Similarly, at the EU level, Article 102 of the TFEU, which prohibits the abuse of a dominant position, does not have a definition of dominant position. Thus, the determination of dominance has been made by the institutions in charge of the enforcement of EU competition law. The European Court of Justice established in the *Hoffmann-La Roche* case that dominance was a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers (*Hoffmann-La Roche & Co. v Commission, supra* note 121).

[126] See Article 8 of the Albanian Law on Competition Protection.

[127] In Argentina, in order to determine the dominance of a determined undertaking, the following factors have to be considered: (i) the level of substitution of the involved product or service; (ii) the entry barrier level in the relevant market; and (iii) the level in which the relevant undertaking can unilaterally influence the price determination or restrict market supply and the level in which the competitors have to counteract such power (Article 5 of the Law for Defense of Competition). In Australia, an undertaking will abuse its dominant position if it uses it with the purpose of: (i) eliminating or substantially damaging a competitor; (ii) preventing the entry of a person in that or any other market; or (iii) deterring or preventing a person from engaging in competitive conduct in that or any other market (Section 46 of the Competition and Consumer Act). In China, Article 18 of the Chinese Anti-monopoly Law states that the dominant market of an undertaking can be determined by taking notice of: (i) the market share of a business operator, and the competition situation in the market; (ii) the capacity of an undertaking to control the sales market or the raw material market; (iii) the financial and technical conditions of the undertaking; (iv) the degree of dependence of other undertaking; (v) the degree of difficulty for other undertakings to enter the relevant market; and (vi) other factors related to determine a dominant market position. In Germany, according to Section 19(2) of the Act Against Restraints of Competition an undertaking is dominant where, as a supplier or purchaser of certain kinds of goods or commercial services on the relevant market, it (i) does not have any competitors; or (ii) has a paramount market position in relation to its competitors.

[128] In Brazil, an undertaking or group of undertakings are presumed to be dominant if these are capable of altering or controlling unilaterally or conjunctionally the market conditions, or controlling 20% or more of the relevant market (Article 36(2) of the Antitrust Law). In China, according to Article 19 of the Anti-monopoly Law, dominance is presumed if; (i) the market share of an undertaking accounts for 1/2 or more of the relevant market; (ii) the joint market share of two or more undertakings accounts for 2/3 or more of the relevant market; or (iii) the joint market share of three undertakings accounts for 3/4 or more of the relevant market. However, if in the cases (ii) and (iii) any undertaking has less than 1/10 of the market share; it will not be considered as dominant. Moreover, these dominance presumptions are rebuttable, accordingly, if the undertaking presents evidence to the contrary, it will not be considered dominant. In Estonia, pursuant to Section 13(1) of the Competition Act, an undertaking is presumed to be dominant if it holds a market share of more than 40% in the relevant market by itself or with other undertakings. In Germany, pursuant to

competition regimes with market share thresholds, if the undertaking meets the determined market share thresholds, it will constitute *prima facie* evidence of dominance, and it will be on the undertaking to disprove that it has market power, and consequently, that it is not dominant[129]. Finally, in some jurisdictions with no previously determined market share thresholds, the enforcers of the competition provisions have established safe harbors based on market share thresholds[130].

Furthermore, in other competition systems, other mechanisms have been established to ease the determination of dominance, such as the elaboration of guidelines to assist the competition authorities in determining if a certain undertaking is dominant[131]. Additionally, in some jurisdictions, other factors besides market shares are taken into account for the determination of dominance, i.e. in some countries, the annual turnover of undertakings is considered to determine if the latter is dominant in the relevant market[132].

A further issue related to the determination of dominance is concerned with the number of undertakings that can hold a dominant position in a determined market. In this respect, in some competition regimes, the notion of dominance refers to a single undertaking having market power in the relevant market. Alternatively, in other competition regimes, two or more undertakings acting together may have market power and be collectively dominant in the relevant market. Thus, depending on the jurisdiction, the competition law provisions will apply to the abusive behavior of a single dominant undertaking[133], and conversely, in other systems, the abuse of dominance prohibition will apply to the anticompetitive practices of a group of undertakings with market power acting together in a determined

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Section 19(3) of the Act Against Restraints of Competition, a single undertaking is presumed to be dominant if it has a market share of at least one third, while several undertakings are presumed to be dominant if they are three or less reaching a combined market share of 50%, or they are five or less reaching a combined market share of two thirds. In Russia, pursuant to Article 5(2) of the Federal Law on Protection of Competition, an undertaking is dominant if it has a market share of more than 50% in the relevant market. In South Africa, according to Section 7 of the Competition Act, an undertaking is dominant if: it has at least 45% of that market; it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or it has less than 35% of that market, but has market power.

[129] In China, according to Article 19 of the Anti-monopoly Law, a business operator is presumed to be dominant if it meets certain market share thresholds, however, where a business operator who has been presumed to have a dominant position can prove that it does not have a dominant position, it shall not be determined as being dominant.

[130] In Denmark, the Competition Council in its Decisions of 20 June 2007 *Elsam III,* determined that there is a presumption of dominance if an undertaking holds a market share between 40 to 50 % in a relevant market. In France, the *Autorité de la Concurrence* established that a market share below 10% does not provides market power (La Française des Jeux, 2001). At the EU level, there is rebuttable presumption of dominance for market shares of more than the 50% of the relevant market (Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359). Also, the ECJ held that market shares which are superior to 70% are in themselves, evidence of the existence of a dominant position (*Hoffmann-La Roche & Co. v Commission, supra* note 121). In the U.S. firms have a dominant position if they hold about two-thirds or more of a relevant market (*Spectrum Sports, Inc. v. Mc Quillan, supra* note 123).

[131] For instance, in Bulgaria the *Methodology on Investigation and Definition of the Market Position of undertaking in the Relevant Market* is an instrument designed to investigate and determine the market position of undertakings in the relevant market in relation to the application of the provisions of the Law on the Protection of Competition. According to this methodology, the Commission on Protection of Competition presumes that the maintenance of a market share higher than 70% over a sufficiently long period of time is sufficient proof the existence of dominance (page 13). At the EU level, the *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Firms* determines that dominance is unlikely if the market share of a firm is below 40% (Recital 14).

[132] In Korea, according to Article 4 of the Monopoly Regulation and Fair Trade Act, an undertaking will be presumed to be market-dominant if it holds a market share of 50/100 or more, or if the total market share of not less than three undertakings is 75/100 or more. However, undertakings with less than 10/100 of market share, or undertakings whose annual sales turnover or purchases in a particular market amount to less than KRW 4 billion, shall not be considered as dominant.

[133] In Egypt, Article 8 of the Law on the Protection of Competition and the Prohibition of Monopolistic Practices refers to *a person* holding a dominant position. In South Africa, according to the wording of the abuse of dominance provisions of the Competition Act, these apply only to single dominant undertakings. In the US, there is no notion of collective dominance; the provisions of abusive dominance apply only to single firm conduct (Section 2 of the Sherman Act).

market[134]. Nevertheless, provided that most of the current jurisprudence recognizes the possibility of collective dominance[135], in some competition systems where dominance used to refer to an undertaking actin on its own, the abuse of dominance prohibition has been amended in order to be applicable to cases involving collective dominance[136]. Moreover, depending on the competition regime, dominance will be recognized to groups of buyers or suppliers[137], and in some cases, to non-dominant undertakings seeking to acquire a dominant position[138].

As to the determination of which practices amount to the abuse of dominance, as previously seen, it is important to first notice that the mere possession of a dominant position or a substantial market power is not prohibited by the competition provisions, given that such possession do not raises competition issues by itself[139]. Thus, the abuse of dominance prohibition will apply only when the dominant undertaking abusively uses its dominant position to distort competition on its favor without any advantages to consumers.

Overall, an undertaking abuses its dominant position in a market when, through the effects of its conduct on competition, it adversely affects consumers directly, i.e. though the prices charged; or indirectly, i.e. by reducing existing or potential competition. Thus, in general, the abusive conduct of a dominant undertaking may be of two kinds. On the one hand, practices that exploit customers and suppliers, for example, by charging excessively high prices. And on the other hand, practices that amount to exclusionary behavior, by removing or limiting competition in a market, or establishing or strengthening entry barriers.

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[134] In Belgium, Section 3 of the Competition Act applies to single undertakings and to two or more undertakings that are collectively dominant. In Bulgaria, Article 21 of the Law on Protection of Competition prohibits the abusive practices of single undertakings and multiple undertakings which are dominant in the relevant market. In Denmark, Section 11 of the Competition Act prohibits abuses by one or more undertakings of a dominant position. In France, Article L.4202(1) of the Commercial Code prohibits abuse by an undertaking of a group of undertakings of a dominant position. In Greece, according to Article 2 of the Law on the Control of Monopolies and Oligopolies and the Protection of Competition prohibits the abuse by a single undertaking or by a group of undertakings of their dominant position. In Italy, the provisions of Section 3 of the Competition Act apply to abusive practices of single undertakings and to group of undertakings. In Vietnam, Article 11 of the Competition Law applies to enterprises or groups of enterprises holding a dominant position.

[135] In the *Italian Flat Glass* case, the European Court determined the principle of collective dominance: *"There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis à vis the other operators on the same market"* (Cases T-68/69 etc *Societá Italiano Vetro SpA v Commission* [1992] II ECR 1403, [1992] 5 CMLR 302).

[136] For example in India, the abuse of dominance prohibition of the Competition Act was amended in 2007 from *"No enterprise shall abuse its dominant position"* to *"No enterprise or group shall abuse its dominant position"*.

[137] In Australia, the abuse of dominance provisions apply to both buyers and suppliers with substantial power in a market (Section 46 of the Competition and Consumer Act), for instance, in the following case, a wholesale supplier of bread was successfully condemned for the violation of the abuse of dominance rules (Australian Competition and Consumer Commission v. Australian Safeway Stores Pty Ltd (No. 4) [2008] FCA 21). At the EU level, from the wording of Article 102(a), the abuse of dominance prohibitions shall apply to dominant buyers, given that it mentions the imposition of unfair prices in the list of abusive practices. In Ireland, the High Court has ruled that the provisions of abuse of dominance can be applied to buyers and suppliers. The Court held that a monopsonist undertaking has similar power to control price in purchasing as a monopolist has in selling, and is able to act independently from its competitors and customers (Jim Blemings v David Patton Ltd. [2001] 1 IR 385). In the US, the provisions of the Sherman Act prohibit monopsonization and also attempts to monopsonize under the same principles that apply to monopolization and attempted monopolization.

[138] In Portugal, according to the abuse of economic dependence provisions, it is forbidden, as long as it may affect the functioning of the market or the structure of competition, the abusive exploitation by one or more undertakings, of the state of economic dependence of any of their suppliers or clients, due to the absence of an equivalent alternative (Article 12 of the Portuguese Competition Act). In the US, the provisions of the Sherman Act prohibit attempts to monopolize where the defendant has a dangerous probability of gaining monopoly power (Section 2 of the Sherman Act).

[139] According to the OFT Guidelines on the Abuse of a dominant position 2004, the prohibitions of Article 82 (now 102 TFEU) and Chapter II of the Competition Act are against the abuse of the dominant position, not the holding of the position.

1. Types of Abusive Practices

As mentioned before, most competition systems have included a general prohibition against the abuse of dominance which is coupled with non-exhaustive lists of practices considered as abusive. Thus, in practice, all the practices that fall within the general prohibition shall be considered as contrary to the competition provisions. With respect to the lists of practices provided by most competition provisions, these are mere examples introduced by the legislators with the purpose of serving as a guide for enforcers and market participants. Despite the preceding, most competition regimes prohibit the majority of the following practices for being considered as abusive; predatory pricing; exclusive dealing; resale price maintenance; discriminatory pricing; refuse to deal; tying or bundling; among others.

According with the traditional taxonomy of abusive behavior, abusive practices are distinguished as exploitative abuses, including discriminatory abuses, and exclusionary abuses. The difference between these categories of abusive behavior is concerned with the way in which these harm social welfare[140]. Accordingly, exploitative and discriminatory abuses are directed towards the customers of a dominant undertaking, while exclusionary abuses are directed towards the competitors of a dominant undertaking. Thus, in practice, dominant undertakings can abuse their market position in three ways. First, dominant undertakings may use their dominant position to harm consumers, for instance, by raising prices (exploitative abuse). Second, within the same category, dominant undertakings use their market position to harm consumers by charging different prices to different customers (discriminatory abuse). And third, dominant undertakings may use their market power to create or maintain a dominant position to suppress competition, by

a) Exploitative Abuse

(i) Excessive pricing

Excessive pricing is a type of exploitative abuse that occurs when prices are set significantly above competitive levels as a result of monopoly or market power[141]. According to the relevant jurisprudence, excessive pricing constitutes abusive behavior when the price charged is excessive because it does not have a reasonable relation to the economic value of the product supplied[142]. With regard to the design of the abuse of dominance provisions, there are jurisdictions that have introduced excessive pricing provisions in their antitrust act[143]. Alternatively, in other jurisdictions this type of exploitative abuse falls within the general provisions of abusive behavior[144]. From the enforcement perspective, normally, competition authorities are often extremely reluctant to take enforcement action in case of exploitative abuses in general and excessive pricing in particular[145].

[140] NAZZINI, Renato (2011), 'The Foundations of European Union Competition Law: The Objective and Principles of Article 102'. Oxford; New York: Oxford University Press, p. 51.
[141] OECD, *Glossary of Industrial Organization Economics and Competition Law,* 1993.
[142] In the EU case law, see: Case 27/76, *United Brands Company and United Brands Continental v Commission* [1978] ECR 207.
[143] Such is the case of the Competition Act of South Africa.
[144] In the EU excessive pricing is regulated by the provisions of Article 102.
[145] OECD, *Excessive Prices,* 2011.

b) Discriminatory abuse

(i) Discriminatory Pricing

Under certain conditions, discriminatory pricing is also considered as an abusive practice in most jurisdictions. Discriminatory pricing occurs when an undertaking sells a product or service at different prices, regardless of identical costs of supplying the goods, however, this kind of practice will be anticompetitive only when it is intended to unfairly exclude competitors from the market, provided that charging lower prices to consumers may be a sign of competition. Accordingly, discriminatory pricing will be anticompetitive: if there is no objective commercial justification for it; when the act places an undertaking at a competitive disadvantage[146]; if it is likely to have the effect of substantially preventing or lessening competition[147]; if it creates inequality in competition[148]; or if it creates diversified conditions of competition[149]; among others.

c) Exclusionary abuse

(i) Predatory Pricing

One of the most common abusive practices by dominant undertakings is predatory pricing. Predatory pricing is an exclusionary practice where a dominant undertaking sells a product or service at a very low price with the purpose of driving competitors out of the market, or creating barriers to entry for potential new competitors. The main issue related to this exclusionary practice is the determination of when this practice occurs. Normally, predatory pricing involves pricing bellow some acceptable measure of costs and certain evidence of exclusionary or monopolistic intent. However, in practice, this issue varies widely among jurisdictions; nonetheless, some similarities are evidenced by studying the provisions of some competition systems. For instance, in some jurisdictions, predatory pricing will occur when a dominant undertaking sells its goods at a price that is below cost[150]. Alternatively, in other regimes, predatory pricing will take place when a dominant undertaking sells its goods: below their marginal or variable cost[151]; below their marginal or average variable cost[152]; at prices lower than the acquisition cost[153]; at extremely low prices[154]; at prices that drive competitors out of a market or that prevent the entry of new competitors[155]; at glaringly low prices[156]; or, at unfair prices, including predatory prices[157]; among others. In addition, in some cases, it has been determined that in order for predatory pricing to exist, the predator

[146] Article 102 of the TFEU.
[147] Section 9 of the South African Competition Act.
[148] Article 13 of the Vietnamese Competition Law.
[149] Article 09 of the Polish Act on Competition and Consumer Protection.
[150] In China, Section 17 of the Anti-monopoly Law prohibits selling products at prices below cost without any justifiable cause. In Vietnam, Article 13 prohibits dominant undertakings to sell goods at prices lower than the aggregate costs in order to eliminate competitors.
[151] In Zambia, see Section 16 of the Competition and Consumer Protection Act.
[152] In South Africa, see Section 8 of the Competition Act.
[153] In Canada, see Section 78 of the Competition Act.
[154] In Hungary, Article 21 of the Competition Act determines as abusive behavior, to set extremely low prices which are not based on greater efficiency.
[155] See Section 3 of the Pakistani Act No. XIX of 2010. See Article 9 of the Albanian Law on Competition Protection.
[156] In Poland, see Article 9 of the Act on Competition and Consumer Protection.
[157] In India, see Section 4 of the Competition Act.

must be able to recoup its investment in low prices after some or all existing rivals are eliminated[158]. However, in some jurisdictions, the ability to recoup is not an essential element of predatory pricing, in such cases, it is sufficient for the predator to price below average variable costs with the ultimate intention of eliminating or disciplining a competitor[159].

Nonetheless, despite the preceding, the provisions against undesirably low pricing have to be carefully considered, provided that the indiscriminate use of these may deter vigorous, aggressive pricing, which is ultimately the type of behavior that competition law is aimed to protect and foster[160].

(ii) Exclusive Dealing

Another anticompetitive practice that is related to the abuse of dominance is exclusive dealing. Exclusive dealing is a practice whereby a supplier of a product makes the supply of the product dependent upon the acceptance of restrictions on the distribution or manufacture of competing goods[161]. In these cases, the undertaking will have the exclusive right to buy or sell the dominant undertaking's products. However, in exchange of this exclusive right, the supplier requires the buyer to deal only or primarily in products supplied by the supplier. In some competition regimes, exclusive dealing is related to restrictions to buyers to sell the supplied goods in determined territories only[162].

(iii) Resale price maintenance

Most competition systems have provisions that prohibit manufacturers to enforce or try to enforce vertical contractual agreements containing a minimum[163] or maximum[164] price at which the retailer must resale those goods. Resale price maintenance prevents resellers from setting their prices independently, and ultimately, lead to increased prices for consumers. In practice, unlike other abuse of dominance practices, resale price maintenance has been declared as illegal *per se* in some jurisdictions[165]. Moreover, depending on the jurisdiction, the suggestion of advertisement of prices by the manufacturer may also be sanctioned by the competition provisions[166]. Finally, in some jurisdictions, resale price maintenance is considered as an anticompetitive vertical agreement, and consequently, governed by those provisions[167].

(iv) Refusal to Deal

Most competition systems have provisions that prohibit dominant undertakings to refuse to deal with other undertakings with the purpose of excluding competitors or granting a competitive advantage to

[158] *Brooke Group v. Brown & Williamson Tobacco,* 509 U.S. 209. 1993.
[159] Case C-62/86 *AZCO Chemie v Commission* [1991] ECR I-3359; and Case C-333/94 P. *Tetra Pak International SA v Commission* [1996] ECR I-5951.
[160] FOX, Eleanor M. (1997), 'US and EU Competition Law: A Comparison'. In: Graham E.M. & Richardson J.D. (eds) *Global Competition Policy*. Washington: Institute for International Economics, p. 351.
[161] *Standard Oil Co of California v. United States,* 337 U.S. 293 (1949).
[162] In Canada, see Section 77 of the Competition Act.
[163] *Dr. Miles Medical Co. v. John D. Park & Sons. Co.* 220 U.S. 373 (1911).
[164] *Albercht v. Herald Co.* 390 U.S. 145 (1968).
[165] The US Supreme Court has determined that minimum resale price maintenance is *per se* illegal under Section 1 of the Sherman Act (*Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 720, 724 (1988)).
[166] In Canada, see Section 76 of the Competition Act.
[167] In South Africa, Section 5(2) of the Competition Act, titled *"Restrictive vertical practices prohibited"* prohibits minimum resale price maintenance.

another undertaking. Provided that in most jurisdictions undertakings should be allowed to contract with whosoever they wish, unless it is not justified, the decision of an undertaking to refuse to deal with another undertaking will not always raise competition issues[168]. In some competition regimes, refusal to deal is also concerned with the refusal to allow another undertaking to access a network, infrastructure or facility of a dominant undertaking, provided that there is an adequate remuneration by the other undertaking and that without such access the other undertaking is unable to operate as a competitor of the dominant undertaking[169]. Similarly, in some competition regimes, refusal to deal is related to refusing to supply scarce goods to a competitor when supplying those goods is economically feasible[170]. Moreover, in some competition systems, the refusal to deal provisions is not related to the abusive behavior of a dominant undertaking, but applies to any undertaking[171], or is regulated as a vertical anticompetitive agreement[172].

(v) Tying or Bundling

A further abusive conduct by dominant undertakings is the practice of tying or bundling**.** Tying is the practice of a suppliers of one product (the tying product) requiring a buyer also to buy a second product (the tied product)[173]. Bundling is a practice where two products are sold as a single package at a single price. Accordingly, in practice, most competition regimes have provisions that prohibit dominant undertaking to carry out these anticompetitive practices[174].

(vi) Other Abusive Practices

Finally, there are other practices that amount to an abuse by dominant undertakings that are prohibited by the competition provisions of certain competition regimes. These include: margin squeezing[175]; buying a scarce supply of goods or resources required by a competitor[176]; undertaking an act that leads to the non-manufacturing, or non-production, or the non-distribution of a product for a certain period of time[177]; reducing or increasing the quantity of the assets or the scope of the services offered by a dominant undertaking[178]; abusing an intellectual property right[179]; or unreasonably impeding the participation of new competitors[180]; among others.

[168] In Hungary, see Article 21 of the Competition Act.
[169] In Albania, see Article 9(e) of the Law on Competition Protection. In South Africa, see Section 9 of the Competition Act.
[170] In South Africa, see Section 9 of the Competition Act.
[171] In Canada, see Section 75 of the Competition Act.
[172] In India, refusal to deal is a prohibit agreement between enterprises at different stages of the production chain (Section 3(4)(d) of the Competition Act.
[173] (*Northern Pacific Railway v. United States, supra* note 78).
[174] Armenia, Article 7 of the Law on Protection of Economic Competition; Bosnia and Herzegovina, Article 10 of the Competition Act; Canada, Section 77 of the Competition Act; Egypt, Article 8 of the Law on the Protection of Competition and the Prohibition of Monopolistic Practices; Jamaica, Section 20 of the Fair Competition Act; Seychelles, Section 7 of the Fair Competition Act.
[175] In Canada, see Section 78 of the Competition Act.
[176] In Malaysia, see Section 10 of the Competition Act.
[177] In Egypt, see Article 8 of the Law on the Protection of Competition and the Prohibition of Monopolistic Practices.
[178] In Israel, see Section 29A of the Restrictive Trade Practices Law.
[179] In Kenya, see Section 24 of the Competition Act.
[180] In Korea, see Article 3-2 of the Monopoly Regulation and Fair Trade Act. In Vietnam, see Article 13 of the Competition Law.

8. Merger Control

Other practices that normally fall under the control of the competition law provisions are mergers and acquisitions that create or reinforce a dominant position. Even though, the prohibitions of restrictive agreements and the abuse of dominance, plus the control of mergers and acquisitions that raise competition law issues are the typical provisions of most competition law regimes, there are jurisdictions, especially those of new competition law regimes, that have not included provisions that control these types of transactions. Nevertheless, in some of these competition law systems, mergers and acquisitions that raise competition law issues can be challenged by the abuse of dominance provisions.

In practice, M&A's can take different forms: through the amalgamation of two or more undertakings that merge to become a single entity; through the acquisition of the control of an undertaking; or through the creation of a full-function joint venture. In most competition law regimes with merger control mechanisms, the competition authority is enabled to investigate mergers between undertakings that could be harmful to the competitive process. Accordingly, it is fundamental to determine which transactions are subject to the control by the competition authority provided that not all transactions are contrary to the competition law objectives. For instance, some undertakings might choose to merge with the purpose of becoming more efficient, in such cases; the proposed transaction will result beneficial for the economy and consumers. On the contrary, other transactions may cause anticompetitive effects, provided that these may be intended to reduce or lessen competition in a determined market, and as a consequence, create or strengthen a dominant position. In such cases the scrutiny of competition law is necessary in order to prevent competition from being harm or restricted.

As with the other anticompetitive practices that fall under the control of the competition law provisions, there are some differences with regard to the control of mergers and acquisitions across competition law regimes. These are mainly concerned with the obligation of the undertakings to notify the transaction, the notification process, the procedures undertaken by the authorities responsible for the control of the notified transactions and the remedies available in the different competition law regimes.

9. Other Practices Controlled by Competition Law

In addition to the typical anticompetitive practices controlled by most competition law systems across jurisdictions, there are other conducts that fall under the provisions of some competition law regimes. For instance, in a number of competition law systems there are provisions dealing with state aid, in these jurisdictions the state aid provisions are intended to limit the ability of governments to grant subsidies or benefits to domestic undertakings, in order to prevent that these aids distort the competitive process between the recipients of the subsidies and the undertakings that do not receive subsidies. In this regard, the objective of the state aid control is to ensure that undertakings are not kept artificially in markets through state aid, provided that these subsidized undertakings will create a distortion on competition by affecting the incentives of other competitors in the market and the interest of new entrants. Moreover, in other competition law systems there are provisions that control other possible restrictions or distortions of the competitive process by the intervention of the State. For example, some competition law regimes may

have provisions against the collusion or abuse of dominance by public undertakings or in regard to sectors of the economy that have general interest, alternatively, in some competition law systems, the actuation of public entities or the administration of public utilities by the State are exempted from the scope of the competition law provisions. Finally, in some competition law systems other additional subjects may fall under the scope of competition law, such as consumer protection, intellectual property protections, unfair competition, price regulation or trade regulation.

8. Institutional Design of Competition Law

A further fundamental issue concerned with the study of competition law enforcement is related with the design of the competition law institutions responsible for the enforcement of the antitrust provisions. All competition law enforcement systems are grounded on two essential components: the legal instruments, which deal with the fundamental commands of the law, the procedure and the attributions of the public enforcers; and the institutional structures and procedures through which the legal instruments are implemented. In practice, the efficient interaction of these two components is fundamental for the success of the enforcement system as a whole, provided that well drafted legal commands are useless if these are not effectively enforced and, conversely, strong public agencies cannot apply deficient legal commands in an effective fashion[181].

The establishment of new competition systems and the reformulation of older ones present an opportunity to consider the optimal design of antitrust institutions, provided that a body of competition laws is only as good as the institutions responsible for their implementation[182]. Moreover, the optimal design and efficiency of public institutions, such as the antitrust agencies, is considered as an important driver for accomplishing compliance with the law, provided individuals that have a positive judgment of the government's institutions, usually, consider that the latter ought to be obeyed[183].

As with other issues of competition law and policy, the subject of the design of the competition law institutions varies greatly from one jurisdiction to another. There is a great deal of diversity with regard to the composition, the structure and the responsibilities of the competition law institutions across the world, however, most differences are found in relation to the structure and the enforcement functions of the antitrust agencies.

In relation to the structure of the antitrust institutions there is variety of arrangements found across jurisdictions. In most competition law regimes the main feature considered in the establishment and design of an antitrust institution is the independence of the latter with regard to other public institutions and the government itself[184]. The main purpose of creating independent competition law institutions is to safeguard the interpretation and application of the competition law provisions from being

[181] LOWE, Philip (2008), 'The Design of Competition Policy Institutions for the 21st Century: The experience of the European Commission and DG Competition'. *Competition Policy Newsletter*, Number 3.
[182] KOVACIC, William E., EVERSLEY, DeCourcey (2007), 'An Assessment of Institutional Machinery: Methods Used in Competition Agencies and What Worked for Them'. *International Competition Network, Competition Policy Implementation Working Group, Subgroup 2 on Experiences of Younger Agencies*.
[183] LEVI, et al. (2009), pp. 21-22.
[184] OECD, *The objectives of Competition Law and Policy and the Optimal Design of a Competition Agency*, 2003.

influenced by political considerations. Hence, by delegating the enforcement functions of competition law to independent institutions, the interpretation and application of the antitrust provisions are performed taking into account only economic and legal arguments, thus, relieving competition law institutions from political pressure. As with other features of competition law, the level of independence of the antitrust institutions varies from country to country depending on the administrative structure of the jurisdiction in question[185]. Despite these differences on the level of independence, competition law institutions can be classified by their degree of independence in: competition law institutions that are completely independent from the government; competition law institutions that are affiliated to a public institution, e.g. a certain ministry; and competition law institutions that even though are not affiliated to a public institution are somehow responsible to the government, e.g. by being required to provide the government with annual reports on their activities.

In addition to the independence feature, the structure and design of competition law institutions also varies with regard to the number of institutions responsible for the enforcement of competition law, provided that in some competition law regimes there are multiple enforcers of the competition law provisions. Competition law systems can be group in four models in relation to the number of their competition law institutions[186]. First, there are competition law regimes that have multiple specialized antitrust institutions which are vertically related. In those jurisdictions, there is one main institution, usually named as Tribunal, which reviews the decisions of an antitrust enforcement authority. Second, in some competition law systems with multiple institutions, there is a horizontal distribution of the enforcement functions, in these jurisdictions, there is a distribution of authority to multiple institutions by category of regulated activity, i.e. the distribution of the enforcement functions is made with relation to the anticompetitive practices policed by the competition law provisions. Third, in some competition law regimes, there are multiple institutions that also share enforcement functions, however, in these jurisdictions, in order to avoid the overlap of functions, the authority of the institutions has been divided along industry or sectoral lines, i.e. all multiple antitrust institutions have authority to enforce competition law irrespectively of the anticompetitive practice in question, however, the competences of these multiple institutions are divided in relation to the specialization of the institutions in certain industries or sectors of the economy. And fourth, there are competition law systems that concentrate the enforcement functions of competition law in a single agency, in such jurisdictions; there is a single competition law institution that is responsible for the entire enforcement of competition law, i.e. a single competition law institution is in charge of the investigation, prosecution and adjudication of all competition law cases.

As stated before, the design of the competition law institutions also depends on the enforcement functions vested on these antitrust institutions. Hence, provided that one of the most important functions of competition law institutions is law enforcement, which is concerned with bringing cases against

[185] UNCTAD, *Guidebook on Competition Systems,* New York and Geneva, 2007.
[186] CRANE, Daniel A. (2011A), 'Enforcing Competition Law with Multiple Agencies and Private Enforcers'. *Hokkaido Journal of New Global Law and Policy.* Vol 10, p. 46-47.

anticompetitive practices, having a good institutional design is critical for good competition policy and competition law enforcement[187].

In a broad sense, in relation to the design of competition law institutions and their law enforcement functions, some competition law regimes have chosen the administrative approach. In such jurisdictions, the competition law provisions are enforced via administrative proceedings, in this sense, the institution responsible for the enforcement of competition law is an administrative authority which has different competences that vary from one country to another when applying competition law. In jurisdictions where the competition authority has broad powers to apply competition law, the latter will be empowered to carry out an investigation for the alleged infringement of competition law, and at the end of which, the competition authority will also have authority to reach a final decision on the case. The decision of the competition authority will declare if an infringement of competition law has been committed, order the termination of such infringement and impose any sanction or remedy necessary. Nonetheless, in other to safeguard the defendant's procedural rights of defense, the decisions of the competition authority can be reviewed and appealed before the competent appellate body.

Alternatively, in other competition law regimes, the competition authority lacks competence to decide on competition law cases, in such instances, a judicial approach has been chosen. In these jurisdictions, the power to issue competition law decisions has been vested on courts that handle actions brought by the competition authority, governmental institutions, or private parties against undertakings suspected of having breached the competition law provisions. In such actions the relevant court will, at the petition of the plaintiff, order the termination of the infringement, grant injunctive relief, and award damages to the injured parties. Similarly to the administrative approach, the decisions of these general courts are subject to appeal before the competent appellate body.

In addition, in some competition law regimes, tribunals specialized in competition law matters have been established. These specialist tribunals are usually responsible for the judicial review of the decisions adopted by the competition authority. However, in some competition law systems, these may also be empowered to decide on civil claims by injured parties for the recovery of damages.

In some competition law systems, the application of the competition law provisions is decentralized. Thus, in jurisdictions that have a federal political division, the enforcement of the antitrust provisions is split between the state and federal enforcers. Similarly, at regional levels, the decentralized enforcement of competition law entails the application of the antitrust provisions by the regional competition authority and the competition authorities of the member states[188].

Finally, in some competition law systems other institutions are also responsible for the enforcement of the competition law provisions in different extents. For instance, in some jurisdictions, the competition law provisions may be applied by the relevant ministry, this occurs in jurisdictions where the competition authority is subordinated to a certain ministry, or alternatively, in jurisdictions where the

[187] FOX, Eleanor M. (2010), 'Antitrust and Institutions: Design and Change'. *Loyola University Chicago Law Journal.* Volume 41, No. 3, Spring 2010, p. 473-488.
[188] HAWK, Barry & LAUDATI, Laraine (1996), 'Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A comparison'. *Fordham International Law Journal*, Volume 20, Issue 1.

competition authority shares the enforcement function of competition law with a determined ministry. Moreover, in other competition law regimes, the competition law provisions can be applied by sector regulators in competition law cases that are related to their specific sector. However, the ability of sector regulators to enforce the competition law provisions and their faculties when doing so, vary greatly from one jurisdiction to another.

9. The Enforcement of Competition Law

An important part of having an effective competition law system, besides the adoption of a sound legal framework or the creation of strong competition law institutions, is the effective enforcement of the competition law provisions. Accordingly, it is not enough to merely have a competition law statutory basis and a competition authority, but it is also fundamental to have effective enforcement mechanisms that ensure a reasonable degree of compliance of the competition law provisions[189]. On the contrary, without enforcement, the competition law provisions would be reduced to ink on paper[190].

In a broad sense, the enforcement of competition law is the application or implementation of the substantive commands of the competition law provisions by the competition law enforcers – competition authorities, judicial authorities or private parties - to specific cases with the ultimate goals of discovering competition law infringements, restoring the competitive process, compensating those injured by the antitrust infringement, punishing those responsible for the antitrust violations and deterring future competition law infringements.

In practice, the enforcement of the competition law provisions is intended to fulfill determined objectives sought by competition law and policy. However, these enforcement objectives of competition law are not to be confused with the objectives of competition law itself, even though the fulfillment of the latter are strictly related to the accomplishment of the former. The objectives of the enforcement of competition law can be classified as three[191]. The first one is to prevent competition law infringements from happening, or alternatively, once the competition law provisions have been breached, to bring the infringement to an end. In particular, the accomplishment of this objective through the enforcement of the competition law provisions is fulfilled thanks to the deterrence effect of competition law enforcement; this means that the effective application of the competition law provisions by the competition law enforcers deters market participants from engaging in future anticompetitive practices. Moreover, if the antitrust infringement has already taken place, the competition law enforcers, through the application of the competition law provisions, may bring the infringement to an end, via a decision of the competition authority or the competent court. The second objective of competition law enforcement is to restore the competitive process and to compensate the victims of the competition law infringement once the antitrust violation has occurred. In such cases, the enforcers of the competition law provisions seek to remedy the injury caused by the competition law infringement by restoring competition and compensating the

[189] POSNER (2001), p. 266.
[190] DABBAH (2010), p. 51.
[191] KOMNINOS, Assimakis, P. (2008), 'EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts'. Oxford [etc.]: Hart Publishing, p. 7; and WILS (2009), p. 5-15.

persons who suffered as a result of the unlawful conduct of the antitrust offender. In these cases, competition law enforcement can restore the competitive process thanks to the ability of competition law enforcers to order the antitrust offenders to restore the competitive process via orders and injunctions. In addition, the possibility of private plaintiffs to enforce the competition law provisions and file claims in order to recover the damages suffered as a consequence of the infringement of the competition law provisions, allows the accomplishment of the compensatory objective of competition law enforcement. Finally, the third objective of competition law enforcement is the punishment of the person responsible for the infringement of the competition law provisions through the application of the sanctions established in the competition law provisions.

Due to the fact that a single infringement of competition law can affect different market participants in a variety of ways, the competition law provisions can be enforced in different proceedings, by a number of persons, seeking different sanctions and remedies. Overall, in practice, the competition law provisions can be enforced either publicly or privately. In the first case, competition law will be enforced in public proceedings by public authorities and with the imposition of sanctions on the competition law offenders that have a public nature. In the second case, the provision of competition law will be applied by private parties in private proceedings seeking the imposition of remedies of a private nature.

This possibility to enforce the competition law provisions in different ways is further exacerbated by the fact that several countries with different legal systems and traditions have implemented competition law regimes. As a consequence of this diversity of jurisdictions and competition law regimes, the enforcement of competition law varies greatly from on jurisdiction to the next. In practice, most differences are found with regard to the nature of the proceedings for the infringement of competition law; the persons given standing to initiate a competition law action; the procedural issues involved in these procedures; and the outcome of these competition law proceedings.

10. Types of Competition Law Enforcement

As stated before, one of the main characteristics of competition law in most jurisdictions is the multiplicity of proceedings that a single anticompetitive conduct may instigate. For instance, in most competition law regimes, administrative proceedings may be brought against undertakings suspected of having infringed the substantial provisions of competition law by competition authorities; judicial authorities; and other public institutions, such as Ministries or sector regulators; regional competition law institutions; and even foreign competition law authorities, depending on the competition law regime. Additionally, in a variety of competition law systems, any party affected by, or involved in, a competition law infringement may bring civil proceedings before the competent court seeking civil remedies, such as, the recovery of damages, injunctive relief, or a declaration. Finally, in some competition law systems, where hard-core cartels are considered as criminal offenses, the participation in a hard-core cartel may instigate the criminal prosecution against the individuals involved in such anticompetitive practices.

A broad categorization can classify the abovementioned types of application of the competition law provisions in two kinds, which are: public and private enforcement of competition law. Accordingly, all the cases that are handled by public institutions in public proceedings will fall under the category of public enforcement of competition law. This category includes the administrative cases handled by the competition authority, irrespective of the way in which these have been instigated, i.e. under the initiative of the competition authority itself, at the request of a public institution, a regional competition law institution or a foreign competition authority, or after the complaint of a private party. In addition, other competition law cases can also be resolved via administrative proceedings, such as, the adjudication of competition law cases by Ministries or sector regulators, where available. Moreover, the public enforcement of competition law also comprehends the judicial application of the antitrust provisions by general courts in jurisdictions where the competition authority lacks competence to adjudicate competition law cases. And finally, the criminal prosecutions of hard-core cartel participants correspond to the public enforcement of competition law due to the public nature of criminal proceedings.

In relation to the private enforcement of competition law, this type of enforcement includes the antitrust cases brought by private parties that seek the award of private remedies, like the recovery of damages, the award of injunctive relief, or a declaration. The nature of these civil proceedings is private due to the parties involved, the proceedings, and the outcome of the latter.

(a) Public Enforcement of Competition Law

As happens with other branches of public law, the public application of the competition law provisions is the primary source of enforcement in the majority of competition law regimes, with the exception of one jurisdiction where the number of competition law cases adjudicated in private proceedings is superior to the number of competition law cases handled publicly[192]. This public approach of the government to protect competition through public laws reflects the determination of states to safeguard the competitive process by intervening in the economic activities of market participants. Moreover, the intervention of the states in the competitive process is ultimately intended to accomplish the previously seen goals and objectives of competition law, i.e. maximization of consumer welfare, enhancement of economic efficiency, and others, depending on the jurisdiction.

As stated in the introduction of this Chapter, there are several differences with regard to the implementation of competition law systems across jurisdictions. Some of these differences are concerned with the enforcement of competition law. Chapter II of the study addresses the main differences found in relation to the public application of the competition law provisions in more detail.

In a broad sense, and irrespective of the institutional arrangement of the jurisdictions that have implemented competition law systems, the public enforcement of competition law is the public application of the antitrust provisions by the relevant public authorities, which may be: an administrative institution (competition authority, sector regulator or Ministry) or a judicial authority (courts of general jurisdiction or specialized courts). Moreover, while applying these provisions, these public institutions

[192] In the US there are ten private cases for every one brought by the government.

address their decisions in regard to the infringement of the competition law provisions to private persons, which may be natural or legal. In addition, the public enforcers of competition law have been granted authority to impose sanctions and penalties upon the antitrust offenders, nevertheless, these sanctions, as other features of competition law, vary widely from one jurisdiction to another. In that sense, there is a wide spectrum of sanctions that can be imposed for the breach of competition law, which ranges from the imposition of an administrative fine, to the imprisonment of the individuals involved in certain anticompetitive practices, in the most stringent jurisdictions. One of the main characteristic of this type of enforcement is the verticality of the dispute between the State and the private persons. This verticality provides the public enforcers of competition law with wide powers of investigation in order to detect possible antitrust infringements, and eventually, the possibility to impose any sanction or penalty available upon the antitrust offenders. However, the decisions of these public authorities are normally subject to judicial review.

Another main feature of the public enforcement of competition law is that related to objectives sought by the public application of the competition law provisions. Due to its public nature, this branch of law is aimed at protecting the public interests of the State and the private individuals that form part of the latter. Thus, unlike the private enforcement of competition law, in which private parties seek to satisfy their personal interests, the public application of competition law is intended to protect the well-being of the entire population. Generally speaking, the enforcement of competition law can be presumed of fulfilling three main objectives. The first one is intended to prevent competition law infringements from happening, or alternatively, to put an end to the antitrust infringements if these have already taken place. The second objective is aimed at restoring the competitive process and to compensate the victims of the anticompetitive practice, in cases where the antitrust infringement has already been committed. And the third objective of the enforcement of competition law is to punish those responsible for the breach of the competition law provisions.

With regard to the accomplishment of the abovementioned objectives of the enforcement of competition law, public enforcement is capable of fulfilling these objectives in different extents. For instance, in relation with the first objective the public application of competition law may prevent antirust infringements from happening thanks to its deterrent effect. The successful application of competition law by public enforcers can deter future infringements by presenting to the market participants the possibility of being caught and sanctioned for engaging in anticompetitive practices. In addition, most public enforcers have authority to order the end of an anticompetitive conduct once this has been detected through the public application of competition law. In this sense, the public application will stop antitrust infringements that have already occurred. Furthermore, in relation to the restorative and compensatory objectives of competition law enforcement, the public application of competition law may restore the competitive process by ordering the infringing undertakings to stop the anticompetitive practices, and if possible to restore the competitive process. With regard to the compensatory objective, the public enforcement of competition law is not well suited to accomplish this objective, due to the fact that most public proceedings are not aimed at compensating the victims of the antitrust infringements. Thus, in these cases, the private enforcement of competition law is better suited to obtain the compensation of the

victims, provided that these types of proceedings are intended to seek the recovery of damages of the victims of the antitrust infringements. Notwithstanding, there are few jurisdictions where the competition authority may order the infringing undertakings to compensate those who suffered for the breach of the competition law provisions in public proceedings, however, these are exceptions because in most jurisdictions private remedies such as the award of damages cannot be awarded in public proceedings. Finally, as to the punishment objective, the fact that public enforcers are empowered to impose a variety of sanctions and penalties upon the infringers of the competition law provisions reflects the readiness of public enforcement to accomplish this enforcement objective.

There are also some differences in relation to how these public proceedings for the infringement of competition law are initiated. Overall, the initiation of public proceedings against anticompetitive practices can be instigated by different events, which vary from country to country. For instance, in most competition law systems, public proceedings against anticompetitive practices may be initiated by the competition authority under its own discretion. Moreover, in most cases, the initiation of public proceedings by the competition authority can also be instigated by the request of a public authority, such as the head of state, Ministers, or sector regulators, among others. Alternatively, the initiation of public proceedings may also be instigated by the complaint filed by private persons, however, despite the participation of private parties in these types of proceedings, these shall not be considered as private due to the public nature of the proceedings and the sanctions and remedies available in these proceedings. In this sense, this kind of actions have been named as "privately triggered public enforcement"[193] due to the participation of private parties in the initiation of these public proceedings.

A further difference found across jurisdictions in relation to the public enforcement of competition law is that concerned with the powers of investigation that the public enforcers have while applying the antitrust provisions. Due to the secretive nature of most anticompetitive practices, the role of the competition authorities in detecting antitrust infringements requires special powers of investigation in order to detect antitrust breaches. In this regard, most legislators have vested the competition authorities with wide powers of investigation in an attempt to ease the public enforcement of competition law. Despite the differences that exist from legislation to legislation, most competition law systems allow their competition authorities the possibility to request all relevant information concerned with a possible infringement of competition law, to carry out interviews with individuals to receive testimonies, to enter and search premises where relevant information may be stored, or to perform intrusive surveillance and property interference, in the most permissive jurisdictions.

The sanctions and remedies available in the public enforcement of competition law also vary from one country to another. Due to the compulsory and remedial nature of competition law, most competition regimes have implemented sanctions and remedies for the infringement of the competition law rules. Thus, the establishment of sanctions and remedies are intended to serve as mechanisms for the accomplishment of the competition law goals and objectives, and also for the fulfillment of the

[193] JACOBS, Francis G. & DEISENHOFER, Thomas (2003), 'Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective'. In: Ehlermann and Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*. Oxford and Portland: Hart Publishing, p. 197.

enforcement objectives. In this regard, most competition law regimes have established sanctions for the infringement of the substantial commands of competition law, i.e. sanctions against anticompetitive agreements, the abuse of a dominant position, and mergers that create or reinforce a dominant position. In addition, the sanctioning systems have also included penalties for procedural violations, i.e. refusal to supply information, the production of false, incorrect or misleading information, and the failure to comply with orders and decisions by the enforcers of competition law. Overall, most competition law regimes allow public enforcers the possibility to impose sanctions such as, financial penalties, confiscation of illegal gains, blacklisting of infringing undertakings, and director disqualification, among others. In addition, in the most stringent jurisdictions the individuals who have engaged in certain anticompetitive practices – hard-core cartels – are sanctioned with imprisonment. In these jurisdictions, the participation in hard-core cartels is considered a criminal offense, in such cases; the imposition of imprisonment is decided by a criminal court in criminal proceedings. In relation to the remedies, unlike sanctions, these do not have a punitive nature. The objective of remedies is to maintain and/or restore the competitive process. Most competition law regimes allow competition enforcers the possibility to grant interim measures, accept commitments, order the divestiture of undertakings, and order the restitution of injured parties, among others.

Lastly, several variations can be found across jurisdictions with regard to the review mechanisms of the competition law decisions. Most competition law systems have established review mechanisms for the revision of the competition law decisions given that some of these tend to restrict the rights and freedoms of the subjects of these decisions. The purpose of allowing the addressees of competition law decisions to request the revision of these decisions is to prevent flawed decisions that harm the interests of the addressees, third parties and the general public. In addition, the possibility to request the revision of competition law decisions is intended to safeguard due process and to challenge the unlawful or abusive acts of the administration. Overall, most competition law decisions are subject to be appealed before the competent appellate body (decisions imposing interim measures, accepting commitments, ordering the inspection of premises, opening a case, imposing sanctions and penalties, ordering divestiture, blocking a merger, etc.). However, the review mechanisms established vary from country to country. Accordingly, depending on the competition law regime in question, the review of the competition law decision will be handled by: the competition authority itself, by general administrative courts, by specialized administrative courts, by judicial courts, by Ministries, or by the Supreme Court.

(b) Private Enforcement of Competition Law

In several competition law regimes, the competition law provisions are not exclusively enforced publicly by administrative or judicial authorities in public proceedings and with the imposition of sanctions and remedies of a public nature. Instead, in many competition regimes, the antitrust provisions may also be applied privately, this means, enforced by private parties, in private proceedings, and seeking the award of private remedies. However, even though most competition systems rely on a model based primarily on

governmental competition law enforcement (public enforcement), in many jurisdictions several measures have been established to strengthen the role of private parties in the application of competition law[194].

In a broad sense, the private enforcement of competition law is the application of the antitrust provisions by private parties for the infringement of competition law. In this regard, the initiation of the competition law procedures has to be made by private parties, however, this private instigation of the antitrust procedures does not include the cases where the concerned parties file complaints to the public authority requiring the application of the competition law provisions (privately triggered public enforcement), provided that such procedures ultimately have a public nature. Accordingly, this type of competition law enforcement requires that the private parties who promoted the initiation of the procedure form part of the subsequent proceedings. Moreover, the private enforcement of competition law involves the imposition of remedies of a private nature (award of damages, injunctive relief, or a declaration), which are awarded by a judicial authority in a court procedure. In summary, private antitrust enforcement entails the initiation of civil proceedings by private parties for the infringement of the competition law provisions seeking the award of civil law remedies.

As mentioned above, in private antitrust enforcement the plaintiff can ask the court the imposition of different remedies: injunctive relief, a declaration or the award of damages. In practice however, the bulk of private antitrust enforcement is constituted by damages claims. Even if the plaintiff initially requests injunctive relief from further violations, the initial petition is normally followed by an award of damages or settlements pay by the defendant[195].

In respect to the accomplishment of the enforcement objectives of competition law – prevent and terminate antitrust infringements, restore the competitive process and compensate victims, and punish antitrust offenders -, it has been noted that state of the art private enforcement of competition law may fulfill these objectives. Hence, antitrust infringements may be deterred from happening or terminated via cease and desist orders and negative or positive injunctions ordered by civil courts in private proceedings. Moreover, the persons harmed by the challenged anticompetitive practices of the defendant can be compensated by the award of civil damages. And finally, antitrust offenders can be punished for their unlawful behavior with the imposition of punitive damages[196].

Notwithstanding the abovementioned, and despite the professed benefits of private enforcement of competition law, most competition law regimes that allow the possibility to apply the competition law provisions in private proceedings have not achieved a decent level of private enforcement. In this regard, there have been some initiatives to foster the proliferation of private antitrust litigation. The intention behind these initiatives is to promote private antitrust enforcement given that the latter can serve as a complement to public enforcement in cases where the public authorities will not prosecute certain anticompetitive practices for priority reasons or lack of information and resources, in such cases, private antitrust enforcement provides for an alternative given in some cases private parties may be better suited

[194] FOER, Albert A. & SCHULTZ, Evan P. (2011), 'Will Two Roads Still Diverge? Private Enforcement of Antitrust Law is Getting Harder in the United States. But Europe May be Making it Easier'. *Global Competition Litigation Review*, Issue 3.
[195] CRANE, Daniel A. (2010), 'Optimizing Private Antitrust Enforcement'. 63,3 *Vanderbilt Law Review,* p. 676.
[196] KOMNINOS (2008), p. 8.

to prove the infringement of the competition law provisions. Moreover, the compensation objective of antitrust enforcement requires the participation of private parties, provided that this fundamental objective cannot be accomplished through public enforcement as awarding compensation is outside the field of competence of competition authorities[197].

In practice, just as with the public enforcement of competition law, the private application of the competition law provisions varies widely from one jurisdiction to another. Chapter III of the present comparative study deals with the most important features of private enforcement of competition law and describes the main differences found across jurisdictions in the private application of the competition law provisions.

A first differentiation found across competition law regimes is the statutory basis for bringing a private claim for the infringement of the competition law provisions. In this regard, there are competition law systems that have included specific competition law provisions establishing the right of antitrust victims to bring private actions against the anticompetitive practices of the defendants. Alternatively, in other competition law regimes, there are not specific competition law rules allowing private parties to bring private claims, instead, in these jurisdictions private claims for the infringement of competition law are grounded on the general provisions of civil law or commercial law. Nevertheless, even jurisdictions that have specific competition law rules allowing the possibility to bring private claims refer, at least in some degree, to general provisions for procedural issues.

Additionally, there are also differences with regard to the legal standing to bring a private claim for the infringement of competition law. There are different approaches chosen with regard to the legal standing, for instance, in jurisdictions with broad provisions, any person or entity harmed by the anticompetitive conduct of the defendant will be allowed to bring a private claim before the competent court. Conversely, in other competition law regimes the spectrum of persons who can bring a private action has been narrowed, in such cases, this possibility has been limited to: undertakings, competitors, parties to a contractual agreement, specific bodies, legal associations, or certain public entities.

Moreover, there are different approaches with regard to the possibility to file collective claims for the infringement of the antitrust provisions. The availability of collective redress mechanisms allows injured parties to exercise their rights collectively. There are different types of collective redress mechanisms for private parties across jurisdictions, overall, these include: public interest litigation, class actions, collective claims, representative action, joint actions and the assignment of claims.

A further differentiation concerned with the private application of the competition law provisions is that related to the legal forum for the adjudication of private antitrust claims. Even though there are some different approaches in relation to the legal forum for competition law civil claims, most jurisdictions have granted jurisdiction to decide on civil antitrust claims to general courts. Alternatively,

[197] European Commission, *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, 2013 (Proposal Directive for damages actions), p. 2.

in some competition law systems, specialist tribunals have been created, which hold jurisdiction to handle private claims for the infringement of competition law.

Probably the majority of differences that can be found in the private application of competition law across jurisdictions are concerned with procedural issues. These procedural differences are related to: the burden and standard of proof; the forms of admissible evidence; the process for the disclosure of evidence; the fault requirement; the level of causation; the grounds of justification; the limitation periods; and the recovery of legal expenses.

Finally, there is a variety of remedies that can be granted to the plaintiffs in civil claims for the infringement of competition law. Thus, in most competition law systems, private plaintiffs may request, the award of damages, which may be actual damages or punitive damages, depending on the jurisdiction; the declaration of nullity of anticompetitive agreements; the award of injunctive relief; the award of declaratory relief; and the recovery of interests.

(c) International Enforcement of Competition Law

With the globalization of trade and commerce, anticompetitive practices have also gained an international dimension. In line with this globalization of the anticompetitive practices, the enforcement of competition law has acquired an international scope. The international enforcement of competition law can take different forms depending on the jurisdiction. First, there is the unilateral application of competition law by a determined country outside its national borders, this type of application is referred to as the extraterritorial enforcement of competition law, by virtue of this type of application a country may apply its national competition law provisions to acts that have been committed beyond the borders of its territory. Second, in some competition law systems the competition law provisions can be enforced by virtue of bilateral cooperation agreements signed between nations. In such cases, the competition law provisions are enforced against anticompetitive practices that produce their harmful effects in the territory of one of the signing parties. Third, another approach related to the international enforcement of competition law is the adoption of multilateral agreements on competition law matters. These are multilateral initiatives aimed at developing common competition law policy and practice. Finally, there is the regional application of the competition law provisions, which is intended to develop competition law and policy at a regional level.

In this international context of competition law, the doctrine of extraterritoriality plays a fundamental and controversial role in the international enforcement of competition law. In a broad sense, the doctrine of extraterritoriality allows countries to assert jurisdiction over situations outside their territory to ensure that proper protection is afforded to their citizens, interests, and national security. Notwithstanding, the assertion of jurisdiction outside the territory of a state is highly controversial given that it conflicts with the fundamental principle of sovereignty of states. According to the latter, a country is able to enact and enforce laws within its national borders. Consequently, the assertion of jurisdiction outside the territory of a determined state is most of the times questionable. However, according to the principles of public international law, the jurisdiction of the states can be extended beyond their borders

in certain circumstances; for example, the jurisdiction of a country can be extended when certain acts committed beyond its national borders produce an effect within its national territory (*Effects Doctrine*). In the case of the extraterritorial enforcement of competition law, according to the *Effects Doctrine*, national competition law provisions are applicable to foreign undertakings, and national undertakings located outside the country's territory, when their behavior or transactions produce an effect within the national territory[198].

As with other features of competition law, the basis for the extraterritorial application of the competition law provisions varies from one jurisdiction to the next. For example, in some systems the basis for the extraterritorial application of the antitrust rules is established in specific legislation[199]. In addition, some competition law provisions also include specific provisions on the extraterritorial application of competition law. In such cases, the statutory basis of competition law establishes, in different extents, the possibility to apply the antitrust provisions outside the national borders[200]. Additionally, in some jurisdictions, the competition authorities have published guidance referring to the possibility to apply the competition law provisions extraterritorially[201]. Alternatively, in other regimes, the competition law provisions do not include the possibility to apply their provisions in an extraterritorial way; however, the existing case law confirms the availability of this possibility[202].

Furthermore, the extraterritorial application of the competition law provisions in private cases is also possible depending on the jurisdiction in question. This extraterritorial enforcement of the competition law provisions by private parties occurs when private plaintiffs file damages claims for the damages caused by undertakings established in another country. In most jurisdictions where this possibility is available, this alternative is governed by the principles of private international law. Consequently, in most jurisdictions that allow private parties to file damages claims against anticompetitive practices committed outside their national territory, a direct relationship with the defendant has to be proven in order to successfully recover damages. Alternatively, in some competition law regimes, this possibility to claim damages does not exist.

In addition to the preceding type of international enforcement of competition law, in some countries, bilateral and multilateral cooperation mechanisms have been adopted with the purpose of coordinating the activities of the cooperating states when enforcing competition law. Some countries have signed formal cooperation agreements in competition law matters. These cooperation agreements can be mainly of two kinds, on the one hand, there are cooperation agreements with negative comity, which

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[198] In the *Empagran* case, the US Supreme Court determined that the provisions of the Sherman Act do not apply to the effects of foreign price-fixing schemes if those schemes do not have domestic effects (*F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 123 S.Ct. 2359 (2004)). Moreover, the Court established that the Foreign Trade Antitrust Improvements Act was intended to prevent American Courts from interfering in foreign commerce.

[199] In the US see the provisions of the Foreign Trade Antitrust Improvement Act (1982).

[200] In Brazil, Article 2 of Law 12.529/2011 (Antitrust Law) establishes that the provisions of the law are applicable to acts committed within the national territory and to those acts that produce their effects within the national markets.

[201] In the US, the Antitrust Division of the Department of Justice and the Federal Trade Commission have published the *Antitrust Enforcement Guidelines for International Operations* (1995), which deals with the extraterritorial application of the US antitrust provisions.

[202] For instance, in the EU Articles 101 and 102 of the TFEU do not make any reference to the possible extraterritorial application of the competition law provisions, however, the Court of First Instance embraced the "Effects Doctrine" by establishing that the application of the Merger Regulation (EC No. 139/2004 on the control of concentrations between undertkings) to a transaction between undertakings located outside EU territory is justified under public international law (Case T-102/96, Gencor Ltd v Commission, (1999) E.C.R.).

require that the signing parties take into consideration the important interests of the other party and notify the latter when its enforcement activities may affect these interests. The main purpose of this kind of agreements is to prevent jurisdictional conflicts by requiring that the investigation is carried out by the party with the superior or more reasonable right to assert jurisdiction[203]. On the other hand, there are cooperation agreements with positive comity in which one party to the agreement may request the other party to inquire about certain anticompetitive practices within its national territory that produce negative effects on the territory of the requesting party[204]. Finally, bilateral cooperation for the enforcement of competition law may also be accomplished via *de facto* cooperation. In such cases, even though the cooperating states have not signed a formal cooperation agreement, these may still coordinate their enforcement activities. For instance, one country may require, in an informal way, the competition authority of another country to investigate certain anticompetitive behavior that negatively affects its interest.

The international enforcement of competition law has also a multilateral approach. In this regard, some countries and international organizations have been interested in developing common competition law policy and practice. In practice, some of these multilateral agreements include binding obligations on the signing states. In such cases, these multilateral initiatives may entail the creation of supranational competition law provisions and international institutions capable of enforcing these provisions[205]. Alternatively, other multilateral options do not include binding obligations for the parties, in such cases; these multilateral approaches entail the formulation of guidelines, best practices and recommendations on competition law matters[206].

Finally, the regional approach usually follows supranational initiatives for integration and economic cooperation. In this regard, some regional cooperation efforts have included competition law matters in their agenda. Overall, the aim of regional integration and cooperation is to attain higher objectives, such as the liberalization of trade across a determined region, nevertheless, given that competition law can play a fundamental role for the accomplishment of these higher objectives, some of these regional initiatives have sought the development of a supranational competition law regime, which controls anticompetitive behavior at a regional level[207].

11. Interaction of Competition Law Proceedings

As stated before, one of the most peculiar characteristics of competition law is the possibility to enforce its provisions in more than one proceeding and by different persons. This possibility is given to the fact that a single competition law infringement may harm a variety of person in different ways. Accordingly,

[203] For example, the *Agreement Between the US and Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices* (1976).
[204] *Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws* (1998).
[205] Such as the efforts to integrate a competition law agenda within the World Trade Organization.
[206] These multilateral initiatives are supported by international organizations such as: the International Competition Network (ICN), the Organization for Economic Cooperation and Development (OECD) or the United Nations Conference on Trade and Development (UNCTAD).
[207] Even though there are several regional cooperation agreements across the world, only one, the European Union, has been successful in implementing a fully functioning supranational competition law system.

due to this characteristic, there is the possibility of concurrent proceedings being instituted against the same anticompetitive behavior. Thus, in order to avoid concurrent proceedings to interfere with each other in some competition law systems there have been established certain mechanisms that regulate this concurrency. Overall, the different procedures that may be instituted for the infringement of competition law may interact with each other at different levels.

In competition law regimes where the antitrust provisions may be applied both publicly and privately, these two types of independent proceedings may interact with each other manly in two respects. On the one hand, these competition law proceedings converge in relation to the decisions issued by the competent authorities. Hence, in some jurisdictions, the decisions of the competition authority declaring the infringement of the competition law provisions are a prerequisite for private plaintiffs wanting to bring civil claims for damages. In such jurisdictions, only follow-on actions are allowed, provided that a prior decision by the competition authority declaring the infringement of competition law is required. However, since this requirement can be considered as an obstacle for private enforcement, most jurisdictions do not request the existence of a prior decision to bring actions for damages. On the other hand, public and private proceedings may interact when the competition law provisions are applied both publicly and privately at the same time against the same anticompetitive conduct. In such cases, some competition law regimes have established stay mechanisms to avoid the overlaping of procedures. Hence, depending on the jurisdiction in question certain procedures may be stayed awaiting the resolution of the other. As general rule, ordinary courts are not under the obligation of staying their proceedings if the competition authority has initiated procedures on its own based on the same legal or factual issues. However, most courts may decide to do so and wait for the decision of the competition authority, provided that the latter is a specialized institution and has specific powers to uncover anticompetitive practices. By staying their proceedings, ordinary courts will be relieved from having to determine if the competition law provisions have been breached and will focus on the award of damages or other civil remedies requested by the plaintiff. Alternatively, in some competition law regimes ordinary courts are statutorily obliged to stay their proceedings whenever the competition authority has initiated public proceedings based on the same legal or factual issues. With regard to the competition authority, most regimes do not require their authorities to stay their proceedings if an ordinary court has initiated civil proceeding on the same matter. Nevertheless, some competition authorities may decide to stay their proceedings if they feel that private litigation is better suited for the resolution of the case, or for prioritization purposes.

Furthermore, public and private proceedings for the infringement of competition law also interact with each other in relation to the evidenced gathered in such proceedings. In respect to the evidenced gathered by the competition authority in public proceedings, this may have a high value for private plaintiffs in civil claims given that the competition authority has broad powers to acquire relevant information concerned with the infringement. Accordingly, private plaintiffs are always willing to get access to the files of the competition authority; however, the accessibility of such files varies depending on the jurisdiction. There are different arrangements in relation to the accessibility to the competition authority's files across jurisdictions, hence, in some countries, these files will be available for interested

parties, and alternatively, in other regimes the files of the competition authority will not be disclosed to parties outside the proceeding. Nevertheless, irrespective of the different arrangements found across jurisdictions, the information shared by the competition authority is always restricted to non-confidential documents that do not contain sensitive information about the parties in the proceedings. In addition, competition authorities are usually reluctant to share information acquired via leniency applications with private parties seeking the recovery of damages, this is mainly because, it will reduce the attractiveness of leniency programs and would put the leniency applicant in a disadvantaged positions in respect to the other cartel members in case a private action for damages is filed. Leniency programs are also related to private actions for damages in some jurisdictions where the leniency applicants have to compensate antitrust victims in order to receive lenient treatment, or have to cooperate with the victims so these can successfully recover damages from the other cartel members.

Public and private proceedings also interact in relation to the evidential value of the decisions issued in each proceeding. For instance, the decisions of the competition authorities declaring the infringement of the competition law provisions have different evidential value depending on the jurisdiction. Thus, such decisions may constitute; a rebuttable presumption; *prima facie* evidence; admissible evidence; reversal of the burden of proof; or have binding effects on ordinary courts. With regard to the decisions of ordinary courts handling competition law cases and its incidence on public competition law cases, normally, competition authorities are not bound by the findings of ordinary courts, however, in some jurisdictions, the competition authority may take into account when imposing a penalty for the infringement of competition law the fact that the defendant has compensated the antitrust victims that have brought damages claims.

In addition to the most obvious interaction of competition law proceedings (public/private), there may be other concurrent proceedings when enforcing the competition law provisions. For instance, in jurisdictions with criminal provisions for the infringement of competition law, this kind of proceedings may concur with others, such as private actions for damages or public cases initiated by the competition authority. However, as a general rule both civil and administrative proceedings will normally be stayed until the criminal proceedings are concluded.

Moreover, in some jurisdictions the interaction of competition law proceedings is regulated in other ways. For instance, in countries where regional competition law systems have been established the overlap of proceedings between national and regional competition law institutions is addressed with regard to the scope of the anticompetitive practice in question. Accordingly, if the anticompetitive behavior has a national dimension, then the national competition authority will have the right to assert jurisdiction over the matter, conversely, if the case has a regional scope, then the regional competition law institution will be entitled to adjudicate the case. In respect to regionally enforced competition law cases and national civil claims for damages, the initiation of a case by the regional competition law institution does not deprive national courts from its right to initiate civil proceedings, however, normally; the latter will wait for the decisions of the former. Similarly, in countries with a federal structure that have a federal competition authority plus regional competition law institutions, the competence of the relevant institution will be declared in relation to the scope of the competition law infringement. In addition, in

countries that have more than one institution responsible for the enforcement of competition law, the jurisdiction of these authorities will be determined by the specific arrangements of each country, thus, in some countries, the jurisdiction of the competition institutions will be determined in relation to the type of anticompetitive practice, while in other countries the jurisdiction will be determined in relation to the industry or sector affected by the competition law infringement. Finally, in competition law regimes where the competition law provisions can be enforced both by the competition authority and sector regulators, the competence of the relevant institution will be determined by the sector or industry affected by the anticompetitive conduct of the defendant.

12. The Law and Economics of Antitrust Enforcement

The mere enactment of a law does not, on its own, guarantee the attainment of the purposes and objectives of the law in question. Hence, in order to fulfill the objectives of a determined law, its legal commands have to be effectively enforced. In a broad sense, the main objective of law enforcement is to assure a certain degree of compliance with the law by apprehending, prosecuting and punishing offenders. However, complete enforcement of the law cannot be achieved, mainly because, law enforcement is costly[208]. The costs of enforcement usually include the expenditure on detecting the violations, punishing the offenders, and compensating the victims. On the other hand, despite the costs involved in law enforcement, the application of the law has certain socially desirable benefits, like the reduction of crimes or the deterrent effect to prevent future infringements. In practice, the extent of law enforcement is strictly related to the amount of resources devoted to the application of the law. Nevertheless, as happens with other public activities the states have only limited resources to assign to the enforcement of the law. Consequently, the states need to balance the costs of law enforcement against its benefits, in this regard; policy makers should allocate the state's limited resources to achieve the goals of law enforcement efficiently[209].

1. The rationale for competition law enforcement

In light of the preceding, provided that the application of the law is expensive for the state and ultimately for the tax payer, it is worth considering if the enforcement of the law –in our case of competition law- is socially desirable in the first place.

Among the main objectives of competition law there is the enhancement of economic efficiency and the maximization of consumer welfare, hence, from the perspective of the government, these objectives constitute a fundamental part for the development of the nation and the welfare of its inhabitants. Competition law and policy have a public nature given that antitrust violations can harm the general public, thus, provided that competition can be considered as a public good, it must be worthy of governmental protection.

[208] STIGLER, George T. (1970), 'The Optimum Enforcement of Laws'. *Journal of Political Economy*, Vol. 78, No. 3, pp. 526-527.
[209] GAROUPA, Nuno. (1997), 'The Theory of Optimal Law Enforcement'. *Journal of Economic Surveys,* Vol. 11, No. 3, p. 267.

Even though apprehending and convicting competition law offenders is expensive for the government, some law & economics-scholars note that the estimated direct gains to consumers from antitrust policies alone tend to be well in excess of the costs incurred by the competition law enforcers applying the antitrust legal commands[210]. Moreover, it is expected that the benefits of competition law enforcement to the general public would be far larger than the expenses of the government on antitrust enforcement and of undertakings on antitrust compliance[211].

It is well know that competition law infringements can be particularly harmful for the economy and the general public. In practice, competition law enforcement can stop the noxious effects of most antitrust violations and, additionally, prevent future infringements from happening in the first place. At first instance, through the application of competition law, the enforcement authorities can detect and punish most competition law infringements, in such cases, if it was not for antitrust enforcement most infringements could cause a substantial harm to competition and society. Additionally, the effective enforcement of the competition law commands can create a deterrent effect that prevents future infringements from taking place. In this sense, competition law enforcement benefits society substantially by remedying past violations and preventing future losses.

Moreover, in favor of competition law enforcement, there is empirical evidence in some jurisdictions that undertakings have behaved differently before the competition act was enacted and during periods in which competition law enforcement was absent or lax. Furthermore, there has been a proliferation of competition law in the last couple of decades around the world; nonetheless, the enforcement of the antitrust rules has been uneven across jurisdictions. Therefore, provided that in countries with a robust competition policy the levels of development and welfare are higher, cross-national comparisons between jurisdictions with strong competition regimes and countries where antitrust enforcement is less serious provide further evidence on the efficacy of antitrust and the value of protecting competition[212].

2. Modalities of Antitrust Enforcement

Traditionally, the states have implemented public laws to control unwanted behavior from happening. To enforce effectively such rules of public law the states delegate to public authorities the detection of violators of the legal rules and the imposition of sanctions upon offenders. Additionally, in some branches of public law, these public provisions can also be enforced by the private parties affected by a determined infringement of the law, as will be seen in the following chapters; such is the case of competition law in a number of jurisdictions across the world[213].

Most competition law enforcement systems are basically grounded on two enforcement types: public enforcement and private enforcement. In practice, the coexistence of public and private antitrust enforcement raises questions about the appropriate role of these types of enforcement, the appropriate

[210] DON, Henk, KEMP, Ron & VAN SINDEREN, Jarig (2008), 'Measuring the Economic Effects of Competition Law Enforcement'. 156 *De Economist*, p. 345.
[211] For more on the voluntary compliance of the competition law provisions, please see Chapter Four.
[212] BAKER Jonathan B. (2003), 'The Case for Antitrust Enforcement'. 17 *Journal of Economic Perspectives*.
[213] For more on the private enforcement of competition law, please see Chapter Three.

division of enforcement responsibilities between private and public enforcers, and the type of dual enforcement system (mix) that is preferable on efficiency grounds.

Viewed from the perspective of the optimal enforcement of competition law, both public and private antitrust enforcement are costly, however, these two enforcement systems also have their respective objectives and benefits. In consequence, an effective dual competition law regime should find an appropriate balance between the costs that these types of enforcement represent and the benefits that these report.

a) Public Antitrust Enforcement

Public antitrust enforcement is the use of public authorities for the detection and punishment of competition law violations. In order to be able to apply the law effectively, public enforcers have specific powers and procedures to investigate possible violations. Moreover, the enforcement authorities are usually empowered to impose sanctions for the infringement of the competition law provisions upon offenders. Finally, the decisions of the public enforcers are subject to an appeal process.

With regard to the objectives of public antitrust enforcement, it is considered that this type of enforcement is mainly intended to achieve deterrence, and in this way, compliance with the law[214]. From an economic point of view an individual decides rationally whether to commit an infringement of the law if he can perceive a utility from engaging in an illegal activity. In order for an individual to break the law, he will compare rationally the benefits and costs of engaging in illegal activities. Accordingly, people will only infringe the law if the benefits obtained from their illegal conduct outweigh the costs of the probability of apprehension, conviction, and punishment[215]. In practice, the costs of apprehension, conviction, and punishment can reduce the benefits of engaging in illegal activities. Hence, if it was not for the public enforcement of the law, people would be more prone to violate the law, given that the cost of crime would be eliminated and its benefits increased.

According to the preceding, it is fundamental to determine an optimal level of public law enforcement that effectively deters individuals from violating the law. As seen above, if the costs of breaking the law are higher than the utilities expected from it, then rational individuals would be deterred from engaging in illegal activities. Therefore, in order to prevent individuals from committing illegal acts, law enforcers could raise the probabilities of apprehension and the punishment for conviction to deter individuals from breaking the law. The probabilities of apprehension can be increased by hiring more public officers, policemen and judges, and the levels of punishment can be increased by raising the amount of the fines and the terms of imprisonment. However, since these approaches can be expensive for the government, especially hiring more officials and increasing the terms of imprisonment, it is considered that optimal levels of deterrence can be achieved by the imposition of financial penalties made by public enforcers[216]. Accordingly, in the case of antitrust enforcement, in most competition regimes the

[214] WILS, Wouter P.J. (2002), 'The Optimal Enforcement of EC Antitrust Law: Essays in law & economics'. The Hague: Kluwer Law International.
[215] BECKER, Gary S. (1968), 'Crime and Punishment: An Economic Approach'. 76 *Journal of Political Economy*.
[216] *Idem*

imposition of financial penalties by the competition authority is the main sanction imposed for the infringement of the competition law provisions.

b) Private Antitrust Enforcement

In a number of competition regimes, the antitrust provisions are not solely enforced by public authorities, because these can also be applied by private parties. Private antitrust enforcement is the application of competition law by private parties, before a court, and seeking the imposition of private remedies (award of damages, injunctive relief, or a declaration). Private antitrust enforcement can take place as a stand-alone action (without a prior decision declaring the infringement of the law), or as a follow-on action (after a decision by the competition authority declaring the infringement of the law). Private parties in antitrust proceedings do not have special powers of investigation like public enforcers in public proceedings; therefore, they have to rely on the rights conferred to them by the procedural rules of civil proceedings.

With regard to the objectives of private antitrust enforcement, it is considered that its main purpose is to seek compensation for the harm caused by the infringement of the competition law provisions[217], provided that awarding compensation for the damages suffered as a consequence of an antitrust violation is outside the field of competence of competition authorities[218], and as a consequence, of public antitrust enforcement. From an economic perspective, a party who has suffered a loss will sue only when the costs of suit are less than the expected benefits from suit[219]. However, provided that the incentives of private parties diverge from those of the general public, it is necessary to determine the optimal level of private enforcement. In this regard, it has been noted that the amount of private enforcement would be optimal if the successful private enforcers were paid the amount caused by the infringement, excluding their enforcement costs, divided by the probability that they are successful[220].

3. An Economic Approach to Public vs Private Antitrust Enforcement

As previously seen, the two possible modes of law enforcement, public and private, have both costs and benefits for society. Therefore, it is necessary to determine which type of enforcement is preferable on efficiency grounds, or alternatively, to determine an effective dual enforcement system. For instance, in the specific case of competition law, it is recognized that the public and private application of competition law complement each other in accomplishing the enforcement objectives of competition law[221], thus, in this case it is necessary to determine the appropriate role of each type of enforcement.

Particularly, the optimal private enforcement of public laws, such as competition law, has always been a disputed matter among academics. There are different positions with regard to this debate which

[217] WILS (2009).
[218] Proposal Directive for damages actions, *supra* note 197, p. 2.
[219] KAPLOW, Louis & SHAVELL, Steven (2002), 'Economic Analysis of Law'. In: Auerbach A.J. & Feldstein M. (eds) *Handbook of Public Economics*, Volume 3. Amsterdam: Elsevier, p. 1722.
[220] BECKER, Gary S. & STIGLER, George J. (1974), 'Law Enforcement, Malfeasance, and Compensation of Enforcers'. 3 *Journal of Legal Studies*, 1, p. 14.
[221] European Commission, *Staff Working Paper, Annex to the Green Paper damages actions for breach of the EC antitrust rules* (Green Paper Staff Working Paper), 2005, p. 8; and OECD, *Private Remedies*, 2007, p. 9.

have been reflected in the most relevant law and economics literature; nevertheless, it has been established that both public and private enforcement of the law can achieve optimal deterrence.

Chronologically speaking, first it has been suggested, regarding criminal law, that deterrence can be achieved through private enforcement as effectively and efficiently as with public enforcement if private individuals compete for the high damages that would follow from demonstrating that a defendant was liable. Moreover, private enforcement was considered as a solution to governmental failure, i.e. malfeasance or inaction of public authorities. In this sense, it would be better to reward private enforcers with a bounty than having to pay a salary to public enforcers. However, it was recognized that private enforcement could have adverse effects such as actions against innocent defendants and different private enforcers competing creating a double jeopardy[222].

Straightaway, challenging the abovementioned arguments that private enforcement could be as efficient and effective as public enforcement, it was replied that the use of private enforcers to apply the law could lead to over-enforcement and over-deterrence. Given that in order to deter individuals from breaking the law it is required the imposition of high financial penalties or damages, this situation would attract higher than optimal numbers of private enforcers trying to collect these fines or damages by allocating their own private resources to detection and prosecution. Instead, due to the fact that public enforcers are not compelled by profit maximization, unlike private enforcers motivated by collecting fines or damages, they would be able to make optimal decisions regarding the amount of resources to be spent on prosecution. However, over-enforcement by private actors can be controlled if the rewards offered to private enforcers are restricted, so that these do not devote more private resources than the socially optimal[223].

Subsequently, this over-deterrence proposition of private enforcement was challenged by arguing that private enforcers would only pursue a violation of the law if the reward collected is greater than the costs of enforcement. Furthermore, in cases where the violation in question does not generate a sufficient return for the private enforcer in order to cover the costs of enforcement, it would not be rational for private actors to pursue such violations. In this regard, private enforcement would be suitable for cases where the rewards offered are higher than the costs of enforcement and, on the other hand, public enforcement would be more appropriate for cases where the rewards available for pursuing an infringement of the law are significantly less than the cost of enforcement[224].

As a conclusion, developing on the study of the reviewed literature, it is evident that the private enforcement of the law provides benefits and disadvantages. For instance, the availability of a private enforcement regime can encourage private parties to pursue cases in which public enforcers would not act. In such cases, private enforcement of the law delivers more information about the violation and offers additional resources to the overall enforcement of the law. In this regard, private enforcement can increase the levels of deterrence. Despite the preceding, the private enforcement of the law may cause

[222] BECKER & STIGLER (1974).
[223] LANDES, William M. & POSNER, Richard A. (1975), 'The Private Enforcement of Law'. 4 *Journal of Legal Studies*. 1.
[224] POLINSKY, Mitchell A. (1980), 'Private versus Public Enforcement of Fines'. 9 *Journal of Legal Studies.* 105.

negative effects as well, such as the expenditure of additional enforcement costs and the strategic enforcement of the law.

In this sense, it is fundamental to determine the appropriate role of public and private enforcement to reach an optimal dual enforcement system by quantifying the costs and benefits expected from each type of enforcement.

4. Benefits of Private Antitrust Enforcement

The validation for a private antitrust enforcement system is founded on the benefits that this system can deliver to the overall enforcement of the competition law provisions. In this regard, given that private antitrust enforcement serves as a complement of public enforcement[225], it is fundamental to review the ways in which private antitrust enforcement can interact efficiently with public enforcement in order to determine the optimal role of private enforcers in the application of competition law.

Initially, private enforcement can act as a check on the monopoly power of enforcement that public authorities would otherwise hold[226]. The public monopoly of enforcement allows public authorities to decide which infringements are worthy of being prosecuted. In practice, however, the existence of a private enforcement system means that all the violations that return a positive utility will be prosecuted despite of the inaction of the public authorities[227]. In this sense, private parties can palliate the inaction of the government by bringing their own actions for the infringement of competition law, and as a consequence, adding private resources for the enforcement of the antitrust provisions. The addition of private resources to the overall enforcement of competition law is especially important in jurisdictions where the competition authorities have tight financial budgets and in times of fiscal constraints. Finally, private enforcement can be an effective mechanism to challenge the decisions not to prosecute of public authorities by determining in court proceedings if a certain violation of the law has been committed or not.

Furthermore, private antitrust enforcement can strengthen deterrence and compliance by acting in cases that have not been pursued by public enforcers due to the lack of information and/or resources, or for priority reasons. In such cases, private enforcers that are aware of the infringement and have information about it are in a better position than the public authorities to pursue the infringement of competition law given that the enforcement costs of the public authorities can be comparatively higher. Similarly, in cases where for prioritization reasons the public authorities chose not to pursue a determined infringement to allocate their limited resources in an efficient manner[228], private enforcers can act in such cases pursuing the infringement of competition law.

Great part of the benefits that private antitrust enforcement provides to the overall enforcement of the law is closely related to the condition of the private parties as victims of the law infringement. Compared to public enforcement, in a private enforcement system, private enforcers are supposed to have

[225] European Commission, *Green Paper: Damages actions for breach of the EC antitrust rules* (Green Paper), 2005, p. 9.
[226] ROACH, Kent & TREBILCOCK, Michael J. (1996), 'Private Enforcement of Competition Laws'. *Osgoode Hall Law Journal*. Vol. 34, No. 3, p. 472.
[227] LANDES & POSNER (1975), p. 38.
[228] For additional information on case selection and prioritization, please see Chapter Two, Section III.2.

greater incentives to pursue a violation, better information about the infringement, and sufficient resources to take on violations than public enforcers, due to their condition of being directly connected with the violation[229].

Private enforcement can be superior to public enforcement due to the fact that private enforcers are usually the ones directly affected by infringement in question[230], in such cases, private actors have greater incentives to take enforcement actions than public authorities, and as a consequence, this type of actions might lead to additional benefits for society through additional deterrence[231]. Law enforcement is more effective in violations with victims given that these have an incentive to apprehend the violators and particularly if they are compensated[232]. Moreover, compensation can achieve corrective justice when the party that wrongfully committed the infringement compensates those parties who innocently suffered the consequences of the infringement[233]. In this regard, private antitrust enforcement is better suited than public enforcement when it comes to compensating the parties affected by the infringement of the competition law provisions[234].

As noted before, private enforcers may have an initial information possession advantage due to their connection with the violation. In practice, this means that regarding the enforcement costs, the costs of public information acquisition can be higher than those of private parties for three reasons. First, the public sector is less efficient than private parties, mainly because it is not motivated by the profit incentive. Second, funding public enforcement with taxes imposes a deadweight costs on economic activity. And third, private actors have superior initial information about the infringement due to their proximity with the violation[235]. Therefore, in certain cases, it is evident that private parties have superior information about violations and the subsequent harm caused upon them. This condition of private parties serves as a justification for allowing private enforcers to sue for a determined infringement of the law which inflicts harm upon them[236]. Likewise, the possibility of private parties to sue for damages arising from the infringement of the competition law provisions is grounded on the same reasoning. For instance, it may be easier for private parties to detect competition law violations that directly affect their interests than for public enforcers concerned with large sectors of the economy. In addition, in some instances, due to the expertise of private parties in certain industries, they often have better information about the industry practices than public enforcers. Furthermore, in certain cases, the standing to sue for antitrust damages has not been recognized to those who have suffered the most damage but to those who have superior information about the infringement[237].

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[229] McAFEE, Preston R., MIALON, Hugo M., & MIALON, Sue H. (2008), 'Private v. Public Antitrust Enforcement: A Strategic Analysis'. 92 *Journal of Public Economics*.
[230] This also includes the cases where the professional enforcers that even though have not been directly harmed, have been hired by the victims.
[231] McAFEE, et al. (2008), p. 1863.
[232] BECKER & STIGLER (1974), p. 4.
[233] PRICHARD, J. Robert S. & TREBILCOCK, Michael J. (1978), 'Class Actions and Private Law Enforcement'. 27 *University of New Brunswick Law Journal.* 5, p. 11.
[234] WILS (2009), p 13.
[235] SEGAL, Ilya R. & WHINSTON, Michael D. (2007), 'Public vs Private Enforcement of Antitrust Law: A survey'. 28 *European Competition Law Review*.
[236] SHAVELL, Steven (2004), 'Foundations of Economic Analysis of Law'. Cambridge: Harvard University Press.
[237] In the US, in the *Illinois Brick* case the Court has recognized the standing to sue to direct purchasers, even if they could have passed-on the overcharge to the consumers (Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)). The reasoning was that direct

Law enforcers are usually constrained by their human and economic resources. With regard to the performance of public authorities, the enforcement activities of the competition authorities are limited by their financial budget. Thus, the public application of competition law can be compromised if competition authorities do not have enough human and financial resources to carry out their enforcement activities effectively. On the other hand, as that private enforcement is motivated by the private incentives of the enforcers, then, private actors will spend in investigation and litigation as many resources as necessary to secure prosecution as long as the resources devoted are less than the benefits expected[238]. However, in the case of small companies, the fact that these have tight budgets to devote to the prosecution of an antitrust violation can affect the case for private enforcement. Overall, the introduction of private resources in the enforcement of competition law can raise the levels of antitrust litigation and help to further develop on the general standards of competition law by setting precedents and creating jurisprudence, evidently, this is only true for stand-alone actions as follow-on actions do not add much to the preceding decision by the public enforcement authority[239]. In this sense, private antitrust enforcement can achieve a fundamental objective of competition law enforcement, which is to clarify the ambiguous substantive commands of competition law by setting precedents, hence, adding legal certainty and clarifying the legal standards of antitrust litigation[240].

5. Drawbacks of Private Antitrust Enforcement

Despite the preceding, there are certain aspects about the application of the law by public authorities that can be regarded as efficiency advantages of public enforcement over private enforcement. These aspects are mainly concerned with the comparative advantages that public enforcers have over private enforcers and the divergence between private and public interests. Accordingly, public enforcement should not be abandoned for a system that relies exclusively on private suits; on the contrary, these two types of enforcement must complement each other in light of the benefits that both of them provide for the increase of social welfare[241]. These important factors in favor of the public enforcement of competition law will be discussed below.

With regard to the advantages that public enforcers have over private enforcers, these are mainly related with the characteristic features of public enforcement. For instance, there are substantial economies of scale in some areas of public law enforcement. Some types of investigation require the coordination on large scales of high technologies and experts, in such cases, public agencies are better positioned than private enforcers to investigate the infringement of the law[242]. In the case of competition law, generally, the competition authorities have exclusive powers of investigation, privileged information, and expert economists and lawyers available to determine if a violation of the law has been committed. On the contrary, due to their costs, private enforcers may not have all these means available to prove their case. Hence, as the costs of running these investigation systems can be considerably high, these

purchasers are in a better position to detect violations than indirect purchasers, and as a consequence, they should be encouraged to sue for these violations.

[238] BLOMQUIST, Robert F. (1988), 'Rethinking the Citizen As Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values'. 22 *Georgia Law Review*, 337.

[239] WILS (2009), p. 10.

[240] WILS, Wouter, P. J. (2008A), 'Efficiency and Justice in European Antitrust Enforcement'. Oxford: Hart Publishing, pp. 50-51.

[241] ROACH & TREBILCOCK (1996), p. 484.

[242] KAPLOW & SHAVELL (2002), pp. 1746-47.

enforcement systems can constitute natural monopolies. In this sense, and in favor of public enforcement, provided that the duplication of enforcement activities by public and private enforcers is wasteful, public monopolistic enforcement is more desirable[243], especially if one bears in mind that public monopolies are preferable than private ones[244].

Additionally, another factor in favor of the superiority of public enforcement is that related with the powers of investigation vested on public authorities[245]. In this regard, since public enforcers rely on the power of the state, they are in a better position than private enforcers to investigate the alleged infringement of the law because of their extensive investigative powers[246]. Consequently, in the specific case of competition law enforcement, competition authorities are better positioned than private parties to discover and prosecute the infringement of the antitrust provisions thanks to their superior investigative tools[247]. Moreover, other mechanisms, such as leniency programs, allow competition authorities to have privileged information about the anti-competitive conduct in question. In addition, the case for public antitrust enforcement is further supported by the limited discovery procedures of civil litigation found in most jurisdictions, given that these govern the acquisition of evidence in private antitrust enforcement[248]. Finally, an additional advantage of public enforcement over private enforcement is that in certain cases the use of force, or the threat of it, may be needed to acquire information about the violation. Under these circumstances, public enforcers would be better suited to investigate the violation in question, as private enforcers cannot use force to demand disclosure.

In the same line, the sanctions available in public antitrust enforcement proceedings make this type of enforcement inherently superior to private antitrust enforcement. On the one hand, compared with private enforcement, public enforcers have a variety of sanctions that can be imposed depending on the violation in question; this possibility provides public enforcers with an ample room for discretion at setting the optimal level of the sanctions. In private proceedings, however, the remedies available for successful plaintiffs are restricted to the award of injunctive relief, damages or a declaration. Conversely, public enforcers have an array of sanction to choose from, these vary from financial penalties to imprisonment depending on the case and jurisdiction in question. On the other hand, public enforcers have the ability to set the level of the penalties; this allows them to set the optimal amount of the sanction. On the contrary, in private proceedings, the amount of damages is calculated in relation with the losses that the plaintiffs can prove to have suffered, and as a consequence, not considering the defendant's gain or the social loss.

One of the main concerns regarding the implementation of a private enforcement system is that related with potential over-deterrence[249]. The establishment of a private enforcement regime could lead to

[243] POLINSKY (1980), p. 107.
[244] LANDES & POSNER (1975), pp. 29-30.
[245] To see the powers of investigation vested on public agencies, please see Chapter Two, Section III.4.
[246] PRICHARD & TREBILCOCK (1978), p. 10.
[247] WILS, Wouter P.J. (2003), 'Should Private Antitrust Enforcement Be Encouraged in Europe?'. *World Competition,* Vol. 26, Issue 3, p. 483.
[248] Except for the US where the parties in a private antitrust case have extensive powers of discovery, in most jurisdictions private parties in antitrust proceedings struggle to acquire relevant information to prove their claims in court (Ashurst, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, 2004, p. 11).
[249] RUBINFELD, Daniel (2006), 'An Empirical Perspective on Legal Process: Should Europe Introduce Private Antitrust Enforcement?'. In: NOBEL & GETS (eds), *New Frontiers of Law and Economics.* Zurich: Schulthess.

excessive enforcement, especially if there are involved generous rewards for successful plaintiffs. In such cases, since private actors are driven by profit motives, the availability of large rewards would incentive them to invest more than the socially desired amount in law enforcement, and as a consequence, creating private over-enforcement[250]. Hence, the risk of over-deterrence occurs when the rewards of private enforcers are superior to the costs of enforcement and where there are multiple potential plaintiffs in a single case. In the context of competition law enforcement, private over-enforcement may harm the antitrust enforcement policies by causing undertakings to refrain from implementing socially desirable agreements for the fear of large financial penalties and compensation payments. A further issue of private antitrust enforcement and over-deterrence is that since the level of the penalty is not strictly related with the anticompetitive effects of the conduct in question but with the loss proved by the plaintiff, then the awards of damages could incentive the infringement of the law (if too small) or deter efficient conduct (if too large)[251].

Another problem with private enforcement is the divergence between the private and the general interest. Since private enforcers are driven by their private motives, they are not normally concerned with the optimal level of enforcement. This difference between the interests of private and public enforcement may lead to inadequate investment on enforcement when private parties will refrain from detecting and litigating cases that even though are meritorious for the overall enforcement of competition law, do not report sufficient rewards for them[252].

Moreover, this divergence may also cause unmeritorious claims by competitor plaintiffs against their rivals. As mentioned before, private enforcers have greater incentives than public authorities to enforce the law due to their connection with the infringement. However, private enforcers also have greater incentives to use the competition law provisions strategically. For instance, companies can use competition law to prevent large potential competitors from entering the market. Companies can also use competition law strategically to prevent rivals from competing vigorously, extort funds, improve contractual conditions, enforce tacit collusive agreements, respond to existing suits, and prevent hostile takeovers[253].

Similarly, since private enforcers are driven by private incentives, these incentives can persuade them to settle the case. Thus, the availability of a private antitrust enforcement regime can encourage nuisance suits to extort large monetary settlements[254]. For example, in cases where the enforcer is a lawyer hired by the victim, the former can be induced to settle the case in exchange for generous attorney fees. In the same way, a competitor plaintiff might have an incentive to enter into a collusive settlement with its rival that will harm competition[255].

[250] LANDES & POSNER (1975), p. 15.
[251] PAGE, William H. (1980), 'Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury'. 47 *University of Chicago Law Review,* 467, p. 475.
[252] WILS (2003), p. 489.
[253] McAFEE, et al. (2008), p. 1863.
[254] SHUGHART II, William F. (1990), 'Private Antitrust Enforcement: Compensation, Deterrence, or Extortion?'. *Regulation,* Vol. 13, No. 3, p. 54.
[255] ROACH & TREBILCOCK (1996), p. 488.

Finally, private antitrust enforcement can create free-ridding problems. Private plaintiffs frequently free-ride on public antitrust enforcement efforts by suing for damages after the competition authority has declared the infringement of the antitrust provisions. In such cases, private enforcement does not add any resources to antitrust enforcement. Similarly, the free-riding problems is not restricted to private enforcers taking advantage of successful public prosecution, as potential private plaintiffs can free-ride on the enforcement efforts of successful private enforcers.

6. Optimality of Public and Private Antitrust Enforcement

A fundamental finding of the previous sections dealing with the benefits and drawbacks of private antitrust enforcement is that a combination of public and private enforcement is likely to enhance the benefits of the overall application of competition law. In practice, the optimal application of the competition law provisions by private parties or by public authorities very much depends on which of these enforcement systems accomplishes the enforcement objectives of competition law in a more economic fashion, i.e. detection of the violation, sanction of the offenders, and compensation of the victims.

According to the preceding, the competition law provisions can be efficiently enforced either by private parties or public authorities depending on different factors, such as the type of action brought[256], the information available about the infringement, or the types of anti-competitive behavior[257].

The costs and benefits of public and private enforcement may vary depending on the type of action brought for the violation of the antitrust rules. For instance, in case of victims seeking compensation for the harm suffered as a consequence of the infringement of the competition law provisions, private intervention seems to be socially desirable for a few reasons. Normally, the victims of antitrust violations possess information about the identity of the offenders, in such cases, the detection of the infringement and the identification of the violators by private enforcers that already have such information would be beneficial for society, instead of having to spend extra resources on public enforcement to detect the infringement of competition law. However, in order to encourage victims to report the infringement and provide information about it, these must be given an incentive, such as the recovery of damages. In practice, this is the rationale for granting antitrust victims standing to sue for the damages suffered as a consequence of the infringement of the competition law provisions. A possible problem with offering private parties a monetary gain for reporting a violation is that these may sue for losses that did not indeed suffer. Nonetheless, in private antitrust litigation courts handle this situation by requiring private plaintiffs to provide sufficient evidence of the loss being claimed. Moreover, since the main objective of private antitrust damages claims is to achieve corrective justice by providing compensation to the victims, the recovery of a monetary sanction by successful plaintiffs appears to be more appropriate than the collection of fines by public authorities or the imprisonment of the individuals

[256] SHAVELL, Steven (2003), 'Economic Analysis of the General Structure of the Law'. National Bureau of Economic Research, Working Paper 9699.
[257] HÜSCHELRATH, Kai & PEYER, Sebastian (2013), 'Public and Private Enforcement of Competition Law: A Differentiated Approach'. Centre for European Economic Research, Discussion Paper No. 13-029.

involved in anti-competitive behavior. In this sense, private actions for damages seem to be superior to public antitrust enforcement to achieve corrective justice through compensation.

Similarly, in private antitrust litigation, the private parties who have suffered injury resulting from an infringement of the competition law provisions, or are threatened with injury, have the right to sue for and have injunctive relief. Injunctive relief is an equitable civil remedy in which a court orders a party to do or refrain from doing specific acts. From the competition law perspective, injunctions are mainly used by private plaintiffs in cases related with the abuse of a dominant position by the defendant and, in a lesser extent, in cartels, vertical restraints and mergers. The rationale for allowing private parties to sue for injunctive relief, instead of relying on public enforcers to secure the rights of the plaintiffs, is that usually the private plaintiffs, due to their connection with the infringement, can detect and recognize unlawful behavior that has affected or could affect their interests more easily. For instance, in a case where the defendant is a dominant undertaking involved in abusive behavior by offering discriminating conditions or an unfair price, the plaintiff could request the court to order the defendant to either stop the discrimination or to grant him access to the products or input to non-discriminatory conditions. Thus, the adequacy of allowing private parties to sue for injunctive relief in competition law litigation is related with the proximity of the plaintiffs with the violation and with the expertise of the plaintiffs about the commercial practices in a determined industry. In this regard, since in private antitrust litigation the plaintiffs can easily detect and recognize violations of the antitrust rules that affect them, society benefits from allowing private antitrust plaintiffs to sue for injunction in order to stop or prevent harm, given that it would be wasteful to rely on the public authorities to detect antitrust violations that can be quickly detected by private parties.

Moreover, for competition law infringements arising from contractual relationships, private antitrust enforcement can play a leading role. In practice, the competition law provisions are regularly invoked in contractual disputes when the parties claim specific performance of the contract, allege the breach of the contract, or request the nullity of the contract. As seen before, in cases where the private plaintiff has a direct connection with the antitrust infringement, i.e. a contractual relationship, this possesses an information advantage in comparison with public enforcers. In addition, since the private plaintiffs are also parties to the contract, these know the identity of the defendant, and can easily observe any anti-competitive term included in the contract. Accordingly, the rationale for relying on private plaintiffs for contractual disputes that give raise to competition law infringements is that society benefits from the information provided by private parties about the infringement and in retribution these are allowed to collect, to obtain specific performance from the defendant, or to declare the contract null and void. On the contrary, to assign the scrutiny and control of contractual relationships to public authorities would be inefficient, as private plaintiffs provide for a readily alternative.

Alternatively, for competition law infringements where the identification or apprehension of the violators is difficult and requires effort, the public application of the competition law provisions by public agents may be desirable on efficiency grounds. If unlike the previous situations where private plaintiffs have an information advantage because of their proximity with the antitrust infringement, then public antitrust enforcement activities may be required to identify and apprehend the offenders. Moreover, under

some situations, even if the private party knows the identity of the offender but does not have sufficient information nor the means to acquire it and secure prosecution, in such cases public intervention may be required.

In practice, in cases where private parties do not have initial information about the infringement of the competition law provisions, public antitrust enforcers are better suited to discover and prove the antitrust infringement, because they have wider powers of investigation and stronger sanctions. Accordingly, in cases where it is difficult for private enforcers to detect and prosecute an antitrust violation, public proceedings for the infringement of the competition law provisions will be instituted. Even in jurisdiction where private parties in antitrust proceedings benefit from broad discovery rules; public enforcement is superior in acquiring relevant information about the violation. For example, in cases related with hard-core cartels, cartel members take efforts in concealing any possible piece of information that can relate them with the violation in question, in such cases, most private parties would not be even aware of the existence of the cartel nor would be able to gather the necessary information for prosecution, however, as public authorities are vested with special powers to detect most anti-competitive conducts, these are superior to private parties when it comes to uncover concealed anti-competitive behavior.

Depending on the on the competition regime in question, these public proceedings will be resolved by specifically entrusted authorities or national courts. Moreover, in relation with the challenged anti-competitive conduct, public proceedings can be handled in administrative procedures, or in the most stringent jurisdictions, in criminal proceedings. The use of public enforcement in these cases is concerned with the seriousness of some anti-competitive practices, and the special powers of investigation and sanctions available in this type proceeding.

In the same vein, even though the remedies available in private antitrust litigation may satisfy private plaintiffs in their claims, from a deterrence perspective, the sanctions imposed in public proceedings seem to be more adequate to reach the desired levels of deterrence, since private antitrust enforcement is primarily driven by private profit motives. In order to accomplish the deterrence objective of competition law enforcement, public antitrust enforcement provides enforcers with a substantial spectrum of sanctions, which range from the imposition of financial penalties, to directors disqualifications, to imprisonment. The setting of these sanctions can be controlled by public agencies in order to assure optimal levels of deterrence. Additionally, public enforcers can attain effective deterrence by using a combination of sanctions, like the imposition of financial penalties on undertakings and the imprisonment of managers responsible for the infringement of the competition law provisions.

Finally, as abovementioned, the optimal use of public and private antitrust enforcement can be related to a certain type of anti-competitive, i.e. horizontal agreements, vertical agreements and abuses of a dominant position. As will be showed below, the costs and benefits of each type of enforcement system (public and private) may vary with regard to the anti-competitive conduct being challenged by the competition law enforcers.

In the case of horizontal agreements -price-fixing agreements, limitation of output or partitioning of markets- public enforcement of competition law may be more effective than private enforcement. Due to the noxious effects of these types of anti-competitive behavior, these are considered as illegal without further inquiry, are vigorously prosecuted, and severely sanctioned. Accordingly, the persons involved in this kind of unlawful behavior resort to highly sophisticated measures to ensure that no incriminatory evidence is left behind. Because of this secretive nature of hard-core cartels, public and private enforcers need to spend a considerable amount of resources to detect this kind of infringements. Unlike other types of antitrust violations, in horizontal restrictive agreements, both public authorities and private plaintiffs do not have an initial information advantage. In this regard, since public authorities possess special powers of investigation and mechanism, like leniency programs, which help in the detection of this type of agreements, it can be argued that the intervention of public authorities to uncover such anti-competitive practices is required. Some of the specific mechanisms of public enforcement of competition law, such as leniency programs and settlement procedures aid to save valuable resources in prosecution. On the other hand, in private proceedings the acquisition of evidence is grounded on the rules of discovery, which are usually very restrictive and require the expenditure of resources from the parties and the court. Even though public antitrust enforcement seems preferable to tackle horizontal restrictive agreements due to its superior investigative and sanctioning powers, it can be complemented by private enforcement actions in order to accomplish with the compensatory objectives of competition law enforcement, as well as increasing deterrence. Hence, the possibility of private plaintiffs to bring follow-actions that benefit from the findings of public enforcement constitutes a valuable mechanism to ensure compensation and deterrence.

Vertical agreements –resale price maintenance or rebate schemes- may be intended to exclude competitors and foreclose markets but can also entail efficiency gains. This means that these agreements are not always anti-competitive, like hard-core cartels, but require further scrutiny to determine if these have negative effects on competition. Nevertheless, from the enforcement perspective, this inquiry about the effects of the agreements on competition can increase the costs of enforcement as the agencies and courts will have to devote more resources in the investigation of these practices. Since this type of anti-competitive agreements are not among the most harmful for competition and the general welfare, public authorities may chose not to investigate them due to priority reasons, agencies usually save their limited resources to prosecute the cases that are more harmful for society. On the other hand, however, when private parties are directly connected with the infringement they normally have insightful information about the violation and some expertise about the commercial practices of a certain industry. In cases where the parties are business partners, private parties may be prevented from pursuing an infringement if they fear retaliations from the defendant. With regard to the sanctions available against these anti-competitive practices, in public proceedings, the public authorities can impose financial penalties and behavioral remedies, on the other hand, private plaintiffs may require the payment of damages, injunctive relief, or the nullity of the agreement. In practice, injunction and nullity declarations are the most economical choices, given that they do not require a monetary quantification. Overall, for anti-competitive vertical agreements, it appears that private antitrust enforcement is more adequate as it is more efficient that the enforcers who have an information advantage pursue the infringement.

Abuses of dominance are conducts by dominant undertakings intended to maintain or increase their dominant position in an anti-competitive way. Like vertical agreements, the unlawfulness of abusive behavior cannot be easily identified, thus, enforcement actions by public or private parties require the expenditure of considerable amounts of resources in the detection of these anti-competitive practices. As with vertical agreements, private parties normally have some expertise about the industry, in addition, in cases where the private plaintiffs are directly connected with the infringement –business partners- these may have an information advantage in comparison with public authorities. However, since this type of anti-competitive behavior require high degree of expertise to delineate the market and determine the dominance of the defendant, public authorities may be better suited to investigate cases related with the abuse of a dominant position.

CHAPTER TWO
Public Enforcement of Competition Law

I. INTRODUCTION

1. Introduction

One of the most peculiar characteristics of competition law enforcement is the possibility to apply the competition law provisions by multiple enforcers and in a variety of procedures. The present chapter is related to the public enforcement of competition law, which is the primary enforcement mechanism of competition law in most jurisdictions. This part of the study addresses the most relevant features of the public enforcement of competition law in a variety of jurisdictions; nonetheless, the chapter is not aimed to be a definitive analysis of each competition regime studied. Instead, the purpose of this part of the study is to be a practical guide for practitioners and academics on how the competition law provisions are publicly applied in some jurisdictions with a long tradition of competition law enforcement and in certain jurisdictions that have recently adopted competition law provisions.

In a broad sense, the present chapter deals with issues such as, what are the substantial provisions of competition law that can be publicly applied; who is empowered to apply these substantial provisions; how these competition law provisions are applied; what is the outcome of the public application of the competition law provision; and how the public application of the substantial provisions of competition law is reviewed.

2. Public Enforcement of Competition Law

The adoption and implementation of competition law and competition policy are governmental initiatives aimed at safeguarding the process of competition in a determined territory with the ultimate purpose of achieving certain goals and objectives, such as the protection of consumer welfare, the economic progress, or the public interest. In order to achieve these objectives, most jurisdictions have opted for a public choice approach, i.e. the protection of competition by using public laws. This intervention of the State in the competitive process has derived from the inability of private forces to sustain competition and to prevent anticompetitive practices from happening. Accordingly, in practice, in the majority of jurisdictions where competition law provisions have been implemented, these are mainly applied by the

public authorities responsible for the enforcement of competition law; this application is usually referred to as the public enforcement of competition law.

The public enforcement of competition law is undertaken by specialized administrative or judicial authorities, depending on the jurisdiction, which apply the competition law provisions in their capacity as public enforcers. In doing so, these authorities address their decisions in respect to the infringement of competition law to private persons, which may be natural or legal, and have the authority to impose upon the latter sanctions that vary from jurisdiction to jurisdiction for the breach of the antitrust rules. The main feature of the public enforcement of competition law is the verticality of the dispute between the State and the private persons and the eventual ability of the former to sanction the latter for the infringement of the competition law provisions.

3. Objectives of the Public Enforcement of Competition Law

The enforcement of the competition law provisions intends to fulfill certain goals or objectives. Generally speaking and without making reference to any competition regime in concrete, the objectives pursued by the enforcement of competition law are usually three[1]. The first objective of the enforcement of competition law is to prevent the antitrust infringement from happening, or alternatively when this has already occurred, to bring the infringement to an end. The second objective of competition law enforcement is restorative or compensatory; this second goal takes place once the antitrust infringement has occurred. In those cases, the enforcement of competition law intends to remedy the injury caused by the anticompetitive conduct by compensating the persons who suffered the consequences of the violation. As to the third objective of competition law enforcement, the latter is intended to punish the person or persons responsible for the competition law infringement.

With regard to the accomplishment of the abovementioned objectives through the public enforcement of competition law, the latter may be better suited, than other types of enforcement, to achieve some of the competition law enforcement goals. For instance, in respect to the first objective, when the public application of the competition law provisions is effective, it can have strong deterrence effects on market participants, accordingly, it may prevent competition law infringements from happening. In addition, in cases where the competition law infringement has already taken place, the public enforcers of competition law may have among their powers the ability to order the competition law offenders to bring the antitrust infringement to an end. As a consequence, it could be argued, that the first objective of the competition law enforcement may be accomplished through the public application of the competition law provisions[2]. Furthermore, with regard to the compensatory objective of competition law

[1] According to Komninos, the enforcement objectives of competition law are: the injunctive objective, to bring the infringement to an end; the compensatory or restorative objective, to remedy the injury caused by the antitrust infringement; and the punitive objective, to punish the competition law offenders (KOMNINOS, Assimakis, P. (2008), 'EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts'. Oxford [etc.]: Hart Publishing, p. 7). Moreover, according to Wils, the tasks of antitrust enforcement are: to clarify and development the antitrust prohibitions; to prevent violations of the antitrust prohibitions through deterrence and punishment; and to provide compensation to achieve corrective justice (WILS, Wouter P.J. (2009), 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages'. *World Competition.* Volume 32, No. 1, p. 5-15).

[2] According to Wils, public antitrust enforcement is a superior instrument, compared to private actions for damages, for deterring future competition law infringements (WILS (2009), p. 15).

enforcement, it has been argued that the public enforcement of competition law cannot accomplish this goal provided that most public enforcers are not allowed to order the competition law offender to compensate the victims of the anticompetitive conduct[3]. In this sense, other types of enforcement, more precisely the private enforcement by private parties bringing damages claims before competent courts, may better suited to accomplish this enforcement objective[4]. Finally, in relation to the punitive objective of competition law enforcement, the fact that public enforcers of competition law are empowered to impose a variety of sanctions on the perpetrators of the antitrust infringement reflects the readiness of public enforcement to fulfill this objective[5].

4. Benefits of the Public Enforcement of Competition Law

In addition to the capacity of the public enforcement of competition law to accomplish, in different extents, the objectives of competition law enforcement, there are situations where public enforcement is superior to other enforcement mechanisms, primordially private enforcement. For instance, the availability of a competition authority that is specialized in competition law matters enhances the efficiency of the public enforcement of competition law in respect to other types of enforcement[6]. Moreover, this specialized authority in charge of the public enforcement of competition law is usually vested with wide investigative powers that allow the authority to be better at discovering and proving competition law infringements more effectively[7]. In the same line, the fact that the competition authority has been empowered to impose a variety of sanctions for the infringement of competition law permits the authority to punish the competition law offenders more effectively and at lower costs than other types of enforcement[8]. Finally, it has been argued that private enforcement is driven by private profit motives, in that respect, the public enforcement of competition law is superior to private actions for damages provided that public enforcers apply the competition law provisions for the protection of the public interest[9].

Accordingly, in every competition law regime, the role of public authorities publicly enforcing the provisions of competition law is of critical importance for detecting competition law infringements

[3] There are, however, some jurisdictions where the public enforcers of competition law can order or accord the compensation of the victims of the anticompetitive conduct. For instance, in Indonesia, the competition authority can order the competition law offender to compensate the victims. In addition, in South Africa, the Competition Commission can agree with the competition law offender to end the investigation for the alleged infringement of competition law in exchange, *inter alia,* of compensating the complainant that has requested the investigation.

[4] Both Komninos and Wils agree that private enforcement of competition law is better suited to obtain compensation for the victims of the competition law infringement (KOMNINOS (2008), p. 8; and WILS (2009), p. 15).

[5] According to Prichard and Trebilcock, the fines imposed trough public enforcement mechanisms are the ideal form of correction. See PRICHARD, J. Robert, S. & TREBILCOCK, Michael, J. (1978), 'Class Action and Private Law Enforcement'. *University of New Brunswick Law Journal.* Volume 27, June 1978, p. 10.

[6] The level of specialization of the competition authority enhances the efficiency of the public enforcement over the private enforcement (PRICHARD & TREBILCOCK (1978), p. 10).

[7] The fact that the competition authority has wide powers of investigation allows the latter to effectively scrutinize for possible anticompetitive behaviors (PRICHARD & TREBILCOCK (1978), p. 10). The availability of these investigative powers makes that the competition authority can discover and prove competition law infringements more easily than private parties can (WILS, Wouter, P. J. (2005B), 'Principles of European Antitrust Enforcement'. Oxford: Hart Publishing, p. 118).

[8] WILS (2005B), p. 118.

[9] *Idem.* In Addition, according to Posner, public enforcement of competition law is more desirable and needed in situations where private parties refuse to enforce the antitrust rules in cases where the amount of the antitrust damage is difficult to calculate and in cases where the harm suffered by independent victims is too small to turn its individual claim cost efficient. In those scenarios, the public application of the competition law provisions is necessary provided that private individuals will lack incentives to file a claim. (POSNER, Richard A. (2001), 'Antitrust Law'. Second Edition. Chicago; London: The University of Chicago Press, p. 274-275).

using their special powers of investigation, and to punish those responsible by imposing sanction or remedies for the infringement of competition law

II. INSTITUTIONS RESPONSIBLE FOR THE PUBLIC ENFORCEMENT OF COMPETITION LAW

Overall, the establishment of competition law provisions has been coupled with the creation of specialized institutions for the enforcement of the competition law provisions and the performance of other tasks in the competition policy area. In most countries, the design of the competition provisions and the competition authorities responds to the political, economic and social environment of that particular country. Accordingly, provided that these environments differ greatly from one jurisdiction to another, the design of the competition provisions and competition institutions is also different depending on the jurisdiction in question. In general, most of the differences related to the competition authorities are concerned with the position of the latter in the administrative structure of the state, the powers and functions of the competition authority, and the relation of the competition authority with other public authorities.

In a broad sense, in most jurisdictions, the enforcement of the competition provisions is done by a specialized, non-judicial public entity, which is the primary responsible institution for the enforcement of the competition law provisions and other activities in the competition policy area, regardless of its actual denomination. In the majority of competition regimes, this institution is usually referred to as competition authority, thus, for the purposes of this part of the study, the term competition authority will be used to make reference to the main institution in charge of the enforcement of the competition law provisions and other tasks related to the competition policy in a determined regime.

1. Legal Basis for the Establishment of the Competition Authority

With respect to the legal basis for the establishment of the competition authority, the approach chosen by the legislators varies from one country to another. Most competition regimes resort to a law as the main legal basis for the establishment of the competition authority, usually the competition law. Alternatively, in other competition systems, the legal basis for the establishment of the competition authority is an ancillary law to the competition act[10]. Ultimately, in other jurisdictions, the competition authority has as its legal basis the constitution[11], and in other regimes, it is established by specific ministerial regulations[12].

[10] For instance, in Seychelles, the Fair Trading Commission finds its legal basis on the provisions of the Fair Trading Commission Act, which is ancillary to the Fair Competition Act 2009.
[11] In some countries, the legal basis for the establishment of the competition authority derives from constitutional principles (In Brazil, Article 170 of the Federal Constitution; in Bulgaria, Article 19 of the Constitution; in Lithuania, Article 46 of the Constitution; in Russia, Articles 8 and 34 of the Constitution of the Russian Federation).
[12] In China, the Ministry of Commerce has created the Anti-monopoly Bureau to control mergers and acquisitions.

2. Position of the Competition Authority in the Administrative Structure

The creation of a specialized institution for the public enforcement of competition law presumes the will of the government to delegate the functions related to the application and interpretation of the competition law provisions to such institutions. The main idea is that the enforcement of the competition law provisions should not be influenced by political considerations of any kind. This approach requires a certain degree of independence from the government's interference and their institutions. Thus, a fundamental feature of any efficient competition agency should be its independence from the government, given that traditionally, the antirust legislations have been usually subject to political manipulation[13]. Accordingly, in practice, by delegating the enforcement of competition law to independent institutions, legislators try to guarantee that the application of the antitrust provisions is carried out taking into account economic and legal arguments alone, and it is not influenced by political pressure.

In the design of competition institutions, the degree of independence of the competition authority is a main issue to the creation of strong institutions[14]. Across jurisdictions, the level of independence of competition authorities reflects the countries' administrative structures and traditions, thus, the degree of independence of competition authorities will vary depending on the jurisdiction and on its administrative structure. Overall, the status of competition authorities in the public administration can be classified in: competition authorities that are completely independent from the government[15]; competition authorities that are affiliated to a public institution, i.e. a certain ministry[16]; and competition authorities that even though are not affiliated to any public institution, are somehow responsible to the government[17].

3. Composition of the Competition Authority

The composition of the competition authority, including its chairman, the number of members, the background of the members, and the way in which they are appointed also varies from one competition system to another. Additionally, the qualifications required to be appointed as a member of the competition authority also varies depending on the jurisdiction. Finally, the tenure of office of the chairman and the members of the competition authority and the possibility of reappointment is different across jurisdictions.

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[13] DILORENZO, Thomas J. (1990), 'The Origins of Antitrust: Rhetoric vs. Reality'. *Regulation*, Vol. 13, No. 3, p. 27.

[14] See the UNCTAD Model Law on Competition: Substantive Possible Elements for a Competition Law, Commentaries and Alternative Approaches in Existing Legislation, 2010, para 160.

[15] Most strong competition authorities considered themselves as independent from their governments. However, it has been argued that even these competition authorities can be influenced by the government under certain conditions and in determined circumstances (VAN DE GRONDEN, Johan W. & DE VRIES, Sybe A. (2006), 'Independent competition authorities in the EU'. *Ultrecht Law Review,* Volume 2, Issue 1.)

[16] In Estonia, the Competition Authority is a governmental authority within the administrative jurisdiction of the Ministry of Economic Affairs and Communications. In Costa Rica, the Commission for the Promotion of Competition operates under the auspices of the Ministry of Economy, Industry and Commerce. In Qatar, the Competition Protection & Prevention of Monopoly Practices Committee is affiliated to the Ministry of Economy and Commerce.

[17] For instance, the Australian Competition and Consumer Commission is an independent statutory agency, however, pursuant to Section 29(1) of the Competition Act, the Minister (Assistant Treasurer and Minister for Competition Policy and Consumer Affairs) may give directions concerned with the performance of several of its functions. In Croatia, the Agency for Protection of Market Competition is an independent and autonomous institution responsible to the Croatian Parliament. In Serbia, the Commission for Protection of Competition is an independent and autonomous organization, however, it is accountable for its work to the National Assembly, to which it submits an Annual Report on its activities by the end of February of the current year for the preceding year (Article 20 of the Law on Protection of Competition).

3.1. Appointment of the Chairman of the Competition Authority

With regard to the appointment of the chairman of the competition authority, in many jurisdictions, the Head of State is somehow involved in this process. For instance, in some competition regimes, the chairman of the competition authority is appointed by the Head of State at its own discretion[18]. In other regimes, the chairman of the competition authority is also appointed by the Head of State, but with the interaction of other institutions. For example, in some jurisdictions the Head of State will appoint the chairman of the competition authority after consultation with the members of the competition authority[19], additionally, in other countries, the chairman will appointed by the Head of State from a list of candidates nominated by other authorities[20]. Alternatively, in other competition regimes where the Head of Stated is not involved, the chairman of the competition authority may be appointed by; the Government[21], a Minister[22], the Parliament[23], or other public authorities[24]. Ultimately, in some competition systems, the chairman of the competition authority is appointed by the competition authority itself[25].

3.2. Number of Members of the Competition Authority

The number of the members of the competition authority also varies depending on the competition regime in question. For instance, in some jurisdictions, the number of the members of the competition authority is clearly established in the competition act[26]. Alternatively, in other competition regimes, this number is

[18] In Egypt, the Executive Director of the Authority for the Protection of Competition and the Prohibition of Monopolistic Practices is appointed by the Prime Minister (Article 15 of the Law on the Protection of Competition and the Prohibition of Monopolistic Practices). In El Salvador, the Superintendent, head of the Superintendence of Competition, is appointed by the President of the Republic (Article 6 of the Competition Law).

[19] In Botswana, according to Section 6 of the Competition Act, the Chief Executive Officer of the Competition Authority is appointed by the Prime Minister after consultation with the Competition Commission, which is body corporate formed by 7 members chosen by the Minister.

[20] In Chile, the chairman of the Tribunal de Defensa de la Libre Competencia is appointed by the President from a list of five candidates nominated by the Supreme Court (Article 6 of Antitrust Act). In Hungary, the President of the Competition Authority is nominated by the Prime Minister and is appointed by the President of the Republic (Article 35 of the Competition Act). In Mauritius, the chairperson of the commission has to be appointed by the President on the advice of the Prime Minister given after consultation with the Leader of the Opposition (Section 7 of the Competition Act).

[21] In India, the Chairperson of the Competition Commission is appointed by the Central Government (Section 8 of the Competition Act).

[22] In Ireland, the Chairperson of the Competition Authority is appointed by the Minister for Enterprise, Trade and Employment (Section 35 of the Competition Act).

[23] In Italy, the President of the Competition Authority proposed and appointed jointly by the Presidents of the Italian Chamber of Deputies and Senate (Section 10(2) of the Competition Act).

[24] In Canada, the Competition Commissioner is appointed by the Governor Council (Section 7 of the Competition Act).

[25] In Barbados, according to Section 6 of the Fair Trading Commission Act, the Commission shall, with the approval of the Minister responsible for Consumer Affairs, appoint a Chief Executive Officer. In Kenya, the Director-General of the Competition Authority is appointed by the Authority with the approval of the Parliament (Section 12 of the Competition Act).

[26] In Bulgaria, according to Article 4 of the Competition Act, the Commission on Protection of Competition shall consist of seven members: a chairman, two deputy chairpersons and four members. Similarly, in Japan, according to Article 29 of the Antimonopoly Act, the Fair Trade Commission is constituted by five members: a chairman and four commissioners. In Tanzania, Section 62 of the Fair Competition Act establishes that the Fair Competition Commission shall be constituted by five members: a chairman, three non-executive members appointed by the Minister and the Director-General.

not fixed and may vary within a minimum and a maximum number[27]. Ultimately, in some competition systems, the number of members of the competition authority is determined by the relevant authority[28].

3.3. Background of the Members of the Competition Authority

As to the background of the members of the competition authority, most competition regimes foster the diversity of the origins of the members of the competition authority with the purpose of attracting the expertise of other fields that are related to the competition process. Traditionally, similar to other public institutions, the majority of the members of the competition authority were officials from the public administration. At present, there are competition regimes that have introduced specific provisions that limit the number of public officials that can be appointed as members of the competition authority with the purpose of allowing representatives from other sectors to be appointed as members of the authority[29]. Similarly, there are competition regimes that have included provisions that limit the number of members that have a diploma in a certain field[30]. Accordingly, in order to include representatives from other fields, some competition regimes have included certain provisions that make reference to the background of the members of the competition authority. Some of these provisions make reference to: members from universities or certified research institutes[31]; members from the public sector[32]; members from the private sector[33]; former judges[34]; members with experience in consumer affairs[35]; or members from the fields of science or health[36]; among others.

3.4. Qualifications to be appointed as Member of the Competition Authority

In many competition systems, the competition provisions establish the qualifications required to be appointed as a member of the competition authority. Thus, there is a variety of personal and professional requirements that have been established in most competition regimes that have to be fulfilled in order to be appointed as a member of the competition authority.

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[27] In India, pursuant to Section 8 of the Competition Act, the Competition Commission shall consist of a chairperson and not less than two and not more than six other members. Likewise, in Ireland, according to Section 35 of the Competition Act, the Competition Authority shall consist of a chairperson and such number of other whole-time members, not being less than two or more than four. In Fiji, according to Section 8 of the Commerce Commission Decree, the Commerce Commission consists of not less than four or more than six members.

[28] In Australia, according to Sections 6A and 8 of the Competition and Consumer Act, the Governor-General has competence to appoint and to determine the number of members of the Competition and Consumer Commission. In Belgium, pursuant to Article 12 of the Act on the Protection of Economic Competition the King may increase the number of councilors of the Competition Council.

[29] In Pakistan, according to Section 14 of Act Nº XIX of 2010, not more than two members of the Competition Commission shall be employees of the Federal Government.

[30] In Belgium, no more than three-quarters of the councilors Competition Council shall have a diploma in the same subject (Article 15 of the Act on the Protection of Economic Competition).

[31] In Korea, see Article 36-2 of the Monopoly Regulation and Fair Trade Act.

[32] In Seychelles, the commissioners from the Fair Trade Commission can be from the public or private sector (Section 5 of the Fair Trading Commission Act).

[33] In Mauritius, see Section 7 of the Competition Act.

[34] In Romania, the members of the Competition Council have to be selected among former judges of the High Court of Rescission and Justice, the Litigation Division or the Commercial Division, among university professors of economics or law, or well know managers in business, or high-raking public servants (Article 18 of the Competition Law).

[35] In Fiji, the members of the Commerce Commission must have knowledge or experience, *inter alia,* in industry, commerce, or consumer affairs, (Section 8 of the Commerce Commission Decree).

[36] In Sri Lanka, the members of the Consumer Affair Authority shall be persons that have distinguished themselves in the fields of industry, commerce, administration, accountancy, science or health (Section 3 of the Consumer Affairs Authority Act).

For instance, most competition regimes require that the members of the competition authority have the nationality of the country in question; moreover, some even require that the members have not acquired any other foreign nationality[37]. Additionally, most competition regimes require certain personal qualifications in order to be appointed as a member of the competition authority, i.e. honorability, civic probity, ability, integrity, impartiality, having the sense of protecting socialist legality, some jurisdiction even require certain religious believes, such as believing in "The Almighty God"[38]

A further qualification required to the members of the competition authority in most competition regimes is related to the level of education. Thus, depending on the jurisdiction, the members of the competition authority will be required to hold a bachelor degree[39], a master's degree[40] or even a doctoral degree[41]. With regard to the field of expertise of the members of the competition authority the majority of jurisdictions require the members to hold a degree in law or economy; however, other degrees are required to a lesser extent[42]. As a particularity, some jurisdictions explicitly require that the head of the competition authority should hold a degree in law[43].

In some competition regimes, the members of the competition authority have to be of a certain age in order to be appointed. Most jurisdictions have provisions establishing a minimum age to be appointed member of the competition authority[44], however, some competition regimes, have established both a minimum and a maximum age for being appointed as member of the competition authority[45].

Finally, there are other qualifications required to be appointed as member of the competition authority across jurisdictions, such as: years of professional experience[46], languages spoken[47], criminal

[37] In Mexico, the members of the Federal Competition Commission have to be Mexican by birth and have not acquired other nationality (Article 26 of the Federal Law on Economic Competition).
[38] In Indonesia, according to Article 32(c) of Law 5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, the members of the Business Competition Supervisory Commission are required to, *inter alia*, believe in and be devoted to "*The Almighty God"*.
[39] In Lithuania, the members of the Competition Council are required to have a university degree in law or economics (Article 20 of the Law on Competition).
[40] In Belgium, all members of the Competition Council must hold a master's degree (Article 14 of the Act on the Protection of Economic Competition).
[41] In Croatia, individuals from the economics field have to hold a doctor's degree in order to be appointed as members of the Competition Council (Article 28 of the Competition Act).
[42] In El Salvador and Honduras, the members of the competition authority can hold a degree in business administration (Honduras, Article 26 of the Law for the Defense and Protection of Competition; El Salvador, Article 9 of the Competition Law). In Vietnam, the members of the Competition Council shall hold a bachelor degree in law, economics or finance (Article 55 of the Competition Law).
[43] In Bulgaria, according to Article 4 of the Law on the Protection of Competition, the chairperson of the Commission has to be lawyer with at least 10 years of experience. In Cyprus, according to Section 9 of the Law on the Protection of Competition, the chairman of the Commission for the Protection of Competition shall be a lawyer of high standing and probity.
[44] In El Salvador, according to Article 9 of the Competition Law, the Superintendent and the members of the Superintendence have to be at least 30 years old.
[45] In Mexico, the commissioners of the Federal Competition Commission must be over 35 years old but under 75 (Article 26 of the Federal Law of Economic Competition).
[46] In Albania, members of the Competition Commission must have a working professional experience of not less than 15 years (Article 20 of the Law on Competition Protection).
[47] In Belgium, the President and Vice-president of the Competition Council must be fluent in Dutch and French and must have a working knowledge of English. Additionally, half of the councilors shall hold a French language diploma and the other half must hold a Dutch language diploma, and at least one councilor shall have a working knowledge of German (Articles 13 and 15 of the Act on the Protection of Economic Competition).

records[48], financial record[49], credentials[50], kinship[51], professional merits or background[52], place of residence[53], among others.

3.5. Tenure in Office of the Members of the Competition Authority

Regarding the tenure in office of the chairman and the members of the competition authority, this varies from country to country. Thus, depending on the jurisdiction, the tenure in office of the chairman and the members of the competition authority may range from three to ten years[54]. Alternatively, in some competition regimes, the term in office of the members of the competition authority is not predetermined by the law, thus, is those cases, the period of the appointment of the members will be determined by the authority responsible for such appointment[55].

In some competition systems, the mandate of the chairman of the competition authority is different than the period of the appointment of the other members of the authority. For instance, in some countries, the chairman is appointed for a fixed period; alternatively, the tenure in office of the other members of the competition authority is not fixed and may vary[56]. Moreover, in some jurisdictions, the period of appointment of the chairman of the competition authority is superior to the period of the other members[57].

As a general rule, the chairman and the members of the competition authority can be reappointed in most competition regimes, nonetheless, in some jurisdictions the members of the authority cannot be

[48] In Armenia, a person cannot be appointed as commissioner of the State Commission for the Protection of Economic Competition if he has been convicted for committing an intentional crime by a valid court decision (Article 20 of the Law on Protection of Economic Competition).
[49] In Mauritius, according to Section 10 of the Competition Act, no person shall be appointed commissioner of the Competition Commission if he has been declared insolvent or bankrupt.
[50] In Croatia, the members of the Competition Council that hold a law degree must have passed the Bar Exam (Article 28 of the Competition Act).
[51] In Panama, according to Article 90 of the Law on the Protection of Consumer and Defense of Competition, the chairman of the Authority for Protection of Consumer and Defense of Competition cannot be related to the President or the Vice-president of the Republic.
[52] In Italy, the President of the Competition authority has to have already held a high office with broadly-based institutional responsibilities. Additionally, the other members of the Authority shall be chosen among serving judges on the Supreme Administrative Court, the Court of Auditors, the Court of Cassation, full professors of Economics or Law or respected business executives of particularly high professional repute (Section 10(2) of the Competition and Fair Trading Act).
[53] In Nicaragua, the directors of PROCOMPETENCIA must have resided in Nicaragua for at least four years before being appointed (Article 9 of the Law on the Promotion of Competition). In Papua New Guinea, at least one of the persons appointed as an Associate Commissioner of the Independent Consumer and Competition Commission shall have international experience and shall not be a resident of Papua New Guinea (Section 11 of the Independent Consumer and Competition Commission Act).
[54] For instance, in Albania, five years (Article 21 of the Law on Competition Protection); in Armenia, five years (Article 20 of the Law on Protection of Economic Competition); in Barbados, five years (Section 6 of the Fair Trading Commission Act); in Belgium, 6 years (Article 13 of the Act on the Protection of Economic Competition); in Chile, six years (Article 7 of the Antitrust Act); in Croatia, five years (Article 28 of the Competition Act); in Honduras, seven years (Article 24 of the Law for the Defense and Promotion of Competition); in India, five years (Section 10 of the Competition Act); in Jamaica, seven years (Section 15 of the Fair Competition Act); in Japan, five years (Article 30 of the Antimonopoly Law); in Latvia, five years (Section 5 of the Competition Law); in Lithuania, six years (Article 20 of the Law on Competition); in Macedonia, five years (Article 27 of the Law on the Protection of Competition); in Mauritius, five years (Section 8 of the Competition Act); in Mexico, ten years (Article 27 of the Federal Law on Economic Competition); in Romania, five years (Article 18 of the Competition Law); In Serbia, five years (Article 20 of the Law on Protection of Competition); In Seychelles, three years (Section 6 of the Fair Trading Commission Act); in South Africa, five years (Section 22 of the Competition Act); in Sri Lanka, three years (Section 4 of the Consumer Affairs Authority); in Vietnam, five 5 years (Article 55 of the Competition Law);
[55] In the Fiji Islands, the members of the Commerce Commission hold office for such a term, not exceeding five years, as the Minister specifies in the member's instrument of appointment (Section 8 of the Commerce Commission Decree).
[56] In Botswana, the chairman of the competition authority holds office for five years, however, the other members of the authority can be appointed for a period that cannot exceed five years (Sections 5 and 11 of the Competition Act).
[57] In Bulgaria, the chairperson of the Commission on Protection of Competition is appointed for six years, while the other members of the Commission are appointed for only five years (Article 4 of the Law on Protection of Competition).

reappointed[58]. In Practice, there are some differences across jurisdictions regarding the reappointment of the members of the authority. For instance, in some regimes, the members of the competition authority can be reappointed only once[59]; in other regimes, the members can be reappointed twice[60]; and finally, in some competition regimes there are no restrictions on the number of times that the members of the competition authority can be reappointed[61]. Additionally, in some competition regimes, the period of the reappointment is different than the first period of appointment[62].

3.6. Removal of the Members of the Competition Authority

As to the removal of the members of the competition authority, there are some differences between jurisdictions regarding this matter. On the one hand, the authority empowered to dismiss the chairman and the members of the competition authority may vary depending on the jurisdiction. For instance, in some competition regimes, the members of the competition authority will be removed by President[63] or the King[64] at its sole discretion. Alternatively, in other jurisdictions, the members of the authority can be removed by the Head of State at the recommendation of the relevant authority[65]. Furthermore, in some jurisdictions, the members of the authority can be removed from office by the relevant Minister[66], and in some cases, by the advice of the relevant Minister[67]. In most competition regimes, the members of the competition authority are removed by the legislature acting on its own[68], or at the request of the relevant authority[69]. Additionally, in some jurisdictions, the Supreme Court will be empowered to remove from

[58] In Mexico, the commissioners of the Federal Competition Commission cannot be reappointed (Article 27 of the Federal Law on Economic Competition).
[59] In Tanzania, the members of the Competition Commission shall be eligible for reappointment for one further consecutive term but shall not be eligible for reappointment thereafter (section 63 of the Fair Competition Act).
[60] In Albania, the members of the Competition Commission can be reappointed no more than twice consecutively (Article 21 of the Law on Competition Protection).
[61] In India, the members of the Competition Commission can be reappointed as many times until they turn sixty-five years old (Section 10 of the Competition Act). Similarly in Japan, however, the members of the Fair Trade Commission cannot be older than seventy (Article 30 of the Antimonopoly Law).
[62] In Jamaica, the Executive Director of the Fair Trading Commission is appointed for a period of seven years, however, if reappointed, it will be for a period not exceeding five years at a time (Section 15 of the Fair Competition Act). In Fiji, the members of the Commerce Commission are appointed for a maximum period of five years, however, they can only be reappointed for a period of three years (Section 8 of the Commerce Commission Decree).
[63] In Armenia, the commissioners of the State Commission for Protection of Economic Competition are removed by the President of the Republic of Armenia (Article 21 of the Law on Protection of Economic Competition). In Seychelles, the President can remove the commissioners from the Fair Trade Commission (Section 8 of the Fair Trading Commission Act).
[64] In Belgium, the councilors of the Competition Council can be removed from office by the King (Article 18).
[65] In Mauritius, the President can remove the members of the Competition Commission acting on the advice of the Prime Minister (Section 11 of the Competition Act).
[66] In Kenya, the Minister in charge of Finance may remove the members of the Competition Authority, (Section 2 of the Kenyan Competition Act Schedule).
[67] In Vietnam, the head of the Competition-managing Agency shall be removed by the Prime Minister at the proposal of the Trade Minister (Article 50 of the Competition Law).
[68] In Albania, the members of the Competition Commission can be removed from office by a decision of the majority, in the presence of more than half of all the members of the National Assembly (Article 22 of the Law on Competition Protection).
[69] In Kosovo, the members of the Commission for Protection of Competition can be dismissed by a decision of the Assembly of Republic of Kosovo on the proposal of the Government (Article 27 of the Law on Protection of Competition). In Macedonia, the members of the Commission for Protection of Competition shall be dismissed by the Assembly of the Republic of Macedonia on the proposal by the Commission for appointment and dismissal matters of the Assembly of the Republic of Macedonia (Article 27 of the Law on the Protection of Competition). In Serbia, the members of the Commission for Protection of Competition are removed by the National Assembly on the proposition of the Council of the Commission or the National Assembly Committee (Article 24 Article 20 of the Law on Protection of Competition).

office the members of the competition authority[70]. Ultimately, in some regimes, the members of the competition authority are removed by the competition authority itself[71], or on the advice of the latter[72].

On the other hand, with regard to the reasons for being removed from the competition authority, these also vary from one jurisdiction to another. Accordingly, depending on the competition regime, the members of the competition authority will be removed in case of: resignation[73]; being absent from duty[74]; serious misconduct[75]; cessation of citizenship[76]; irresponsible, negligent or poor job performance[77]; violation of the competition provisions[78]; being adjudged as insolvent[79]; discrediting the name of the chairman or the members of the competition authority[80]; engaging in any paid employment during the term of office[81]; exercising an elected public mandate[82]; becoming physically or psychologically incapable of discharging his duties as member of the competition authority[83]; being convicted of an offense involving moral turpitude[84]; being convicted of a criminal offense by a valid court decision[85]; losing permanently his abilities to perform his duties[86]; abusing his position as member of the competition authority[87]; or being sentenced to death[88].

[70] In Panama, the Administrator, who is the head of the Authority for Protection of Consumer and Defense of Competition, can be removed from office by the Third Chamber of the Supreme Court (Article 93 of Law Nº 45 of 31 of October 2007).
[71] In Bosnia and Herzegovina, the members of the Council of Competition are removed by Council of Competition itself (Article 23 of the Competition Act).
[72] In Botswana, the Executive Secretary of the Competition Authority can be removed from office by the Minister at the recommendation of the Competition Commission (Section 7 of the Competition Act). Other members of the Competition Authority can be removed by the Minister too (Section 15).
[73] In Bulgaria, the members of the Commission on Protection of Competition can be removed at their own request (Article 5 of the Law on Protection of Competition).
[74] In Pakistan, a member of the Competition Commission can be removed from the latter if he absents himself from three consecutive meetings (Section 14 of Act N° XIX of 2010).
[75] In South Africa, the commissioners of the Competition Commission can be removed for serious misconduct (Section 22 of the Competition Act).
[76] In Moldova, the Director and the deputies of the National Agency for Protection of Competition can be removed in case of cessation of citizenship of the Republic of Moldova (Section 16 of the Regulation of the National Agency for the Protection of Competition).
[77] In Bosnia and Herzegovina, the members of the Competition Council can be removed from office in case of irresponsible, negligent or poor job performance (Article 23 of the Competition Act).
[78] In Japan, the chairman or a commissioner of the Fair Trade Commission can be removed if he has been punished for a violation of the provisions of the Antimonopoly Act (Article 33 of the Antimonopoly Act).
[79] In Kenya, the members of the Competition Authority can be removed in case of being declared bankrupt or insolvent (Section 2 of the Competition Act Schedule).
[80] In Lithuania, the members of the Competition Council shall be removed from office where, by their acts, they discredit the name of the Chairperson or member of the Competition Council (Article 20 of the Law on Competition).
[81] In India, provided that the members of the Competition Commission are whole-time members (Section 8 of the Competition Act), if a member has engaged in any paid employment, during his term of office, he can be removed from the Competition Commission on this basis (Section 11 of the Act).
[82] In Belgium, the King can remove a councilor from the Competition Council if he exercises an elected public mandate (Article 18 of the Act on the Protection of Economic Competition).
[83] In Korea, the commissioners of the Fair Trade Commission can be removed from office in case of incapacity to perform duties due to prolonged physical or mental illness (Article 40 of the Monopoly Regulation and Fair Trade Act).
[84] In Pakistan, a member of the Competition Commission can be removed if he has been convicted of an offense involving moral turpitude (Section 14 of Act N° XIX of 2010).
[85] In Armenia, the commissioners of the State Commission for Protection of Economic Competition can be removed in case of being convicted for a criminal offense by a valid court decision (Article 20 and 21 of the Law on Protection of Economic Competition).
[86] In Croatia, the members of the Competition Council can be removed from office in case of losing permanently the ability to perform their duties (Article 29 of the Competition Act).
[87] In India, a member of the Competition Commission can be removed if he has abused his position as member (Section 11 of the Competition Act).
[88] In Papua New Guinea, the members of the Independent Consumer and Competition Commission can be removed from office in case of being sentenced to death or imprisonment, or has been previously sentenced to death or a term of imprisonment (Section 12 of the Independent Consumer and Competition Commission Act).

4. Structural Design or Model of the Competition Authority

The design of the competition authorities respond to the cultural, political and historical context of each country. The fact that these contexts vary from country to country translate in different models of competition authorities across the globe. Nonetheless, many young competition regimes have been inspired by the models of the competition authorities of jurisdictions that have a longer experience with the enforcement of competition law. Thus, departing from the idea that the design of the majority of competition authorities is based on different models, generally speaking, most competition regimes share some similarities with regard to their enforcement structure.

4.1. Models Based on the Number of Agencies Enforcing Competition Law

A first issue related with the design of competition agencies has to do with the number of institutions that deal with competition law matters in a determined jurisdiction. With regard to this issue, the enforcement of competition law can be performed by multiple agencies or single agencies.

(a) Multiple Institutions

The multiple agency model has been adopted in jurisdictions where the power to enforce the competition law provisions has been distributed in multiple institutions. One of the characteristics of this kind of enforcement structure is that these multiple institutions, which share authority to enforce the competition law rules, are independent from each other. This means that these authorities are not vertically related as they are in other systems where one institution investigates, another adjudicates and a final one reviews the decisions of the latter.

In practice, the distribution of the enforcement functions within multiple institutions may serve different purposes depending on the jurisdiction. For instance, in some competition regimes that have multiple agencies, this separation of the enforcement duties is based on the nature and form of anticompetitive conduct. Thus, in these regimes, separate agencies enforce laws aimed at specific forms of anticompetitive conduct[89]. On the contrary, in other competition systems with multiple institutions, these share concurrent jurisdiction over the same anticompetitive practices, in those cases, in order to avoid the overlap of competences, the agencies have opted to divide the cases by industries or sectors[90]. Additionally, the role of the multiple institutions may be assigned in relation to the type of proceedings in which the competition law provisions are applied, thus, each institution will be competent to enforce the competition law provisions in a determined kind of procedure, i.e. civil proceedings, administrative

[89] In China, there are three independent institutions responsible for the enforcement of the Anti-Monopoly Law. The State Administration of Industry and Commerce, which controls anticompetitive practices related to non-prices cartels and the abuse of dominance; the National Development and Reform Commission, which oversees price-related cartels and abuse of dominance; and the ministry of Commerce, which is in charge of the merger control.

[90] In the US, the Antitrust Division of the Department of Justice and the Federal Trade Commission have authority to investigate the same anticompetitive practices. In order to avoid overlaps, these agencies have divided the anticompetitive practices by industries.

proceedings, or criminal proceedings[91]. Similarly, in some competition regimes with multiple institutions, these will be assigned different enforcement functions[92]. Moreover, in countries where the competition agency shares jurisdiction over the application of competition law with other non-specialized institutions, the former is usually in charge of the enforcement of the more complex and aggressive anticompetitive conducts, while the latter will be allowed to handle small competition law violations[93].

Moreover, in some jurisdictions, a dual antitrust enforcement system has been established. This system of public enforcement is characterized by the existence of one main competition agency and other additional agencies that regulate the competitive process[94]. The most evident example of jurisdictions with dual enforcement systems are federal states where both the federal and the states governments share jurisdiction to enforce the antitrust provisions[95]. In such cases, due to the political division of federal states, there are many federal statutes, such as the competition law provisions, that authorize enforcement by a federal and states institutions (antitrust federalism). In practice, the multiplicity of enforcers in antitrust federalism results in that the federal and states institutions assume different functions in the enforcement of competition law, which in turn, are also complementary[96]. This multiplicity present in dual antitrust enforcement systems is further exacerbated by the fact that in some cases besides the states agencies, the federal agencies have regional offices that perform the investigatory and other functions of the federal authority, within their geographic area of responsibility[97], furthermore, in addition to the federal antitrust statutes, in some jurisdictions, the states may also have their own competition acts, however, these largely resemble the provisions of the federal antitrust law; accordingly, most of these have established that they are supposed to be interpreted consistently with federal precedent[98], additionally, in other dual enforcement systems, the regional agencies have to apply their antitrust laws and the general antitrust statutes when the infringement in question affects other territories outside their own[99].

In favor of antitrust federalism, it has been noted that dual enforcement systems that allow state enforcement of federal competition law, provides a competitive alternative to the monopoly of antitrust

[91] In the US, both the Antitrust division of the Department of Justice and the Federal Trade Commission have authority to bring civil suits before ordinary courts, however, the Antitrust Department holds sole jurisdiction to enforce the antitrust provisions in criminal proceedings. Similarly, the FTC has authority to apply the antitrust provisions in administrative proceedings.

[92] In the UK, the main institution in charge of the enforcement of competition law is the Office of Fair Trading, which withholds both the investigative and adjudicative function in administrative cases. Nevertheless, both the Serious Fraud Office – in criminal cartel cases; and the Competition Commission - in mergers and market investigations, have only investigative functions. In Vietnam, the Competition-Managing Agency is responsible for the investigation, while the Competition Case-Handling Council is the decision-making body.

[93] In France, the *Autorité de la Concurrence* is the main institution in charge of the enforcement of the competition provisions. However, the latter shares jurisdiction over the application of the antitrust rules with the Minister of Economy who has residual jurisdiction over the anticompetitive practices of small and medium companies which affect only local markets – micro-anticompetitive practices (Article L. 464-9 of the French Code of Commerce).

[94] Except for the US where there are two antitrust agencies at the federal level: the Federal Trade Commission and the Antitrust Division of the DoJ.

[95] In the US, in addition to the federal authorities (the Antitrust Division of the Department of justice and the Federal Trade Commission) the state attorneys general can initiate proceedings for the infringement of the federal or state antitrust provisions before federal or state courts.

[96] HAWK, Barry E. & LAUDATI, Laraine L. (1996), 'Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison'. *Fordham International Law Journal,* Vol. 20, Issue 1, p. 18.

[97] In the US, both the FTC and the Antitrust Division of the DoJ have several regional offices across the US to enforce the antitrust provisions more efficiently in matters of regional concern.

[98] Such is the case of the US where almost every state has an antitrust statute or constitutional provision of general application.

[99] In the EU, even though is not a federal jurisdiction, by the provisions of Regulation 1/2003, when the national competition authorities are investigating an anticompetitive conduct which may affect trade between the EU Member States under national competition law, they must also apply the EU antitrust provisions in parallel to or instead of national law.

enforcement by the central government by adding additional enforcers[100]. Conversely, the establishment of a dual enforcement system may translate in differences between the authorities responsible for the enforcement at the state and federal levels provided that states enforcement promote the interest of the state and its residents, while federal enforcement is intended to promote the broader national interest. Furthermore, antitrust federalism empowers additional institutions responsible for the enforcement of competition law, which may result into differences in enforcement outputs[101]. For instance, states governments may be more concerned than the federal government with the protection of small businesses that represent the states[102].

Additionally, dual enforcement systems have been established in other jurisdictions besides federal countries. The establishment of a dual enforcement system in those jurisdictions may not be strictly concerned with the political division, but may respond to other motives, such as the decentralization of antitrust enforcement. For instance, in countries where the territorial organization is divided in autonomous regions that do not constitute a federation *per se,* the antitrust enforcement structure is organized in one central competition agency and one regional agency per autonomous region[103]. Similarly, the decentralization of competition law enforcement can take place in multinational organizations that have antitrust provisions that are applicable in the territories of the member states. In such organizations, there is a decentralized application of competition law, as the enforcement structure is composed by one supranational antitrust agency and several national authorities[104]. The main advantage of decentralizing the enforcement of competition law is the reduction of the workload of the central competition agency and the addition of enforcement forces for the detection and prosecution of anticompetitive practices. However, there are certain disadvantages, like the biased application of the antitrust provisions by the decentralized enforcers[105].

The main issue with both antitrust federalism and decentralized enforcement of competition law is related with the efficient interaction of the multiple competition agencies in order to achieve affective coordination and cooperation between the multiple institutions and to avoid overlapping responsibilities and duplicate work. In this sense, in order to avoid jurisdictional conflicts, in most competition regimes where a dual enforcement system has been adopted, the main mechanism to avoid overlapping responsibilities is to restrict the competence of the regional enforcers. Both in antitrust federalism and decentralized enforcement, the regional antitrust institutions prosecute infringements, the effects of which are limited to the specific territory of the state/region in question. Alternatively, if a determined anticompetitive practice has broader effects and affects more territories within the jurisdiction of the

[100] POSNER, Richard A. (2004), 'Federalism and the Enforcement of Antitrust Laws by State Attorneys General'. *The Georgetown Journal of Law & Public Policy*, Vol. 2:5, p. 12.
[101] LEMOS, Margaret H. (2011), 'State Enforcement of Federal Law'. *New York University Law Review*, Vol. 86:698, p. 717.
[102] HAWK, Barry E. & VELTROP, James D. (1993), 'Dual Antitrust Enforcement in the United States: Positive or Negative Lessons for the European Community'. In: Slot & McDonnell (ed), *Procedure and Enforcement in E.C. and U.S. Competition Law.* London: Sweet & Maxwell, pp. 28-29.
[103] In Spain, ten of its autonomous communities have created regional competition authorities: Andalucía, Aragón, Castilla y León, Catalunya, Comunidad Valenciana, Extremadura, Galicia, Islas Canarias, País Vasco, and Región de Murcia.
[104] In the EU, since the adoption of Regulation 1/2003, the enforcement of competition law has been decentralized by increasing the involvement of national courts and national competition authorities.
[105] WILS, Wouter P.J. (2004), 'The Reform of Competition Law Enforcement: Will it Work?'. In: Cahill (ed), *The Modernisation of EU Competition Law Enforcement in the European Union-FIDE 2004 National Reports*. Cambridge: Cambridge University Press.

central antitrust authority, then the latter has sole jurisdiction to apply the competition law provisions[106]. In addition, there are other restrictions/attributions that are design to avoid overlapping competences between multiple enforcers. For instance, to ensure coherent application of the competition provisions, the central competition authority may retain jurisdiction in the prosecution of severe infringements or landmark cases[107]. On the contrary, in some jurisdictions, the states governments may be empowered to bring suits on behalf of the residents of their states for the infringement of the competition law provisions[108].

As to the coordination and cooperation of multiple antitrust institutions in dual enforcement systems, there are different approaches across jurisdictions regarding the coordination and cooperation networks between competition authorities. On the one hand, in more formalistic jurisdictions, the competition authorities' network works through formal predetermined management mechanisms and respect a hierarchical structure where the central competition authority has a managerial position and differentiated authority. On the other hand, in other less formal jurisdictions, the competition network is established on empirical learning and functions through informal and flexible cooperation mechanism, where all the institutions are in a same level and have broad discretion to cooperate or not with other institutions within the network[109].

(b) Single Institutions

In some competition regimes the enforcement duties of competition law have been vested in a single institution. Unlike the multiple agency systems, in these jurisdictions, there is a single competition agency that holds sole jurisdictions to enforce the competition law provisions. Accordingly, the main differences found between jurisdictions with regard to single competition agencies, is the functions and powers that these agencies have when applying the competition law provisions.

Traditionally, in this type of institutions there is conglomeration of the prosecuting and adjudication functions. Even though this system provides for greater economy and broader enforcement, in cases where the proceedings before the administrative authority are strictly judicial in nature, and the remedy imposed in one usually granted by courts, there can be no effective protection of private rights unless there is a complete separation of the prosecuting functions from the functions of decision[110].

In some competition regimes where the competition authority has been granted wide powers to enforce the competition provisions, the latter is empowered to carry out investigations for the discovery of anticompetitive practices, to issue orders requiring the stop of the anticompetitive conduct, to issue

[106] In Germany, the Bundeskartellamt is the main institution responsible for the enforcement of the competition law provisions. However, at the regional level, State Cartel Offices (*Landeskartellbehörden*) have jurisdiction over infringements with regional effects.
[107] In the EU, according to the *Commission Notice on Cooperation within the Network of Competition Authorities* (2004), the Commission will concentrate on severe infringements and landmark cases.
[108] In the US, states can bring *parens patriae* suits on behalf of their resident acceding to the provisions of the Hart-Scott-Rodino Antitrust Improvements Act.
[109] Talking about the European Competition Network in the EU and the US competition network, see: CENGIZ, Firat (2012), 'Antitrust Federalism in the EU and the US'. London and New York: Routledge.
[110] The Hoover Commission Report on Organization of the Executive Branch of the Government, 'Legal Services and Procedure', 1955.

final decisions declaring the infringement of the competition law provisions, and to impose the determined sanctions for the infringement in question. Traditionally, in most competition systems that have a single agency responsible for the enforcement of competition law, the enforcement functions are distributed between different offices or departments within the same authority. Thus, in those cases, the handling of the investigation of an alleged infringement of competition law will be performed by a determined office or department within the authority[111]. Alternatively, in some competition regimes, the investigative function is vested in a determined employee of the authority who will be in charge of the investigation[112]. With regard to the adoption of a decision declaring the infringement of the competition law provisions, in some jurisdictions, this function may be awarded to the head of the competition authority who will decide based on the findings of the investigation[113]. In other competition systems, the adoption of a decision will be made by a collegiate body that is part of the competition authority. In those cases, the decision will be adopted in relation to the votes of the members of the collegiate body[114]. Additionally, in most of these competition regimes, the single authority is empowered to impose the established sanctions to the infringers of the competition law provisions. Finally, in jurisdictions where the competition authorities have been awarded vast powers to enforce the competition law provisions, these authorities may even have authority to review their own decisions, at least in first instance[115].

In other competition regimes with a single agency responsible for the enforcement of the competition law provisions, the enforcement functions vested on this authority are more limited than in the previously seen systems. For instance, in most of these competition regimes, the competition authority is empowered to investigate the alleged infringement of the competition provisions, but cannot issue a decision declaring the infringement of the competition law provisions nor impose any sanctions for the anticompetitive conduct of the perpetrators[116].

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[111] In Albania, there is a single institution that is responsible for the enforcement of competition law, the Competition Authority, this is compound of the Competition secretariat, which is the office in responsible for the investigative process and the Competition Commission, which is the decision-making body (Articles 18 to 29 of the Law on Competition Protection). In Belgium, the investigation is carried out by the College of Prosecutors that is part of the Competition Council. In Denmark, the Competition Council is the institution responsible for the enforcement of the competition provisions. However, there is another institution, the Competition Authority, which is subordinated to the Council and is responsible for the investigation process.

[112] In Mexico, the investigation is carried out by the Executive Secretary of the Federal Competition Commission (Article 30 of the Federal Law on Economic Competition).

[113] In Nicaragua, the President of PROCOMPETENCIA (Nicaraguan competition authority) is empowered to decide on the investigated cases and to impose the relevant sanctions (Article 14 of the Law on the Promotion of Competition).

[114] In Belgium, the decisions are issued by the General assembly of the Competition Council, which is a corporate body composed by the President, the Vice-president and the councilors of the Competition Council. The decisions are adopted by the vote of the simple majority of the members of the Assembly (Article 22 of the Act on the Protection of Economic Competition). In Croatia, the Competition Agency is responsible for the enforcement of competition law. The Competition Council is the managing body of the Agency; it is composed of five members. The Council can investigate and decide on a determined case; in order to issue a decision, it has to be adopted by the vote of the majority of the members of the Council.

[115] In Mexico, the decisions of the Federal Competition Commission can be reviewed, in first instance, by the Commission itself. The Commission can revoke, modify or confirm its decision, however, against this decision there is a further appeal before the District Courts and the Tribunals specialized in competition matters. In El Salvador, the decisions of the Superintendence of Competition are reviewed by the Directive Council, which is the highest authority of the Superintendence. In Pakistan, an order made by any authorized member of the Competition Commission can be appealed before the Appellate Bench of the Commission, which is a corporate body, comprised at least two members of the commission. The decision of the Bench shall be made unanimously or by a majority of votes if the Bench comprises more than two members. In the case of a split decision, the original order appealed will be hold and have the effect as the final order of the commission.

[116] In Finland, the Competition Authority is allowed to carry out investigations for the alleged infringement of competition law. However, the Authority lacks competence to issue decisions or to impose sanctions to the infringing undertakings. Thus, in order to declare the infringement of the competition rules and to impose penalties to the perpetrators, the Authority will propose the initiation of proceedings before the Market Court. In Moldova, the National Agency for the Protection of Competition is allowed to conduct investigations and to issue some orders to stop the anticompetitive conduct of the defendant. However, if the Agency considers necessary the imposition of a penalty, the latter will have to bring an action before the relevant court.

4.2. Models Based on the Distribution of the Enforcement Functions

Additionally, the design of the enforcement structure can vary from one country to another depending on the enforcement responsibilities and functions vested on the competition authorities and other additional institutions. Overall, the enforcement structure of the competition authority and the allocation of decision-making functions within the administrative and judicial systems generally fall into one of three structural models. First, the bifurcated judicial model, where the competition authority is allowed to conduct the investigation, but has to bring enforcement actions before general courts in order to declare the infringement of the competition law provisions, appeals against the court decision can be made before general appellate courts. Second, the bifurcated agency model, where the competition authority is allowed to conduct the investigation, but has to bring enforcement actions before specialized competition adjudicative institutions in order to declare the infringement of the competition law provisions, appeals against these decisions can be made before specialized appellate bodies or general appellate courts. And third, the integrated agency model, where the competition authority is allowed to conduct the investigation and also to issue a decision declaring the infringement of the competition law provisions, appeals against these decisions can be made before specialized appellate bodies or general appellate courts[117].

(a) Bifurcated Judicial Model

In competition regimes where the bifurcated judicial model has been adopted, the different enforcement functions have been awarded to different institutions, i.e. competition authorities and courts of general jurisdiction. The main characteristic of this kind enforcement structure is the strict separation of the enforcement functions, additionally; the fact that the decision-making body is a general court differentiates this structure model from others where the decisions are issued by a specialized competition adjudicative authority. Thus, in practice, in the competition systems where this model has been fully implemented, the investigative, enforcement or prosecutorial and adjudicative functions have been delegated to separate authorities, i.e. the competition authority is the investigative and prosecutorial body and a court of general jurisdiction is the decision-making body[118]. Finally, due to the strict separation of the enforcement functions in this kind of model, the decisions issued by the general courts are appealable before independent general appellate courts.

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[117] This categorization has been borrowed from: TREBILCOCK M. & IACOBUCCI E.M. (2010), 'Designing competition law institutions: values, structure and mandate'. 41 *Loyola University Chicago Law Journal* 455.

[118] In Australia, even though the Australian Competition and Consumer Commission has extensive powers to carry out investigations and to grant immunities to certain cartel conducts and to proposed mergers, the Federal Court has sole jurisdiction to declare the infringement of the antitrust provisions and to impose penalties and fines. In New Zealand, the New Zealand Commerce Commission enforces the antitrust provisions, however, the latter only investigates the alleged infringements and when it believes there has been a breach of competition law, it then brings proceedings before the High Court seeking orders imposing pecuniary penalties, injunctions, orders preventing individuals from participating in the management of any undertaking for up to five years, and the amendment of any relevant contractual provisions. In Panama, the Authority for Protection of Consumer and Defense of Competition is allowed to carry out investigations for the infringement of the competition law provisions. After an investigation, the head of the authority shall decide whether or not to institute a proceeding before the relevant court. In the USA, in civil and criminal cases, the competition authorities are entrusted only with the investigation and prosecution of antitrust infringements, thus, ordinary courts hold sole jurisdiction in the US to decide on civil or criminal competition law cases.

With regard to the enforcement or prosecutorial function, it has been argued that this function can only be differenced from the investigatory function in jurisdictions where there is a strict separation of the enforcement functions (Bifurcated Judicial Model), because in systems where a single authority investigates, prosecutes and adjudicates (Integrated Agency Model), the prosecutorial function cannot be differentiated from the investigatory function[119]. Consequently, this enforcement function can be better evidenced in jurisdictions where the decision is adopted in court proceedings, given that in those cases; the competition authority will act as a prosecutor before the court. Nevertheless, the prosecutorial function may not always be held by the competition authority, in some regimes, whenever the application of competition law may affect the public interest, the prosecutorial function may be assigned to an institution subordinated to the government[120]. Similarly, in some jurisdictions with criminal competition law provisions, the prosecution may be performed by public prosecutors[121].

Moreover, in some competition regimes where the bifurcated judicial model has been adopted the powers of the competition authority are not restricted to the conduction of the investigation, accordingly, even though the competition authority is not allowed to issue a decision declaring the infringement of the competition law provisions nor is allowed to impose any sanctions or penalties to the perpetrators of the anticompetitive conduct, the authority may be empowered to issue certain orders while enforcing the competition law provisions. For instance, in some jurisdictions, despite the fact that the competition authority is not an adjudicative body, the latter has certain prerogatives, such as: to order the infringing undertakings to stop the contested anticompetitive conduct[122]; to issue an order requiring an undertaking to supply[123]; to declare that certain anticompetitive agreements are not prohibited if they comply with certain conditions[124]; to grant immunity to previously notified restrictive agreements[125]; to accept commitments from investigated undertakings to put an end to the anticompetitive effects of their

[119] WILS, Wouter, P.J. (2004A), 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis'. *World Competition.* Volume 27, No. 2, pp. 201-224.

[120] In Austria, the Federal Cartel Prosecutor (*Bundeskartellanwalt*), which is incorporated to the Austrian Minister of justice, is responsible of representing public interests in the field of competition law in cases before the Cartel Court.

[121] In Ireland, the Competition Authority investigates suspected infringements of competition law, following its investigation, and if the Authority considers that a breach has occurred, it can file summary proceedings in the District Court. For competition law breaches that have criminal sanctions, the Competition Authority shall submit its file to the Director of Public Prosecution who may initiate criminal proceedings before the Central Criminal Court. In Estonia, pre-trial investigation in cartel cases is carried out by the Estonian Competition Board (Competition Authority), in these cases, the prosecution is made by the Prosecutor's Office and the final decision is adopted by a criminal court.

[122] In Moldova, the National Agency for the Protection of Competition is allowed to investigate and request information related to the alleged infringement of the competition rules. The Agency is also allowed to issue an order requiring the stop of an action violating the competition provisions. In case this order is not complied, the Agency can bring an action before court in order to declare it to be non-binding or to impose the restoration of the situation. In case of a contract that is in contravention with the competition provisions, the Agency can bring an action before a court to modify or dissolve the contract. This orders issued by the Agency can be appealed before a court. Finally, whenever the Agency considers that the imposition of financial penalties is suitable for the anticompetitive conduct of a certain undertaking, it can then bring an action before the competent court for the imposition of the financial penalty.

[123] In Finland, the Competition Authority may order the termination of anticompetitive conducts; oblige undertakings to supply, and accept commitments from infringing undertaking. However, the latter cannot impose any fines for the breach of the competition rules; instead, the Competition Authority can only recommend the imposition of fines to the Market Court, which is the decision-making body for competition law matters.

[124] In Ireland, even though the Competition Authority is not an adjudicative body, the latter can declare that certain agreements, decisions or concerted practices are not prohibited if they contribute to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.

[125] In Australia, the Australian Competition and Consumer Commission is empowered to decide on immunity applications and proposed mergers, but it lacks authority to declare the infringement of the competition law provisions or to impose fines or penalties.

contested practices[126]; or to grant clearance to notified mergers that do not strengthen or create market position[127].

Additionally, in some of these competition regimes where the competition authorities are not decision-making bodies and cannot impose penalties or sanctions for the infringement of the competition law provisions, the competition authorities may be allowed to suggest the infringing undertaking the payment of settlement fines for its anticompetitive conduct, however, this is a mere suggestion given that the competition authorities lack competence to impose or order the payment of financial penalties. In those cases, if the infringement undertaking agrees to pay the settlement fine, the competition authority will end the proceedings, on the contrary, if the undertaking refuses to accept the payment of the settlement fine, then competition authority can bring formal enforcement actions before the relevant court for the imposition of financial penalties[128]. Similarly, in other competition regimes where the competition authority lacks jurisdiction to impose financial penalties for the infringement of competition law on its own, the competition authority will bring enforcement actions before the competent court with the purpose of obtaining a declaration of the infringement of the competition provisions, once the antitrust infringement has been declared by the relevant court, then the competition authority is allowed to impose a financial penalty for the anticompetitive conduct of the defendant[129].

With regard to the right of appeal, due to the strict separation of enforcement powers in this type of enforcement structure, the decisions issued by the general courts are appealable before appellate courts of general jurisdiction[130]. Moreover, as previously seen, in some competition regimes with the bifurcated judicial model, the competition authorities are allowed to issue some orders while enforcing the competition law provisions. With respect to these decisions by the competition authority, the review of such orders or decisions can vary from one jurisdiction to another, for example, in some competition regimes, the judicial review of the decisions by the competition authority will be made before appellate courts of general jurisdiction[131], alternatively, in other competition regimes, the review of the competition authority decisions will be made by the competition authority itself[132].

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[126] In Ireland, the Competition Authority may agree not to bring an action before courts in exchange for commitments to bring to an anticompetitive action to an end.

[127] In the US, both the FTC and Antitrust Division are allowed to grant clearance to proposed mergers, nonetheless, if these authorities oppose to a proposed transaction, they have to resort to a court of general jurisdiction in order to block the merger in question.

[128] In Sweden, the Competition Authority may only order the termination of the anticompetitive conduct and suggest the payment of a settlement fine. Only national courts have jurisdiction to impose fines on competition law infringers.

[129] In Panama, the Authority for Protection of Consumer and Defense of Competition is empowered to conduct the investigation for the infringement of competition law. It is also allowed to bring enforcement actions before the relevant courts for the declaration of the antitrust infringement, at the end of which, the competition authority can impose financial penalties to the perpetrators of the antitrust violation.

[130] In Ireland, the decisions of the Circuit Court on the cases brought by the Competition Authority can be appealed before the High Court; further appeal against the decisions of the High Court can be brought before the Supreme Court. In the US, the decisions of federal courts on the cases brought by the FTC and the Antitrust Division for the infringement of competition law are appealable before the Supreme Court.

[131] In Australia, appeals against the decisions of the ACCC in the course of the investigation can be made before the Federal Court of Australia. In Ireland, even though the Competition Authority is not empowered to issue a decision in respect to the breach of competition law, the latter can issue certain orders or issue certain decisions, hence, the parties affected by such orders or decisions can resort to the High Court for judicial review.

[132] In the US, in civil cases both the FTC and the Antitrust Division are empowered to issue Civil Investigative Demands (CIDs) requiring the submission of written answers and/or oral testimony. In the case of a CID issued by the FTC, the recipient can request the FTC to limit or quash the CID. On the other hand, the recipient of a CID by the Antitrust Division can request an order modifying or setting aside the CID directly from a federal district court.

Lastly, this kind of enforcement structure model provides for some advantages and some drawbacks with regard to the other two models. The fact that the decisions adopted by general courts are appealable before independent courts of appeal provides for significant accountability. Moreover, because the decisions are finally adopted by a different authority the levels of detachment, transparency and due process are higher compared with other models. Nevertheless, there are also some drawbacks related to this kind of enforcement structure, for instance, the level of expertise of general courts in relation to competition law matters is usually low, additionally, the timeliness are longer and the process costs are higher than would be in administrative proceedings.

(b) Bifurcated Agency Model

In competition regimes where the bifurcated agency model has been instituted there is also a separation of the enforcement functions. Nonetheless, in this type of model, unlike with the bifurcated judicial model where the decisions are issued by courts of general jurisdiction, the competition authority, which is vested with investigative and enforcement functions, has to bring enforcement actions before specialized competition adjudicative authorities. In addition, the decisions issued by the specialized adjudicative authorities can be appealed before specialized appellate bodies or before general appellate courts, contrary to the bifurcated judicial model where the appeal is made before general appellate courts.

Depending on the competition regime, some differences can be evidenced with regard to this model of enforcement structure. The main differences that can be found from one jurisdiction to another are related to the type of specialized authority that holds the adjudicative functions. For instance, in some of these competition regimes, the decision-making functions have been awarded to specific tribunals that are specialized in competition law matters, which are usually comprised of a mix of judges and lay members[133]. Moreover, in some competition regimes, certain courts of general jurisdiction sit as specialized courts for competition matters and have jurisdiction to decide on the cases brought by the competition authority[134]. Alternatively, in other competition regimes, the adjudicative functions are withhold by executive bodies specialized in competition law which are independent from the authority responsible for the investigation of the antitrust infringement[135].

Irrespective of the specific arrangement of a determined competition regime, the decision-making functions of these specialized competition adjudicative authorities are limited in certain respects. For instance, none of these specialized adjudicative authorities can impose criminal sanctions for the infringement of the competition law provisions, accordingly, in jurisdictions where criminal sanctions can be imposed for the violation of competition law, these sanctions can only be imposed by criminal courts, this has the purpose of safeguarding the rights of the defendants due to the seriousness of the sanctions

[133] In Chile, the investigative authority is the *Fiscalía Nacional Económica*, while the adjudicative authority is the *Tribunal de Defensa de la Libre Competencia*, which is specialized tribunal in competition law matters. In South Africa, the Competition Commission is responsible for the investigation of competition law violations, once the Commission has concluded its investigation; it can then file a case before the Competition Tribunal – which is a specialized court in charge of competition matters, for the imposition of administrative sanctions.

[134] In Austria, the Higher Regional Court of Vienna sitting as the Cartel Court (*Kartellgericht*) is the adjudicative body that decides on competition matters upon the application of the Federal Competition Authority.

[135] In Croatia, the authority responsible for the investigative and enforcement functions is the Competition Agency. On the other hand, the adjudicative function is vested on the Competition Council which is corporate body composed by five members.

involved in criminal proceedings[136]. Similarly, the specialized adjudicative authorities in this kind of model are not competent to award civil remedies, such as the award of damages to individuals affected by the anticompetitive conduct of the competition law offender, accordingly, whenever an affected party wishes to recover the amount of damage suffered as a consequence of the unlawful conduct of the competition law offender, the former will have to bring a civil action before the relevant court of general jurisdiction[137].

Finally, in respect to the appeals against the decisions issued by the specialized adjudicative authorities, the legal forum for the appeal may be different depending on the competition regime. Hence, in some jurisdictions, the appeals against the decisions of the specialized adjudicative authorities will be made before appellate courts of general jurisdiction[138]. Oppositely, in other competition regimes such appeals will be presented before specialized appellate courts[139].

When adopted, this type of institutional system for competition law enforcement involves certain trade-offs. For instance, this model provides a high level of independence in the decision-making process provided that the investigative and the adjudicative functions are performed by different institutions. Moreover, the fact that the appeals are handled by independent appellate courts entails some degree of accountability. Due to the fact that the decision-making body is specialized in competition law matters, the degree of expertise in this kind of system is higher compared to other systems. The main inconvenient with this type of enforcement structure are the costs involved in the creation of these specialized adjudicative institutions, especially given that courts of general jurisdiction provide for a ready alternative.

(c) Integrated Agency Model

Finally, in the integrated agency model there is not a separation of the enforcement functions, on the contrary, in this model a specialized agency in competition law matters consolidates the investigative, enforcement and adjudicative functions[140]. The main virtue of this type of enforcement structure is its efficiency and the degree of expertise of the decision-making body in competition law matters. Nevertheless, this kind of enforcement structure presents some drawbacks as well, for instance, the concentration of the enforcement powers in a single competition agency raises issues of transparency, independence and due process, this due to the fact that a single agency is responsible for the investigation and adjudication of the case.

[136] In Israel, the Antitrust Authority cannot impose any sanction for the breach of the competition rules; instead, it has to file a suit before the District Court of Jerusalem, when seeking criminal sanctions, or, to the Antitrust Tribunal for other kind of remedies.
[137] For instance, the Australian Competition Tribunal, which is a specialist tribunal that is, *inter alia*, responsible for the judicial review of the decisions of the Australian Competition and Consumer Commission, has no authority to award civil remedies. Similarly, in Peru, the Tribunal for the Defense of Competition and Intellectual Property cannot award damages for the infringement of the competition rules.
[138] In Austria, the decisions of the Cartel Court will be appealed before the Supreme Court sitting as the Higher Cartel Court.
[139] In South Africa, the appeals against the decision of the Competition Tribunal can be made before the Competition Appeal Court. Further appeal can be made before the Supreme Court of Appeal or the Constitutional Court.
[140] The most representative competition authority that combines the investigative and adjudicative functions in the world is the DG Competition within the European Commission, which is responsible for the enforcement of the competition provisions at the EU level.

The most common arrangement in this type of system is to delegate each enforcement function to a separate office or subdivision of the competition authority. Hence, depending on the internal organization of the competition authority in question, the enforcement functions will be fulfilled by separate bodies within the same authority. For example, a certain office of the competition authority will be in charge of conducting the investigation, while another will be responsible for the final adoption of a decision in the case[141].

With regard to the adoption of a decision by the competition authority, there are different approaches depending on the competition regime on this matter, for example, in some competition systems the adoption of the final decision will be issued by the head of the competition authority[142]. Alternatively, in other competition systems the adoption of the said decision will be made by a collegiate body formed by the conjunction of the members of the competition authority. In these jurisdictions, the adoption of the decision will be implemented by taking into account the votes of the members of the collegiate body[143].

Irrespective of the fact that the competition authorities are decision-making bodies in the competition regimes where the integrated agency model has been instituted, the decisions issued by these authorities are limited in some respects. The main restriction is evidenced in regimes that have criminal antitrust provisions. In these regimes, despite the fact that the competition authority has competence to issue an infringement decision, make orders and impose fines and penalties, the latter will not be allowed to impose any criminal sanction when applying competition law[144]. Similarly, normally competition

[141] In Albania, the Albanian Competition Authority is subdivided in: the Competition Commission, which is the decision-making body; and the Secretariat, which is a technical and investigative body. In Belgium, the College of Competition Prosecutors and the Directorate General for Competition (*Service de la concurrence/Dienst voor de* Mededinging) is the investigative body, and the Competition Council is the Adjudicative body. In Cyprus, the Service of the Commission for the Protection of Competition is the investigative body, and the Committee of the Commission for the Protection of Competition is the decision-making body. In Denmark, the Competition Authority investigates and the Competition Council is the decision-making body. In Greece, the Hellenic Competition Commission is a two-tier institution, where the Directorate General is in charge of the investigation, and the Commission is de decision-making body. In Italy, the Investigation Directorate – incorporated to the Competition Authority, investigates suspected antitrust violations, following the investigation, a decision on the case is made by the five members of the Competition Authority sitting as a college. In Spain, the National Competition Commission is composed of a Council – which is the decision-making body and a Directorate for Investigation – which is the investigative body.

[142] In Nicaragua, the President of PROCOMPETENCIA (Nicaraguan competition authority) is empowered to decide on the investigated cases and to impose the relevant sanctions (Article 14 of the Law on the Promotion of Competition).

[143] In Albania, the Competition Authority composed by the Secretariat, in charge of the investigation, and the Commission, this is a collegiate decisions-making body, formed by five members (Article 24 of the Competition Act). In Armenia, the State Commission for the Protection of Economic Competition of the Republic of Armenia adopts its decisions in a session by the votes of the majority of the members participating in the session. In Belgium, the decisions are issued by the General assembly of the Competition Council, which is a corporate body composed by the President, the Vice-president and the councilors of the Competition Council. The decisions are adopted by the vote of the simple majority of the members of the Assembly (Article 22 of the Act on the Protection of Economic Competition). In El Salvador, the Council of Directors of the Competition Superintendence is a collegiate decision making body, which adopts a decision on a case by simple decision of its members.

[144] In Canada, the Commissioner of Competition, which is the head of the Competition Bureau of Canada, has authority to directly enforce the non-criminal provision of the Competition Act, however, if after an investigation it finds that the criminal provisions of the Act have been breached, it can recommend the opening of criminal proceedings to the Director of Public Prosecution. In Estonia, the Competition Authority, which is government authority incorporated within the Ministry of Economic Affairs and Communications, has jurisdiction to conduct only administrative proceedings. In case of conducts that are criminally prosecuted, the Prosecutor's Office is competent to enforce the competition provisions before criminal courts. In Japan, the Japanese Fair Trade Commission has authority to investigate, prosecute and decide on administrative proceedings for the breach of competition law. However, for the imposition of criminal sanctions, the JFTC has to file a criminal accusation to the Public Prosecutors' Office; the latter will then begin the criminal procedure. In Korea, the Korean Fair Trade Commission has jurisdiction to enforce the provisions of the Monopoly Regulation and Fair Trade Act in administrative procedures –investigates, prosecutes and decides on the case. For criminal sanctions, it has to file a criminal complaint to the Public Prosecutors' Office. In Mexico, the Federal Competition Commission applies the competition provisions in administrative cases, while the Federal Prosecutor is in charge of the prosecution criminal offenses before criminal courts. In Slovenia, the Competition Protection Office is empowered to investigate and impose administrative sanctions for the infringement of competition law; however, criminal proceedings are initiated by state prosecutors and are adjudicated by ordinary criminal courts.

authorities are not allowed to grant civil remedies such as the award of damages to the parties affected by the unlawful conduct of the perpetrator. This is due, mainly because, as a general rule, the impositions of criminal sanctions and the award of civil remedies are powers exclusively reserved for criminal and civil courts, respectively. Nevertheless, there a few exceptions where the competition authority is empowered to award damages for the infringement of the competition law provisions. For instance, in jurisdictions where courts of general jurisdictions are not empowered to handle competition law matters, the competition authority is competent to order the competition law offender to pay compensation to the victims of the competition law infringement[145].

Finally, the right to appeal the decisions issued by the competition authorities in this kind of enforcement structure varies from one competition regime to another. Accordingly, in some competition systems, the right to appeal the decisions of the competition authority will be exercised before general appellate courts[146]. Alternatively, in other competition regimes where the integrated agency model has been established, the decisions of the competition authority will be appealable before appellate courts which are specialized in competition law matters[147]. In a few competition regimes, the decisions of the competition authority can be reviewed by a determined Ministry[148]. And finally, in some competition regimes the decisions of the competition authority will be reviewed by the competition authority itself, depending on the jurisdiction this revision will constitute the first level of the appeal process[149], or will exhaust the administrative procedure[150].

5. Enforcement of Competition Law by Sector Regulators

The fact that the interests of various stakeholders interact with each other in most economies has resulted in the creation of regulatory frameworks by the governments. In this sense, most jurisdictions have adopted both competition law provisions and sector regulations with the purpose of promoting

[145] In Indonesia, the Commission for Supervision of Business Competition (*Komisi Pengawas Persaingan Usaha,* or KPPU) has authority to order the competition law offender to compensate the parties injured by its anticompetitive conduct. Similarly in Tanzania, according to Section 59 of the Fair Competition Act, any person who has suffered loss or damage as a result of an infringement of the provisions of the Act can apply to the Fair Competition Commission for a compensatory order requiring the competition law offender to pay a determined amount of money for the loss or damages caused to the requesting party.

[146] In Belgium, the decisions of the Competition Council can be appealed before the Court of Appeal; further appeals can be made before the Court of Cassation. In the EU, the appeals against the decisions of the European Commission are presented before the General Court. Further rights of appeal can be exercised before the Court of Justice.

[147] In India, appeals against the decisions of the Competition Commission can be brought before the Competition Appellate Tribunal, with further rights of appeal before the Supreme Court. In Malaysia, the Competition Appeal Tribunal is responsible for the judicial review of the decisions of the Competition Commission. In the UK, the decisions of the OFT can be appealed to the Competition Appeal Tribunal, decisions of the CAT, may be subject to further appeal, in certain circumstances, before the Court of Appeal or the Court of Session in Scotland. In Tanzania, the Fair Competition Tribunal reviews the decisions of the Fair Competition Commission, the decisions of the Tribunal are final.

[148] In Norway, the decisions of the Competition Authority can be appealed before the Ministry of Government Administration, Reform and Church Affairs.

[149] In Barbados, the decisions issued by the Fair Trading Commission can be review by the Commission itself upon the request or an interested party or at its own motion. Further appeals can be made before the High Court. In Korea, an affected party by the decision of the KFTC may file an objection to the KFTC within 30 days from the date of receiving the notice. If the objection is not accepted by the KFTC, the party that submitted the objection will be allowed to file an administrative lawsuit before the appellate court (Seoul High Court). In Mexico, the decisions of the Federal Competition Commission are reviewable before the Commission itself in first instance; further appeal can be made before the competent courts of general jurisdictions (District Courts and tribunals specialized in competition matters). In El Salvador, the decisions of the Superintendence of Competition are appealable, in first instance, before the Directive Council, which is the highest authority within the Superintendence.

[150] In Nicaragua, the decisions of the PROCOMPETENCIA (Nicaraguan Competition Authority) can be reviewed in first instance by the president of the Authority. The decision of the president of PROCOMPETENCIA can be appealed before the Directive Council which is a collective body and the highest authority within the competition authority. These two levels of review exhaust the administrative procedure.

competition in markets and preserving consumer welfare, nevertheless, in certain ways; these separate frameworks can be sometimes a source of friction between their objectives and also their enforcement institutions, i.e. sector regulators and competition authorities.

The institution of these regulatory frameworks and of their enforcement bodies can create conflicts and discrepancies between the goals of the regulatory frameworks and the actuation of the enforcement institutions. Given that certain types of regulation may have a bearing on competition law, it is fundamental for the success of the economic policies to consider the relationship between the regulation of specific sectors or industries and competition law.

Normally, most governments have paid special attention to certain specific sectors or industries, such as: energy, water, telecommunications and transport. The interest in these sectors or industries is due to their importance for the correct functioning of the economy in every country, provided that their performance is directly related to the development of the economy and the state of welfare of society. These sectors or industries are fundamental for the economic development, mainly because, they provide essential inputs for all other sectors of activity, and as a consequence, they are considered by the government to be of general interest. Hence, the essential nature of these sectors has caused the intervention of the governments through regulation with the purpose of guaranteeing the timely and non-discriminatory access to these services to all citizens, even more; in some countries is the State that provides these services through State-owned enterprises.

In practice, the State regulation of these specific sectors or industries is usually concerned with guaranteeing universal access to these services at affordable prices. In order to fulfill these objectives, the actuation of the government through sector regulation interacts with competition law policy in certain ways.

On the one hand, sector regulation can have beneficial effects on competition. For instance, one of the principal characteristics of these regulated industries is that their activities can be performed only by a few operators at the national level. Accordingly, usually in these regulated sectors, natural monopolies have been established due to the fact that it is more efficient that a single operator provides the service in question to society. The main impact that the presence of natural monopolies has on competition law policy is the lack of competition that the operators of these services face in their relevant markets. In this regard, the intervention of the government through sector regulation consists in mimicking competition in these regulated sectors. In these cases, sector regulation will control prices with the purpose of preventing the operators to charge monopolistic prices for the services provided, as a consequence, in these cases sector regulation will alleviate some of the market imperfections that are proper of these regulated sectors and restore competition to these industries.

On the other hand, sector regulation can also have negative effects on competition law policy when the intervention of the State in these sectors raises competition law issues. The main way in which sector regulation can affect the competitive process is through the creation of regulatory barriers to competition. Thus, the acts of the government or governmental authorities with regard to sector regulation may affect competition by: creating administrative barriers to entry, like, complex and lengthy

authorization procedures for the entry of new market participants; requiring compliance with unusual norms and standards that impede the entry of new market participants; preventing foreign enterprises from competing in national markets; or favoring certain national enterprises, i.e. national champions. Ideally, State intervention should not affect competition through regulation that restraints the independence of enterprises, or creates discriminatory or favorable conditions for the activity of particular enterprises, however, some jurisdictions have established express provisions addressing this problems with the purpose of preventing State regulation from affecting competition negatively.

One of the solutions that some jurisdictions have adopted in order to impede that State regulation affects competition negatively is to grant the competition authority the power to review, in advance, sector regulations that are related to the specific sectors or industries discussed above. In these cases, the competition authority will advise the government on the effects of the sector regulation over competition. This function is attributed to competition authorities in virtue of their expertise in competition matters and their advocacy role[151].

Furthermore, with regard to the regulatory barriers on competition established by sector regulation, some jurisdictions have introduced specific regulations to address this issue. For instance, some competition regimes have provisions that prohibit administrative organs to eliminate or restrict competition by: setting discriminatory measures; imposing different technical requirements and standards; setting up barriers to entry; preventing business operators from participating in tendering and bidding activities or impeding business operators from investing or setting up local branches by imposing unequal treatment; or to force business operators to engage in monopolistic practices[152].

With regard to the enforcement of the competition law provisions in regulated sectors, there are different approaches depending on the jurisdiction. The main differences with regard to this matter are associated to the regulatory functions that sector regulators and competition authorities have. As a general rule, there are four regulatory tasks: i) competition protection, which is controlling anticompetitive practices and mergers; ii) access regulation, which is ensuring non-discriminatory access to necessary inputs; iii) economic regulation, which is adopting measures to control monopoly pricing; and iv) technical regulation, which is setting and monitoring standards[153].

Depending on the jurisdiction and on the regulatory tasks vested on sector regulators and competition authorities, five different approaches can be found in relation to the coordination between competition authorities and sector regulators when enforcing their respective frameworks, however, more than one of these approaches can be implemented within a single jurisdiction[154]: i) there are jurisdictions

[151] In Ireland, the Competition Authority has among its advocacy functions: to advice the Government and Ministers concerning the implications for competition in markets for goods and services of proposals for legislation; to advice public authorities generally on issues concerning competition which may arise in the performance of their functions; and to identify and comment on constraints imposed by any enactment or administrative practices on the operation of competition in the economy (Section 30 of the Competition Act).

[152] In China, Articles 33, 34, 35 and 36 of the Anti-monopoly Law that prohibit any administrative organ or organization empowered by a law or administrative regulation to administer public affairs to abuse their administrative power to eliminate or restrict competition in the aforementioned ways.

[153] UNCTAD, *Best Practices for defining respective competences and settling of cases, which involve joint action of competition authorities and regulatory bodies,* Geneva. 19 August 2004.

[154] *Idem.*

that combine technical and economic regulation in a sector regulator and leave competition enforcement exclusively in the hands of the competition authority[155]; ii) other jurisdictions combine technical and economic regulation in a sector regulator and award the latter some or all competition law enforcement functions[156]; iii) some jurisdictions combine technical and economic regulation in a sector regulator and award the latter competition law enforcement functions which are to be performed in coordination with the competition authority[157]; iv) other jurisdictions organize technical regulation as a stand-alone function for sector regulator and include economic regulation within the competition authority[158]; and v) in some jurisdictions the competition authority has sole jurisdiction to enforce the competition law provisions[159].

The enforcement of the competition law provisions also vary from country to country depending on the ability of the sector regulators to enforce the competition law provisions on their own, or, in conjunction with the competition authority. Consequently, in some jurisdictions the sector regulators will be required to enforce the competition provisions in conjunction with the competition authority. Alternatively, in other jurisdictions the sector regulators will be empowered to apply directly the competition law provisions.

In competition law systems where the sector regulators enforce the competition law provisions in conjunction with the relevant competition authority, the former may perform different functions and their participation varies from one jurisdiction to another. For instance, in some of these competition regimes, the sector regulators may be simply invited by the competition authority to submit their opinions with regard to a certain case that is concerned with their respective fields. Furthermore, in other competition regimes, such participation may be mandatory, accordingly, whenever a competition authority has begun an investigation in a field that is controlled by a determined sector regulator; the competition authority may be under the obligation to communicate the initiation of such investigation with the purpose of giving the sector regulator a fair chance to state its opinion with regard to the case in question[160]. Conversely, in some competition regimes, the sector regulators are obliged to notify any anticompetitive practice they have become aware of in their respective sectors to the competition authority while performing the functions that have been vested on them[161]. Finally, in order to make the collaboration between competition authorities and sector regulators smoother, in some competition systems, the competition authorities have signed cooperation agreements with the sector regulators that address the issues related to the enforcement of competition law in cases concerned with the regulated sector[162].

[155] Brazil, Indonesia, Korea, Tanzania, US, Zimbabwe.
[156] Canada, France, Kenya, Malawi, Mauritius, US, Zambia, Zimbabwe.
[157] Canada, France, Indonesia, Portugal, Korea, South Africa, Namibia, UK.
[158] Australia, Korea.
[159] Australia, New Zealand.
[160] In Algeria, pursuant to Article 39 of the Competition Ordinance (Algerian Competition Act), the Competition Council is obliged to provide the respective sectorial regulator with a copy of its file whenever the Council has initiated an investigation that is concerned with the field of a determined sectorial regulator. Accordingly, the relevant regulator is allowed to submit its opinion to the Council in cases related to its sector.
[161] In Brazil, the Electric Energy National Agency, which is responsible for the prevention of economic concentration and the stimulation of competition in the electric energy field, is under the obligation of notifying any anticompetitive practice it has become aware of to the *Conselho Administrativo de Defesa Econômica*, the Brazilian Competition Authority (CADE).
[162] For instance, in El Salvador, the Competition Superintendence (Salvadoran Competition Authority) has signed cooperation agreements with the Telecommunications and Electricity Authority for the enforcement of the competition provisions in those sectors.

On the other hand, there are jurisdictions where the sector regulators can apply competition law directly, in most of these cases; the sector regulations have included competition law rules in their provisions[163]. In these jurisdictions, the role of the sector regulators in the enforcement of competition law depends on the attributions granted to them by these specific provisions. In practice, the attributions of these sector regulators when enforcing competition law provisions may range from the power to initiate investigations for the alleged infringement of competition law, to the issue of orders and the impositions of fines to undertakings responsible for the breach of competition law[164]. Furthermore, besides the powers vested on sector regulators to enforce the competition law provisions, some of these sector regulators can additionally request the competition authority to submit its opinion whenever they are investigating a possible infringement of competition law[165].

Finally, irrespective of the fact that some sector regulators can enforce the competition law provisions directly[166], in some cases, such application will be made under the surveillance of the competition authority[167]. Even more, in some competition regimes, the decisions issued by sector regulators when applying the competition law provisions may be reviewed by the relevant competition authority[168].

III. PROCEDURAL ISSUES

1. Initiation of the Investigation

Generally speaking the public enforcement of competition law can be triggered in two ways. On the one hand, the authority in charge of enforcing the competition law provisions will be empowered to initiate an investigation at its own discretion, and, on the other hand, the actuation of the relevant authority will be instigated by a complaint filed by a natural or legal person, or at the request of the government or some of its institutions. Despite the preceding, irrespective of the way in which the public enforcement of the competition provisions has been instigated, the actuation of the relevant authority will lead to the opening

[163] In Brazil, the National Telecommunication Agency is responsible for the control of anticompetitive practices in the telecommunication sector according to its Norm No.7/99, approved by Resolution No. 195, 7 December 1999. In China, the State Electricity Regulatory Commission has to prevent unfair competition practices and collusion between undertakings in the electricity sector pursuant to the Measures for the Supervision of Electric Power Market. In Croatia, the Banking Law and the Decision Regulating Market Competition in the Banking Sector, contain provisions regulating competition in the banking sector.

[164] In Austria, the *Telekom-Control Kommission* is an independent institution in charge of the review of the decisions issued by the Austrian Regulatory Authority for Broadcasting and Telecommunications. Besides its reviewing functions, the *Kommission* is also empowered to determine if an undertaking has significant market power on a market related to the telecommunication or broadcasting sectors, and to impose remedies for the abusive use of such market power. In Brazil, the National Telecommunication Agency has authority to initiate investigations and administrative proceedings whenever it finds anticompetitive practices in its sector. In China, the State Electricity Regulatory Commission may impose corrections order and fine for non-compliance to undertakings in the electricity sector, additionally; the Insurance Regulatory Committee may order an insurance undertaking to change its insurance terms and premium rates if it finds that the undertaking is involved in monopoly practices.

[165] In Croatia, the National Bank has authority to request the Agency for Protection of Market Competition (Croatian Competition Authority) to submit its opinion on a case being investigated by the National Bank.

[166] In Croatia, the National Bank, which is responsible for the control of the banking sector, has plenty powers to apply the competition provisions of the Law on Protection of Market Competition (Croatian Competition Act) along with the banking sector provisions containing competition rules.

[167] In Brazil, the powers vested on the National Telecommunication Agency have to be exercised under the vigilance of the CADE.

[168] In Belgium, the Competition Council, which is the primary decision-making institution responsible for the enforcement of competition law, has authority to hear on appeal the decisions issued by the Belgian Institute for Postal Services and Telecommunications and the Commission for Electricity and Gas Regulation - both sectorial regulators on the fields of telecommunications and post, and gas and electricity (Article 79 of the Competition Act).

of an investigation with the purpose of establishing if a certain practice is contrary to the competition law provisions.

(a) Investigations Initiated by the Competition Authority

Provided that one of the main purposes of the competition provisions is to eradicate most of the anticompetitive practices, in this sense, the legislators have provided the authorities in charge of the application of the competition rules with wide powers to conduct inquires and investigations under their own discretion. Accordingly, in most competition regimes the authority in charge of the enforcement of the competition provisions is entitled to open an investigation for the alleged violation of competition law on its behalf[169]. In some of these regimes, however, the ability of the competition authority to initiate an investigation may be conditioned to certain circumstances[170].

In practice, frequently enough, the relevant authority will become aware of potential anticompetitive practices while exercising its functions. As a consequence, the initiation of an investigation by the competition authority on its behalf will vary from one jurisdiction to another depending on the powers and functions that have been entrusted to such authority. Despite the differences that may exist, most authorities will initiate enforcement proceedings while: investigating markets; reviewing the behavior of market participants; evaluating information gathered from the press and other means of information; or evaluating information obtained from the government or from foreign competition authorities, among others.

In some competition regimes, the competition authority will initiate an investigation after receiving information about a certain practice that raises or may raise competition law issues, in these cases, the information is provided by the parties involved in such practice. This scenario occurs in jurisdictions where leniency programs have been implemented with the purpose of gaining insightful information about a cartel from the disaffected members of the latter, in those cases, the information contained in the leniency application, if sufficient, will trigger the actuation of the competition authority on that specific matter. Similarly, in countries where prior notification or clearance mechanisms have been established in order to determine, in advance, if a certain practice, if implemented, will eventually affect competition, such approach to the competition authority may instigate an inquire by the competition authority. For instance, in countries where merger notifications are mandatory, such

[169] For instance, at the EU level, the Commission can act on its own initiative pursuant to Article 7(1) of the Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (Regulation 1/2003). Similarly, in Germany, Section 54(1) of the Act Against Restraints of Competition, the cartel authority may institute proceedings acting on its own initiative or upon request. In India, according to Section 19(1) of the Competition Act, the Competition Commission may inquire into any alleged contravention of the provisions of the Act on its own motion. In Lithuania, according to Article 24(2) of the Law on Competition, the Competition Council is empowered to start an investigation on its own initiative by taking a justified decision. In Mexico, Article 30 of the Federal Law on Economic Competition states that the investigation will be initiated by a party request or by the sole decision of the Federal Competition Commission. In Taiwan, according to Article 11 of the Fair Trade Act, the Fair Trade Commission may investigate and handle any violation of the competition provisions, upon complaint or ex officio.

[170] In the UK, according to Section 25 of the Competition Act, the OFT will be allowed to open an investigation on its own behalf if there are reasonable grounds for suspecting that an agreement falls within Article 81 and/or the Chapter I prohibition, and/or that there has been an infringement of Article 82 and/or the Chapter II prohibition.

notifications will inevitably lead to the actuation of the relevant authority[171]. Likewise, in countries where the parties to an agreement that may raise competition issues are allowed to approach the competition authority in order to get a prior approval for the agreement in question, such approach may instigate the actuation of the competition authority[172].

(b) Investigations Initiated by Complaints or Requests to the Competition Authority

Apart from the investigations initiated by the competition authorities on their own behalf, in most regimes, the intervention of the authority can be instigated by certain events outside the sphere of the competition authorities. Generally speaking this possibility to initiate an investigation by the competition authority can be caused bay: a complaint lodged by a natural or legal person; or a request made by the government, certain national public institutions, and even by foreign institutions and competition authorities.

With regard to the initiation of an investigation following the filing of a complaint, given that the initiation of the public proceeding in those cases is instigated by a private party, this possibility has been named "*privately triggered public enforcement"* of competition law[173]. In practice, there are some differences among jurisdictions related to the lodge of such a complaint. For instance, with regard to who is allowed to file the compliant, depending on which jurisdiction, the standing to file a claim will be granted to: any natural or legal person[174]; interested parties only[175]; persons whose rights have been

[171] In Bulgaria, pursuant to Article 38(1)(6) the Commission will initiate proceedings upon a notification of a concentration between undertakings. In Croatia, according to Article 38(2) of the Competition Act, the proceedings related to the assessment of a concentration will be initiated by the notification of the parties to the concentration. Alternatively, of the parties fail to notify, the Competition Agency, acting on its own initiative, will initiate any relevant proceedings. In Hungary, pursuant to Article 68(1)(a) of the Competition Act, an application for the commencement of proceedings may be submitted by persons obliged to obtain authorization for a concentration.

[172] At the EU level the prior approval mechanism was first established in the EU Article 2 of the EEC Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, which allowed undertakings and association of undertakings to get negative clearance from the Commission. However, this mechanism was abolish by Regulation 1/2003 (Recital 3 and Article 34(1)) because it prevented the Commission from concentrating on the most serious infringements. Accordingly, most EU competition regimes that have similar mechanisms have repealed them and encourage undertakings to self-assess the effects of their conducts on competition. Outside the EU there are jurisdictions that have prior approval procedures, for instance: in Korea an interested party may request the Korean Fair Trade Commission to review a transaction and to determine in advance if the latter infringes the provisions of the Monopoly Regulation and Fair Trade Act; in Singapore, according to Section 43 of the Competition Act (for restrictive agreements) and Section 50 (for abuse of dominance), a party to an agreement may notify the agreement to the Commission in order to see of the agreement is likely to infringe competition law; in Switzerland, the parties to an agreement may file a notification to the Competition Commission in order to get clearance from the Commission; in the US, parties may apply to the Federal Trade Commission for a formal advisory opinion if the case involves substantial or novel issues of fact or law, or if the publication of the Commission's opinion would be of significant interest, in such cases, the Commission will not pursue the transaction if the information provided by the parties was correct.

[173] JACOBS, Francis G. & DEISENHOFER, Thomas. (2003), 'Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective'. In: Ehlermann and Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*. Oxford and Portland: Hart Publishing, p. 197.

[174] In China, the AMEA will investigate suspected monopolistic conduct under its own motion or after a complaint by an entity or individual (Article 38 of the Anti-Monopoly Law). At the EU level, pursuant to Article 7(2) of Regulation 1/2003, a complaint to the Commission may be lodged by: natural or legal persons and Member States. As a curiosity, in Canada, an investigation will be initiated by the application in proper form by six Canadian residents (Section 9 of the Competition Act).
In China, according to Article 38 of the Anti-monopoly Law, any entity or person may report a suspicious monopolistic conduct. In Egypt, According to Article 19 of the Law on the Protection of Competition and the Prohibition of Monopolistic Practices, any person may report to the Authority for the Protection of Competition and the Prohibition of Monopolistic Practices any breach of the provision of the Law. In Hungary, any person may submit a complaint to the Competition Authority (Article 43/G(1) of the Competition Act). In India, according to Section 19(1)(a) of the Competition Act, any person shall submit a complaint to the Competition Commission. In Ireland, the Competition Authority may carry out an investigation in response to a complaint made to it by any person (Section 30(1)(b) of the Competition Act). In South Africa, according to Section 49B (2)(a)of the competition act, any person may submit information concerning an alleged prohibit practice to the competition commission, in any manner or form. In Kenya, any person may submit a complaint to the Competition Authority (Section 31(1) of the Competition Act). In Zambia, the Competition and Consumer Protection Commission may initiate an investigation upon a complaint made by any person if it has

affected or endangered[176]; associations[177]; and consumers[178]. Moreover, with regard to the form of the complaint, the majority of jurisdictions provide for many forms in which the complaint can be presented, these include: written complaints, oral complaints, complaints made by telephone, by fax, by e-mail or other electronic means, delivered by post, by hand, or submitted online. Other important issue concerned with the presentation of a complaint is the content of the latter. Across jurisdictions, the main difference regarding this subject is related to the level of proof required from the complainant[179]. Finally, the response of the authority to the complaint also varies from one country to another, hence, in some regimes the authority will be under the obligation to respond to any complaint, and if rejected, the competition authority will have to notify the complainant this decision and the reasons for rejecting the complaint[180]. In addition, in most jurisdictions, the decision rejecting a complaint by the competition authority will be subject to an appeal[181]. Alternatively, in other competition regimes, the authority will be allowed to reject the complaint without providing any reason to the complainant[182].

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reasonable grounds to believe that there is, or is likely to be, a contravention of the provisions of the Act (Section 55 of the Competition and Consumer Protection Act).

[175] In Albania only interested parties may submit a complaint to the Authority requesting the initiation of an investigation (Article 42 of the Law on Protection of Competition). In Belgium, pursuant to Article 44 of the Competition Act, a claim may be filed by persons showing direct and immediate interest. In Lithuania, according to Article 24(1)(1) of the Law on Competition, undertakings whose interests have been violated are allowed to request the start of an investigation. In Spain, according to the Annex I of the Spanish Competition Act Implementing Regulation (Royal Decree 261/2008 of 22 February 2008), only parities with legitimate interest may lodge a complaint.

[176] In Barbados, every person who is aggrieved by an act done by a service providers or business enterprise which is contrary to the law, may make a compliant to the Commission (Section 23 of the Fair Trade Commission Act). In Bulgaria, pursuant to the provisions of the Law on Protection of Competition, a complaint can be lodged by a person whose rights have been affected or endangered by a violation of the Law (Article 38(1)(3)).

[177] In Croatia, according to Article 37 of the Competition Act, the initiative for the initiation of the proceedings may be done by at the request of, *inter alia*, professional association or economic interest group or association of undertakings, or consumer associations. In Lithuania, according to Article 24(1)(3) of the Law on Competition, associations representing the interests of undertakings may request the initiation of an investigation.

[178] In India, pursuant to Section 19(1)(a) of the Competition Act, a complaint may be filed by consumers or consumers associations. In Italy, According to Section 12(1) of the Competition Act, the Competition Authority shall conduct an investigation to ascertain an infringement of the provision of the Act by assessing the information submitted by, *inter alia*, bodies representing consumers. In Lithuania, pursuant to Article 24(1)(3), consumers associations may request the opening of an investigation.

[179] In Argentina, the complaint must be made in written and contain: the name and address of the complainant, description of the anticompetitive practice, and the facts and legal grounds that support its claim (Section 28 of the Law for Defense of Competition). In Brazil, the Economic Law Secretariat of the Ministry of justice Regulation 04/06 provides for the requirements of a complaint: identification of the parties; description of the facts to be investigated; relevant documentation; any other relevant elements. The complaint can be made anonymously and the forms can be downloaded from the website. In Canada, Section 9(2)(1) of the Competition Act established that a complaint should be contain: the names and addresses of the applicants; the nature of the contravention, grounds for making an order, the offense; the names of the persons concerned; a concise statement of the evidence supporting their opinion. In Egypt, according to Article 32 of the Executive Regulations provides the content of the complaint: name, address, and interest; name, address of the subject of the complaint and the nature of its activity; the kind of breach; supporting evidence, if available; an indication of the damage incurred by the complainant, if available. In Spain, Annex I of the Spanish Competition Act Implementing Regulation (Royal Decree 261/2008 of 22 February 2008) establishes the content of a complaint: identification of the parts; object of the complaint; relative information of the market; legitimate interest; proof; measures adopted; other information. At the EU level the content of the complaint is regulated by the Commission Notice on the handling of complaints by the Commission under Article 81 and 82 of the EC Treaty [2004] C101/5.

[180] In Belgium, pursuant to Article 45(2) of the Competition Act establishes that when the College of Competition Prosecutors believes that the complaint is inadmissible or ungrounded it is under the obligation to reject the complaint by a reasoned decision which has to be notified by registered letter to the complainant. In Canada, pursuant to Section 22 of the Competition Act, the Commissioner may discontinue an investigation by a decision that has to be notified to the applicants. In Hungary, according to Article 43/H(10) of the Competition Act, the Authority issue a decision declaring that the conditions to pursue a complaint are not fulfilled, and the complainants shall be informed of such a decision. In Kenya, of the Competition Authority decides not pursue a complaint; the latter has to inform its decision in writing of the reasons for its decision (Section 31(2) of the Competition Act). In Zambia, the commission may decide not to investigate if it determines that a request is frivolous or vexatious, it will inform in writing this decision (Section 56(1) of the Competition and Consumer Act).

[181] In Belgium, according to Section 45(3) of the Competition Act, a complainant may appeal to the Competition Council a decision from the College of Competition Prosecutors rejecting its complaint. In Canada, a decision not to pursue a complaint by the Commissioner can be appealed to the Minister (Section 22(3) of the Competition Act). At the EU level, the decision of the Commission rejecting a complaint may be appealed before the General Court.

[182] In Croatia, according to Article 38(7) of the Competition Act, the Agency is not obliged to provide assessment or give explanation in respect to every received complaint. Moreover, a decision of the Agency to reject a complaint is not appealable; nevertheless, the complainant may take action at the Administrative Court of the Republic of Croatia (Article 38(6) of the Competition Act). In Estonia, according to Section 63(2) of the Competition Act, an application will be rejected without review, if:

As stated before, in some competition law regimes, there is also the possibility to instigate the actuation of the competition authority through a request made by the government or certain national or foreign institutions. Accordingly, in the competition law regimes where this faculty has been granted, a variety of institutions will be entitled to request the competition authority to initiate an investigation for the alleged infringement of the competition law provisions, thus, in practice, the following institutions may be entitled to request the actuation of the competition authority in a determined matter: the central government[183], local governments[184], ministers[185], public prosecutors[186], courts[187], and even foreign institutions and competition authorities[188].

2. Case selection and prioritization

As happens with other branches of public law, the resources devoted to antitrust enforcement are limited. A common characteristic shared by competition authorities, irrespective of their size and experience, is the limitation of resources. The competition authorities inevitably have only limited human and financial resources to allocate to the application of the competition law provisions in relation to the many cases of potential competition law infringements that could be investigated. Thus, it is essential for competition agencies around the world to allocate their resources efficiently, given that these are mainly funded by tax payers' money. From the perspective of efficient antitrust enforcement this means that the authorities have to spend their limited resources according to the likelihood of finding a serious violation that can be remedied or punished[189]. In this regard, competition authorities have the prerogative to determine which cases to investigate, and which of those to prioritize, accordingly, complainants cannot compel the competition authorities to carry out an investigation or to take a decisions as to the existence or non-existence of an alleged infringement of the antitrust provisions[190]. Competition authorities should be allowed to set their priorities based on the expected direct and indirect effects of their action, allowing

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it is unjustified; an action concerning the same matter has been filed to the European Commission or there is a decision by the latter on the same matter; similarly with actions filed to a competition authority of another Member State; if it does not have the contact information of the complainant.

[183] In India, the Competition Commission will begin proceedings after receiving a reference by the Central Government or a State Government or a statutory authority (Section 19(1)(b) of the Competition Act).

[184] In Russia, the antimonopoly body will initiate a case after receiving information indicating signs of violation of the antimonopoly legislation from state bodies or bodies or local self-government (Article 39(2)(1) of the Federal Law of the Russian Federation on Protection of Competition).

[185] In Belgium, an investigation can be opened at the request of the Minister of Economic Affairs, the Minister of Middle Classes or other public bodies referred to in Article 44(1)2 of the Competition Act (Article 44 of the Belgium Competition Act). In Canada, proceedings may be initiated by a directive from the Ministry of Industry (Section 10(1)(c) of the Competition Act). In Italy, the Competition Authority will begin an investigation at the request of the Minister of Trade and Industry, or the Minister of State Shareholdings (Section 12(2) of the Competition Act). In Kenya, the Competition Authority can, upon receiving information or a complaint from a Government Agency or Ministry, carry out an investigation into any conduct that may constitute an infringement of competition law (Section 31(1) of the Competition Act).

[186] In Bulgaria, proceedings may initiated by a request from a prosecutor (Article 38(1)(2) of the Law on Protection of Competition).

[187] In Belgium, an investigation by the college of Competition Prosecutors may be instigated by the request of the Brussels Commercial Court (Article 44 §1(5) of the Belgian Act on the Protection of Economic Competition).

[188] At the EU level, in accordance with Article 20 to 22 of Regulation 1/2003, most Member States have provisions allowing the European Commission and competition authorities from other Member States to request the nation competition authority to initiate an investigation for the infringement of the EU competition law provisions. For instance, Section 14 of the Belgian Competition Act determines that the Competition Council may open an investigation upon a referral from the European Commission or other competition authorities of the European Union. Similarly, in Bulgaria, according to Article 38(1)(7) of the Competition Act, the Commission will initiated proceedings upon a request of a national competition authority of a Member State of the EU or of the European Commission. Also, in the UK, according to Section 61 to 65 of the Competition Act the OFT is entitled to conduct an investigation on behalf of the European Commission or at the request of a national competition authority of another Member State of the EU.

[189] WILS, Wouter P.J. (2008B), 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles'. *World Competition,* Vol. 31, No. 3.

[190] Case T-24/90 *Automec v Commission* [1992] ECR II-2250, paragraphs 75 and 76.

them to concentrate their resources on the potentially most harmful anticompetitive practices and on emblematic cases that will set precedent[191]. Hence, and appropriate case section and prioritization criteria can help competition authorities to ensure the best outcome for consumers and businesses and to achieve maximum efficiency. In brief, prioritization can be understood as the process of deciding what to do and, equally important, what not to do[192].

From the perspective of the optimal enforcement of the law, the discretionary non-enforcement of the law is related to the public application of the law by a single public enforcer (public monopoly of enforcement). In the case of competition law, the enforcement authority may nullify particular laws, or particular applications of law, by declining to prosecute offenders. The fact that the antitrust provisions normally contain broad and general rules enables these to be overinclusive, this means, that the legal provisions of competition law may sometimes prohibit conduct that the legislators did not want to prohibit. In this regard, if a strict application of the legal mandates of an overinclusive law would be mandatory, such application would not be socially desirable given that, in practice, the enforcers could convict an innocent in order to reduce the probability of acquitting a guilty. Thus, the costs associated with convicting an innocent and acquitting a guilty can be reduced by allowing the enforcement authorities to decide which cases are worthy of being prosecuted[193].

There are basically two enforcement models in relation to how competition law investigations are initiated. On the one hand, there is the complaint/request-driven model, by the virtue of which competition authorities open an investigation based on the complaints filed to the authority and the requests made by the government. On the other hand, the competition authorities can also initiate investigations on their own behalf by conducting market studies and performing periodic collection and assessment of information.

With regard to the complaints filed by third parties, there are different approaches in relation to the ability of competition authorities to select which cases will be further investigated. For instance, in some competition law systems, the competition authority has wide discretion to determine which complaints are worthy of being investigated[194]. On the other hand, in other jurisdictions, the competition authority is under the obligation to conduct at least a preliminary investigation into all complaints received[195].

In relation to the studies and inquiries conducted by the competition authorities on their own behalf, the authorities exercise their discretion to allocate resources to the investigation and resolution of cases that provide the greatest overall benefit for consumers and businesses. Normally, in determining which cases to investigate and prioritize, the competition authorities take into consideration different

[191] LOWE, Philip (2008), 'The Design of Competition Policy Institutions for the 21st Century: The experience of the European Commission and DG Competition'. *Competition Policy Newsletter*, Number 3, p. 2.
[192] ICN, *Report on the Agency Effectiveness Project*, Zurich, 2009.
[193] LANDES, William M. & POSNER, Richard A. (1975), 'The Private Enforcement of the Law'. 4 *The Journal of Legal Studies*, 1, p. 38.
[194] In Denmark, according to Section 14(1) of the Competition Act, the Competition Council may decide whether there are sufficient grounds to open an investigation or to adopt a decision in a case, including the determination of whether a case should be suspended or discontinued.
[195] In South Africa, in terms of Section 49B(3) of the Competition Act, the Competition Commission has the duty to initiate an investigation upon receiving a complaint or information from a third party about a prohibited practice.

factors, including whether the conduct is of significant public interest or concern, results in significant consumer detriment, is a blatant disregard for the law, involves national or international issues and involves a significant new or emerging market. Additionally, competition authorities may consider whether action is likely to have a worthwhile educative or deterrent effect and whether there is a history of previous infringements. Finally, competition authorities may also decide to pursue matters that test or clarify the competition law provisions.

The success of a competition authority depends heavily upon its ability to select priorities and design strategy for applying its authority[196]. Thus, in order to clarify the priorities of competition authorities in the enforcement of the antitrust provisions, some regimes have introduced different instruments to shed light on the enforcement policies of their competition agencies. Depending on the competition regime in question, the enforcement priorities may be set by law, or by formal or informal processes.

As stated before, in some competition regimes, the enforcement priorities of the competition authority are set by the law[197]. Moreover, in other jurisdictions, the enforcement priorities are formally set through strategic planning, such as the issue of prioritization principles or guidelines[198]. Alternatively, in some regimes, the enforcement priorities are informally agreed and then communicated within the competition authority[199]. Finally, enforcement priorities are usually set by the leadership of the competition agency. This process may include, or not, the participation of the staff, and normally is not defined by one person.

In practice, the exercise of competition authorities to set enforcement priorities with regard to which cases should be investigated and which cases should be discarded can produce both benefits and drawbacks for the overall enforcement of competition law.

In favor of prioritization, due to the fact that the competition law provisions are broad enough to include most practices that may be anticompetitive, the discretion of competition authorities to decide which cases they pursue is fundamental to avoid enforcing the antitrust prohibitions in cases that could be brought under the prohibitions but do not fit under the rationale of the prohibitions. Moreover, prioritization of antitrust enforcement allows competition authorities not to investigate cases where the costs of the investigation exceed the benefits of doing so. As mentioned above, another reason in favor of antitrust enforcement prioritization is that competition authorities have limited resources to spend. Additionally, given that most complaints are brought by competitors affected by exclusionary practices, if competition authorities would be required to pursue all the filed complaints, this would result in competition authorities only investigating this type of practices, given that all the resources would be spent on pursuing these complaints, thus, leaving insufficient resources to pursue other types of infringements. Another justification for enforcement prioritization is that it may be possible to achieve the

[196] ICN, *Agency Effectiveness Project*, Kyoto, Japan, 2008.
[197] For example in Turkey.
[198] In Ireland, see the Irish Competition Authority *Project Selection and Prioritization Principles*, 2011 (http://www.tca.ie/images/uploaded/documents/Prioritisation%20booklet.pdf); and in the UK, see the OFT *Competition Prioritisation Framework,* 2006 (http://www.oft.gov.uk/shared_oft/press_release_attachments/compcriteria.pdf).
[199] Such is the case of Spain.

same level of deterrence that the one obtained by pursuing all potential infringements at a lower cost by pursuing fewer infringements but punishing these more severely. Finally, prioritization may also be desirable in cases where other enforcers are better placed to handle the case.

On the other hand, however, there are also risks in relation to the enforcement prioritization of the competition law provisions. For example, there is the risk that competition authorities abuse their discretion and pursue cases on the basis of criteria unrelated to either optimal antitrust enforcement or efficient resource allocation. Furthermore, prioritization may cause competition authorities to focus on big cases in big markets, thus, leaving behind smaller cases that may be equally or more important. Announced prioritization on specific sectors or anticompetitive practices may allow the infringers in the sectors concerned to prepare themselves and conceal the evidence related to the infringement. Additionally, market participants in other sectors may take advantage of the fact that the authority is focused on other sectors. Finally, the prioritization process itself may consume substantial resources, and as a consequence, diminish the enforcement capacity of competition authorities[200].

3. Investigation Process

Irrespective of the way in which the actuation of the competition authority has been initiated, once the latter has become aware of a potential infringement of competition law, it will usually open an investigation with the purpose of determining if a certain practice is contrary to the competition provisions. In most jurisdictions, the investigation process has been divided in two phases, hence, in the first one; the competition authority will conduct a preliminary investigation in order to determine if according to the information collected so far there are good reasons to believe that the competition provisions have been infringed. In the second phase, the competition authority will open an in-depth investigation, which unlike the preceding; it is normally a formal proceeding. The opening of the in-depth investigation is usually done through the issuing of a resolution which will be notified to the concerned undertakings[201], or by publishing the resolution in an official way[202]. The purpose of notifying the decision of the competition authority to open a formal investigation is to allow the concerned parties the opportunity to intervene in the proceedings and to try to convince the competition authority that the challenged practices are not contrary to competition law[203].

One fundamental issue about the opening of an investigation is the ability of competition authorities to decline the prosecution of a determined potential infringement. This ability is concerned with the economization of the resources of the competition authorities. Given that all competition authorities have limited resources to prosecute every potential infringement of the competition law

[200] WILS, Wouter P.J. (2011), 'Discretion and Prioritisation in Public Antitrust Enforcement, in particular EU antitrust enforcement', *World Competition*, Volume 34, No. 3.
[201] In Italy, according to Section 14 of the Competition Act, the Authority has to notify the undertakings concerned of the opening of an investigation. In Zambia, the Competition and Consumer Protection Commission will notify the concerned undertaking the opening of an investigation (Section 55(3) of the Competition and Consumer Protection Act).
[202] In Mexico, according to Article 30 of the Federal Law on Economic Competition, the Executive Secretary of the Federal Competition Commission will open the investigation by issuing a resolution (*Acuerdo de Inicio*) which will be published in the *Diario Oficial de la Federación*.
[203] In Argentina, the competition authority grants the concerned parties a 10-day-period to submit their explanations regarding the conduct in question.

provisions, they are obliged to select the cases to be investigated. In this line, some competition authorities have issued prioritization guidelines which explain the principles that the competition authorities take into account when selecting a case for investigation[204].

4. Powers of Investigation

The competition law provisions are not self-enforced; accordingly, competition agencies must be given more than just a mandate to enforce the law efficiently[205]. Thus, the enforcement authorities normally require specific powers and attributions to apply the antitrust mandates with vigor and efficiency. The public enforcement of the competition provisions is a hard endeavor most of the times. The secretive nature and harmful characteristics of most anticompetitive practices increase the difficulties that competition authorities face when pursuing possible breaches of competition law. The fact that the individuals involved in anticompetitive practices resort to highly sophisticated measures to ensure that no evidence is left behind to be discovered by the competition authorities makes the enforcement of the competition rules more challenging. Thus, in practice, the participants in anticompetitive conducts take elaborate measures to try to conceal their unlawful activities, such as: to prepare false bids with the purpose of leaving an impression of genuine competition; to use codes for company names; to use codes to cover the identity of individuals; or to use secured emails and SMS messages and encrypt telephone communications, among others[206]. As a way to ease the effective enforcement of the antitrust rules, most legislators have vested competition authorities with specific powers of investigation in order to assist them to effectively detect and punish as many anticompetitive practices as possible, given that insufficient investigative powers for the enforcement authorities may frustrate enforcement[207].

Depending on the legal system and on the sanctions imposed for the violation of the competition law provisions, these investigation powers may be more or less intrusive, for instance, in jurisdictions where criminal provisions and sanctions have been established for the breach of the competition rules, the legislators have granted the competition authorities more intrusive powers of investigation, e.g. intrusive surveillance or property interference. Despite the nature of the powers of investigation, the main purpose of these is to allow the competition authorities to retrieve all necessary information to be able to determine that a competition law infringement has occurred and to impose a sanction for such infringement in order to effectively comply with the enforcement objectives of competition law. In practice, however, the battle between perpetrators and enforcers is continuous, provided that the more intrusive the powers of investigation become, the perpetrators turn to more extreme measures to try to conceal any incriminating information that can be used by the competition authority to prosecute them for the infringement of the antitrust provisions.

From a global perspective, the powers conferred to competition authorities vary from jurisdiction to jurisdiction; however, there are vast similarities between most competition systems. Nonetheless, despite the differences and similarities, all competition regimes should try to provide

[204] In the UK, see the OFT *Prioritisation Principles,* 2008.
[205] STIGLER (1970), p. 531.
[206] See, the Commission Decision of 24 January 2007 (Case COMP/F/38.899), at paras 170 – 176.
[207] CHADWELL, John T. (1955), 'Antitrust Administration and Enforcement'. 53 *Michigan Law Review*, p. 1133.

competition agencies with effective investigative techniques, provided that these are essential for the success of any competition law procedure[208]. Accordingly, in practice, when conducting investigations related to the infringement of competition law, most competition regimes allow competition authorities to: request relevant information; carry out interviews with individuals to receive testimony; enter and search certain premises; among others.

4.1. Power to Request Information

The most common power of investigation that has been vested on competition authorities around the world is the ability to request certain information which may contain relevant documentation or facts concerned with an investigation for the alleged infringement of the competition provisions. The main objective of this power of investigation is to acquire any kind of information which has a bearing on the investigation in course. Depending on the jurisdiction, the exercise of this power of investigation varies with regard to the form on which the competition authorities require the information in question; the individuals subject to being requested; and the type of information that can be required.

As to the form of the request for information, most jurisdictions have established the obligation of the competition authorities to make such a request in writing[209]. However, depending on the jurisdiction, there are other forms on which the competition authorities may require certain information in the course of an investigation. For instance, in some competition regimes, the competition authorities will be empowered to require the desired information through a simple request[210], or alternatively, through a formal decision issued by the relevant competition authority[211]. Similarly in other regimes, the competition authorities will be entitled to make voluntary requests for information, in such cases the requested parties are not obliged to provide the requested information[212], however, in the same jurisdictions, when the competition authorities deem that a voluntary request is not adequate for the case, the latter will be empowered to compel the production of the requested information and documents through other means[213].

With regard to the spectrum of individuals that can be requested by the competition authorities, this power of investigation can be exercised against a variety of individuals and even institutions. For

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[208] LOWE (2008), p. 8.

[209] In Sri Lanka, pursuant to Section 57(1) of the Consumer Affairs Authority Act, a requirement for documentation made in the course of an investigation shall be made by notice in writing.

[210] In the EU, according to Article 18(2) of Regulation 1/2003, the Commission is entitled to send a simple request for information to an undertaking or association of undertakings.

[211] In the EU, the Commission, pursuant to Article 18(3) of Regulation 1/2003, is empowered to require undertakings and associations of undertakings to supply information by a decision issued for this cause. The difference between a simple request and a request by decision is that failure to comply by a request by decision or supplying incorrect, incomplete or misleading information can subject the company concerned to a fine, plus the imposition of a periodic penalty on the company in order to compel the company to comply with the request, while the failure to comply with a simple request is sanctioned just with the imposition of a fine (Article 23 and 24 of Regulation 1/2003).

[212] In the US, both the Federal Trade Commission and the Antitrust Division of the US Department of Justice are entitled to make voluntary requests for information and documents to the potential subjects of an investigation, other companies in the industry, customers, trade associations, and other sources. The advantage of this kind of request is the informality of such petition, the avoidance of the adversarial tone of the use of compulsory process, and the speedy collection of information.

[213] In the US, both the FTC and the Antitrust Division are empowered, in civil procedures, to require certain information or documentation through the issue of Civil Investigative Demands (CIDs). In case of failure to comply with the request, the competition authority will be allowed to obtain a court order to compel the recipient to comply (Section 5 of the Antitrust Civil Process Act).

instance, in most countries where this possibility is available, such a request can be made to any natural or legal person[214]. Nevertheless, in some jurisdictions, the scope of this attribution has been narrowed and may include: only natural or legal persons concerned with the investigation, i.e. complainants and concerned undertakings[215]; third parties[216]; representatives and employees[217]; consumers associations[218]; undertakings and associations of undertakings[219]; undertakings with market power[220]; state agencies[221]; local governments[222]; non-governmental organizations[223]; and public institutions[224], such as: national statistical institute[225].

In relation to the kind of information which may be required, again, some regimes have broad provisions allowing the authority to obtain all relevant information to the investigation[226]. Alternatively, some jurisdictions have empowered the relevant authority to require only specific documents or information[227]. Despite the aforementioned, according to the competition provisions of some jurisdictions, the competition authorities may be allowed to request, *inter alia*: any information[228] (digital[229], material[230], oral[231], written[232], economic[233], business[234]); data[235]; personal data[236]; electronic

[214] In Argentina, see Article 24(a) of the Law for Defense of Competition. In Australia, see Section 155 of the Competition and Consumer Act. In Bulgaria, see Article 46 of the Law on Protection of Competition. In Canada, see Section 11(1)(b) of the Competition Act. In Croatia, see Article 41(1)(1) of the Competition Act. In Denmark, see Section 17 of the Competition Act. In Estonia, see Section 57(1) of the Competition Act. In India, see Section 36(4) of the Competition Act. In Latvia, see Section 9(5)(1) of the Competition Law. In Russia, see Article 25 of the Federal Law on Protection of Competition. In Singapore, see Section 63(1) of the Competition Act. In the UK, see Section 26 of the Competition Act, and Section 193 of the Enterprise Act.

[215] In Albania, see Article 33 of the Competition Act. In Croatia, see Article 41(1)(1) of the Competition Act. In Kenya, see Section 31(3)(b) of the Competition Act. In Latvia, see Section 9(5)(2) of the Competition Law. In Mexico, see Article 31 of the Federal Law on Economic Competition. In Switzerland, see Article 40 of the Cartels and Other Restraints of Competition Act. In Taiwan, see Article 27 of the Competition Act.

[216] In Albania, see Article 33 of the Competition Act. In Switzerland, see Article 42 of the Cartels and Other Restraints of Competition Act.

[217] In Korea, see Article 50(1)(3) of the Monopoly Regulation and Fair Trade Act.

[218] In Argentina, see Article 24(a) of the Law for Defense of Competition. In Croatia, see Article 41(1)(1) of the Competition Act.

[219] In Belgium, see Article 44 §2 of the Belgian Act on the Protection of Economic Competition. In Bulgaria, see Article 46 of the Law on Protection of Competition. In Croatia, see Article 41(1)(1) of the Competition Act. In the EU, see Article 18 of Regulation 1/2003. In Finland, see Section 33(1) of the Competition Act. In Germany, see Section 59(1)(1) of the Act Against Restraints of Competition. In Korea, see Article 50(1)(3) of the Monopoly Regulation and Fair Trade Act. In Taiwan, see Article 27 of the Competition Act.

[220] In Switzerland, see Article 40 of the Federal Act on Cartels and other Restraints of Competition.

[221] In Bulgaria, see Article 46 of the Law on Protection of Competition. In Estonia, see Section 57(1) of the Competition Act. In Russia, see Article 25 of the Federal Law on Protection of Competition. In Taiwan, see Article 27 of the Competition Act.

[222] In Argentina, see Article 24(a) of the Law for Defense of Competition. In Bulgaria, see Article 46 of the Law on Protection of Competition. In Croatia, see Article 41(1)(1) of the Competition Act. In Estonia, see Section 57(1) of the Competition Act. In Russia, see Article 25 of the Federal Law on Protection of Competition.

[223] In Bulgaria, see Article 46 of the Law on Protection of Competition.

[224] In Argentina, see Article 24(a) of the Law for Defense of Competition. In Albania, see Article 34 of the Competition Act. In Croatia, see Article 41(1)(1) of the Competition Act.

[225] In Bulgaria, see Article 46 of the Law on Protection of Competition.

[226] In Bulgaria, Article 45(1) of the Law on Protection of Competition allows the Competition Commission to request all relevant information. In Croatia, see Article 41(1)(1) of the Competition Act. In Denmark, according to Section 17 of the Competition Act, the Competition Council may require all relevant information. In Egypt, according to Article 11(3) of the Law on the Protection of Competition and the Prohibition of Monopolistic Practices, the Authority for the Protection of Competition and the Prohibition of Monopolistic Practices is allowed to require all data, papers, or documents necessary for the exercise of its competences. In Estonia, see Section 57(1) of the Competition Act. In Finland, see Section 33(1) of the Competition Act. In Germany, pursuant to Section 57(1) of the Act Against Restraints of Competition, the cartel authority may collect any evidence required. In Hungary, see Article 65 of the Competition Act. In India, see Section 36(4) of the Competition Act. In Italy, see Section 14(2) of the Competition and Fair Trading Act. In Kenya, see Section 31(3)(a) of the Competition Act.

[227] In Singapore, see Section 63(1) of the Competition Act. in the UK see Section 26 of the Competition Act.

[228] In Australia, see Section 155 of the Competition and Consumer Act.

[229] In Bulgaria, see Article 45(1) of the Law on Protection of Competition. In Russia, see Article 25(1) of the Federal Law on Protection of Competition.

[230] In Bulgaria, see Article 45(1) of the Law on Protection of Competition.

[231] In Russia, see Article 25(1) of the Federal Law on Protection of Competition.

[232] In Bulgaria, see Article 45(1) of the Law on Protection of Competition. In Russia, see Article 25(1) of the Federal Law on Protection of Competition.

[233] In Germany, see Section 59(1)(1) of the Act Against Restraints of Competition. In Macedonia, see Article 40(1) of the Law on the Protection of Competition.

[234] In Macedonia, see Article 40(1) of the Law on the Protection of Competition.

data[237]; accounting acts[238]; records[239]; certified copies of records[240]; documents[241]; evidence[242]; contracts[243]; financial statements[244]; books[245]; papers[246]; articles[247]; items[248]; and business correspondence[249].

Moreover, in some competition regimes, whenever a person is required by the competition authority to produce a determined document which is not under his custody, the latter will be under the obligation to state to the best of his knowledge and belief where the document may be found, also, to identify to the best of his knowledge and belief the last person who had custody of the document and to state where that person may be found[250].

There are some restrictions, however, with regard to the information provided at the request of the competition authorities. These are mainly concerned with the treatment of confidential information, such as: privileged information and trade secrets. In the case of privileged information, this refers to the communications between legal counselors and its clients which are protected by the professional secrecy privilege; accordingly, such information will be protected from disclosure when it contains confidential information supplied by a client to its legal counselor or legal advice supplied by the latter to its clients. As to the trade secrets, these constitute information which is not generally known or reasonably ascertainable, by the virtue of which an undertaking may obtain an economic advantage over its competitors, similarly to privileged information, the disclosure of trade secrets is protected to certain extents.

In practice, most competition regimes have provisions that allow competition authorities to require confidential information from the concerned parties in an investigation for the infringement of competition law. Despite the aforementioned, such information has a special treatment regarding to its production and its handling. As a general rule, most jurisdictions have provisions that protect confidential or sensitive information from being disclosed. For instance, when the competition authority has acquired confidential or sensitive information through leniency applications, merger notifications, prior notifications of potentially anticompetitive agreements, or complaints, it is reluctant to share such information with other interested parties in the procedure, provided that the sharing of confidential or

[235] In Egypt, see Article 11(3) of the Law on Protection of Competition and the Prohibition of Monopolistic Practices.
[236] In Hungary, see Article 65(2) of the Competition Act.
[237] In Bulgaria, see Article 45(1) of the Law on Protection of Competition. In Denmark, see Section 17 of the Competition Act. In Hungary, see Article 65 of the Competition Act. In Russia, see Article 25(1) of the Federal Law on Protection of Competition.
[238] In Russia, see Article 25(1) of the Federal Law on Protection of Competition.
[239] In Canada, see Section 11(1)(b) of the Competition Law.
[240] In Canada, see Section 11(1)(b) of the Competition Law.
[241] In Argentina, see Article 24(a) of the Law for Defense of Competition. In Australia, see Section 155 of the Competition and Consumer Act. In Egypt, see Article 11(3) of the Law on Protection of Competition and the Prohibition of Monopolistic Practices. In Germany, see Section 59(1)(1) of the Act Against Restraints of Competition. In India, see Section 36(4) of the Competition Act. In Kenya, see Section 31(3)(b) of the Competition Act. In Russia, see Article 25(1) of the Federal Law on Protection of Competition.
[242] In Australia, see Section 155 of the Competition and Consumer Act.
[243] In Russia, see Article 25(1) of the Federal Law on Protection of Competition.
[244] In Denmark, see Section 17 of the Competition Act.
[245] In Denmark, see Section 17 of the Competition Act. In India, see Section 36(4) of the Competition Act.
[246] In Egypt, see Article 11(3) of the Law on Protection of Competition and the Prohibition of Monopolistic Practices.
[247] In Kenya, see Section 31(3)(b) of the Competition Act.
[248] In Korea, see Article 50(1)(3) of the Monopoly Regulation and Fair Trade.
[249] In Russia, see Article 25(1) of the Federal Law on Protection of Competition.
[250] In Malaysia, see Section 18(2) of the Competition Act.

sensitive information may harm the interests of the person who provided the information to the competition authority.

With regard to the production of privileged information and trade secrets at the request of the relevant competition authority while carrying out an investigation concerned with the possible infringement of the competition law provisions, the production and handling of that information can be different in some competition law regimes.

In the case of privileged information, the main purpose of this legal principle is the protection of the confidentiality of the communications between a legal counselor and its client in order to provide the latter a fair access to the judicial system and to protect him from the disclosure of any sensitive information that may harm his interests. Accordingly, as a general rule, most competition authorities are not empowered to request privileged information from the concerned parties in an investigation[251]. Nevertheless, there are some procedures that have to be fulfilled in order to declare that certain information shall be protected by the professional secrecy privilege. For instance, in some competition regimes, the requested party has to make an application before the relevant court with the purpose of obtaining a declaration establishing that such information contains legal advice between the requested party and its legal counselor, and consequently, should not be acquired by the competition authority[252]. Finally, there are other types of privileged information, like the confidential communications between a bank and its clients, in some countries, such communications are also exempted from disclosure at the request of the competition authority[253].

With regard to trade secrets, the production and treatment of such information vary from one jurisdiction to another. In principle, the disclosure of trade secrets is protected in order to preserve the interests of the requested party. However, unlike with privileged information, in some jurisdictions, the competition authority may be empowered to request information that contains trade secrets when conducting an investigation for the infringement of competition law[254]. Alternatively, in other competition regimes, the production of such information is protected, and consequently, the requested party cannot be

[251] In Canada, pursuant to Section 19(7) of the Competition Act, a person cannot examine, copy, or seize any record without affording the concerned person a reasonable opportunity to file a claim of solicitor-client privilege. In Croatia, according to Article 45 of the Competition Act, any letters, notices and other communications between the undertaking and its lawyers shall be excluded from surprise inspections to the extent they constitute confidential or privileged information. In Finland, according to Section 38(3) of the Competition Act, an undertaking is not obliged to deliver to the Finnish Competition Authority documents which contain confidential correspondence between an outside legal consultant and the client. In Singapore, pursuant to Section 66(3) of the Competition Act, a professional legal adviser is not under the obligation of disclosing privileged communications between him and his clients. In Malaysia, according to Section 22 of the Competition Act, no person shall be required to produce or disclose any communication between a professional legal adviser and his client. In Mauritius, Section 54 of the Competition Act establishes that no person shall be required to disclose or produce information or a document that the person would in an action in a court be entitled to refuse to disclose or produce on the grounds of legal professional privilege. In the UK, according to Section 196 of the Enterprise Act, a person may not be required to disclose any information or produce any document which he would be entitled to refuse to disclose or produce on grounds of legal professional privilege, similarly, Section 30 of the Competition Act establishes that a person cannot be required to produce or disclose a privileged communication.

[252] In Canada, whenever a person is requested to submit certain information that may contain confidential communications between a legal counselor and its client, the requested person shall place such information in a sealed package referred to an officer of a superior or county court, or of the Federal Court; a sheriff; or some person agreed between the Commissioner and the person who makes the claim of privilege. Once the documents have been received by the competent judge, the latter shall determine if the information contains confidential communications between the requested person and its legal counselor or not (Section 19 of the Canadian Competition Act).

[253] In the UK, according to Section 196 of the Enterprise Act, a person cannot be required to disclose any information or produce any document in respect of which he owes an obligation of confidence by virtue of carrying on any banking business.

[254] In Russia, according to Article 25 of the Federal Law of the Russian Federation on Protection of Competition, a person who has been requested to submit information relevant to subject matter of an investigation carried out by the antimonopoly body is required to provide any legally protected secrets.

obliged to submit it under the petition of the competition authority[255]. Just like with privileged information, there are some procedures concerned with the declaration of the confidentiality of documents that contain trade secrets. For instance, in some jurisdictions, whenever a person is required by the competition authority to submit information that according to him contains trade secrets, the latter has to file an application to obtain a declaration of the confidentiality of such information provided that it contains sensitive information that may harm his competitiveness. Depending on which jurisdiction, the application for the declaration of confidentiality will have to be filed to the competition authority[256], or alternatively, before the competent court[257]. Moreover, in some jurisdictions, besides the application for the declaration of confidentiality, the requested parties may be under the obligation of submitting to the competition authority a copy of the documents which does not contain trade secrets, the failure to provide this copy will lead to the assumption that the document submitted does not contain any trade secrets[258]. Finally, with regard to the treatment of confidential information that contains trade secrets; most competition regimes have provisions that establish the obligation of competition authorities and their officials to keep and not to disclose any confidential information irrespective of the way in which it has been acquired by the competition authority[259], nevertheless, in some competition regimes, the competition authority may be empowered to disclose confidential information under some circumstances[260].

Another issue with the power of the competition authority to require information while conducting an investigation for the infringement of competition law is the one related to the production of self-incriminatory information. Self-incrimination is accusing oneself of an unlawful conduct for which a person can then be prosecuted; such act can be done by producing information of a self-incriminatory nature or by making statements or answering questions while testifying. In practice, most competition regimes that have provisions on this matter have restricted its scope of application to testimonies[261]. Accordingly, the privilege against self-incrimination will protect the requested party from making statements or answering questions that might incriminate him. Oppositely, such privilege will not excuse

[255] In Hungary, according to Article 47(1) of the Law on Protection of Competition, when the Competition Commission has requested information from a person, this may not refer to any production, trade or other secret protected by law.
[256] In Mexico, pursuant to Article 31 bis of the Federal Law on Economic Competition, whenever a person is required to submit to the Federal Competition Commission documents that contain confidential information, such as trade secrets, the requested person shall file a petition for the declaration of confidentiality to the Commission, the latter will examine the information submitted and will determine if it contains sensitive information that if disclosed may harm the competitiveness of the requested party.
[257] In South Africa, according to Section 44 of the Competition Act, a person requested to submit to the Competition Commission or the Competition Tribunal may identify certain information as confidential (pursuant to Section 1(1)(v) of the Act, *confidential information* means trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or know by others). The Competition Commission is bound by such a claim of confidentiality; however, the Commission may challenge the claim before the Competition Tribunal.
[258] In Croatia, according to Article 44 of the Competition Act, when the Competition Agency has requested information which contains business secrets, the requested person can state in the writing presented with the documentation that certain information should be considered confidential and provide the necessary argumentation. Moreover, the requested person is under the obligation to provide for a copy of the documentation submitted to the Agency that does not contain business secrets, the failure to do so will lead to the assumption that the documents do not contain confidential information. In Kosovo, according to Article 38(6) if a party required to provide information which contains trade secrets to the Competition Authority does not provide the Authority a copy which does not contain trade secrets, it will be assumed that the information submitted does not contain trade secrets.
[259] In China, see Article 41 of the Anti-monopoly Law. In Croatia, see Article 53 of the Competition Act. In Kenya, see Section 20 of the Competition Act. In Mexico, see Article 31 bis of the Federal Law on Economic Competition.
[260] In Russia, pursuant to Article 25 of the Federal Law of the Russian Federation on Protection of Competition, the antimonopoly body shall not disclose legally protected secrets except in cases established in the Federal Laws.
[261] At the EU level, the ECJ has determined the scope of the privilege against self-incrimination in EU competition law proceedings in the *Orkem v. Commission* case. In this case, the ECJ determined that the privilege against self-incrimination shall be restricted to the possibility of a person to refuse to answer questions that might constitute an admission of an infringement of the EU competition provisions. In that sense, a person shall not be allowed to refuse to produce documents that may evidence the existence of an infringement on the grounds of the privilege against self-incrimination (Case 374/87 *Orkem v. Commission* [1989] ECR 3283).

a requested party from producing any information that might have an incriminating nature when requested by the competition authority[262].

4.2. Power to Take Statements or Testimonies

Another power of investigation vested on most competition authorities is the faculty to summon certain individuals to submit a declaration over certain facts or evidence concerned with an investigation for the infringement of the competition provisions. The main objective of this power of investigation is to acquire any relevant information concerned with the investigation in course, by requiring certain persons related to the alleged infringement of the competition provisions to appear before the competition authority and give a declaration concerning any fact, document or information which is related to the subject matter of the investigation.

In practice, there are certain differences between jurisdictions which are concerned with the exercise of this power of investigation, these are mainly related to: the variety of individuals who may be required to appear before the competition authorities; the subject matter of the declaration; and the form in which the declarations will be taken.

With regard to the spectrum of individuals who can be required to appear before the competition authorities in the course of an investigation to testify, this varies from one jurisdiction to another. Thus, in the competition regimes with the broadest provisions the competition authority will be entitled to call any person who it believes has relevant information concerned with the investigation[263]. Alternatively, in other competition regimes, this possibility has been narrowed, accordingly, in most of these regimes, the competition authorities will be allowed to summon: the persons related to the investigation[264]; the complainants and the allegedly responsible for the antitrust infringement[265]; the managers or any other members of the investigated undertakings[266]; interested third parties[267]; experts[268]; witnesses[269]; the officials of public agencies[270]; or the officials of local governments[271].

The subject matter of the testimonies requested by the competition authority while conducting an investigation for the infringement of the competition provisions may differ depending on the jurisdiction

[262] In the Fiji Islands, Section 119 of the Commerce Commission Decree establishes that a person shall not be entitled to refuse or fail to furnish information or records or a copy thereof on the ground only that the information, or records or copy thereof would tend to incriminate him. In Hungary, pursuant to Article 65 of the Competition Act, a party shall not be obliged to make statements admitting as infringement of the Act; however, he may not refuse to supply incriminating evidence. In Singapore, according to Section 66(1) of the Competition Act, a person is not excused from providing any information required by the Competition Commission on the ground that the disclosure of such information might tend to incriminate him.

[263] In Pakistan, according to Section 33 the Commission is allowed to summon and enforcing the attendance of any witness. In South Africa, the Commissioner may summon any person believed to be able to furnish any information on the subject of the investigation (Section 49A(1) of the Competition Act). In the US, the Attorney General or the Assistant Attorney General in charge of the Antitrust Division are entitled to issue a Civil Investigative Demand requiring any person who may have any information related to a civil antitrust investigation, to give oral testimony concerning documentary materials or information (Antitrust Civil Process Act 15 U.S.C. § 1312(a)).

[264] In El Salvador, see Article 44 of the Competition Law.

[265] In Panama, see Article 99 of Law N° 45 on the Protection of Consumers and Defense of Competition.

[266] In Chile, see Article 39 of the Antitrust Act.

[267] In Korea, see Article 50 of the Monopoly Regulation and Fair Trade Act.

[268] *Idem*

[269] In Jamaica, see Section 52 of the Competition Act. In Sri Lanka, see Section 35(2) of the Consumer Affairs Authority Act.

[270] In Moldova, see Article 14 of the Law on the Protection of Competition.

[271] In Estonia, see Section 58 of the Competition Act.

in question. In Practice, however, most competition regimes have established broad provisions in order to allow the competition authorities to interrogate the required individuals about any fact, document, information or agreement that is somehow related to the investigation in course[272].

In addition, another feature related this power of investigation that varies from one country to another is the one related to the form of the declarations submitted to the competition authorities while investigating an alleged infringement of the competition provisions. Traditionally, in most competition regimes, the declarations submitted to the competition authorities are made through oral testimonies concerned with certain facts, documents or information which are relevant for the investigation in course. Alternatively, in other jurisdictions, the declaration presented by the requested parties to the competition authorities in the course of an investigation will be either made by answering written interrogatories, or by giving oral testimonies[273]. Finally, in most competition regimes where this power of investigation is available, the testimonies submitted by the requested parties will be given under oath[274].

Finally, regarding the faculty of competition authorities to obtain a declaration from the individuals related to the alleged infringement of the competition provisions, some competition regimes have established a restriction to this investigative power. As stated before, in some jurisdictions the power to require relevant information in an investigation by the competition authority does not entail the production of self-incriminatory evidence. In practice, in the majority of jurisdictions where this restriction has been established, such limitation is only applicable to oral testimonies. Thus, in most of these jurisdictions whenever a party is requested to provide the competition authority with certain documents, the former will not be excused from doing so on the grounds that the requested documents may tend to incriminate him. Conversely, whenever a requested party is required to give oral testimony on certain facts or documents related to the investigation, the testifying party will be allowed to refuse to make any statement that will incriminate him[275]. Nevertheless, in some competition regimes whenever a party is requested to testify or produce certain evidence, the latter cannot refuse to answer any question or provide any document by arguing that such a testimony or evidence may have an incriminatory nature, nonetheless, in such jurisdictions, the testimony given by an individual at the request of the competition authority cannot be used against that individual in any criminal proceedings instituted against him[276].

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[272] For instance, in Mauritius according to Section 52 of the Competition Act, the Executive Director may order any person to attend, at a specified time and place, for the purpose of being examined orally in relation to any matter.

[273] In Bosnia and Herzegovina, according to Article 35 of the Competition Act, the parties to the proceedings and other legal and natural persons are obliged upon the request of the Council of Competition or official person: to provide all necessary information in the form of written submissions or oral statements. In Chile, the *Fiscalía Nacional Económica* may call to declare or to submit written declaration any representative, manager, and staff member of any natural or legal person who may have relevant information for the investigation (Article 39(j) of the Antitrust Act). In the US, the persons conducting a civil investigation are allowed to require the concerned individuals to answer written interrogatories and to give oral testimonies (15 U.S.C. § 1312(a)).

[274] In Jamaica, the Fair Trading Commission is empowered to summon and examine witnesses, and to administer oaths (Section 7 of the Fair Competition Act). In Pakistan, according to Section 33 of Act No. XIX of 2010, when the Competition Commission is examining a witness in the course of an investigation, the former shall do so under oath. In Sri Lanka, pursuant to Section 36(2) of the Consumer Affairs Authority Act, the Authority is empowered to administer oaths when taking the testimony of a requested party.

[275] In the US, a person compelled to appear under a demand for oral testimony may refuse to answer any question on grounds of the privilege against self-incrimination (15 U.S.C. § 1312(i)(7)(A)).

[276] In Canada, according to Section 11(3) of the Competition Act, no person shall be excused from complying with an order to appear before the Commissioner to be examined or to produce any record on the ground that the testimony or record required may tend to criminate the person or subject him to any proceedings or penalty. However, no testimony given shall be used against the individual in any criminal proceedings other than a prosecution under section 132 (Perjury) or 136 (Giving contradictory evidence) of the Criminal Code.

4.3. Power to Enter and Search Premises

Another power of investigation that most competition authorities have is the possibility to enter and search certain premises while conducting an investigation for the infringement of competition law. This is one the most intrusive powers that competition authorities have, however, given to the secretive nature of most anticompetitive practices, especially hard-core cartels, competition authorities require such powers in order to acquire the necessary information for the detection and punishment of the most harmful anticompetitive conducts. In that sense, some competition regimes have restricted the ability of competition authorities to enter and search certain premises to cases involving the investigation of hard-core cartels[277]. The investigative power to enter and search premises consists in a visit by the authorized officials of the competition authority, or other individuals properly authorized, to the business premises, means of transportation, or residential premises, of an investigated undertaking or its directors, managers and other staff, with the purpose of gathering all relevant documentation and information concerned with the alleged infringement of the competition law provisions. In practice, this power of investigation is carried out by the authorized officials of the competition authorities[278], however, depending on the jurisdiction, it can be also be performed by: police officers[279], officials of other institutions[280], or any other person appointed by the relevant authority[281].

The characteristics of this power make it especially suitable for retrieving relevant documentation and information that is concealed in the business premises of an investigated undertaking or the private dwellings of the directors, managers or other staff members of the undertaking in question, which could not have been acquired by other means such as the formal request by the competition authority. One of the virtues or advantages that this investigative power has over the others granted to competition authorities is the element of surprise that the officers of competition authorities have when inspecting and searching the concerned premises with the purpose of retrieving relevant information. The fact that the inspection may be carried out without a previous notice allows the officers conducting the inspection to have access to any relevant information without giving the owners, directors, representatives, or any other employee of the investigated undertaking the chance to conceal, modify or destroy any incriminating information or documentation.

The exercise of this power of investigation varies depending on which jurisdiction. The main differences that can be evidenced when conducting an investigation are concerned with the: authorization

[277] In Chile, according to Article 39(n) of the Antitrust Act, the ability to enter and search certain premises in the course of an investigation is restricted to cases related to hard-core cartels.
[278] In the EU, according to Article 20 of Regulation 1/2003, the officials of the Commission and other accompanying persons are authorized to enter and search the concerned premises. In the UK, any officer of the Director General of Fair Trading is authorized to perform an inspection (Sections 27 and 28 of the Competition Act).
[279] In Poland, according to Article 91 of the Act on Competition and Consumer Protection, the inspection of residential and any other premises has to be carried out by the Police. In South Africa, pursuant to Section 46 of the Competition Act, the inspection can be performed by an inspector or a police officer.
[280] In the US, search warrants during an investigation for the infringement of the antitrust provisions are executed by agents of the Federal Bureau of Investigation (FBI) according to the *Antitrust Division Grand Jury Practice Manual* (III-186).
[281] In Canada, according to Section 15 of the Competition Act, the judge issuing a search warrant may authorize the Commissioner of any other person to execute the search warrant. In Germany, pursuant to Section 59 of the Act Against Restraints of Competition, any person entrusted by the Bundeskartellamt may enter and search the concerned premises.

required to perform an inspection; the types of premises that are subject to an inspection; and the powers that the officials of the competition authority have during the course of an inspection.

1. Authorization to Perform an Inspection

The first issue related to the conduction of an on-site inspection is concerned with the authorization required to conduct such an inspection. Given the intrusive nature of this power, most competition regimes require some formalities prior to its performance. The most important and first requirement to conduct an on-site inspection is the prior attainment of a proper authorization from the competent authority, in most cases courts. Thus, in practice, depending on the jurisdiction, the competition authority will first have to file an application to the competent court with the purpose of obtaining a judicial warrant allowing its officials to enter and search certain premises related to the investigation. Alternatively, in other competition regimes, the competition authority may be empowered to authorize its officials to conduct the inspection without a judicial order, in such cases; the authority will perform the inspection under its own discretion. Finally, in some jurisdictions, the competition authority will be allowed to enter and search certain premises if it is authorized to do so by the occupants of the premises in question.

(a) Inspections Carried Out with a Judicial Warrant

There are jurisdictions where the competition authority is not empowered to conduct an inspection under its own discretion. In those cases, the competition authority will be required to apply for a judicial warrant to the competent judge with the purpose of obtaining permission to carry out an inspection in the course of an investigation for the infringement of the completion law provisions. This requirement is mostly concerned with the protection of the fundamental rights of privacy and the inviolability of homes and documents. In that sense, the restriction of those fundamentals rights will have to be determined by an independent judge which is not related to the investigation of the alleged violation of competition law, who will determine the admissibility of the application by evaluating factors such as: if the measure is not arbitrary nor excessive; the gravity of the suspected infringement; the importance of the evidence sought for the resolution of the case; the involvement of the person who is subject to the inspection; or the likelihood of finding the searched evidence in the premises related to the inspection[282].

This requirement is not absolute in all competition regimes; therefore, there are some shades in the application of this requisite. For instance, in some jurisdictions, the search warrant will be required every time the competition authority is planning on conducting an inspection, irrespective of the types of premises planned to be inspected, the powers the officials of the competition authority have during the inspection, or any other factor. Oppositely, in other regimes, a judicial warrant will be required only when the competition authority is planning the on-site inspection of residential premises, such as the private dwellings of individuals related to the investigated undertakings. Similarly, in other regimes, the search warrant will be mandatory depending on the type of actions that the officials of the competition authority

[282] See, Section 65(5) of the Estonian Competition Act. See, Section 35 of the Finnish Competition Act.

are allowed to perform in the course of the on-site inspection. Finally, in some competition regimes, the competition authorities will be obliged to apply for a judicial warrant to carry out an inspection in the course of an investigation related to a criminal proceeding for the breach of competition law.

As stated before, in some competition regimes, a search warrant is always necessary to conduct an inspection during an investigation by the competition authority despite of the type of premises inspected or the powers of the officials conducting the inspection. In some jurisdictions, the absoluteness of this requirement may be concerned with the strong protection of fundamental rights of persons[283]. However, in other competition regimes, such a requirement is established by virtue of the fact that the competition authority is not a decision-making body. Thus, in those countries, where there is a strict separation of the enforcement functions, given that the competition authority is merely an investigative body; the latter will have to require prior authorization to perform an on-site inspection from the competent court[284].

(i) Warrant Depending on the Premises to be searched

The requisite of a prior judicial warrant to conduct an inspection during an investigation for the infringement of the competition law provisions may be concerned with the types of premises that the competition authority is planning to inspect. Accordingly, in some competition regimes, the competition authority will be allowed to enter and search business premises under its own discretion and without a previous judicial warrant allowing it to do so. On the contrary, in those same regimes, whenever the competition authority is planning on inspecting other premises, like residential buildings, the latter will be obliged to obtain a judicial warrant prior to performing the said inspection. This requirement is related to the private nature of residential premises, by requiring the authorization of an independent party, like a judge who is not related in any way to the investigation, the fundamental rights of individuals are protected from any abuse[285].

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[283] In Hungary, pursuant to Article 65/A of the Competition Act, the investigators of the Competition Authority are allowed to enter and search business and residential premises only upon the attainment in advance of a judicial authorization from the Municipal Court of Budapest. In Lithuania, the Competition Council is allowed to enter and search both business and residential premises, but only with the attainment in advance of a judicial warrant (Article 26(2) of the Law on Competition). In Norway, according to Section 25 of the Competition Act, the Competition Authority may demand access to any business premises, means of transportation, and homes, only when it has obtained a court authorization in advance.

[284] For instance in Ireland, where there is a strict separation of the enforcement functions; the Competition Authority is just an investigatory body that lacks competence to issue decisions while conducting an investigation. In that sense, Section 45 of the Competition Act establishes the obligation of the Competition Authority to obtain a judicial warrant prior to the performance of an inspection. In the US, the Antitrust Division of the Justice of Department, which is an investigative body is required to acquire a search warrant from the relevant court with the purpose of inspecting the concerned premises (Rule 41 of the Federal Rules of Criminal Procedure).

[285] In the EU, the Commission is allowed to enter and search, upon a decision issued under its own discretion, any business premises (Article 20 of Regulation 1/2003), moreover, the Commission is also empowered to enter and search residential premises, however, in order to do so, it will have to obtain a judicial warrant from the national court of the Member State on which it plans on conducting the inspection (Article 21 of Regulation 1/2003).In Finland, the Competition Authority is allowed to enter and search business premises, storage facilities, land, and means of transport under its own discretion (Section 35 of the Competition Act), however, the latter will have to obtain a judicial warrant from the Market Court to enter other premises, such as residential premises (Section 36 of the Act). In the EU, the Commission is allowed to enter and search, upon a decision issued under its own discretion, any business premises (Article 20 of Regulation 1/2003), moreover, the Commission is also empowered to enter and search residential premises, however, in order to do so, it will have to obtain a judicial warrant from the national court of the Member State on which it plans on conducting the inspection (Article 21 of Regulation 1/2003). In Israel, the Competition Authority is allowed to enter and search any business premises under its own discretion (Section 45 of the Restrictive Trade Practices Law), moreover, it is also allowed to enter and search residential premises upon a judicial warrant issued on advance by the competent judge (Section 45(a)(1) of the Law).

(ii) Warrant Depending on the Actions to be carried by the Officials of the Authority

In the same line, the requirement of a search warrant to perform an inspection by the competition authority can be associated with the types of actions that the officials of the competition authority are allowed to carry out during the inspection of the concerned premises. In those cases, the officials of the competition authority may perform certain actions while conducting an inspection without a judicial warrant, and conversely, when the competition authority has previously obtained a judicial warrant its officials will be empowered to perform more intrusive actions in the course of the on-site inspection. For instance, in some jurisdictions, when the competition authority conducts an inspection without a judicial warrant, the latter may only be allowed to make copies relevant documents, however, when the authority performs an inspection with a judicial warrant it may also be empowered to seize and seal any relevant document[286]. Similarly, in other competition regimes, when the competition authority conducts an investigation without a judicial warrant, it may not be allowed to search the persons occupying the inspected premises, conversely, when the inspection is carried out under the attainment of a judicial warrant, the authority will be entitled to search the occupants of the inspected premises to see if they have any relevant documents under their possession[287]. Moreover, in some jurisdictions where the competition authorities are allowed to perform inspections on business premises at their own discretion, those authorities will be empowered to request documents or explanations and to seize objects, however, upon the attainment of a judicial warrant, the competition authority will be permitted to conduct forcible searches, in those cases, the competition authorities will be empowered with more intrusive faculties, such as: prohibit person from moving without permission or from conversing with other individuals until the end of the inspection; obtain confidential information; or seize objects[288]. Finally, despite aforementioned, in some competition regimes, when acting without a judicial warrant, the competition authorities are expressly empowered to exercise the same investigation powers that are vested on them when performing an inspection upon a judicial warrant[289].

(iii) Warrant Depending on the Nature of the Proceedings

In some jurisdictions where criminal provisions and sanctions for the infringement of competition law have been established, the competition authorities may be required to apply for a judicial warrant allowing the officials of the authority to conduct an inspection which is related to a criminal proceeding. Depending on the jurisdiction, the competition authority may only be require to request a judicial warrant for inspections concerned with criminal proceedings, conversely, the competition authority may be free to order an inspection under its own behalf in proceedings that do not have a criminal nature nor seek the imposition of criminal sanctions[290]. This different treatment of the same power of investigation is due to

[286] In Luxembourg, see Articles 15 and 16 of the Competition Act.
[287] In Singapore, see Sections 64 and 65 of the Competition Act.
[288] In Latvia, see Section 9 of the Competition Law.
[289] In Malaysia, according to Section 26 of the Competition Act, when conducting an inspection without a judicial warrant, the Commission officer in charge of the inspection will be allowed to enter the premises and exercise all the powers as if he were authorized to do so by a judicial warrant.
[290] In the UK, in proceedings under the provisions of the Competition Act which seek the imposition of administrative penalties for the breach of competition law, the OFT is allowed to conduct inspections both under its own behalf and with the prior approval of the relevant court (Sections 27 and 28 of the Competition Act). However, in criminal proceedings under the provisions of the

the more serious nature of criminal proceedings and sanctions. In that sense, the exercise of this investigative power in criminal procedures is subject to strict safeguards aimed at protecting the rights of the investigated individuals.

(iv) Exceptions to the Request of a Judicial Warrant

Finally, in some competition regimes where a search warrant is required to conduct an inspection during an investigation for the violation of the competition provisions, such requisite can be waived if certain circumstances are met. For instance, in some jurisdictions, the competition authority may carry out an inspection without a judicial warrant, even if the attainment of which is mandatory, if the competition authority believes that there is imminent danger[291], or when there are circumstances in which the delay necessary to obtain a judicial warrant would result in the loss or destruction of evidence[292].

(b) Inspections carried out at the discretion of the authority

Despite the above, there are some competition regimes where the competition authority is empowered to carry out an on-site inspection without obtaining a prior judicial warrant from court. In these jurisdictions, the competition authorities have been granted significant powers of investigation, provided that they can act independently from any other institutions while conducting an investigation for the infringement of competition law. This degree of independence allows competition authorities to order and conduct an inspection on its own behalf. Nevertheless, in some of these competition regimes, the competition authorities can be required to conduct an inspection at the request of superior authorities[293].

The exercise of the investigative power to enter and search certain premises at their own discretion is intended to provide the competition authorities with the necessary investigation powers required to discover and punish most anticompetitive practices in an effective way. On the one hand, the fact that the competition authorities are not required to obtain in advance a judicial warrant from a determined court saves the authority time and resources that would have been spent on the acquisition of the said warrant. By relieving the authorities of this requirement, the latter will be allowed to act more effectively in detecting and punishing any possible infringements of competition law. However, on the other hand, the availability of such intrusive powers may restrict certain fundamental rights of the persons being inspected whenever those powers are exercised abusively, arbitrarily or excessively.

Enterprise Act, the OFT is allowed only to conduct inspections with the prior attainment of a judicial warrant (Section 194 of the Enterprise Act).

[291] In Germany, the Bundeskartellamt is obliged to obtain a judicial warrant prior to conduct an inspection (Section 59(4) of the Act Against Restraints of Competition), nevertheless, by virtue of the same Section, the Bundeskartellamt is empowered to perform the said inspection without a search warrant if it believes there is imminent danger.

[292] In Canada, according to Section 15(7) and (8) of the Competition Act, an inspection can be performed without a judicial warrant if by exigent circumstances it would not be practical to obtain a warrant. In Malaysia, Section 26 of the Competition Act empowers the persons in charge of an inspection to enter and search the concerned premises without a search warrant if by reason of delay in obtaining the warrant the investigation would be adversely affected or evidence of the commission of an infringement is likely to be tampered with, removed, damaged or destroyed.

[293] For instance, in Russia, the antimonopoly body is required to carry out an inspection under the instruction of the President of the Russian Federation and the Government of the Russian Federation (Article 25(1)(4)(4) of the Federal Law of the Russian Federation on Protection of Competition).

Depending on the jurisdiction, the types of premises that can be inspected by competition authorities at their own discretion may vary. For instance, in the most permissive jurisdictions, the competition authorities are empowered to carry out on-site inspections in both business and residential premises at their own discretion[294]. In jurisdictions where the power to enter and search premises is strictly limited to business premises, the ability of the competition authorities to carry out inspections on their own behalf will also be limited to business premises[295]. Additionally, in countries where this possibility is not limited to business premises, but the competition authorities lack competence to carry out an inspection in residential premises on their own behalf, the latter will necessarily be under the obligation to apply for a judicial warrant[296].

(c) Inspections carried out with the authorization of the occupants of the premises

Finally, in some countries the officials of the competition authority may be allowed to enter and search the concerned premises if they are authorized to do so by the occupants of those premises[297]. Usually, in those jurisdictions, the competition authorities are not empowered to conduct inspections at their own discretion; and consequently, the attainment of a previous judicial warrant is mandatory to enter and search the premises in question. Nevertheless, in the case that the officials of the competition authority are denied access by the occupants of the concerned premises, the competition authority will have the possibility to file a request to the competent court requesting a judicial warrant to carry out the desired inspection. If after the competition authority has obtained a judicial warrant the occupants still refuse to allow the officials of the competition authority to access and search the concerned premises, the authority may be assisted by police officers, who will be allowed to use the necessary force to permit the officials of the competition authority to enter and search the premises[298].

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[294] In Mexico, see Article 30 of the Federal Law on Economic Competition.

[295] In Kenya, only business premises are subject to be inspected, this inspection can be done at the discretion of the competition authority, without any judicial warrant (Section 32 of the Competition Act). In Korea, the Fair Trade Commission is allowed to enter and search, under its own discretion, only the business premises of the concerned undertakings (Article 50 of the Monopoly Regulation and Fair Trade Act). In Macedonia, the officials of the Competition Commission are allowed by a procedural order issued by the Commission to enter and search only the business premises, lands, or means of transportation of investigated undertakings (Article 41 of the Law on the Protection of Competition). In Russia, upon an order of the head of the antimonopoly body, the officers of the latter can carry out inspections in territories or premises of the undertakings investigated, the examination of the private dwellings of the inspected person are exempted from being examined (Article 25(3) of the Federal Law on the Russian Federation on Protection of Competition).

[296] In the EU, the Commission is allowed to enter and search, upon a decision issued under its own discretion, any business premises (Article 20 of Regulation 1/2003), moreover, the Commission is also empowered to enter and search residential premises, however, in order to do so, it will have to obtain a judicial warrant from the national court of the Member State on which it plans on conducting the inspection (Article 21 of Regulation 1/2003). In Israel, the Competition Authority is allowed to enter and search any business premises under its own discretion (Section 45 of the Restrictive Trade Practices Law), moreover, it is also allowed to enter and search residential premises upon a judicial warrant issued on advance by the competent judge (Section 45(a)(1) of the Law). In South Africa, according to Section 47 of the Competition Act, the inspectors not authorized by a warrant may enter and search premises other than a private dwelling.

[297] In Argentina, according to Article 24 of the Law for Defense of Competition, the Competition Tribunal may enter the premises with the consent of the occupants or with a judicial order. Similarly, in Spain, pursuant to Article 40 of the Law on the Defense of Competition, the officials of the National Commission of Competition are allowed to inspect business and residential premises with the authorization of their occupants or with a judicial warrant. In South Africa, whenever an inspector is planning to enter and search the business premises of an undertaking without a judicial warrant, such inspector will have to get the permission of the occupants of the premises (Section 47(2)(a) of the Competition Act).

[298] In Singapore, if upon a written notice, the officials of the Competition Commission are denied access to the premises subject to an inspection by their occupants (Section 64 of the Competition Act); the Commission may then apply for a judicial warrant in order to gain access to the said premises, such order allows officials to enter the premises using such force as is reasonably necessary (Section 65 of the Competition Act). Similarly, in the UK, see Sections 27 and 28 of the Competition Act.

2. Premises Subject to an Inspection

The second issue related to the performance of an inspection by the competition authority when investigating an alleged infringement of competition law is concerned with the types of premises that can be subject to an inspection. The kind of premises that can be inspected by the officials of the competition authorities during an investigation can be grouped in two categories: in the first one, there are the business premises, which are any buildings or premises which are concerned with the commercial activities of the investigated undertakings; and in the second one, there are the residential premises, which are the private dwellings of the persons employed by or related to the investigated undertakings.

(a) Business Premises

Traditionally, the main aim of an inspection in the course of an investigation for the infringement of competition law has been the business premises of the investigated undertakings given that the commercial activities that are related to the anticompetitive practices of the undertakings usually take place in such premises. Thus, as a general rule, most competition regimes have provisions that allow competition authorities to enter and search the business premises of the concerned undertakings while investigating the alleged infringement of the competition provisions.

Looking at the provisions that govern this investigative power, some first differences are evidenced across jurisdictions with regard to the places that shall be considered as business premises, and consequently, that shall be subject to the inspection. For instance, in the competition regimes with the broadest provisions the competition authorities are permitted to carry out inspections at any business premises[299], means of transportation[300], or even at any other location[301], as long as these places are used by the undertakings in connection with their commercial activities. In these cases, it will be up to the enforcers of the competition rules to determine which places should be considered as business premises according to the meaning of the law. Alternatively, other competition regimes have refined the scope of the competition provisions regulating this power of investigation by introducing non exhaustive lists of the places that should be considered by the competition law enforcers as business premises. Across jurisdictions, the most commonly used terms which make reference to the business premises are the following: land[302]; office[303]; building[304]; structure[305]; mean of transportation[306] (vehicles, ships, boats,

[299] In Denmark, see Section 18(1) of the Competition Act. In the EU, see Article 20 of Regulation 1/2003. In Germany, see Section 59 of the Act Against Restraints of Competition. In Israel, see Article 45 of the Restrictive Trade Practices Law. In Kenya, see Section 32 of the Competition Act. In Lithuania, see Article 26 of the Law on Competition. In Macedonia, see Article 41 of the Law on the Protection of Competition.
[300] In Denmark, see Section 18(1) of the Competition Act. In the EU, see Article 20 of Regulation 1/2003. In Lithuania, see Article 26 of the Law on Competition. In Macedonia, see Article 41 of the Law on the Protection of Competition.
[301] In Bulgaria, see Article 50(2)(1) of the Law on Protection of Competition.
[302] In Croatia, see Article 42 of the Competition Act. In South Africa, see Section (1)(1)(xix) of the Competition Act.
[303] In Belgium, see Article 44 §3(2°) of the Act on the Protection of Economic Competition.
[304] In South Africa, see Section (1)(1)(xix) of the Competition Act.
[305] In South Africa, see Section (1)(1)(xix) of the Competition Act.
[306] In Belgium, see Article 44 §3(2°) of the Act on the Protection of Economic Competition. In Bulgaria, see Article 50(2)(1) of the Law on Protection of Competition. In Croatia, see Article 42 of the Competition Act.

vessels, aircrafts)[307]; container[308]; storage facility[309]; site[310]; closed premise[311]; immovable and movable object[312]; territory[313]; or place of business[314]; among others.

Another difference that exists between jurisdictions with regard to the inspection of business premises in the course of an investigation by the competition authority is related to the extent of this power with regard to the business premises of undertakings that are not being investigated for the breach of the competition provisions. In competition regimes that have granted wide investigative powers to the competition authority, the latter will be empowered to inspect the business premises of any undertaking, irrespective of the fact that the undertaking in question is not a party in the proceedings and is not being investigated for the alleged infringement of the competition provisions[315]. Alternatively, in other competition regimes, the competition authorities are empowered to enter and search only the business premises of the undertakings that are concerned with the investigation[316], the business premises where a prohibited practice has taken place[317], or the business premises where relevant information related to the investigation is being kept[318].

(b) Residential Premises

Provided that not all relevant information concerned with an investigation conducted by the competition authority is always stored in the business premises of the investigated undertakings, some legislators have granted their competition authorities the faculty to carry out inspections in the residential premises of individuals that are related with the commercial activities of the undertakings under investigation. The term residential premise comprehends the homes or private dwellings of individuals connected with an investigation for the infringement of competition law, however, depending on the jurisdiction; it may also comprehend the private means of transportation used by these individuals[319].

In most countries, the constitutional right of inviolability of the home protects the private dwellings of the citizens from abusive inspections[320]. In that sense, most competition regimes that allow competition authorities to enter and search the residential premises of individuals connected with the investigation require that the exercise of this investigative power shall be subject to the prior attainment of a judicial warrant. Thus, in the competition regimes where the competition authorities have been granted the faculty to inspect the residential premises of certain individuals, the fundamental right of

[307] In South Africa, see Section (1)(1)(xix) of the Competition Act.
[308] In South Africa, see Section (1)(1)(xix) of the Competition Act.
[309] In Finland, see Section 35 of the Competition Act.
[310] In Hungary, see Article 65/A of the Competition Act.
[311] In Hungary, see Article 65/A of the Competition Act.
[312] In Latvia, see Section 9(4) of the Competition Law.
[313] In Russia, see Article 25(3) of the Federal Law on the Russian Federation on Protection of Competition.
[314] In Korea, see Article 50 of the Monopoly Regulation and Fair Trade Act.
[315] In the EU, see Article 20 of Regulation 1/2003. In Latvia, see Section 9 of the Competition Law. In Poland, see Article 91 of the Act on Competition and Consumer Protection.
[316] In Lithuania, see Article 26 of the Law on Competition.
[317] In South Africa, see Section 46 of the Competition Act.
[318] In Kenya, see Section 32 of the Competition Act. In Macedonia, see Article 41 of the Law on the Protection of Competition. In Norway, see Section 25 of the Competition Act. In the UK, see Sections 27 and 28 of the Competition Act. In Zambia, see Section 7 of the Competition and Consumer Protection Act.
[319] In Hungary, see Article 65/A of the Competition Act. In Singapore, see Section 2 of the Competition Act.
[320] In Germany, Article 13 of the Basic Law for the Federal Republic of Germany recognizes the inviolability of the home. Similarly, in the US, the Fourth Amendment of the US Constitution establishes the right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures.

inviolability of the home is restricted to the extent of the investigation[321]. Besides the requirement of a judicial warrant allowing the competition authority to conduct the inspection of residential premises, some competition regimes require that certain circumstances are met before allowing the competition authority to enter and search any private dwellings. For instance, in some countries, the inspection of residential premises in the course of an investigation by the competition authority will be permitted if there are reasonable grounds or suspicions that relevant evidence concerned with the investigation is being kept in the residential premises of the concerned individuals[322]. Similarly, in other competition regimes, the inspection of residential premises will be permitted if there are reasonable grounds for believing: that evidence that may prove a serious violation of the competition provisions are held in those premises[323]; that relevant information is stored in those premises and that such storage may affect the findings that are material to pending proceedings[324]; that there are documents that have not been produced upon the previous request of the competition authority in those premises[325]; that a prohibited practice has taken place, is taking place, or is likely to take place within those premises[326]; or that anything connected with an investigation is in the possession or control of an occupant of those premises[327].

With relation to the precise residential premises that competition authorities are permitted to enter and search, these also vary from one jurisdiction to another. In competition regimes that have opted for a broad approach, the competition authorities will be empowered to enter and search the residential premises of any individual irrespective of the fact that this has a direct relationship with an investigated undertaking[328]. Alternatively, in jurisdictions with provisions of a narrower scope, the competition authorities will be allowed to enter and search the residential premises of certain individuals, such as: directors, managers or any member of staff, which are related to the undertakings that are concerned with an investigation for the infringement of the competition provisions[329]; individuals connected to undertakings that are involved in commercial activities[330]; or individuals that used to have a relationship with the concerned undertakings, such as, former executives, or former employees[331].

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[321] In Germany, Section 59 of the Act Against Restraints of Competition, establishes that when searches made with a judicial warrant for the location of relevant documents, the fundamental right to the inviolability of the home (Article 13 of the Basic Law) is restricted to this extent. Similarly, in the USA, the *Antitrust Division Grand Jury Practice Manual* (III-178) establishes the legal standards that have to be met with relation to the requirements of the 4th Amendment of the US Constitution, before a valid search warrant can be issued.

[322] In Croatia, see Article 44 of Competition Act. In Lithuania, see Section 26 of the Competition Act.

[323] In Lithuania, see Section 26 of the Competition Act.

[324] In Poland, see Article 91 of the Act on Competition and Consumer Protection.

[325] In Singapore, see Section 65 of the Competition Act.

[326] In South Africa, see Section 46 of the Competition Act.

[327] *Idem*

[328] In South Africa, according to Section 46 of the Competition Act, the Authority is permitted to enter any premises as long as there are reasonable grounds to believe that a prohibited practice is taking, has taken or is likely to take place on those premises or if anything in connection with an investigation is being held in those premises.

[329] In the EU, Article 20 of Regulation 1/2003 allows the inspection of the business premises of any undertaking or association of undertakings; however, Article 21 of the Regulation only allows inspecting the residential premises of individuals related to undertakings or associations of undertakings that are concerned with the investigation.

[330] In Ireland, according to Section 45 of the Competition Act, the authorized officials of the Competition authority are allowed to enter and search the residential premises of individuals related to undertakings in connection with the business of supplying or distributing goods or providing a service, or in connection with the organization or assistance of persons engaged in any such business.

[331] In Hungary, according to Section 65/A of the Competition Act, the homes of former executive officials, employees or agents are subject to inspections during an investigation for the infringement of competition law.

(c) Other Places Subject to an Inspection

Besides business and residential premises, in some competition regimes, other places may be subject to an on-site inspection during an investigation conducted by the competition authorities. For instance, in some jurisdictions, whenever the information of an investigated undertaking is stored or processed by an external data processor, the competition authority will be entitled to enter and search the premises of those external data processors with the purpose of gaining access to any relevant information which is connected to the investigation[332], similarly, in other regimes, the officials of the competition authority will be entitled to inspect the premises of external natural or legal persons entrusted with commercial, accounting, administrative, fiscal or financial management responsibilities[333]. Moreover, in other jurisdictions, the competition authorities will be empowered to search any person who is on the premises subject to the inspections; provided that there are reasonable grounds for believing that such person has under its personal possession any article, equipment or document concerned with the subject matter of the inspection[334], additionally, in some jurisdictions, there are provisions that require that the subject to that inspection shall only be searched by an official of the same sex[335]. Finally, in other competition regimes, the competition authorities will be entitled to inspect the premises of public entities to see if the inspected institutions are complying with the competition law provisions when exercising their economic activities[336].

3. Timing of the Inspections

As to the timing to perform an on-site inspection in the course of an investigation for the infringement of the competition law provisions, the time period during which the officials of the competition authority can enter and search the concerned premises varies from one jurisdiction to another. Accordingly, in some competition regimes, the inspections will be allowed to be performed at any reasonable time[337]. Nevertheless, in most jurisdictions, the time period to conduct an inspection is restricted, in those cases, the officials of the competition authorities will be permitted to inspect the relevant premises either during the daytime, or during business hours[338]. Irrespective of whether the said inspection is carried out during

[332] In Denmark, see Section 18(2) of the Competition Act.
[333] In Belgium, see 44 §3(1°) of the Act on the Protection of Economic Competition.
[334] In Singapore, see Section 65(2)(ii) of the Competition Act. In South Africa, see Section 48(1)(c) of the Competition Act. In the US, see Rule 41 of the Federal Rules of Criminal Procedure. In Zambia, see Section 7(4)(b) of the Competition and Consumer Protection Act.
[335] In Malaysia, see Section 25 of the Competition Act. In South Africa, see Section 49(2) of the Competition Act. In Zambia, see Section 7(4)(b) of the Competition and Consumer Protection Act.
[336] In Moldova, according to Article 13 of the Law on the Protection of Competition, the National Agency for the Protection of Competition has the right to access the premises and territory of public administration authorities and economic entities. In Russia, pursuant to Article 25(1) of the Federal Law of the Russian Federation on Protection of Competition, an antimonopoly body to control compliance with the antimonopoly legislation is empowered to inspect, *inter alia*, federal executive bodies, the authorities of the constituent territories of the Russian Federation, local self-government bodies, and other agencies and organizations exercising the functions of the above bodies.
[337] In Malaysia, according to Section 25 of the Competition Act, the Commission officers may conduct an inspection at any reasonable time by day or night. Similarly in Zambia, see Section 7 of the Competition and Consumer Protection Act.
[338] In Barbados, the inspection can be made between the hours of 5 o'clock in the morning and 8 o'clock in the night (Section 27(2) of the Fair Trading Commission Act). In Belgium, according to Article 44 §3(1°) of the Act on the Protection of Economic Competition, the inspections can be performed between 8:00 and 18:00. In Canada, Section 15(3) of the Competition Act allows to execute a search warrant between six o'clock in the forenoon and nine o'clock in the afternoon. In Germany, Section 59 of the Act Against Restraints of Competition establishes that inspection shall be performed during normal business hours. In Mexico, pursuant to Article 31(II) of the Federal Law on Economic Competition, an inspection shall be performed in business days and during business hours. In South Africa, according to Section 46(4) of the Competition Act, a warrant to enter and search premises shall be

the daytime or business hours, the purpose of such a requirement is to assure that the owners, their representatives, or the occupants of the premises subject to the inspection are present during the search[339]. Despite the preceding, in some competition regimes, the inspection can be carried out without the presence of the concerned persons[340]. Irrespective of the fact that some competition regimes have established certain time periods during which the officials of the competition authorities will be allowed to perform an inspection, in some of these jurisdictions, such time periods can be altered by the authority empowered to grant authorization to perform the inspection[341].

Additionally, in relation to the timing for performing an inspection in the course of an investigation, as a general rule, most of these inspections are surprise and do not require a prior notification to the concerned party[342]. This characteristic makes surprise on-site inspection an effective means for gathering incriminating evidence concerned with an alleged infringement of the competition law provisions. Moreover, the performance of surprise inspections reduces the opportunity for document destruction and concealment, prevents the failure to produce responsive documents either deliberately or through inadvertence[343]. Nevertheless, there are some jurisdictions where the inspection of the concerned premises can be done with a prior notification to the owners or occupants of those premises[344]. Finally, in some competition regimes, the inspection can be scheduled or planned in advance, in those cases, the competition authorities will perform regular inspections every certain period of time in order to determine if the persons subject to those inspections are complying with the competition law provisions in the course of their economic activities[345].

executed only during the day. In the USA, an inspection shall be carried out during the daytime, which according to Rule 41(a)(2)(B) of the Federal Rules of Criminal Procedure is between 6:00 a.m. to 10:00 p.m.

[339] In Bulgaria, Article 52(1) of the Law on Protection of Competition requires that the inspections shall be conducted in the presence of representatives of the undertaking, any of its employees or any other person having the right to be present at the premises or found to be there at the time of the inspection.

[340] In Singapore, according to Section 65(10) of the Competition Act, the officials of the Competition Commission can enter the concerned premises even if there is no one at the time of the inspection, however, first they will have to take such steps as are reasonable to inform the occupier of the intended entry; and if the occupier is informed, afford him or his representative a reasonable opportunity to be present when the warrant is executed. In South Africa, if no one is at the premises which are subject to an inspection, the person executing the warrant is required to affix a copy of the warrant in a prominent and visible place (Section 46(6) of the Competition Act). In the UK, according to Section 29 of the Competition Act, if there is no one at the premises, the person in charge of the inspection has to take the reasonable steps to inform the occupier of the intended entry, and if informed, to afford him an opportunity to be present during the inspection, however if the officer cannot inform the occupier, a copy of the warrant shall be left in a prominent place on the premises. Additionally, according to Section 28(2)(4) of the Act, if the premises subject to an inspection are not occupied, the officers conducting the inspection are under the obligation to leave the premises as effectively secured as they found them.

[341] In Canada, pursuant to Section 15(3) of the Competition Act, the judge who issues a search warrant allowing the performance of the inspection can determine that the execution of the warrant shall be carried out at any time. In Mexico, according to Article 31(II) of the Federal Law on Economic Competition, the Federal Competition Commission is empowered to order that an inspection which has been initiated in business days and during business hours shall be continued during any other days or hours. In South Africa, according to Section 46(4) of the Competition Act, a warrant to enter and search will be executed during the night if the judge or magistrate who has issued the warrant believes that there are reasonable circumstances to conduct the inspection at night. In the US, the Antitrust Division of the Department of Justice can seek permission to conduct an inspection during nighttime if it shows a good cause pursuant Rule 41(e)(2)(B) of the Federal Rules of Criminal Procedure.

[342] In Honduras, Article 47 of the Law for the Defense and Promotion of Competition estates the fact that on-site inspections are conducted without a previous notification.

[343] Antitrust Division Manual, Fourth Edition, III-96.

[344] In the UK, an investigator officer may enter any premises in connection with an investigation if it has given the occupier of the premises at least two working days' notice of the intended entry (Section 27 of the Competition Act).

[345] In Russia, in order to control compliance with the antimonopoly legislation, an antimonopoly body can perform schedule inspections in certain premises as often as every three years (Article 25(1) of the Federal Law of the Russian Federation on Protection of Competition).

4. Powers of the Competition Authority in the Course of the Inspection

Whenever the officials of the competition authority are conducting an inspection in the premises of an investigated undertaking, or elsewhere, these will have certain powers to gather all relevant evidence they can find in the course of the said inspection. These powers have been vested on the individuals responsible for carrying out the inspections of premises with the purpose of allowing them to effectively acquire any information or documentation which may be relevant for proving an infringement of the competition law provision. Given the fact that the individuals involved in anticompetitive practices usually make sure to take all the necessary measures to try to conceal any trace of evidence which may be later used to incriminate them for the infringement of competition law, the officials of the competition authorities require proper investigative powers to match those elusive measures in order to be able to detect and sanction as many as possible anticompetitive practices.

Just like with other powers of investigation previously studied, the faculties that the officials of competition authorities have in the course of an inspection vary from one jurisdiction to another. Nevertheless, in the course of an inspection concerned with an investigation for the infringement of the competition law provisions, most competition regimes allow competition authority officials to: enter and search the premises; examine and copy relevant documents irrespective of the medium on which they are stored; seize documents and objects relevant to the investigation; seal documents or premises; and require explanations from the occupants or their representatives.

(a) Power to Enter the Premises

Chronologically speaking, the first power of investigation that the competition authority officials or any other authorized individuals conducting an inspection have is the right to enter the concerned premises. In most jurisdictions the right to enter the premises is subject to the previous acquirement of a judicial warrant issued by a judge, or an authorization issued by the competition authority. Accordingly, in those cases, the officials or individuals in charge of the inspection will be required to show the owners, their representatives or the occupants of the premises, the judicial search warrant[346], or alternatively, the authorization issued by the competition authority[347], which empowers them to get access to those premises. In addition to the presentation of the relevant authorization, the individuals conducting the inspection will be required to present identification[348]. Moreover, while exercising this faculty, the persons in charge of conducting the inspection are allowed to use the necessary force to enter the premises subject to an inspection[349]. For this purpose, those persons are usually assisted by officials of the public forces of the state, consequently, whenever the owners, their representatives or the occupants of

[346] In Kosovo, according to Article 39(3) of the Law on Protection of Competition, prior to performing an unannounced inspection, the authorized members of the Competition Commission are obliged to display their official legitimation and authorization of the competent district court to conduct the inspection.
[347] In Mexico, the public servants in charge of an inspection are required to identify themselves and to exhibit the authorization for the inspection (Article 31(II) of the Federal Law on Economic Competition).
[348] In China, when carrying out an inspection, there shall be at least two law enforcers, and they shall show their law enforcement certificates (Article 40 of the Antimonopoly Law).
[349] In the UK, according to Section 28 of the Competition Act, an authorized officer of the Director General of Fair Trading is allowed to enter the premises specified in the warrant, using such force as is reasonably necessary for the purpose.

the concerned premises refuse to allow the persons performing the inspection to get access to the premises subject to the inspection, or whenever the premises subject to an inspection are not occupied, the officials of the public forces will be empowered to use all the necessary force with the purpose of allowing the persons performing the inspection to enter the said premises[350]. Nevertheless, in some jurisdictions, if the entry is carried out using force, some obligations may arise for the persons conducting the inspection, for instance, in some competition regimes, if the premises subject to an inspection are not occupied at the time of the execution of the search, and consequently, the persons conducting the inspection are obliged to use the force to enter the premises, the competition authority will then be obliged to compensate anyone who suffers a damage because of the forced entry[351], moreover, in other jurisdictions, if the persons in charge of the inspection have to use the force to enter due to the fact that the concerned premises are not occupied, the latter will then have the obligation to leave the inspected premises as effectively secured as these were found[352].

(b) Power to Search the Premises

Another fundamental power vested on the individuals conducting an inspection in the course of an investigation for the infringement of the competition law provisions is the right to search the premises related to the investigation. This power of investigation allows the persons conducting an inspection to search the premises for valuable information that is relevant for the case. The range of premises that can be searched varies from one country to another and depending on the faculties granted by the judicial warrant or the order issued by the competition authority. In practice, this power of investigation can be exercised in conjunction with other powers that the persons conducting the inspection may have. For instance, while searching for a certain document, the persons conducting the inspection may ask the occupants where those documents may be found, or require explanations regarding the content of those documents.

(c) Power to Search Persons

In some competition regimes, the persons in charge on an inspection are allowed to search certain persons in the course of the inspection. The purpose of this investigation power is to gather any documents, articles, objects or any other thing that may be under the possession of a determined person. In most jurisdictions where this faculty has been granted to the individuals in charge of the inspection, this power of investigation will only be exercised if there are reasonable grounds for believing that the searched person has personal possession of any document, equipment or article which has a bearing on the investigation[353]. Moreover, the scope of this power of investigation is limited to certain individuals, accordingly, in most competition regimes, this faculty will be exercised against the individuals who are

[350] In Canada, according to Section 15(6) of the Competition Act, a judge issuing a warrant may order a peace officer to take such steps as the judge considers necessary to give the Commissioner or other person access to any premises, record or other thing.
[351] In South Africa, see Section 48(9) of the Competition Act.
[352] In Singapore, see Section 65(12) of the Competition Act. In the UK, see Section 28(5) of the Competition Act.
[353] In Singapore, see Section 65(2)(b)(ii) of the Competition Act. In South Africa, see Section 48(1)(c) of the Competition Act. In Zambia, see Section 7(4)(b) of the Competition and Consumer Protection Act.

present in the inspected premises at time of the inspection[354]. Finally, given to the intrusive nature of this kind of searches, in some jurisdictions where the competition authority is allowed to conduct an on-site inspection under its own discretion or upon a judicial warrant, the power to search individuals who are present at the time of the inspection will only be exercised in searches performed with a judicial warrant[355].

(d) Power to Request the Production of Documents

As with previously seen investigation powers, the faculty to require the production of documents in the course of an inspection has the purpose of gathering any piece of information that has a bearing on the investigation. The availability of this investigation power serves as a complement to other powers vested on the competition authority such as the ability to enter and search premises given that once the individuals in charge of the inspection have entered and searched the concerned premises, the latter will then be empowered to require the occupants of the inspected premises to produce any documents which may be stored in those places. In practice, depending on the jurisdiction, the exercise of this investigation power may be restricted in its scope. For instance, the fact that most competition regimes require that the authorization for the performance of an inspection shall be inspired on the assumption that certain documents concerned with the case are being kept in the inspected premises, suggest that the officials in charge of the inspection will be allowed to request only the production of the specific documents that motivated the inspection in the first place[356]. Despite the preceding, in jurisdictions with broader powers of investigation, the competition authorities will be allowed to require the production of any document related to the activities of the investigated undertakings[357], or any document considered related to any matter relevant to the investigation[358]. Finally, depending on the jurisdiction, the failure to comply with a request by the officials of the competition authority conducting the inspection can be sanctioned with the imposition of fines[359] or even imprisonment[360].

(e) Power to Examine Documents

A further power of investigation that the officials in charge of an inspection have in the course of the search is the ability to examine the documents found in the inspected premises. This faculty is

[354] In Malaysia, pursuant to Section 25 of the Competition Act, a Commission officer conducting an inspection may, for the purpose of investigating into the infringement or offence, search any person who is in or on the premises.
[355] In Singapore, the Competition Commission is allowed to inspect any premises upon the attainment of a judicial warrant or at the sole discretion of the Commission, however, with regard to the right to search persons who are presumed to have under their possession relevant information related to the investigation, this power will only be exercised in inspections carried out with a judicial warrant (Sections 64 and 65 of the Competition Act).
[356] For instance, in Germany, according to the wording of Section 59(4) of the Act Against Restraints of Competition, searches will only be made under an order of the competent court, moreover, such order will be granted if it is assumed that documents are located in the relevant premises, and the surrender of which may be requested by the Bundeskartellamt. Consequently, the power to require the production of documents will be restricted to the documents that motivated the issue of the judicial order.
[357] In Ireland, according to Section 45(3)(d) of the Competition Act, the Competition Authority is allowed to require the production of any books, documents or records relating to the activities of the undertaking which are in under the control of the required person.
[358] In The UK, Section 27(5)(b)(i) of the Competition Act, allows investigating officers to require any person on the premises to produce any document considered related to any matter relevant to the investigation.
[359] In Germany the failure to comply with the production of requested documents is sanctioned with administrative fines (Section 81 of the Act Against Restraints of Competition).
[360] In Ireland, the failure to comply with a request for documents in an inspection is punished with a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months or both such fine and such imprisonment (Section 45(10) of the Competition Act).

complementary to the abovementioned powers, provided that once the competition authority has entered the concerned premises and has acquired certain documents, then it has the ability to examine the said documents in order to determine if these contain any incriminating evidence which may be useful for the investigation. Depending on the jurisdiction, the scope of this investigation power varies when executed, thus, in some competition regimes; the persons conducting the inspection will be allowed to examine any document concerned with the commercial activities of the inspected person[361]. Conversely, in other competition regimes, the scope of this power will be limited to the examination of documents which are strictly related to the investigation[362], or to documents that are relevant for the determination of an infringement of competition law[363]. As to the type of documents that can be examined, most countries have adopted wide provisions that allow competition authorities to examine a variety of documents with the purpose of obtaining as much information as possible. Accordingly, the wording of the provisions that regulate this investigative power may include: any documents, irrespective of the medium on which they are stored; records; agreements; account books; business correspondence; electronic data; books; accounts; maps; plans; drawings; diagrams; pictorial or graphic work; microform; accounting records; object; discs; tapes; video tapes; devices in which visual images are embodied, photographs; or sound-tracks; among others.

(f) Power to Make Copies of Documents

In relation to the aforementioned powers of investigation, the individuals conducting an inspection in the course of an investigation by the competition authority are empowered to make copies of certain documents found on the inspected premises. The main purpose of this investigative power is to acquire a copy of certain evidence found on the inspected premises, and in this way, to allow competition authorities the possibility to further examine the copied evidence and/or to safeguard such evidence from being destroyed, altered or concealed. In this sense, as a general practice, any relevant evidence which is produced in the course of the inspection shall be copied by the persons conducting the inspection; however, there are some cases in which by virtue of the characteristics of the concerned evidence the latter cannot be copied at the inspected premises. In those cases, some competition rules expressly provide that whenever certain evidence cannot be copied on the spot, the competition authority will be empowered to seize such evidence for further examination and copying[364]. As to the form of the copies taken, provided that a certain amount of the relevant evidence may be stored in electronic means, most competition regimes, allow the persons in charge of the inspection to take copies in any form and from documents stored in any medium[365]. Additionally, in order to preserve the content of the copied materials some jurisdictions have established certain requirements to be met when making copies of evidence gathered in the course of an inspection. Regarding the copies taken from electronic materials, given to the

[361] In Bulgaria, see Article 50(2)(1)of the Law on Protection of Competition. In the EU, see Article 20(2)(b) of Regulation 1/2003.
[362] In South Africa, see Section 48 of the Competition Act.
[363] In Finland, see Section 37 of the Competition Act. In Macedonia, see Article 41 of the Law on the Protection of Competition.
[364] In Bulgaria, the individuals conducting the inspection are empowered to make paper copies, digital copies or in any other electronic medium, where it is impossible to copy the materials, the original can be seized (Article 50(2)(3) of the Law on Protection of Competition). In Canada, according to Section 15(1)(d) of the Competition Act, the Commissioner or any other person authorized by the warrant may search the premises for any record or other thing and copy it or size it for examination or copying.
[365] In Croatia, pursuant to Article 42(4)(3) of the Competition Act, the persons conducting the inspection may take or obtain any form of copies from the concerned documents irrespective of the medium on which they are stored. In The EU, Article 20(2)(c) of Regulation 1/2003, allows to take or obtain in any form copies of or extracts from books and records.

special characteristics of these, some jurisdictions have established certain requirements to be fulfilled when copying electronic materials, such as: to seal the electronic copies in the premises subject to the inspection; to allow the presence of a representative of the owner of the materials electronically copied when the seal is broken and during the review of those materials by the competition authority; and to deliver a copy of the electronically copied materials to the party who is the target of the investigation[366]. Moreover, in relation to paper based copies, some competition regimes have established the obligation of certifying such copies; the certification shall be done by the persons conducting the inspection and by the representatives of the undertakings whose premises are being inspected[367]. Finally, with regard to the materials that can be copied in the course of an inspection, this issue varies from one country to another, thus, depending on the jurisdiction, the officials in charge of the inspection will be entitled to copy: any materials relevant to the investigation[368], or to the determination of the infringement of competition law[369]; the materials that inspired the issue of the authorization to conduct the inspection; or even materials which are not in any way related to the investigation in course, but which are related to another possible infringement of the competition provisions[370].

(g) Power to Seize Elements

Another power of investigation that the individuals conducting an inspection have is the ability to seize certain elements from the premises subject to the inspection. The faculty to seize elements during an inspection concerned with the infringement of competition law allows competition authorities to confiscate and remove from the premises certain elements which may be relevant for the investigation. There are mainly three justifications related to the exercise of this investigation power when enforcing the competition law provisions. Firstly, most competition regimes permit the individuals in charge of an inspection to seize certain elements with the purpose of protecting such evidence from being destroyed, concealed or manipulated. Accordingly, when there are reasonable grounds to believe that any relevant elements may be destroyed, concealed or manipulated, and as a consequence the investigation will be hampered, the individuals conducting the inspection will be allowed to seize those elements in order to protect their evidential value[371]. Secondly, in some competition regimes, the ability to seize certain elements will be exercised with the purpose of obtaining a copy of a determined piece of evidence which for technical reasons cannot be copied on the premises subject to the inspection. In those cases, the persons conducting the inspection will be entitled to seize the concerned elements and remove them from the inspected premises to be able to copy the concerned elements elsewhere[372]. And thirdly, in some competition regimes, the persons conducting the inspection will be empowered to seize certain elements

[366] In Denmark, see Section 18(4) of the Competition Act.
[367] In Bulgaria, see Article 52(2) of the Law on Protection of Competition.
[368] In South Africa, see Section 48(1)(f) of the Competition Act.
[369] In Macedonia, see Article 41(3) of the Law on the Protection of Competition.
[370] In Hungary, see Article 65/A(9) of the Competition Act.
[371] In Croatia, according to Article 42 of the Competition Act, the Competition Agency is entitled to seize the objects found on the inspected premises, particularly if it can be reasonably assumed that if left on the premises, the evidence might be destroyed or concealed. In Singapore, Section 65 of the Competition Act, allows to seize certain documents for preserving them or preventing interference with them, and also for taking copies of them if it not reasonably practicable to take copies on the premises.
[372] In Macedonia, Article 41 of the Law on the Protection of Competition permits to seize certain elements when the originals cannot be copied on the premises inspected. In the UK, according to Section 28 of the Competition Act, certain documents may be seized for preservation and for preventing their manipulation, additionally; certain documents may be removed from the inspected premises if those cannot be copied on the spot.

with the purpose of further examination. Thus, in cases where the competition authority will not be allowed to fully examine certain evidence for technical or any other reasons, some jurisdictions will permit the latter to seize such elements to submit them to a full examination[373].

There are some differences among jurisdictions in relation to the scope of this power of investigation. On the one hand, with regard to the type of materials that can be removed from the inspected premises, most competition regimes have adopted broad provisions allowing competition authorities to seize, *inter alia*: any element[374]; thing[375]; equipment[376]; object[377]; book[378]; or document, irrespective of the medium on which it is stored[379]. Additionally, in some competition regimes, when inspecting the individuals occupying the concerned premises, the competition authorities are entitled to seize anything, other than the necessary clothing, found under the personal possession of these individuals[380]. On the other hand, in relation to the elements that can be removed and their relation with the investigation, depending on the jurisdictions, the officials in charge of the inspection will be allowed to seize: only the elements which are related to the investigation in course[381]; only the materials that motivated the award of the authorization to conduct the inspection[382]; or any materials that are related to a possible infringement of competition law, even if such infringement is not the subject matter of the investigation in question[383].

Due to the ability of this investigative power to restrict certain fundamental rights, i.e. private property, the possibility to remove materials from the premises inspected is expressly forbidden in some competition regimes[384]. In addition, in jurisdictions where this faculty has been granted to competition authorities, the exercise of this power is regulated in different ways. For instance, in most competition regimes, the exercise of this seizure power is restricted by time, which means that an object that has been seized from an inspected premise will have to be returned to its proprietary in a certain period of time[385].

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[373] In South Africa, according to Section 49 of the Competition Act, anything which is important for the investigation can be removed from the inspected premises for further examination and for safekeeping.
[374] In Belgium, Article 44 §3(2°) of the Act on the Protection of Economic Competition allows the competition prosecutors to seize elements relative to their investigation.
[375] In Canada, according to Section 15 of the Competition Act, the Commissioner or any other person named in the warrant may seize any record or thing as long as it is established in the warrant. In Kenya, Section 32(3)(d) of the Competition Act allows to remove anything that has a bearing o the investigation from the inspected premises, upon the issue of a receipt for the items removed.
[376] In Singapore, according to Section 65 of the Competition Act, any equipment or article which relates to any matter to the investigation may be removed from the premises for examination purposes.
[377] In Croatia, Article 42 of the Competition Act allows to seize objects and documents found on the premises inspected. In Germany, the Bundeskartellamt is empowered to seize objects which may be of importance as evidence in the investigation (Section 58 of the Act Against Restraints of Competition).
[378] In Ireland, according to Section 45 of the Competition Act allows the persons authorized by the Authority to seize any books, documents or records related to the activities of the undertakings.
[379] In Bulgaria, pursuant to Article 50 of the Law on Protection of Competition, the Competition Commission is empowered to seize all documents and records, related to the activities of the undertakings or associations of undertakings, irrespective of the medium on which they are stored.
[380] In Malaysia, see Section 25 of the Competition Act.
[381] In Kenya, Section 32(3)(d) of the Competition Act allows to remove anything that has a bearing on the investigation from the inspected premises. In Poland, Article 90 of the Act on Competition and Consumer Protection allows the seizure of objects which are relevant evidence for the investigation.
[382] In the UK, according to Section 28 of the Competition Act, the officers of the Director General of Fair Trading are allowed to take possession of any document which motivated the issue of the warrant for the inspection.
[383] In Bulgaria, Article 50(4) of the Law on Protection of Competition allows to seize any document or evidence found if they contain data raising well-founded doubts of other infringements of the competition provisions.
[384] In Mexico, according to Article 31(V) of the Federal Law on Economic Competition, the seizure of materials in the course of an inspection is strictly forbidden.
[385] In Bulgaria, according Article 50(4) and (5) of the Law on Protection of Competition, the seized materials shall be returned after the Competition Commission's decision has entered into force, unless the proprietary of the seized item makes a request for the materials to be returned before. In Canada, any record or thing that has been seized shall be returned to its owner no later than sixty

Furthermore, in some jurisdictions, the persons conducting the inspection will be under the obligation to issue a receipt to the proprietary identifying the seized items[386]. Moreover, in some jurisdictions, the competition authorities are under the obligation of submitting the seized materials before the competent court in order to obtain a court order allowing them to retain the seized elements[387].

The proprietaries of the seized materials have some prerogatives over the removed materials. Thus, in some jurisdictions, the proprietaries of equipment or articles which are susceptible of being seized due to their evidential value may request the persons conducting the inspection to allow them to retain those elements in the premises under certain conditions[388]. Similarly, in other jurisdictions, the owners of the seized materials are entitled at all reasonable times to inspect any of the seized materials and to make copies of them[389]. Finally, in some jurisdictions, when the seize objects are of a perishable nature, the competition authority is entitled to sell them, and later on, if the owner of those objects is convicted for the infringement of the competition provisions the authority is allowed to keep the amount made from that sale, oppositely, if the owner of the seized materials is discharged for the alleged infringement of competition law, then he has the right to recover the amount obtained through the sale[390].

(h) Power to Seal or Mark Elements

A further power of investigation vested on the individuals conducting an inspection in the curse of an investigation by the competition authority is the ability to seal or mark certain elements or premises. The main purpose of this investigation power is to protect certain elements that have a bearing on the investigation from being destroyed, concealed or manipulated, by securing them through the imposition of a seal that guaranties that the evidence has not been altered during the absence of the persons conducting the inspection. Moreover, in some competition regimes, the seal of a determined material may occur due to the inability of the competition authority to seize such material, provided that by reason of its nature, size or amount, it is not practicable to remove it from the premises[391]. Consequently, unlike with the faculty of competition authorities to seize or remove certain materials from the inspected premises,

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days from the seizure (Section 18(4) of the Competition Act. In Croatia, Article 42(4)(4) of the Competition Act, allows the Competition Agency to retain seized materials as long as it takes to make photocopies of them, however, these cannot be retained after the day on which the Agency closes the proceedings in the case concerned. In Ireland, according to Section 45(6) any document or record seized may be kept for a period no longer than six months. In Macedonia, according to Article 41(1)(4) of the Law on the Protection of Competition, the seized materials can be retained for the period necessary to make copies of them, if such copies cannot be made on the spot. In South Africa, pursuant to Section 49 of the Competition Act, any seized materials shall be returned to their proprietary as soon as possible. In the UK, according to Section 28 of the Competition Act, any seized materials cannot be retained for a period of more than three months.

[386] In Kenya, Section 32(3)(d) of the Competition Act allows to remove anything that has a bearing on the investigation from the inspected premises, upon the issue of a receipt for the items removed. In the US, the official conducting the inspection has to give a receipt for the property taken to the owner according to Rule 41 of the Federal Rules of Criminal Procedure.

[387] In Canada, Section 17 of the Competition Act, the judge who issued the warrant will have to determine if the seized materials can be retained by the Commissioner, provided that those materials are required for an inquiry or any proceeding under the provisions of the Act.

[388] In Singapore, according to Section 65 of the Competition Act, the officer in charge of the inspection may allow any equipment or article which has a bearing on an investigation and which may be seized from the inspected premises to be retained on those premises subject to such conditions as the named officer may require.

[389] In Barbados, see Section 27(7) of the Fair Trading Commission Act. In Malaysia, according to Section 19 of the Competition Act, the owner of a document which is being retained by the Competition Commission is entitled to be supplied, as soon as practicable, with a copy certified by the Commission to be a true copy of the document.

[390] In Sri Lanka, see Section 59 of the Consumer Affairs Authority Act.

[391] In Malaysia, see Section 25 of the Competition Act.

the possibility to seal a determined element in the course of an inspection does not necessarily entail the confiscation of the said element[392].

Depending on the jurisdiction, a variety of elements can be sealed in the course of an inspection by the competition authority. In most countries, the competition authorities are empowered to seal evidential materials such as books, records, objects, or documents, irrespective of the medium on which these are stored. In such cases, the individuals in charge of the investigation will be entitled to seal these elements with the purpose of protecting them from destruction or concealment and preserving their content from manipulation[393]. Additionally, most jurisdictions also permit the competition authorities to seal certain premises where relevant information concerned with the investigation is being kept. This faculty empowers the individuals conducting the inspection to seal the inspected premises overnight in order to prevent the entrance of any unauthorized person who may destroy, conceal or alter the content of any relevant evidence stored on the sealed premises. Additionally, in some competition regimes where a judicial warrant is required to conduct an inspection, the competition authorities are empowered to order the seal of the concerned premises until the judicial warrant is available[394].

There are some restrictions to the exercise of this investigative power. Thus, in the majority of jurisdictions where competition authorities are allowed to seal premises, this faculty has been restricted to business premises only[395]. Alternatively, in some competition regimes, the competition authorities are allowed to seal residential premises too[396]. Finally, the ability to seal premises in the course of an inspection is also restricted by time; accordingly, a determined premise cannot be sealed indefinitely[397].

As to the ability of competition authorities to mark or stamp certain evidence in the course of an inspection, this power of investigation is mainly concerned with the preservation of the content of certain materials that have been found on the inspected premises. Thus, in jurisdictions where the competition authorities are empowered to mark or stamp a determined document, the latter will do so in order to avoid the document from being exchanged or altered, provided that in some of these countries the competition

[392] In Mexico, according to Article 31 of the Federal Law on Economic Competition Whenever a sealed document or object is indispensable for the activities of the inspected undertaking; the latter will be allowed to use such elements once their content has been reproduced by the public servants conducting the inspection.
[393] In Kenya, according to Section 32(3)(d) of the Competition Act, the authorized persons may attach anything that has a bearing on the investigation on the premises inspected for examination and safekeeping.
[394] In Norway, see Section 25 of the Competition Act.
[395] In Bulgaria, Article 50(2)(6) of the Law on Protection of Competition allows the Competition Commission to seal any premises, means of transport and other locations, used by the inspected undertakings or associations of undertakings, as well as commercial or accounting books or other information media. In the EU, only business premises may be sealed (Article 20(2)(d) of Regulation 1/2003). In Finland, Section 37(2) of the Competition Act allows the official conducting the inspection to seal business premises and business correspondence and data. In Latvia, according to Section 9(5)(4)(g) of the Competition Law, the non-residential premises, means of transport, structures and other objects and the storage facilities may be temporally sealed to ensure the preservation of evidence. In Mexico, according to Article 31 of the Federal Law on Economic Competition, the public servants in charge of the inspection are empowered to secure by sealing and marking the information, documents and offices and any other means which may contain evidence supporting the infringement of the competition law provisions.
[396] In Belgium, according to Article 44 §3 of the Act on the Protection of Economic Competition, the individuals conducting the inspection may seal the residential premises of heads of undertakings, directors, managers and other members of staff, without exceeding a period of 72 hours.
[397] In Lithuania, Article 26(4) of the Law on Competition allows the authorized officers of the Competition Council to seal the premises used by the undertaking under investigation for the time period necessary to carry out checks, however, no longer than three calendar days. In Macedonia, Article 41(1)(6) of the Law on the Protection of Competition, allows the authorized officials of the Commission to seal the business premises and books or other documentation for the period and the extent necessary for the examination, but not longer than seven days.

authorities are not entitled to seize, confiscate or remove any property from the premises inspected[398]. Nevertheless, in some competition regimes, the ability to stamp certain documents is not related to the fact that the competition authorities cannot seize relevant materials from the inspected premises[399].

(i) Power to Ask for Explanations and Statements

Furthermore, in some jurisdictions, the individuals conducting an inspection in the course of an investigation by the competition authority are entitled to question certain individuals or to require a statement from those persons. Regarding the ability to question individuals, most competition regimes enable the persons in charge of an inspection to ask for explanations about the evidence gathered in the course of the inspection. This faculty serves the purpose of gaining insight clarification about the possible evidential value of the materials found during the inspection by the occupants of the inspected premises. The advantage that this power of investigation provides is that the clarifications are submitted by individuals that are familiar with the content and nature of the materials found on the premises, in addition, it allows the competition authorities to better scrutinize all the information collected during the inspection, and to effectively determine the evidential value of such information. In practice, the power to ask for explanations applies to both the information acquired by the officials of the competition authority while searching the inspected premises[400], and additionally, to the information that has been obtained from the occupants of the inspected premises at the request of the individuals in charge of the inspection[401].

As to the form on which these explanations are produced, there are some differences across jurisdictions. For instance, in some competition regimes the explanations to the competition authority have to be rendered orally[402], alternatively, in other competition regimes the explanations have to be produced in writing[403], and finally, in some competition regimes there is the possibility to submit the explanations both orally and in writing[404].

In addition to the preceding power of investigation, in some jurisdictions, the competition authorities are allowed to require a statement from certain individuals. Depending on the jurisdictions, the subject-matter of the statements will vary, accordingly, in some competition regimes, the individuals conducting the inspection will be entitled to require from certain individuals on the inspected premises a

[398] In Mexico, according to Article 31 of the Federal Law on Economic Competition, the individuals in charge of the inspection can mark certain documents with the purpose of safeguarding their content, give that these cannot be removed from the inspected premises.
[399] In Pakistan, according to Section 34 of the Act No. XIX of 2010, the Competition Commission is entitled to stamp, copy, impound any document in the course of an inspection under the provision of the Act.
[400] In Finland, see Section 37(2) of the Competition Act.
[401] In the UK, under Section 27 of the Competition Act, the investigating officer entering the concerned premises is empowered to require any person on the premises to produce any document considered to be related to the investigation, and if produced, to provide an explanation of it.
[402] In the EU, see Article 20(2)(e) of Regulation 1/2003.
[403] In Macedonia, an authorized person or other employee in the undertaking submitting a written explanation regarding the facts or documents relevant for determining the existence of a misdemeanor within a determined deadline (Article 41(1)(8) of the Law on the Protection of Competition).
[404] In Kazakhstan, according to Article 64(1)(3) of the Law of the Republic of Kazakhstan on Competition, the officers of the antimonopoly body are entitled to request from the directors, officers and other employees of the inspected undertakings, written and verbal explanations on questions arising during the inspection. In Lithuania, there is the possibility to get oral and written explanations from persons connected with the activity of the undertakings under investigation, and to request them to arrive in the office of the authorized investigating officer in order to provide explanations (Article 26(1)(5) of the Law on Competition).

statement on the facts or documents related to the subject-matter and the purpose of the inspection[405]. Alternatively, in other jurisdictions, the persons in charge of the inspection will be entitled to require certain individuals to state where a determined document may be found[406]. Lastly, the form in which the required statements may be produce also varies from country to country, in that sense, depending on the jurisdiction, the requested statements will be produced, orally[407] or in writing[408].

(j) Power to Use or Cause the Use of Computer Systems

Another investigation power that some competition authorities have in the course of an on-site inspection is the ability to use or cause to be used any computer system found on the inspected premises. Provided that certain relevant evidence concerned with the investigation in course may be digitally stored on computer systems, some competition regimes expressly allow the individuals conducting the inspection to use any computer inside the inspected premises to get access to such information[409]. Furthermore, some of these competition regimes may additionally provide for the possibility to require an individual in charge of the handling of the computer system to assist the persons in charge of the investigation to gather any relevant evidence stored on such system[410], or to produce at the request of the persons in charge of the inspection any document digitally stored[411]. Finally, in some jurisdictions, the persons conducting the inspection will be entitled to have access to any necessary password, encryption code, decryption code, software or hardware or any other thing to allow access to the computer system[412].

(k) Other Powers of Investigation

In addition to the most common investigation powers aforementioned, some competition regimes provide for other powers to be exercised in the course of an inspection. For instance, in some countries, the competition provisions empower the persons conducting the inspection to take photos or film in the course of the inspection[413]. Furthermore, in some jurisdictions, the persons in charge of the inspection are authorized to prohibit the individuals occupying the premises to leave the site under inspection, to move without permission, and to converse with other individuals on the premises[414]. Additionally, in other competition regimes, the official of the competition authority conducting the inspection are allowed to request the persons occupying the premises to show the content of their pockets or bags[415]. Moreover, in some competition regimes the competition authorities are empowered to order individuals to accompany

[405] In Croatia, see Article 42(4)(7) of the Competition Act.
[406] In Singapore, see Section 64 and 65 of the Competition Act.
[407] In Denmark, see Section 18(1) of the Competition Act.
[408] In Croatia, see Article 42(4)(7) of the Competition Act.
[409] A bunch of jurisdictions have provisions that enable the persons conducting the inspection to search for, examine and copy documents and information, irrespective of the medium on which these are stored. Consequently, in practice this includes any material which is stored in computer systems.
[410] In Canada, Section 16 of the Competition Act authorizes the persons conducting an inspection to use or cause to be used any computer system on the premises to search any data contained in or available to the computer system. In Kenya, the individuals conducting the inspection may use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to search data contained in the system (Section 32(3) of the Competition Ac).
[411] In the UK, according to Sections 27 and 28 of the Competition Act, the persons conducting the inspection may require any information which is kept in a computer and is related to any matter relevant to the investigation, to be produced in a form in which it can be taken away, and in which it is visible and legible.
[412] In Malaysia, see Section 27 of the Competition Act.
[413] In Russia, see Article 25(3)(3) of the Federal Law of the Russian Federation on Protection of Competition.
[414] In Latvia, see Section 9 of the Competition Law.
[415] In Denmark, see Section 18(1) of the Competition Act.

the officials conducting an investigation[416]. Finally, in most competition regimes the competition provisions enable the persons conducting the inspection to require the assistance of experts[417] and police officers[418].

5. Powers of Investigation in Criminal Proceedings

The nature of criminal proceedings reflects on the characteristics of the investigative powers used in such cases. The seriousness of the sanctions imposed on individuals and undertakings for the infringement of the criminal provisions of competition law makes the exercise of the investigation powers in criminal proceedings different from the powers used in civil or administrative proceedings. Thus, depending on the jurisdiction, there are certain differences in the application of investigative powers in criminal proceedings compared to the application of investigative powers in other procedures concerned with the enforcement of competition law.

The first difference evidenced while conducting an investigation for the infringement of competition law in criminal proceedings is concerned with the authority in charge of the investigation, and accordingly, the authority vested with the powers of investigation. In some competition law regimes, the competition authority lacks competence to carry out an investigation for the infringement of competition law in criminal proceedings. This means that whenever a criminal proceeding concerned with a competition law matter is being instituted, a different institution than the competition authority will be empowered to exercise the powers of investigation. This mainly occurs in jurisdictions where the relevant criminal provisions do not grant the competition authorities competence to investigate the infringement of criminal offenses[419]. Instead, in other competition regimes, the competition authorities are entitled to conduct the investigation for the infringement of competition law, irrespective of the nature of proceedings, i.e. criminal, administrative or civil[420].

A further issue related to the investigative powers in criminal proceedings is concerned with the formalities and restrictions attached to the exercise of these powers. Due to the more intrusive nature of these powers of investigation, most jurisdictions have implemented more formalities to their application than the ones required in administrative/civil proceedings. For instance, in jurisdictions where the competition authorities were allowed to require information from the concerned parties in a voluntary way, such requirement has to be done through a formal request in criminal proceedings[421]. Additionally, in some competition regimes where the authorities have power to enter and search the premises related to

[416] In Israel, see Section 46 of the Restrictive Trade Practices Law.
[417] In Kazakhstan, see Article 64(1)(4) of the Law of the Republic of Kazakhstan on Competition. In Lithuania, see Section 26 of the Law on Competition.
[418] In Mexico, see Article 31(v) of the Federal Law on Economic Competition.
[419] In Russia, the Federal Antimonopoly Service is in charge of the application of the competition provisions in regular proceedings, however, whenever criminal proceedings are being instituted; those proceedings are handled by the Ministry of Internal Affairs, which has sole authority to conduct the criminal investigation. In the US, the Antitrust Division of the Department of Justice will request the opening of a Grand Jury Investigation to prosecute criminal offenses, in those procedures; the Grand Jury will be in charge of the investigation.
[420] In the UK, the OFT is the authority in charge of the investigations under the provisions of the Competition Act and the provisions criminal provisions of the Enterprise Act.
[421] In the US, both the FTC and the Antitrust Division are allowed to make voluntary requests for information and documents in civil proceedings, oppositely, in criminal proceedings, the Antitrust Division is only allowed to request information and documents through the issue of Grand Jury subpoenas *Ad Testificandum*, or subpoenas *Duces Tectum*, respectively (Antitrust Division Manual, III-91-94).

an investigation under their own discretion, and under the issue of a judicial warrant in administrative/civil proceedings, in criminal proceedings, these same authorities are only allowed to inspect the concerned premises under the prior attainment of a judicial warrant[422].

The main purpose of these formalities and restrictions in criminal proceedings is to impose certain boundaries on the government's investigations in order to safeguard the fundamental rights of individuals in the course of a criminal procedure. Accordingly, it is fundamental that the authorities conducting a criminal investigation comply with every formal requirement during the procedure, otherwise, any piece of evidence that has not been collected in a proper way may be declared illegal. The main requirement for the correct exercise of investigation powers in criminal procedures is usually the prior acquisition of a judicial warrant that allows the authority to perform a certain activity in the course of an investigation. The absence of this judicial warrant, when required, will invalidate any piece of evidence collected in the investigation[423]. However, there are other requisites that have to be complied with when exercising a certain power of investigation in criminal proceedings, for instance, the participation of witnesses when conducting an on-site inspection, or when conducting a body-search[424].

Another issue that is concerned with the nature of criminal proceedings is the extent of the powers of investigation. Provided that the criminal offenses are more harmful to society, the powers of investigation granted to the authorities responsible for detection of these offenses tend to be more intrusive than the powers granted for investigations which are not related to a criminal offense. For that reason, besides the more traditional investigative powers (to request information, to request documents, to summon witnesses, or to enter and search premises), some competition regimes where certain anticompetitive practices are considered as criminal offenses have vested the authorities in charge of the procedure with additional powers of investigation with the purpose of providing such authorities with effective means for proving the existence of a criminal offense.

In that sense, in some of these jurisdictions, the authorities conducting the investigation are empowered to carry out intrusive surveillance on the premises that are related to an investigation. This surveillance can be made through the introduction of a covert individual in the premises (an informant), or through the use of a surveillance device (recording device). As with other powers of investigation, the exercise of this one requires the acquisition, in advance, of a judicial warrant allowing the surveillance of the concerned premises[425].

Furthermore, in some countries the authorities conducting the investigation are allowed to intercept the communications of the persons who are suspected to be participants in anticompetitive

[422] In the UK, the OFT is allowed to enter and search premises with or without a judicial warrant in non-criminal proceedings (Sections 27 and 28 of the Competition Act). However, under the provision of the Enterprise Act, the OFT is only allowed to enter and search premises in criminal proceedings under the issue, in advance, of a judicial warrant (Section 194 of the Enterprise Act).
[423] To see on what grounds a piece of evidence may be declared illegal in the Grand Jury procedure in the US, see the Grand Jury Manual (IV-D).
[424] In Japan, the participation of a female witness is required when the officials of the Federal Trade Commission are performing a body-search on a female (Section 109 of the Antimonopoly Act).
[425] In Russia, the Ministry of Internal Affairs is empowered to monitor or record discussions under the provisions of Chapter 25 of the Code of Criminal Procedure of the Russian Federation. In the UK, under the issue of a judicial warrant, the OFT is allowed to use intrusive surveillance in criminal proceedings according to Sections 199 and 200 of the Enterprise Act. In the US, the Antitrust Division is entitled to petition the court the use of wiretaps and electronic surveillance (18 USC § 2516(1)(r)).

conducts considered as criminal offenses. Due to the intrusive nature of this power of investigation, the exercise of the latter is also subject to the issue, in advance, of a judicial warrant allowing the interception of the communications. Thus, depending on the jurisdictions the investigating authorities will be allowed to intercept a variety of communication which may include postal communications, electronic messages[426], or telegrams[427], among others.

Finally, in other competition regimes, the competition authorities conducting the investigation may have additional powers in the course of the proceedings, such as to prohibit any person from entering or leaving certain premises that are related to a criminal investigation without their permission[428], or to arrest and detain individuals who are suspects in a criminal investigation for the infringement of competition law[429].

6. Sanctions in the Course of an Investigation

Most jurisdictions have implemented specific provisions aiming at protecting the integrity of the investigation process. As stated before, the secretive nature of antitrust infringements is also evident in the actions of the persons involved in anticompetitive practices in the course of an investigation by the competition authorities. The perpetrators of competition law breaches are frequently adept to concealment, which means that those persons are often wiling to obstruct the investigation in any way possible so they will not get caught by the competition authority. The most frequent obstructions to the investigations concerned with the infringement of the competition provisions are usually related to the failure to comply with an order to provide information or documents, to provide false or misleading information in response to such orders, or to obstruct a legal inspection by the officials of the competition authority, among others. Thus, with the purpose of safeguarding the process of investigation and to grant the competition authorities with effective powers of investigation, most competition regimes have introduced certain sanctions that can be imposed on the persons who fail to comply with an order or try to obstruct the investigation in any way.

As with other features of the investigations concerned with the enforcement of the competition law provisions, the sanctions for the failure to comply with an order to provide information or documents, or the obstruction of the investigation are different from one country to another, however, some similarities can be observed while studying the provisions of some competition law regimes.

In relation to the nature of the sanctions imposed for the failure to comply with an order requesting information or documentation, or for the obstruction of the investigation, this may be different depending on the jurisdiction. On the one hand, in some competition regimes, the sanctions imposed for

[426] In Ireland, according to the provisions of the Interception of Postal Packets and Telecommunications Messages Act of 1993, the police or other public authority vested with investigative powers (Competition Authority), upon the acquisition of a judicial warrant, may intercept postal and telecommunication messages.
[427] In Japan, according to Article 103 of the Antimonopoly Act, the FTC is empowered to intercept postal items, correspondence mails or telegrams that are sent by or to criminal suspects.
[428] In Japan, see Article 108 of the Antimonopoly Act.
[429] Given that in Ireland hard core cartels are arrestable offences sanctioned with imprisonment for up to five years, the Gardaí is allowed to arrest and detain individuals suspected for participating in hard core cartel activities for up to twelve hours (Criminal Justice Act 1984).

these infractions are of a civil/administrative nature[430]. On the other hand, in some competition regimes these infractions amount to a criminal offense, and therefore, the sanctions imposed on the perpetrators have a criminal nature[431]. It has to be noted, however, that in most regimes that sanction criminally the failure to comply with an order or the obstruction of an investigation by the competition authority, the penalties for the participation in anticompetitive practices is not sanctioned criminally. This occurs because, in those regimes, the involvement in an anticompetitive conduct is not penalized criminally; instead, obstructing the labor of a functionary of State, such as an official of the competition authority, amounts to a criminal offense.

A further issue related to the sanctions imposed for the failure to comply with an order or the obstruction of an investigation by the competition authority is the types of practices that are punished. Depending on the jurisdiction, there is a variety of actions that are sanctioned for interfering with the investigation by the competition authority, some of these include: failure to comply with an order to provide information or documents[432]; failure to comply with an order to give testimony[433]; giving inaccurate, untimely, untrue, imprecise, misleading or incomplete information[434]; breaking the integrity or destroying seals affixed by the competition authority[435]; attempting to impede or prevent an investigation[436]; destroying or the falsification of documents[437]; interfering with the investigation of the competition authority[438]; obstructing an inspection by the competition authority[439]; or assaulting an official of the competition authority[440]; among others.

A further difference regarding the punishment for the failure to comply with an order or the obstruction of an investigation by the competition authority is related to the persons on whom a sanction can be imposed. In this regard, in some competition regimes, only the undertakings can be punished for these infractions[441], alternatively, other jurisdictions, allow the possibility to sanction both individuals and undertakings[442].

Similarly, the types of sanctions that can be imposed on the perpetrators of the preceding actions vary from one country to another. The most common sanction for this kind of infractions is the imposition

[430] At the EU level, according to Article 23.5 of Regulation 1/2003, the fines imposed by the Commission on undertakings and association of undertakings for the obstruction of an investigation for the infringement of competition law shall not be of a criminal law nature.
[431] In Canada, Section 64 of the Competition Act establishes that every person who in any matter impedes or prevents or attempt to impede or prevent any inquiry or examination under the provisions of the Act, is guilty of a criminal offense.
[432] In South Africa, see Section 71(b)(ii) of the Competition Act.
[433] In Papua New Guinea, see Section 127 of the Independent Consumer and Competition Commission Act.
[434] In Malaysia, see Section 23 of the Competition Act. In Pakistan, see Section 38(d) of Act No. XIX of 2010. In Honduras, see Article 46 of Decree No. 357-2005.
[435] In Malaysia, see Section 25.7 of the Competition Act.
[436] In Canada, see Section 64.1 of the Competition Act.
[437] In Malaysia, see Section 24 of the Competition Act.
[438] In Sri Lanka, see Section 36(3)(b) of the Consumer Affairs Authority Act.
[439] In Bulgaria, see Section 100(6)(3) of the Law on Protection of Competition.
[440] In Barbados, the assault, obstruction or interference with any Commissioner is punished with a fine of $40.000 or imprisonment for 6 months, or both (Section 44 of the Fair Trade Commission Act).
[441] In Switzerland, pursuant to Article 52 of the Federal Act on Cartels and other Restraints of Competition, only undertakings can be fined for the failure to submit requested information.
[442] In China, according to Article 52 of the Anti-monopoly Law, provides for fines to be imposed on entities and individuals for the failure to comply with a request for information. In Korea, both undertakings and individuals may be fine for the failure to comply with the requirements made by the FTC with a fine for negligence according to Article 69-2 of the Monopoly Regulation and Fair Trade Act.

of administrative fines for the failure to comply with an order or the obstruction of the investigation[443]. Additionally, in some jurisdictions, the competition authorities can impose periodic penalty payments in order to compel a requested party to satisfy the petition of the competition authority[444]. In the most severe jurisdictions, the failure to comply with an order by the competition authority or the obstruction of an investigation is sanctioned with imprisonment[445]. Finally, there are other remedies that can be imposed to the parties that have failed to comply with an order or have obstructed the investigation, such as to order the parties to make a rectification within a time limit[446], or to order the arrest of a witness duly summoned who fails to appear before the competition authority[447].

Finally, in practice, there have been a few cases on which the competition authorities have successfully sanctioned individuals and undertakings for failing to comply with an order or obstructing an investigation related to the infringement of the competition law provisions. Most of these are concerned with: the destruction or seals affixed by a competition authority[448]; the obstruction of an investigation by intentionally delaying the production of requested documents[449]; obstructing an inspection by a competition authority[450]; or the failure to appear before a competition authority to give testimony[451].

IV. LENIENCY PROGRAMS

1. Introduction

As seen before, the core of the competition law provisions is the prohibition of hard-core cartels[452]. The intrinsic anticompetitive nature of this type of practices has led jurisdictions to consider them as the "supreme evil of antitrust"[453] and "cancers on the open market economy"[454], consequently, these should

[443] In Belgium, see Article 64 of the Act in the Protection of Economic Competition. In the EU, see Article 23 of Regulation 1/2003. In Romania, see Section 50 of the Competition Act. In Switzerland, see Article 52 of the Federal Act on Cartels and other Restraints of Competition. In Turkey, see Article 17 of the Law on the Protection of Competition.
[444] In Algeria, see Article 59 of the Competition Ordinance. In Bulgaria, see Article 100 of the Law on Protection of Competition. In Denmark, see Section 17 of the Competition Act. In the EU, see Article 24 of Regulation 1/2003. In Italy, see Section 14(5) of the Competition and Fair Trade Act.
[445] In the Fiji Islands, the failure to supply required information is an offense sanctioned with $1,000 and imprisonment for 12 months, for natural persons, and with a fine of $5,000 for legal persons (Section 119 of the Commerce Commission Decree). In Malta, the failure to comply is a criminal offense sanctioned with a criminal fine and imprisonment for up to six months (Section 23 of the Competition Act). in Mauritius, according to Section 52 of the Competition Act, a person who fails to comply with a request made by the Competition Commission shall be guilty of an offense, and sanctioned with a fine not exceeding 50,000 rupees and imprisonment for a term not exceeding 2 years, for natural person, and a fine not exceeding 200,000 rupees, for legal persons. In the UK, pursuant to Section 42 of the Competition Act, the failure to comply with a request by the OFT is a criminal offense punished with criminal fines or imprisonment for up to two years.
[446] In China, according to Article 52 of the Anti-monopoly Law, if business operators refuse to provide related materials and information, or refuse to or obstruct the investigation, the antimonopoly authority shall order them to make rectification or impose a fine.
[447] In Malta, see the Second Schedule (Article 37)(8) of the Competition and Consumer Affairs Authority Act.
[448] In the EU, in May 2011, the Commission fined Suez Environnement and Lyonnaise des Eaux €8 million for the breach of a seal during an inspection. Press release available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/632&type=HTML
[449] In the US, in October 2004, a fish distributor was charged with obstructing the grand jury investigation of a suspected conspiracy for price fixing for intentionally delaying the production of documents that the grand jury subpoenaed. Press release available at: http://www.justice.gov/opa/pr/2004/October/04_at_705.htm
[450] In the EU, in November 2007, in a case for the price fixing cartel of professional videotape producers, the Commission increased the fine on Sony by 30% for obstructing the Commission's investigation during an on-site inspection. Press release available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1725
[451] In Ireland, in 2005, a director was successfully prosecuted for an offense under Section 31(4)(a) of the Competition Act (failure to appear before the Competition Authority on foot of a witness summons). See the 2006 Annual Report of the Irish Competition Authority (Page 12), available at: http://www.tca.ie/EN/News--Publications/Annual-Reports.aspx
[452] Chapter One, Section 7.
[453] *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

be considered as always unlawful without the need of any further inquiry[455]. From this recognition of hard-core cartels as the most egregious violations of competition law, the fight against this type of anticompetitive practices has become the focus of competition law policy and enforcement[456]. In this regard, most competition law regimes have implemented specific enforcement procedures and sanctions to prevent, discover and punish the formation cartels. In practice, the heavy persecution of hard-core cartels and the seriousness of the sanctions imposed on undertakings and individuals involved in this kind of behavior, which depending on the competition system may include high financial penalties on undertakings and even the imprisonment of individuals, have led the participants to take elaborate measures to try to conceal their unlawful activities. This in turn has exponentially challenged the enforcement actions of competition law enforcers, especially in detecting and proving the infringement of the competition law provisions.

For the abovementioned reasons, some competition systems have introduced specific programs that offer cartel participants a more lenient treatment in exchange for information and cooperation with the ultimate purpose of facilitating the discovery and termination of cartels. Leniency programs[457] are systems that grant partial or total exoneration from the penalties that would otherwise be applicable to a cartel member which reports its cartel membership to a competition authority and offers its full cooperation during the investigation. This cooperation can consist in the facilitation of intelligence and/or evidence related to the competition law infringement, and/or the recognition of the infringement and acceptance of the reduced penalty. Additionally, it can also include the acceptance of remedial or compensatory measures. Finally, depending on the competition regime in question, the sanctions to be waived or reduced may include: financial penalties on undertakings, financial penalties on individuals, director disqualification and/or imprisonment.

According to the preceding, it goes without saying that in all competition regimes that have implemented leniency programs, the use of these is expressly restricted to hard-core cartels because of their particular nature[458]. Hence, other practices contrary the competition law provisions are not suitable for leniency programs, provided that these do not have the particular characteristics of cartels, such as being continuative, collective and hard to detect by the competition authorities[459].

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[454] MONTI, M., 'Cartels Why and How? Why should we be concerned with cartels and collusive behavior?' Speech delivered to 3rd Nordic Competition Policy Conference, Stockholm, September 2000.

[455] The approach of the US Supreme Court to declare hard-core cartels as illegal *per se* (*Northern Pacific Railway Co. v. United States,* 356 US 1 (1958)) has been followed by most jurisdictions in the fight against this type of anticompetitive practices.

[456] OECD, *Recommendation of the Council concerning Effective Action Against Hard Core Cartels*, 1998.

[457] The term "leniency program" or "leniency" is used in this section to make reference to all programs and situations which offer either full immunity (usually referred to as amnesty) or a significant reduction in penalties that would otherwise have been imposed on a participant in a cartel, in exchange for information about the cartel which satisfies specific standards prior to or during an investigation by the competition authority.

[458] In jurisdictions where the cartel activities include vertical agreements, such as vertical price-fixing (i.e. resale price maintenance), the leniency program also applies to this type of anticompetitive practices. This is the case of the UK where the prohibition of the Chapter I of the Competition Act covers both horizontal and vertical agreements. In this line, the OFT's guidance on leniency recognizes its applicability to vertical restrictions of competition, specifically, to resale price maintenance (OFT, *Leniency and no-action: OFT's guidance note on the handling of applications*, 2008, p. 70).

[459] ZINGALES, Nicolo (2008), 'European and American Leniency Programmes: Two Models Towards Convergence?'. *Competition Law Review*, Volume 5, Issue 1, p. 7.

The origins of leniency programs, as we know them today, can be traced back to the 1970s[460]. Nevertheless, the implementation of effective leniency programs has involved a continuous process of reforms over the years[461]. With time and practice, leniency programs have become the most important investigative tool for detecting cartel activity in some competition systems. Moreover, the apparent success of leniency programs in these jurisdictions has inspired other competition regimes to implement leniency programs as part of their arsenal against hard-core cartels, in this sense, while in the 1990s only one jurisdiction had a leniency program, by 2010, over fifty competition regimes had implemented leniency programs[462].

2. Benefits and Negative Effects of Leniency Programs

Over the years, and due to their success in cartel enforcement, leniency programs have been considered as the *"single and most significant development in cartel enforcement"*[463], and as *"one of the great successes of competition policy in recent years"*[464]. This success of leniency programs in determined competition regimes provoked the proliferation of these programs all over the world. As a consequence, competition authorities have been driven to implement these kinds of programs for the professed benefits that these may have on the overall enforcement of the competition law provisions.

Accordingly, the implementation of an effective leniency policy may contribute to the optimal enforcement of the competition law provisions and improve the level of compliance of the antitrust rules through the increased detection and punishment of hard-core cartels. In particular, the implementation of leniency programs can contribute to the enforcement of competition law by: (a) improving the collection of information and evidence; (b) enhancing the difficulty of creating and maintaining cartels; (c) lowering the costs of adjudication; and (d) the restitution to injured parties[465].

(a) Leniency programs constitute a way in which competition authorities can obtain information and evidence from the undertakings and individuals that have committed an infringement of the competition law provisions. In this sense, leniency programs have the ability to improve the collection of information and evidence by encouraging competition law infringers to confess and implicate their co-conspirators, hence, providing first-hand and direct insider evidence of conduct that the other parties to the cartel want to conceal, this allows competition authorities to discover conspiracies that would otherwise go undetected. In practice, leniency programs allow competition authorities to collect all kinds of information, like documents but also intelligence

[460] Contemporary leniency policy in competition law enforcement was first implemented in the US Corporate Leniency Policy of 1978.
[461] In the US, the 1978 Corporate Leniency Policy has been replaced for the current Corporate Leniency Policy in 1993, three major revisions were made to the program: (1) amnesty is automatic if there is no pre-existing investigation; (2) amnesty may still be available even if cooperation begins after the investigation is underway; and (3) all officers, directors, and employees who cooperate are protected from criminal prosecution. Similarly, in the EU the first Leniency Notice was adopted in 1996, this was later amended in 2002, when the main changes included: (1) immunity became automatic; and (2) fine reductions became more strictly aligned to the timing of the cooperation. In 2006, the European Commission amended the Leniency Notice again to clarify the threshold for immunity and the duty of cooperation of leniency applicants.
[462] HAMMOND, Scott D. (2010), 'The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades'. Department of Justice Antitrust Division, Miami, 25 February 2010, available at: http://www.justice.gov/atr/public/speeches/255515.pdf
[463] HAMMOND (2010), p.1.
[464] ITALIANER, Alexander (2011), 'Zero Tolerance for International Cartels'. ICN Cartel Workshop, Bruges-Belgium, 2011, available at: http://ec.europa.eu/competition/speeches/text/sp2011_11_en.pdf
[465] WILS, Wouter P.J. (2007), 'Leniency in Antitrust Enforcement: Theory and Practice', 30 *World Competition*, pp. 38-45.

about the cartel. Moreover, these programs provide for a cheaper and more reliable collection of evidence of antitrust violations, given that such collection is done by the undertaking and its staff, thus, saving the competition authority's resources. In addition, the evidence collected is highly reliable due to the fact that the leniency applicants do not have an incentive to provide unreliable information, given that this could jeopardize the benefit of a lenient treatment[466].

(b) Furthermore, leniency programs have the ability to destabilize existing cartels by increasing the difficulty of maintaining them and also of creating them in the first place. Successful cartels need constant efforts, for example, to coordinate the behavior of the cartelists, to increase their profits, and to prevent cartelists from cheating on the agreement[467]. The availability of an effective leniency program can raise the costs of creating and maintaining cartels, for instance, by increasing the possibility of cheating, by making collusion more difficult, by increasing uncertainty, by diminishing trust among cartelists, or by increasing the need for costly monitoring[468]. In practice, leniency programs work by disseminating distrust within the cartel and increasing the possibility of its members to confess to the competition authority[469]. Thus, the aim of leniency programs is the destabilization of the cartel and its eventual detection through confession[470].

(c) In addition to the costs saved by competition authorities in collecting evidence from leniency applicants, leniency programs can also save costs at the adjudication stage. This occurs in jurisdictions where the cooperation of leniency applicants includes the recognition of the infringement and the acceptance of the penalty. In such cases, the recognition of the infringement and the acceptance of the penalty will save the costs of adjudication and the costs of any further appeal. By lowering the costs of adjudication, competition authorities can devote their efforts and resources to investigate and punish other anticompetitive practices[471].

(d) Finally, in competition regimes where the restitution of injured parties is a requirement to obtain leniency[472], this obligation of leniency applicants can be beneficial for the overall enforcement of competition law, provided that the restitution of the injured parties may contribute to the enforcement objective of corrective justice in cases where the injured parties would not have been successful in obtaining restitution through follow-on actions for damages, and when the litigation expenses have been saved[473]. In his sense, considerations of fairness may require

[466] ICN, *Anti-Cartel Enforcement Manual, Chapter 2: Drafting and implementing an effective leniency policy*, May 2009, p. 2.
[467] LEVENSTEIN, Margaret C. & SUSLOW, Valerie Y. (2006), 'What Determines Cartel Success?', 44 *Journal of Economic Literature*.
[468] WILS (2007), pp. 42-43.
[469] LESLIE, Christopher R. (2006), 'Antitrust Amnesty, Game Theory, and Cartel Stability', 31 *Journal of Competition Law*, p. 462.
[470] ZINGALES (2008), p. 8.
[471] WILS (2007), pp. 43-44.
[472] According to the provisions of the U.S. Leniency Program, leniency will be granted to a corporation reporting illegal antitrust activity before an investigation has begun if: (1) the Division has not received information from any other source; (2) the corporation took prompt and effective action to terminate its participation in the activity; (3) the corporation reports the wrongdoing with candor and completeness; (4) the confession is truly a corporate act; **(5) the corporation makes restitution to injured parties, where possible**; and (6)the corporation did not coerce other parties to participate in the activity and was not he leader in, or the originator of, the activity [emphasis added].
[473] WILS (2007), pp. 44-45.

leniency applicants to make efforts to terminate and correct the violation, for instance, by making restitution to the victims[474].

On the other hand, leniency programs can have negative effects on the optimal enforcement of competition law, these may include: (a) lowering the penalty level; (b) exclusive reliance on leniency; (c) facilitation of the creation and maintenance of cartels; and (d) negative moral effects[475].

(a) As to the interaction between leniency programs and the level of penalties, the fact that successful leniency applicants are granted full immunity or a reduction of the penalty in exchange for cooperation has a negative effect on the penalty level, and as a consequence, on deterrence itself. In this regard, in order to avoid unnecessary penalty reductions, the applicability of leniency programs should be restricted to horizontal hard-core cartels, provided that these are among the most serious violation of competition law[476]. Moreover, full immunity should be limited to the first applicant; hence, the reduction for further applicants must reflect their actual contribution to the investigation[477].

(b) Leniency programs only work as long as cartel members truly believe that their violation can be discovered and sanctioned by the competition authority in case they do not apply for leniency or that there is the possibility that one of the members defects from the cartel and informs the competition authority about the infringement. Competition authorities that have been successful in the implementation of effective leniency programs may face the risk of relying too much on these programs and lose their capacity to detect and prosecute violations outside leniency applications[478].

(c) Provided that cartels are complex organizations capable of learning, this can eventually lead cartel members to adapt their organization to leniency policies in order to minimize the destabilizing effect and if possible to exploit leniency policies to facilitate the creation and maintenance of cartels[479]. Moreover, given that the direct effect of leniency is to reduce penalties to at least some members, leniency programs might actually encourage collusion because they decrease the expected cost of misbehavior[480].

(d) Finally, leniency programs may have two additional negative effects, on the one hand, there is the concern of the retributive injustice of an antitrust offender escaping punishment, and on the other hand, there is the concern of the unequal treatment between the cartel member that has been granted leniency and the other members that receive full punishment for the same action. With regard to the first concern, it is considered that it is in the public interest to reward cartel members that are willing to terminate their participation and cooperate in the investigation,

[474] OECD, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, 2002, pp. 9-10.
[475] WILS (2007), pp. 45-51.
[476] European Commission, *Notice on Immunity from fines and reduction of fines in cartel cases*, 2006, para. 1.
[477] *Idem*, at para. 8 and 5 respectively.
[478] WILS (2007), pp. 47-48.
[479] WILS (2007), pp. 48-49.
[480] MOTTA, Massimo & POLO, Michele (2003), 'Leniency Programs and Cartel Prosecution', 21 *International Journal of Industrial Organization*.

independently of the other members of the cartel. Furthermore, the interest of the general public in the detection and punishment of secret cartels outweigh the interest in fining the cartel members that confess the infringement to the competition authority[481]. As to the second concern, it is suggested that even though some cartel members are relieved from prosecution, there will be other members to prosecute, and that their prosecutions will be more certain and successful as a result of the evidence obtained from the leniency applicants[482].

3. Rationale for Leniency Programs

With regard to the overall structure of the public enforcement of the law, self-reporting is socially desirable. Self-reporting can be encouraged by lowering the sanctions for individuals who disclose their own infractions. In practice, self-reporting is socially desirable because of two reasons. On the one hand, self-reporting reduces the costs of enforcement, given that in cases where the violators reports to the enforcement authority, the latter does not have to identify and prove who the violator was. On the other hand, self-reporting reduces risk; accordingly, individuals will bear less risk because they know that if they infringe the law, they can report the infringement to the enforcement authority and suffer a lower and certain sanction compared to a full sanction[483].

The secretive nature of hard-core cartels makes their discovery, investigation and prosecution a very difficult task for competition authorities. The fact that cartels are clearly illegal, and may even amount to a criminal offense in certain jurisdictions, has led cartel participants to conduct their unlawful activities with a great deal of secrecy and to take extra measures to hide any incriminating evidence. Moreover, provided that hard-core cartels are especially harmful for the competitive process and consumers, this type of anticompetitive practices are normally under the spotlight of competition law enforcement. In this regard, competition authorities devote most of their efforts in detecting and punishing as many cartels as possible, and have implemented for this purpose specific enforcement tools, like leniency programs that encourage cartel members to come forward and confess their participation in a determined cartel[484]. As will be explained bellow, some of the special characteristics of horizontal cartels make this kind of unlawful behavior suitable for being discovered and prosecuted thanks leniency programs.

Hard-core cartels are characterized for being continuative, collective, and hard to detect[485]. In practice, due to the fact that cartels have a secretive nature and are difficult to detect and prosecute, leniency programs try to exploit the collective nature of cartels by pushing cartel members to defect and confess. Thus, the idea behind leniency programs is to turn one of the cartel members against the other(s) by creating a Prisoner's Dilemma. A prisoner's dilemma occurs when two parties pursue their own

[481] European Commission (2006), para. 3.
[482] OECD (2002), p. 26.
[483] POLINSKY, A. Mitchell & SHAVELL, Steven (2007), 'The Theory of Public Enforcement of the Law'. In: Polinsky & Shavell (eds) *Handbook of Law and Economics*, Volume 1. Amsterdam: Esevier, pp. 437-438.
[484] According to the statistics published in 2010 by the International Competition Network, related to a survey made about anti-cartel enforcement in 46 jurisdictions over the past 10 years, most competition authorities devote great part of their efforts in combating cartel activities (ICN, *Trends and Developments in Cartel Enforcement*, Turkey, 2010, available at: www.internationalcompetitionnetwork.org/uploads/library/doc613.pdf).
[485] ZINGALES (2008), pp. 7-8.

interest acting in a rationally selfish manner, which ultimately results in both parties ending up in a worse position than if they had cooperated and pursued the group's interests instead of their own. The strategy of leniency programs is to create distrust among cartel participants and encourage them to come forward before the competition authority and provide the latter with information, evidence and intelligence about the cartel in question in exchange for the total or partial exoneration from the sanctions that would otherwise be applicable to the leniency applicant[486]. Thus, when presented with this possibility, cartel participants must contemplate whether or not to apply for leniency and choose between two possible scenarios: do not report in the hope that the other co-conspirators will play the same; or report the cartel, if it is believed that it is imminent that the other members will report the cartel[487].

In light of the preceding, as stable cartels require trust among their members, the aim of competition law and more specifically of leniency programs is to create distrust among cartel members in order to prevent the formation of stable cartels. Accordingly, distrust can prevent companies from joining cartels and encourage cartel participants to report their anticompetitive activities to the government. The fact that leniency applicants report the cartel makes prosecution of the remaining cartel members much easier for the competition authorities. Ultimately, to create distrust among cartel participants can be a cost-effective mechanism to deter, uncover, and sanction hard-core cartels[488].

In addition, the increment in the penalties for cartel agreements in competition regimes has allowed leniency programs to become more successful. The fact that individuals and undertakings have been severely sanctioned in the past for their involvement in cartel activities with jail sentences and high financial penalties works as a strong incentive for both undertakings and individuals to come forward and report the cartel to the competition law enforcers. In practice, an effective leniency program and strong potential sanctions provide powerful "carrot and stick" incentives for cartel participants to be the first to report the cartel[489].

With regard to the justification for lowering the sanctions to be imposed on cartel participants that come forward before the competition authority and confess their participation in the cartel and provide sufficient information to prosecute their cartel co-conspirators, it has been suggested that lowering the penalties for self-reporting parties increases the overall welfare by reducing the enforcement costs, lowering risk, and allowing early remediation of damages[490].

4. Conditions for Effective Leniency Programs

There are certain conditions and characteristics that make leniency programs effective. A fundamental factor for the success of leniency programs is the availability of a sound enforcement program that

[486] SPAGNOLO, Giancarlo (2004), 'Divide et Impera: Optimal Leniency Programmes' , C.E.P.R. Discussion Paper No. 4840 (December 2004), available at: http://www.cepr.org/pubs/new-dps/dplist.asp?dpno=4840
[487] SAMÀ, Danilo (2008), 'Competition Law, Cartel Enforcement & Leniency Program', MPRA Paper No. 14104, December 2008, available at: http://mpra.ub.uni-muenchen.de/14104/1/MPRA_paper_14104.pdf
[488] LESLIE, Christopher R. (2004), 'Trust, Distrust, and Antitrust'. 82, 3 *Texas Law Review.*
[489] OECD, *Using Leniency to Fight Hard Core Cartels*, September 2001.
[490] MALIK, Arun (1993), 'Self-Reporting and the Design of Policies for Regulating Stochastic Pollution', 24(3) *Journal of Environmental Economics and Management*, pp. 241-257; KAPLOW, Louis & SHAVELL, Steven (1994), 'Optimal Enforcement with Self-Reporting of Behavior', 102 (3) *Journal of Political Economy*, pp. 583-606; and INNES, Robert (1999), 'Remediation and Self-Reporting in Optimal Law Enforcement', 72(3) *Journal of Public Economics*, pp. 379-393.

includes strong penalties for the infringement of competition law and a dynamic application of the antitrust provisions by the enforcement authorities. Accordingly, if the penalties are too weak or the competition provisions are rarely applied, then cartel members offered immunity from, or a reduction of the penalties will have little incentives to apply for leniency. In this sense, irrespective of how generous or well drafted a leniency policy is, it will not be effective unless there is an actual risk of imminent detection and punishment.

In practice, there are certain identified factors and conditions that make leniency programs effective for the detection and punishment of hard-core cartels[491], these include: (i) A strong anti-cartel enforcement program, which involves active investigations to detect hard-core cartels and substantial sanctions for the participation in these kind of practices. This will lead cartel members to believe that there is an actual risk of being detected and sanctioned if they do not come forward and confess to the competition authority. Moreover, effective cartel enforcement can create a race between cartel members to be the first to apply for leniency and, in jurisdictions where there are leniency programs for individuals, there will also be a race between the undertaking and its employees; (ii) Significant sanctions that shall be imposed on cartel members that did not apply for leniency, provided that if sanctions are not high enough, cartel members will not confess their participation in the cartel given that the benefits of leniency are reduced or inexistent, moreover, the penalty imposed on the first applicant has to be much less than the imposed on following applicants; (iii) Transparency and predictability in the operation of leniency programs that allow potential leniency applicants to predict how they will be treated in case they come forward, and alternatively, what will be the consequences if the application is not made; (iv) Protection of the information provided by the cartel participant in order to protect the latter from being more exposed than non-applicants in follow-on actions.

5. Different Approaches

As abovementioned, due to the success of leniency programs in some competition regimes in the detection and punishment of cartel agreements, these programs have become the tool of choice to fight hard-core cartels. As a consequence, this success has provoked the adoption of leniency programs in new competition regimes in order to improve anti-cartel enforcement. In practice, the proliferation of leniency programs across jurisdictions has resulted in many cases in the adoption of different approaches in the design and application of these programs across the world. The most important features of leniency programs are discussed below.

5.1. Scope of leniency programs

Virtually all leniency programs are concerned with the detection of hard-core cartels, which are agreements or concerted practices between two or more competitors that have the purpose of restricting competition mainly by fixing purchase or selling prices, allocating production or sales quotas, sharing markets and fixing the output of competitive tenders. On the contrary, normally, other types of competition restrictions that are usually less difficult to discover and investigate do not fall under the

[491] UNCTAD, *The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries*, 2010, p. 3; and ICN (2009), p. 3.

scope of leniency programs. Nevertheless, there are competition systems that have implemented cooperation programs, which offer individuals and undertakings a lesser enforcement action, or no action at all, in exchange for cooperation in violations of the competition law provisions that are not related with hard-core cartels[492].

In practice, the scope of the leniency programs is restricted in different ways depending on the competition system. For instance, in some jurisdictions, leniency programs are applicable to secret cartels only[493]. Alternatively, in jurisdiction with a broader scope of application, leniency programs are not restricted to secret cartels only, but also apply to cartels that already have been detected[494]. The aim of the possibility to allow cartel participants to apply for leniency is to ease the investigation of these cartels and reduce the costs of investigation, prosecution and punishment.

As seen in the beginning of this section, all leniency programs are concerned with horizontal hard-core cartels (price-fixing, market sharing, bid-rigging); however, there are a few jurisdictions that have a wider scope of application. For instance, in the jurisdiction with the widest scope of application, undertakings can apply for a reduction of financial penalties in exchange for cooperation in the investigation of restrains of competition other than cartel cases[495]. Similarly, other competition systems allow the application of their leniency programs not only to horizontal cartels, but also to vertical cartels, i.e. vertical price-fixing[496]. Finally, in some jurisdictions there are cooperation programs, which are alternative to leniency programs and do not apply to hard-core cartels, that offer a lower level of enforcement action in exchange for cooperation in the investigation of the anticompetitive conduct[497].

5.2. Types of leniency

Overall, leniency programs can be of two types: leniency for undertakings, and leniency for individuals. The availability of these types of leniency programs usually depends on the sanctioning systems of the competition regimes. Hence, in jurisdictions where only the undertakings can be sanctioned for the infringement of the competition law provisions, then leniency will be available only for undertakings. Alternatively, in competition systems where both undertakings and individuals can be sanctioned for their participation in anticompetitive practices, usually, the leniency policy allows both undertakings and individuals to apply for leniency.

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[492] For instance, in New Zealand, the 'Cooperation Policy' of the Commerce Commission of New Zealand offers cooperating parties a lesser enforcement action or no action at all for violations of the Commerce Act that do not involve cartel behavior. For further information, please visit: http://www.comcom.govt.nz/the-commission/commission-policies/cooperation-policy/

[493] In Bulgaria, the leniency program is only applicable to cases related to secret cartels of undertakings (Commission for Protection of Competition, Decision No. 274 of 08.03.2011).

[494] In Spain, according to the provisions of the leniency notice, the leniency program is aimed at discovering secret cartels and advance the investigation of those already detected (Comisión Nacional de la Competencia, *Comunicación sobre el Programa de Clemencia*, 2013, para. 6).

[495] In Finland, undertakings can apply for the immunity from, or reduction of financial penalties in cartel cases, additionally, undertakings can also apply, only for a reduction on the penalty, in other cases that do not involve hard-core cartels (see Sections 14-18 of the Competition Act, 2011).

[496] Such is the case of the UK.

[497] In New Zealand, the Commerce Commission has implemented a *Cooperation Policy* aimed at encouraging individuals and businesses to cooperate in the investigation in exchange for a lower level of enforcement, or no action at all. Further information available at: http://www.comcom.govt.nz/cooperation-policy/

(a) Leniency for undertakings

Corporate leniency programs are systems under which undertakings can apply for the total or partial exoneration from the sanctions that would have been imposed upon them for the infringement of the competition law provisions by confessing their participation in the anticompetitive activities, fully cooperating in the investigation with the competition authority, and meeting any other requirements established by the competition regime in question. The further requirements for being granted leniency vary from one jurisdiction to another, however, these are mainly concerned with: the timeliness of the application, the completeness of the information provided and the cooperation in the investigation, and the role and responsibility of the undertaking in the creation and maintenance of the cartel. As would be expected, this type of leniency is the one available in jurisdictions where only undertakings can be sanctioned for violating the antitrust rules[498]. Even though it is suggested that sanctions on undertakings should be coupled with penalties imposed on individuals for their involvement in the violation in order to attain higher levels of deterrence[499], in jurisdictions where this possibility is not available, it does not make any sense to implement mechanisms for individuals to confess their participation in cartel activities if these do not face an actual threat of being sanctioned for their implication in the anticompetitive practice, provided that these would not have enough incentives to come forward and report the cartel. Notwithstanding the preceding, in practice, the unavailability of mechanisms for individuals to report a cartel can weight against the effectiveness of the incentive to confess in the case of individuals who are determined to abide by the laws and are unwilling to act as firm-interest maximizers, when this would entail a risk of personal charges[500]. Finally, in jurisdictions where individuals can be sanctioned for their participation in cartel activities and no leniency programs are available for them, this lack of mechanisms to confess to the competition authority can reduce the overall effectiveness of leniency, given that, to the extent that undertakings care about their employees, they will have few incentives to apply for leniency, provided that such application will expose their employees to be sanctioned. Moreover, even in the case that undertakings do not care about their employees, they will not be successful in obtaining leniency due to the fact that their employees will be unwilling to cooperate to avoid incriminating themselves[501].

(b) Leniency for individuals

Leniency programs for individuals are systems under which the directors, officers and employees of undertakings involved in cartel activities can obtain a more lenient treatment from the competition authority in exchange for information and cooperation in the investigation of an alleged infringement of competition law[502]. As explained above, this type of leniency is normally available in jurisdictions where

[498] The most representative example of jurisdictions that only provide lenient treatment for undertakings is the EU, where according to the provisions of Regulation 1/2003, the penalties by the European Commission for the infringement of competition law are imposed only on undertakings and association of undertakings. In the same vein, the provisions of the Commission's leniency notice apply solely to undertakings.

[499] WILS, Wouter P.J. (2001), 'Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings But Also Individual Penalties, In Particular Imprisonment?' Paper presented at the 6th Competition Law and Policy Workshop at the European University Institute (Florence, 1-2 June 2001); and WILS, Wouter P.J. (2006A), 'Optimal Antitrust Fines: Theory and Practice'. *World Competition.* Volume 29, No. 2.

[500] ZINGALES (2008), p. 13.

[501] WILS (2007), p. 56.

[502] For example, in Colombia both legal and natural persons involved in anticompetitive practices can report the infringement in exchange for leniency (Article 14 of the Competition Act).

the individuals can be punished for their participation in anticompetitive practices[503]. Accordingly, it is in the interest of competition authorities and for the sake of the effectiveness of leniency programs to protect to the greatest extent possible managers, officer and employees of the undertakings applying for leniency[504]. In competition systems where leniency is available for both undertakings and individuals, this possibility can increase the effectiveness of leniency in a number of ways, for instance: by offering undertakings the possibility to obtain a discount in the penalties otherwise imposed on them and their employees; by creating a race to be first to confess and cooperate between undertakings and employees; and by reducing the risk of perverse effects of leniency policies, such as the possibility of undertakings that participate in a number of cartels to take turns to apply for leniency[505]. Nevertheless, even though the opportunity to avoid individual liability may be a significant factor in encouraging early co-operation, the success of certain leniency policies where only undertakings are subject to the competition law provisions, evidences that the threat of individual liability may not be a necessary condition for the success of leniency programs[506].

In jurisdictions where individual and undertakings are allowed to file for leniency, such application can be made jointly or independently, depending on the provision of the leniency program. Hence, in some regimes, individuals can apply for leniency independently from their employees[507], and alternatively, in other jurisdictions an application filed by the undertaking covers all the employees involved in the reported conduct[508]. Finally, in order to protect reporting employees from retaliations by their employers, in some jurisdictions there are specialized legislation that protects whistleblowers[509].

5.3. Degree of leniency

There are different degrees of leniency that vary from one jurisdiction to the next that usually depend on factors, such as the timeliness of the application and the completeness of the information and cooperation provided to the competition authority. Overall, depending on the case, successful leniency applicants can either obtain full immunity from the penalties, or alternatively, a reduction or discount in the sanctions that would otherwise be applicable to a cartel member which reports its cartel membership to the competition authority. Typically, in order to obtain leniency, cartel participants have to comply with requirements, like confess their cartel membership, cease their participation in the cartel activity, and fully cooperate in providing significant evidence to aid in the proceedings against their cartel co-conspirators.

As explained above, the level of leniency to be granted basically depends on the timeliness of the application and the evidential threshold required by the leniency policy of the competition system in

[503] To see the jurisdictions where individuals can be sanctioned for the infringement of the competition law provisions, please see the Sanction and Remedies Section below.
[504] See Point 15 of the Explanatory Notes of the *ECN Model Leniency Programme*, 2012.
[505] WILS (2007), pp. 55-57.
[506] The success of the EU leniency program in spite of not being available for individuals shows that the threat of individual liability may not be a necessary condition for leniency programs to achieve some results (OECD (2001), p. 3).
[507] Such is the case of the Australian Leniency Programme.
[508] See the Bundeskartellamt Leniency Programme (2006).
[509] In Japan, employees are allowed to report violations of the Antimonopoly Law under the provisions of Article 45(1). In addition, reporting employees are protected from retaliations by their employers according to the provisions of the Whistleblowers Protection Act (2004).

question. Thus, a determined leniency applicant will be granted full immunity from the sanction or just a reduction of the penalty depending on whether or not the cartel participant was the first successful applicant.

(a) Full immunity or exoneration

Immunity or amnesty, depending on the jurisdiction in question, makes reference to the total exoneration from the penalties that would otherwise be applicable to a cartel participant who reports its cartel membership to the competition authority. As seen before, provided that the penalties that can be imposed for the violation of the cartel prohibition vary widely from one competition regime to the next, the exoneration offered in a determined leniency program will be related to the types of penalties available for the infringement of the anti-cartel provisions.

Consequently, the scope of the immunity offered by leniency programs is determined in practice by the sanctioning system of the competition regimes. For instance, in jurisdictions that only allow for the imposition of financial penalties on undertakings for the infringement of the anti-cartel provisions, their leniency programs will respectively provide for immunity from the financial penalties that would have been imposed on the undertakings if these have not been granted leniency[510]. In Such cases, given that individuals would not be encouraged to report the cartel since they cannot be sanctioned, offering leniency to individuals in these regimes would be useless. Moreover, in jurisdictions where individuals can be sanctioned with the imposition of financial penalties for their involvement in cartel activities, being granted full immunity means waiving the obligation of cartel participants of paying a fine as a reward for their cooperation in the investigation[511]. With regard to criminal penalties, in jurisdictions where undertakings can be sanctioned with the imposition of financial penalties of a criminal nature, some leniency programs allow the possibility to grant successful leniency applicants full immunity from the criminal penalties which means not being charged criminally and being relieved from paying the fine[512]. Similarly, in jurisdiction where individuals can be sentenced to prison, successful leniency applicants may be granted full immunity from criminal prosecution[513]. Finally, in some competition regimes that impose administrative fines and criminal convictions, the leniency program offers immunity regarding administrative financial penalties and prevents the commencement of criminal investigations regarding all crimes directly related to the cartel.[514]

[510] That is the case of the EU Leniency Program.
[511] In New Zealand, according to Section 30 of the Commerce Act, 1986, individuals and undertakings can be sanctioned with the imposition of financial penalties for the breach of the cartel prohibition (up to $500,000 and $10,000,000, respectively), however, pursuant to the *Cartel Leniency Policy and Process Guidelines*, 12 April 2011, individuals, as well as undertakings, can receive conditional immunity from financial penalties where the applicant is the first participant in a cartel to apply for leniency and to meet the prescribed conditions. Available at: http://www.comcom.govt.nz/assets/The-Commission/Policies/Leniency/Cartel-leniency-Policy-and-Process-Guidelines-12-April-2011.pdf
[512] For instance, in Ireland, where undertakings are charged criminally for their participation in cartel activities and sanctioned with financial penalties of a criminal nature, the leniency program provides for full immunity for undertakings that come forward and cooperate with the investigation, in such cases, immunity means not being charged criminally, and as a consequence, not having to pay any financial penalty (Irish Competition Authority, *Cartel Immunity Programme*, 2001, at para. 12, available at: http://www.tca.ie/images/uploaded/documents/Cartel%20Immunity%20Programme.pdf).
[513] In the US, according to the Leniency Policy for Individuals, the directors, officers and employees who come forward and confess their implication in the illegal activities can avoid criminal prosecution for antitrust violations.
[514] In Brazil, see Articles 86(4) and 87 of the Antitrust Law.

As seen in the previous section, it is important for the effectiveness of leniency programs to provide potential applicants full certainty about the benefits of being granted leniency in order to incentivize cartel participants to come forward and report their illegal activities. Moreover, optimal leniency programs should grant full exoneration from all penalties at least for the first person to come forward[515]. In this sense, it is fundamental that leniency programs are in line with the sanctioning systems of the competition regime, provided that if the program only covers part of the sanctions that can be imposed for the infringement of the anti-cartel provisions, cartel members will be reluctant to report the cartel if they can still be sanctioned because the leniency program does not fully protect applicants from additional penalties. Hence, the possibility of being sanctioned for the reported cartel even after leniency has been granted can reduce the effectiveness of the program[516].

The requirements for being granted full immunity vary from one competition regime to another, however, most jurisdictions share certain similarities in this regard which are related to the timeliness of the application and the stage of the investigation by the competition authority. Thus, in order for being granted full immunity from any penalty which would otherwise have been imposed, most competition regimes require the applicant to be the first cartel participant to file an application and provide the competition authority with sufficient evidence to commence proceedings in relation to the cartel. Alternatively, in order to broaden the scope of the programs and to encourage cartel participants to file for leniency, most competition systems allow cartel participants to apply for leniency if no other member has been granted immunity even if the competition authority has knowledge about the existence of the cartel, but does not have sufficient evidence to declare the infringement of the cartel prohibition. The purpose of granting immunity to cartel members in cases where the authority has already commenced proceedings to declare the antitrust violation is to ease the collection of incriminatory evidence and to terminate the cartel faster[517].

(b) Reduction of penalties

In addition to the possibility to receive full immunity from penalties, potential cartel members that do not qualify for immunity may benefit from a reduction of any penalty that would otherwise have been imposed. It is in the interest of competition authorities to obtain the cooperation of those cartel members that do not qualify for immunity in order to ensure that cartel violations are more efficiently investigated and penalized. There are different scenarios where a cartel member is not suitable for being granted full immunity, but can obtain a reduction in the penalty imposed. For instance, in cases where no cartel member has filed for leniency but the competition authority has already initiated an investigation on the cartel in question. In this case, provided that the competition authority has already evidence about the existence of the cartel, no cartel member could be granted full immunity, however, to encourage their cooperation, certain competition regimes offer these the possibility to reduce the penalty to be imposed if they cooperate in the investigation. Additionally, in cases where a successful leniency application has

[515] HARRINGTON, Joseph E. (2008), 'Optimal Corporate Leniency Programs'. *The Journal of Industrial Economics*, Volume LVI, No. 2.
[516] For instance, in Spain, the leniency program only grants exoneration from the administrative sanction, even though cartels can also be prosecuted criminally.
[517] This is how immunities are granted in the EU according to the ECN's *Model Leniency Programme*, 2012.

already been made, subsequent leniency applicants may be offered a reduction in the penalties if they fully cooperate in the investigation. The level of the reduction that subsequent applicants receive depends on a series of factors including the speed at which they approach the authority and the quality of the evidence they provide. It may also include a complete acceptance of responsibility for cartel behavior and other factors in mitigation. Finally, some cartel members cannot apply for full immunity due to the role they play in the cartel, i.e. coercers or ringleaders, however, these may qualify for a reduction of the penalty if provide full cooperation with the investigation.

The level of reduction of the penalty varies depending on the jurisdiction in question and on certain factors, such as the timeliness of the application and the value of the evidence provided to the competition authority. Despite the preceding, it is considered a good practice to create a significant difference between immunity and reduction of the penalties with the purpose of making application for immunity significantly more attractive. In this regard, most competition regimes reward the cooperation of cartel members that do not qualify for full immunity with a maximum reduction of 50% of the penalty which lowers in relation to subsequent applicants[518]; however, there are regimes where the penalty can be reduced up to 100%[519].

5.4. Excluded leniency applicants

A frequent feature of leniency programs is to exclude certain applicants by virtue of their implication in the creation and maintenance of the cartel. As a general rule, most leniency programs require that the applicant did not coerced others into participating in the conduct[520]. Hence, as a matter of principle, an undertaking that has coerced one or more undertakings to join or remain in the cartel should be excluded from the benefits of leniency. Considerations of natural justice prevent an undertaking that has played such a role from escaping sanction altogether[521].

Furthermore, other competition systems exclude cartel leaders from their leniency programs. In practice, with regard to the exclusion of cartel leaders, in most jurisdictions, leniency applicants are excluded from obtaining leniency only if they were the single ringleader of a conspiracy[522]. For instance, if in a cartel there are two ringleaders in a conspiracy of more than two undertakings, then all of them, including the two ringleaders, may qualify for leniency. Similarly, in a conspiracy of two undertakings where both of them have played a fundamental role in the cartel, both undertakings may be eligible for leniency. Moreover, leniency applicants should not be excluded under this condition for being the largest undertaking in the industry or for having the greatest market share. The purpose of reducing the scope of

[518] In Japan according to the Antimonopoly Law, the JFTC will grant full immunity to the first applicant filed before the initiation of the investigation, and a reduction of 50% to the second applicant, 30% to the third through the fifth applicant, and a 30% reduction to any applicant filed after the initiation of the investigation.
[519] In Singapore, according to the *Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases,* in cases where the Competition Commission of Singapore has opened an investigation related to a cartel, the members cannot file for full immunity but may benefit from lenient treatment by way of a reduction of up to 100% of the fine imposed if they are the first to come forward. Subsequent cartel members may benefit from a reduction of up to the 50%.
[520] European Competition Network, *ECN Model Leniency Programme: Report on Assessment of the State of Convergence*, 2010. According to the Report, half of the Network members have provisions that exclude coercers from immunity (Austria, Belgium, Bulgaria, Denmark, European Commission, Spain, France, Hungary, Luxembourg, the Netherlands, Portugal, Sweden, and the UK).
[521] See point 22 of the Explanatory Notes of the ECN Model Leniency Programme, November 2012.
[522] Bundeskartellamt, *Notice No. 9/2006 on the Immunity from and Reduction of Fines in Cartel Cases –Leniency Programme-*, 7 March 2006, p. 1, B.3(3).

this exclusion to the single ringleader is to provide the maximum amount of incentives and opportunities for undertakings to come forward and report their illegal activity[523].

In some jurisdiction, recidivists are excluded from leniency programs[524]. The rationale for this exclusion is to prevent undertakings that have been granted leniency previously for a reported cartel from benefiting again from the total or partial exoneration of the penalty. Moreover, it has been partly suggested that the exclusion of recidivists could be a partial solution to prevent undertakings that participate in various cartels in different markets to take turns to apply for leniency every time one of the cartels is, or is about to be detected by the competition authority. Nonetheless, the exclusion of recidivists would mean that leniency would no longer work in cases were the same group of undertakings that was found to be involved in cartel activity forms a new cartel. Thus, the fact that this group of undertakings cannot apply for leniency for being recidivists, would make the second cartel more stable than the first one, and as a consequence, encourage recidivism[525]. In this sense, in some of the jurisdictions where recidivist cartel members were allowed to apply for leniency, recent modifications have abolished this possibility[526].

In addition, in some jurisdictions the initiators of the cartel are excluded from the leniency programs. The refusal of competition authorities to grant leniency to initiators is due to the fundamental role that these have played in the creation of the cartel. The foundation for denying leniency to cartel originators is to disqualify the most blatant violators[527]. This exclusion is generally coupled with other cumulative conditions, i.e. did not initiate the cartel, did not take steps to coerce others to join the cartel or to remain in it, or did not have a leading role in the alleged cartel[528].

Finally, in some competition regimes, cartel participants are not excluded from the leniency programs by virtue of the applicant's role and responsibility in the design and implementation of the reported cartel[529]. This approach is intended to encourage as many cartel participants as possible to come forward and report their unlawful activities, irrespective of their condition as initiator, coercer or leader. However, in some competition systems, the competition authority will not consider the role of the leniency applicant only when the latter is the first to come forward before the competition authority and cooperate with the investigation in a full, frank and timely manner. In such cases, the competition

[523] HAMMOND, Scott D. & BARNETT, Belinda A. (2008), 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters', US Department of Justice, question 15.
[524] In Algeria, according to Article 60 of the Ordonnance Nº 03-03 de 19 juillet 2003 (Algerian competition act), the Conseil de la Concurrence can waive or reduce the sanctions to be otherwise imposed on undertakings in exchange for information and collaboration, however, this possibility is not allowed for recidivists.
[525] WILS (2007), pp. 48-49.
[526] In Greece, the requirement of "not being a recidivist" was abolished by the new Hellenic Competition Commission's Leniency Programme of 15 November 2011.
[527] OECD (2002), p. 16.
[528] See point 1.3.1(d) of the leniency program of the Czech Office for the Protection of Competition.
[529] In Canada, according to the provisions of the Leniency Program (2010), the role and responsibility of cartel participants is not a condition for eligibility. Similarly, in Italy, *Comunicazione sulla non imposizione e sulla riduzione delle sanzioni ai sensi dell'articolo 1 della legge 10 ottobre, N. 287* (March 2013) (Italian leniency notice), does not take into consideration the condition or participation of leniency applicants in the reported cartel.

authority will consider the role and responsibility of subsequent leniency applicants, the degree to which the applicant benefited from the infringement, and any other aggravating or mitigating factor[530].

5.5. Marker System

The marker system under a leniency program is a procedure for applicants to protect their place in the queue for a finite period of time that allows leniency applicants to gather all the necessary information and evidence to perfect their application. The applicant's position is reserved in the queue for a given period of time that varies depending on each leniency program[531]. If the applicant fails to disclose sufficient evidence to determine the infringement of the anti-cartel provisions, the marker may be withdrawn. However, many competition regimes allow the possibility of extensions to the marker period if the applicant can demonstrate that an extension is necessary to perfect the application and that the applicant is making a good-faith effort to complete the application in a timely manner[532]. The availability of a clear marker system with reasonable extensions increase the incentives on cartel participants to self-report their membership in a determined cartel, given that it makes the operation of leniency programs more transparent and certain.

5.6. Leniency Plus and Penalty Plus Policies

Besides the leniency program, in some competition regimes a leniency plus policy has been instituted in order to gather tips and leads about additional cartels. The leniency plus program operates in situations where an undertaking that does not qualify for leniency in an ongoing cartel investigation, discloses evidence about the existence of a second cartel, and complies with the requirements of the leniency program for the second infringement. In such cases, the undertaking will be granted leniency for the second violation and a reduction of the penalty for its participation in the first violation[533]. The ultimate objective of this type of programs is to further encourage leniency applicants to report additional cartels in the hope of benefiting from a more lenient treatment, and as a consequence, to discover additional cartels.

Conversely to the abovementioned amnesty plus policy and as an additional incentive for leniency applicants, the penalty plus policy is intended to sanction leniency applicants that fail to report a separate infringement of the anti-cartel provisions that is later discovered by the competition authority. In

[530] In Canada, pursuant to question 22 of the *Leniency Program-FAQ's*, the Competition Bureau will recommend that no separate charges be made against first leniency applicants. Alternatively, the Bureau will consider whether or not to recommend that second and any subsequent leniency applicant be charged by considering several factors, including: the role of the applicant, the degree to which the applicant benefited from the offense, the fact that the applicant is a recidivist or has a criminal record, and any other relevant aggravating or mitigating factors.

[531] For instance, in Brazil, according to the Regulation 01/2012 of CADE the first position in the queue for leniency is hold for 30 days.

[532] In Korea whenever an applicant requires additional time to obtain evidence or there are special circumstances that impede the applicant to submit the evidence at the time of the application, the KFTC may initially grant the applicant a 15-day period, which may be extended for up to 60 additional days if valid reason is provided to the KFTC.

[533] In Singapore, leniency applicants that do not qualify for leniency in a determined cartel investigation may furnish information about another cartel that they may be participating in or may be aware of in exchange for a reduction of the penalties.

such cases, the enforcers will consider the failure to report the cartel violation as an aggravating factor in sentencing[534].

5.7. Financial Rewards to Informants

Another way to incentive cooperation in the detection and prosecution of cartels is to grant informants positive financial rewards or bounties[535]. The positive financial reward scheme consists in paying a monetary reward to those who provide information or evidence on cartel activity. Unlike leniency programs, the informant reward program targets third parties and not the cartel participants. The objective of this type of policy is to gather information and evidence on cartels in a more efficient way with as little effort and cost as possible by providing financial reward to informants. Moreover, this program is a strong cartel deterrent given that undertakings are conscious of being watched all the time and helps create a social awareness of the harmfulness of cartels[536]. In this sense, it has been argued that positive financial rewards can provide stronger tools than leniency programs for the preventions of cartels[537].

In this type of programs, the amount of the financial reward will be determined by the degree of the violation reported and the strength of the evidence submitted by the informant. Hence, the more severe the reported infringement was and the strongest the submitted evidence was, the more amount of money will be rewarded to cartel informants[538].

6. Protection of Information[539]

A fundamental feature of leniency programs is the protection of sensitive information provided by leniency applicants from unauthorized disclosure. The confidentiality of leniency application is important for applicants, provided that unauthorized disclosure could provoke commercial and even personal retaliations and exposure to liability in other jurisdictions. In this sense, the possibility of information being shared with other jurisdictions can seriously decrease the incentives of cartel participants to come forward.

In order to encourage cartel participants to come forward a cooperate with the competition authority, competition authorities usually promise applicants that the information provided in the frame of leniency programs will be strongly protected from unauthorized disclosure. Accordingly, most competition regimes provide for specific mechanisms to protect the information submitted by the

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[534] In the US, leniency applicants that do not qualify for leniency in one market may file for amnesty plus leniency by disclosing an offense in another market. In such cases, the Antitrust Division will recommend to the sentencing court that the undertaking receive a discount in its fine for the offense in the first market. In addition, the Antitrust Division has a penalty plus program, under which it may encourage a sentencing court to consider the failure to report a separate cartel that is discovered later by the Division as an aggravating sentencing factor.

[535] Such is the case of Korea that according to Article 64-2 of the MRFTA, the KFTC may pay a financial reward to any person reporting any violation of the Act providing proof of such violation.

[536] HUR, Joseph Seon (2004), 'Cartel Detection Techniques of the KFTC', presented at the *Cracking Cartels Conference: International and Australian Developments.*

[537] Referring to positive financial rewards for undertakings and individuals involved in cartel activities, see: AUBERT, C., REY, P., KOVACIC, W.E. (2006), 'The impact of leniency and whistle-blowing programs on cartels'. 24 *Int. J. Ind. Organ.*

[538] Korean Fair Trade Commission, press release: 'KFTC's launch of Reward System for Informants', available at: http://www.ftc.go.kr/data/hwp/rewardsystem.doc.

[539] For additional information on the disclosure of information contained in leniency applications and the interaction with private actions for damages, please see Chapter Three, Section VIII.4.

applicants, like maintaining the identity of the informant and the information provided as confidential[540]. Similarly, some jurisdictions will refuse to share information gathered via lenience applications with other enforcement agencies without the applicant's consent[541]. At regional levels, there are propositions to limit the disclosure of evidence submitted in the frame of leniency programs in follow-on claims for damages[542]. Moreover, due to the fact that potential leniency applicants may fear to make a written application for the risk of follow-on litigation, some competition regimes provide for the possibility to make oral application to avoid the incriminating nature of written applications[543].

V. SETTLEMENTS

1. Introduction

Negotiated settlements or plea agreements between cartel participants[544] and the enforcement authorities[545] are an important enforcement tool to dispose competition law cases. Settlement systems have been implemented in many jurisdictions as a means to foster the early resolution of competition law cases and to achieve further objectives of the enforcement of competition law, i.e. efficient allocation of the competition authority's resources, increase of the enforcement activity, and deterrence. In a broad sense, settlement agreements are instruments used by the enforcement authorities to obtain cooperation from the defendants in exchange for a lesser penalty. These procedures mean for the government a greater economy and broader enforcement, and provide the defendants an opportunity to avoid a protracted expensive trial attended by unfavorable publicity and potentially to be followed by damage litigation[546].

According to the procedural rules, by default, competition law cases are resolved via the full disposal procedure. The standard procedure for the resolution of competition law cases varies heavily from one jurisdiction to another depending on the enforcement framework, however, in a broad sense, the standard procedure may include the full investigation and prosecution of the competition law infringement, the production of a fully reasoned and detailed decision or the litigation of the antitrust case before courts, and eventually the appeal process. On the one hand, the ordinary procedure is beneficial for the parties provided that it is governed by procedural rules, guidelines and case law aimed at guaranteeing the due process, and the quality and fairness of the decisions delivered by the enforcement authorities. On the other hand, the downside of resolving cases in full proceedings is that these procedures require time and the expenditure of the limited resources of the enforcement authorities and the defendants.

[540] In Canada, the identity of leniency applicants and the information provided by these is treated as confidential by the Bureau.
[541] According to the provisions of the U.S. leniency program, the Antitrust Division will not share information provided by the applicants to foreign governments even if there is a bilateral antitrust cooperation agreement.
[542] In the EU, Article 6 of the *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union* (2013), determines that Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or third party to disclose leniency corporate statements.
[543] In India, cartel members can file a written leniency application, or contact the Commission orally to furnish the information relating to the existence of a cartel (Regulation 5(1) of the Lesser Penalty Regulations of the Competition Commission of India, 2009).
[544] The settlement systems reviewed in this section are those implemented in the framework of anti-cartel enforcement. For the resolution of cases related to other anticompetitive practices via commitment decisions please see Section VI.2.1.d, below.
[545] Provided that the authorities responsible for the investigation and adjudication of cartel cases differ depending on the competition system in question, the term "enforcement authorities" or "enforcers" in this section makes reference to all public enforcers in charge of the investigation and/or prosecution of competition law cases (i.e. competition authorities, prosecutors and courts).
[546] BARNES, Stanley N. (1954), 'Settlement by Consent Judgment'. Section of Antitrust Law, ABA Publishing, p. 8.

In opposition to the full procedure for the adjudication of competition law cases, many jurisdictions have implemented different kinds of settlement systems to resolve competition law cases more expeditiously, thus, saving time and resources. Under the frame of the normal procedures, the enforcement authorities have to investigate, prosecute and adjudicate a determined case respecting and complying with all the rules of due process. In addition, the defendants have the prerogative of contesting the investigations and the decisions issued by the enforcement authorities in the exercise of their procedural rights of defense. The settlement systems for the early resolution of competition law cases are intended to relieve the enforcers and defendants from lengthy and expensive proceedings by simplifying the resolution of the case by relieving the enforcers of having to conduct a full investigation and adjudication of the case, and securing the admission or non-contestation of the antitrust infringement by the defendants. In this sense, settlement procedures refer to the disposal of a case by the enforcement authorities through a specific and simplified procedure where some of the formalities of a fuller procedure can be dismissed and some benefits be granted to the defendant in exchange for the admission or non-contestation of the infringement and/or the offer or acceptance of remedies and/or penalties[547].

Settlements procedures are not to be confused with commitment decisions. The latter are mechanisms through which the competition authorities can terminate their proceedings by adopting a commitment decision in exchange for undertakings or commitments on the part of the undertakings that have allegedly infringed the provisions of competition law. In practice, settlement procedures differ from commitment decisions in that a settlement decision does establish the infringement of the competition law provisions and requires an admission of guilt from the parties and the promise not to contest the settlement decision. Conversely, commitment decisions do not establish the infringement of the competition law mandates and do not require any admission by the parties. Moreover, settlement procedures are related to past behavior, while commitment decisions require commitments in relation to future behavior. Finally, settlement procedures are only available for cases related to cartel activity, whereas commitment decisions are appropriate for all the other competition law cases.

2. Rationale for Settlement Systems

The ability of competition law enforcers to detect and punish cartels is strictly related to their facility to obtain information about a determined anticompetitive conduct. In this regard, it is in the best interest of enforcers and the general public to offer cartel participants genuine incentives to cooperate with the investigation. Many competition regimes have implemented specific mechanisms to secure the cooperation of antitrust offenders, such as leniency programs[548] or settlement policies.

The rationale for the implementation of settlement systems in the framework of anti-cartel enforcement is that due to the seriousness of cartel infringements and that these cases are normally long, expensive and procedurally complex to dispose, some competition regimes have adopted settlement policies to simplify the regular procedure thanks to the cooperation of the defendants[549]. Under regular

[547] WILS (2008B).
[548] Section IV, above.
[549] DEKEYSER Kris & ROQUES Christian (2010), 'The European Commission's settlement procedure in cartel cases', *The Antitrust Bulletin,* Vol. 55, No. 4.

conditions, from the initiation of an investigation, to the adoption of a final decision by the enforcement authorities, the time lapse and resources invested are considerable in cartel cases, if one adds further appeals against these decisions[550], the entire procedure could last years and spend a considerable amount of resources on the part of both the enforcers and the defendants. In this sense, as a way to improve the efficiency and performance of competition law enforcers in their relentless fight against cartels, some competition regimes have introduced settlement procedures to enhance deterrence by facilitating the enforcers to rapidly dispose cartel cases, and as a consequence, freeing up valuable resources for other investigations, and providing the defendants faster decisions and reduced penalties[551].

A further justification for the introduction of settlement procedures, and in relation to leniency programs, depending on the scope of a determined leniency policy, settlement procedures can be alternatively used in cartel cases in jurisdiction where full immunity or leniency is only granted to the first successful applicant and/or where certain cartel members are ineligible due to their participation in the cartel. In such cases, settlement procedures provide ineligible cartel participants with an alternative way to benefit from an early resolution and lower penalties in exchange for their cooperation[552].

Finally, settlement procedures are ultimately intended to free human and economic resources to allow competition law enforcers to deal with other cartel cases, and as a consequence, increasing the detection rate of hard-core cartels and the overall efficiency of the competition law enforcers. At the end, these settlement policies are expected to have a positive impact on deterrence[553].

3. Benefits of Settlement Systems

Settlement procedures for the early resolution of cartel cases have become an important topic for discussion in international competition forums and a growing practice across jurisdictions due to the benefits that these kinds of procedures report to the overall enforcement of the anti-cartel provisions. Due to the benefits that these systems deliver, in certain competition regimes over 90 percent of the cartel members prosecuted for the infringement of the competition law provisions enter into settlement agreements with the enforcement authorities[554].

Despite the preceding, in order for a determined settlement system to be successful, such a system has to provide cartel participants and competition law enforcers with sufficient benefits and incentives to settle. However, state of the art settlement systems have proved to be beneficial for governments, enforcement authorities, cooperating defendants, the courts, the victims, and the general public. Besides

[550] In the EU, ninety percent of the decisions of the European Commission are appealed, see: VELJANOVSKI, C. (2009), 'European Cartel Prosecution and Fines, 1998-2009: A Statistical Analysis of Fines Under the 1998 Penalty Guidelines' [online]. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016014

[551] MEHTA Kirtimumar & TIERNO CENTELLA María Luisa (2010), 'EU Settlement Procedure: Public Enforcement Policy Perspective', in EHLERMANN & MARQUIS (eds), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law.* Oxford and Portland: Hart Publishing.

[552] Such is the case in the U.S., where according to the Antitrust Division's Corporate Leniency Program, only the first undertaking to report a criminal antitrust violation and to meet the other conditions of the Program is granted full immunity –no criminal conviction, no criminal fine, and no jail sentence for cooperating employees. Nonetheless, undertakings and individuals that lose the race for leniency can still obtain reduced sentences in exchange for their cooperation by pleading guilty to criminal charges and entering into plea agreements with the Division.

[553] European Commission, 'Antitrust: Commission introduces settlement procedure for cartels-frequently asked questions'. Brussels, 30th June 2008.

[554] That is the current situation in the U.S. according to: HAMMOND Scott D. (2006), 'The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All'. *OECD Competition Committee, Working Party No. 3*.

the more obvious benefits that settlements procedures offer to enforcement authorities and settling cartel participants (resource savings and lesser penalties), this type of procedures also provide other additional benefits that will be discussed below.

a) One of the most important benefits of settlements is the saving of time and resources (human and monetary). In opposition to regular procedures, in settled cases the resources and the time that would have been expended in the investigation and prosecution of all the cartel participants is saved thanks to the cooperation of the settling defendants. The immediate repercussion that these savings have is that the resources that would have been expended in a full procedure are freed-up to investigate and prosecute additional cartels, this can ultimately increase deterrence[555]. In addition, the settling cartel participants also benefit from the savings of time and resources given that the quick resolution of the cases allows the defendants to rapidly resolve their liability and move on.

b) A further benefit of settlement is the cooperation provided by cartel participants to the investigation conducted by the competition law enforcers. The cooperation of settling cartel members provides important momentum in the ongoing investigation allowing a faster prosecution of non-settling cartel participants. In this sense, once a cartel member has settled, the other members hurry to settle the case. Moreover, thanks to the cooperation of setting cartel participants, the enforcers can gather important evidence to successfully prosecute additional members of the cartel. Notwithstanding the preceding, in jurisdictions where the settlement procedure is conducted once the investigation has concluded, these procedures are not intended to gather evidence about the cartel, but serve as a means to dispose the case more quickly. Lastly, the cooperation provided by cartel participants in the frame of settlement procedures can lead to the detection of other unidentified cartels (leniency plus)[556].

c) Transparency can be considered as a fundamental element of settlement and also as a benefit. In settlement negotiations, transparency is necessary to secure the cooperation of cartel members, as well as to foster public confidence that there is proportional and equitable treatment of competition law infringers. The practice of some competition agencies to upload prior settlement agreement on their websites[557], allows potential settling parties to somehow predict the possible reward they would receive for they cooperation. Similarly, written settlement agreements constitute a public available record of the enforcers on their policies and positions that can be useful for the undertakings and the bar, and increases the transparency of the settlement policy. Finally, the production of model settlement agreements can increase transparency by informing prospective settling parties on the terms and obligations of singing a settlement agreement.

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[555] OECD, *Experience with Direct Settlement in Cartel Cases,* 2008, p. 7.
[556] For additional information on leniency plus programs, please see Section IV, above.
[557] For examples of websites that contain information on settled cartels cases, visit the websites of the: Australian Competition and Consumer Commission (http://www.accc.gov.au), the Canadian Competition Bureau (http://www.competitionbureau.gc.ca), the German Bundeskrtellamt (www.bundeskartellamt.de) , the UK Office of Fair Trading (http://www.oft.gov.uk), or the U.S. Department of Justice Antitrust Division (http://www.justice.gov/atr/).

d) A further benefit of settlements is that these procedures provide proportionality in the charges and the penalties. Settlement agreements contain agreed upon charges and penalties favorable for the public interest and proportional to other participants of the same cartel and other similarly situated cartel members in other cartels prosecuted. Usually proportionality is related to the timeliness and quality of the cooperation and the culpability of the settling party in relation to other members of the cartel when imposing or recommending the penalty to be imposed upon a settling cartel member.

e) Certainty about the type of penalty or sentence to be imposed on settling cartel members is another benefit of this type of procedures. On order to provide certainty, some jurisdictions allow settling cartel members and the enforcers to agree upon the penalty or sentence before its actual imposition. In competition regimes where the competition authority is empowered to impose the sentence itself, the settling parties and the authority may previously reach a settlement agreement determining the sentence to be imposed. On the other hand, in jurisdictions where the competition authority recommends the imposition of the sentence to the competent court, normally, the courts follow the authority's recommendation, thus providing a certain degree of certainty. Most settlement systems also provide for certainty in relation to future charges. Hence, in jurisdictions where individuals can be prosecuted for their participation in cartel activities, corporate settlement may provide certainty to the individuals that if they cooperate, they will not be prosecuted for the conduct to which their employer plead guilty. Settlement systems can also provide certainty to third parties like customers, banks, or shareholders, that the undertaking has resolved its liability.

f) Finality is another benefit of settlement procedures. Settlement procedures allow the possibility to resolve definitively a determined matter. Such possibility is beneficial for both the enforcers and settling cartel participants. In the case of the enforcers, these can save their limited resources from investigations, prosecutions, litigations and appeals. Moreover, in jurisdictions where courts adjudicate competition law cases, these can also save the time and resources of full procedures. On the side of the defendants, thanks to settlement these can also avoid bad publicity, costly and lengthy procedures, and finally resolve their liability to move on.

4. Drawbacks of Settlement Systems

Even though settlement procedures can be beneficial for the overall enforcement of the anti-cartel provisions and, in some cases, may increase deterrence, there may also be some negative aspects against this type of procedures.

According to the legal and constitutional framework of some jurisdictions, the fact that settling cartel participants have to admit the infringement of the completion law provisions, and waive their right to appeal the decision and other procedural rights, can raise concerns in relation to the privilege against self-incrimination and be considered as a violation of the fundamental rights of defense.

In order to incentive cartel participants to settle, normally, settlement policies offer certain benefits like lower penalties of less burdensome remedies. This constitutes an obvious drawback given that the enforcement authority will have to settle for something less than the maximum possible penalty that could have been imposed against a cartel participant in order to secure its cooperation. This will inevitably lead to lower penalties than the imposed in regular proceedings. In such cases, the reduction of the penalties can be regarded as enforcement losses. Considering that the levels of deterrence are strictly related to the amount of the fines imposed for cartel violations, the fact that these fines can be lowered in settlement procedures can decrease the level of deterrence. This situation is further exacerbated in competition systems where cartel violations are only sanctioned with the imposition of financial penalties, given that in competition regimes were cartel participants can be sanctioned with imprisonment for individuals and face a high level of private enforcement[558]. Hence, settlements will only be desirable from the perspective of optimal enforcement if the losses provoked by the benefits granted to the defendants as an incentive to settle are outweighed by the enforcement gains resulting from the faster resolution of the case and the savings of time and resources[559].

Moreover, in cases where in various settlement procedures the government has accepted less than the maximum they could have imposed in a regular case, these may influence the judgment of the enforcement authorities at the time of trying to determine the penalty to be imposed in following regular proceedings. As a consequence, the use of settlements and the imposition of lesser penalties can eventually reduce the penalties to be imposed on regular proceedings.

There also may be concerns about settlements compromising justice by requiring the imposition of a lesser penalty, and as a consequence, bargaining away charges and justice. Moreover, the term "plea bargaining" has some negative connotations due to fact that the general public and courts consider that prosecutors are bargaining away justice by securing agreements that allow defendant to plead guilty to lesser offenses[560].

The use of settlements can diminish the deterrent effect of competition law, thus, the best approach for the adjudication of competition law cases should be through regular proceedings and the imposition of full penalties, especially, if the enforcers have sufficient elements of proof about the infringement. Settlements should be used in cases where the resources required for the investigation and prosecution of the cases are excessive or when the illegality of the challenged conduct if not crystal-clear. This is especially important for young competition regimes that require clarifying the content of their competition law provisions, and creating a strong reputation in relation to the rates of successful prosecutions of cases and imposition of fines[561].

Other negative aspects of settlement procedures are related to the fact that settlements can result in lesser publicity than litigated trials. Moreover, settlements proceedings may not be considered as

[558] STEPHAN Andreas (2009B), 'The Direct Settlement of EC Cartel Cases', *International and Comparative Law Quarterly,* Vol. 58, p. 653.
[559] WILS (2008B), p. 12.
[560] O'BRIEN Ann (2008), 'Cartel Settlements in the U.S and EU: Similarities, Differences & Remaining Questions'. 13th Annual EU Competition Law and Policy Workshop 5-6 (June 6, 2008), available at: http://www.justice.gov/atr/public/speeches/235598.pdf
[561] MARCOS Francisco (2012), 'Diminishing Enforcement: Negative Effects for Deterrence of Mistaken Settlements and Misguided Competition Promotion and Advocacy'. *Working Paper IE Law School AJ8-187-I.*

precedent in following related cases. Similarly, settlement decisions may not further develop cartel law. In addition, settlement procedures may have a negative impact on leniency programs by diminishing the incentives of cartel participants to apply for leniency[562]. Finally, settlements for imprisonment terms can result in increases in public expenditures on jail[563].

5. Interaction with Leniency Programs

Settlement procedures and leniency programs in practice share some of their benefits and their ultimate finalities. Both settlement and leniency provide for certain benefits to successful settling parties and leniency applicants, as seen before, these benefits are related to the imposition of lesser penalties and the faster resolution of the competition law cases[564]. Moreover, competition law enforcers and the general public also benefit from these types of enforcement policies given that an expeditious resolution of a determined case saves the limited resources of competition authorities, allowing them to detect and prosecute other anticompetitive practices for the sake of competitive markets and consumer welfare. Similarly, with regard to the ultimate objectives of these enforcement policies, settlement procedures and leniency programs seek the earlier resolution of cases related to the infringement of the anti-cartel provisions through the cooperation of cartel participants in exchange for full immunity or a reduction in the penalties to be imposed, depending on the case, and eventually, the increase of deterrence.

Notwithstanding the preceding, leniency programs and settlement procedures are different mainly with regard to the timing and the extent of the benefits offered to the cooperating parties. For instance, with regard to the timing in which these enforcement policies operate, leniency applications are usually filed before the competition authority has initiated a formal investigation about a determined cartel or is even aware of the existence of the cartel. On the contrary, settlement procedures are conducted once the competition authority has knowledge about the cartel and has initiated a formal investigation.

A further differentiation between leniency programs and settlement procedures is that related to the benefits offered to the cooperating cartel participants. In a broad sense, in the frame of leniency programs, the first successful leniency applicant can be granted full immunity, in addition, in competition regimes with an extended leniency program, subsequent leniency applicants can be granted a reduction in the penalties. On the other hand, in settlement procedures, settling cartel participants only benefit from a reduction in the penalties to be imposed.

From these differences is evident that leniency programs are intended to discover cartel activity by encouraging cartel participants to come forward and report the cartel to the competition authority in exchange for full immunity to the first member that reports the cartel and provides sufficient evidence and intelligence to prosecute the other cartel members, and a reduction in the penalties to subsequent leniency applicants, where available. Alternatively, settlement procedures are intended to incentive cartel participants that have lost the leniency race but are still in a position to offer timely and valuable

[562] ICN, *Cartel Settlements*, 2008, pp. 17-18.
[563] POLINSKY & SHAVELL (2007), p. 436.
[564] For more on the benefits of leniency programs, see Section IV, above.

cooperation to collaborate with the investigation and not to challenge the charges in exchange for a reduction in the penalties.

Thus, in competition regimes where according to the provisions of the leniency programs only the first cartel participant to come forward can be granted leniency[565], settlement procedures provide a strong incentive for the other members of the cartel to cooperate with the investigation in exchange for a reduction in the penalties. In these regimes, full immunity to the first cartel participant to report the infringement is granted under the provisions of leniency programs, whereas, penalty reductions for cartel members that have lost the race for leniency are available via plea agreements or settlement.

Nevertheless, as seen before, there are jurisdictions where leniency is not reserved for the first cartel participant to come forward. In these regimes, full immunity is granted to the first successful applicant, however, following leniency applicants can be granted a reduction in the penalties if they comply with the requirements of the program. Unlike the abovementioned example, in these jurisdictions both the grant of full immunity and the reduction of the penalties operate under the frame of the leniency program (extended leniency program). Additionally, in some of these competition systems, there is also in place a settlement policy that offers further incentives for cartel participants that are not eligible for being granted leniency to cooperate with the investigation and settle in exchange for a reduction in the penalties. Hence, in cases where there cannot be further reductions on leniency grounds provided that the authority has sufficient evidence about the cartel, the other cartel members can obtain a reduction in the penalties via plea agreements or settlement. Given that the cartel members cannot provide timely and valuable information in such cases, the reduction is granted in exchange for the non-contestation of the charges against these members. However, in order to maintain the attractiveness of leniency programs, the reductions available in settlement procedures for the cartel participants that are not eligible for leniency have to be considerably low in comparison to the ones available for successful leniency applicants; provided that if settlement incentives are too high, cartel members will prefer these over leniency programs[566].

6. Types of Settlement Systems

Given that there are different anti-cartel enforcement regimes across the world, there is also a variety of settlement systems that are shaped by different factors such as the type of enforcement regime, the persons that can be prosecuted for the infringement of the cartel provisions, the sanctions available, and the legal and constitutional framework.

(a) Criminal enforcement regimes

In competition regimes where cartel activities are prosecuted criminally, both undertakings and individuals may be sanctioned with the imposition of financial penalties or imprisonment. In such cases, the undertakings and individuals involved in cartel behavior may resolve cartel charges by entering into

[565] In this type of leniency programs, leniency refers to full immunity from the penalties.
[566] ICN (2008), p. 7.

plea agreements in the framework of the criminal plea system available for all crimes. In these regimes, plea agreements are subject to the approval of the court responsible for the imposition of the sentence.

In competition regimes where the investigation and the criminal prosecution of cartel cases are conducted by different authorities, once the investigation is completed by the competition authority, this will refer the case to the public prosecutor. The latter will be empowered to conduct plea negotiations and will recommend a plea and sentencing to the court[567]. Alternatively, in other competition regimes, the competition authority is empowered to investigate and prosecute cartels criminally. In these regimes the competition authority is authorized to negotiate and enter into criminal pleas with cartel participants[568].

(b) Civil enforcement regimes

In other competition systems where cartel behavior amounts to civil violations, the competition authority is entitled to negotiate civil settlements in cartel cases. Normally, in such regimes the competition authorities have a wide margin of discretion in deciding whether to settle cartel cases. These early resolution agreements are reached between the competition authority and the cartel participants, which are offered a reduction in the penalties in exchange for an admission of liability and the waiver of certain rights of defense[569].

(c) Administrative enforcement regimes

In some competition regimes cartel conduct is prosecuted under an administrative regime. In this type of regimes, competition authorities are in charge of the investigation and prosecution of cartel violations. Moreover, the competition authorities are empowered to reach settlement agreements with one, some or all the parties to a cartel. The competition authorities have wide discretion in deciding which cases are suitable for settlement. In these regimes, the settling cartel participants are granted a reduction in the penalties in exchange for the admission of a streamlined procedure and the waiver of some rights of defense[570].

VI. SANCTIONS AND REMEDIES

In order to have a sound competition law system that controls, prevents and sanctions the infringement of the antitrust provisions, every competition regime has to address the fundamental issue of how to punish the competition law offenders and how to remedy the harm inflicted to competition and the affected persons by the anticompetitive practices of the latter. Accordingly, this part of the present study is concerned with the sanctioning system of competition law regimes and to illustrate how the different

[567] In Canada, the Canadian Competition Bureau investigates the cartel and refers the evidence to the Director of Public Prosecution for criminal prosecution. The Director then conducts plea negotiations and recommends a plea and sentencing.
[568] In the U.S., the Antitrust Division of the U.S. Department of Justice is allowed to investigate and prosecute criminally cartels. The Antitrust Divisions is also empowered to negotiate and enter into plea agreements.
[569] In the UK, the OFT has discretion to enter into agreements with one or more parties under investigation in relation to violations of the Competition Act whereby a reduction of the penalty can be granted in return for an admission of liability and various other types of cooperation.
[570] In the EU, the European Commission is empowered to reach settlement agreements with cartel participants that cooperate with the Commission and waive some of their rights of defense. As a reward, the Commission grants a fixed 10% settlement discount to the parties that reach a settlement agreement.

regimes approach this issue. The sanctions and remedies reviewed in this chapter are the mechanisms utilized in public competition law enforcement, this means; the application of the competition law provisions by public authorities, such as competition authorities and judicial authorities.

Due to the compulsory and remedial nature of competition law, virtually all competition law regimes have established sanctions and remedies for the infringement of the competition law provisions. For the effective and efficient enforcement of any set of legal provisions, such as competition law, it is fundamental to adopt a sound legislative framework with effective sanctions for offenders and a strong institutional structure that actively polices the behavior of the recipients of the law for those who violate these legal provisions, all this, with the ultimate purpose of finding and terminating unlawful conducts, when these have been committed, and to prevent or deter unlawful conducts from happening in the future. Additionally, in order to apply the concerned legal provisions in an efficient manner, the enforcement functions will have to be performed with reasonable accuracy and promptitude and at a reasonable cost. In this sense, it has been argued that it is not enough to have a well-established competition law framework, but it is also fundamental for the accomplishment of the competition law policy objectives, to have strong enforcement mechanisms that ensure a reasonable degree of compliance with the law[571].

Irrespective of the competition regime in question, in particular, the different sanctions and remedies established in most competition law regimes serve as tools or mechanisms for the accomplishment of the objectives of competition law policy and the enforcement functions. Thus, in practice, these sanctions and remedies will be intended to fulfill some of the enforcement functions of competition law, such as: deterrence, punishment and compensation. Accordingly, the imposition of sanctions and penalties will serve as deterrence to the competition law offenders and to other market participants to refrain from engaging in anticompetitive practices in the future. Similarly, the imposition of sanctions and remedies will serve as punishment for those market participants that have breached the competition law provisions through their anticompetitive conduct. Finally, with regard to the award of remedies, these will, in some instances, serve as compensation for the persons that have been injured by the anticompetitive practices of the competition law offender. This will occur primordially in civil proceedings where the injured persons will instigate a civil action before the relevant court with the purpose of being compensated for the harm suffered as a consequence of the unlawful conduct of the defendant, nonetheless, in some competition law regimes where the competition authority can order the infringing undertakings to pay the injured persons an amount as compensation for the harm inflicted upon them, this remedy issued by the competition institution in public proceedings will accomplish the compensation function.

In particular, with regard to the sanctioning systems, most competition law regimes have established a variety of mechanisms through which the enforcers of the competition provisions can accomplish the enforcement functions. Furthermore, in order to accomplish the enforcement functions more efficiently, the majority of competition regimes use sanctions and remedies in conjunction, given that the imposition of sanctions and remedies serve different purposes in the enforcement of competition

[571] POSNER (2001), p. 266.

law. On the one hand, the imposition of sanctions for the breach of the antitrust rules is intended to encourage market participants to comply with competition law and to punish them for their unlawful practices. On the other hand, the imposition of remedies, which is complementary to the imposition of sanctions, is intended to safeguard or restore competition in cases where market participants have distorted or are about to distort competition in a determined market.

Despite the aforementioned, in practice, just like with the statutory commands, the competition law enforcers and the investigative techniques, the sanctions and remedies that can be imposed for the infringement of the competition law provisions vary from one competition regime to another.

1. Sanctions for the Infringement of Competition Law

Looking at the different sanctioning systems of some competition regimes, some differences and similarities can be noticed, most of which are concerned with: the enforcement authority empowered to impose the sanctions and the different type of sanctions that can be imposed by these authorities while enforcing the competition law provisions.

1.1. Authorities Empowered to Impose Sanctions

Depending on the competition regime, different enforcement bodies may be empowered to impose sanctions for the infringement of competition law. For instance, in some regimes the competition authority holds sole jurisdiction to impose sanctions to the violators of the antitrust rules. Alternatively, in other competition regimes where the competition authorities lack competence to impose sanctions for the infringement of the competition law provisions, this function will be performed by judicial authorities, such as courts of general jurisdiction, courts specialized in competition law matters, or even the Supreme Court. Additionally, in some competition systems, the power to impose sanctions will be vested both on the competition authority and on courts. In those cases, the power of the competition authority to impose sanctions will be limited to such conducts as the refusal to supply information, the production of false information, or the failure to modify agreements, while the courts will have competence to impose sanctions, such as the imposition of penalty payments or imprisonment, where available.

1.2. Types of Sanctions

Overall, the sanctions that can be imposed by the enforcement authorities while applying the competition law provisions can be forced upon persons that infringe the substantive provisions of competition law - prohibitions against anticompetitive agreements, the abuse of a dominant position, and mergers or concentrations that create or reinforce a dominant position; that commit procedural violations -refusals to supply information, the production of false, incorrect or misleading information, etc.; or that fail to comply with a decision by the relevant enforcement authority –decisions ordering the cease of anticompetitive conducts, decisions imposing interim measure, decisions accepting commitments, decisions blocking proposed mergers, etc.

1.2.1. Sanctions for the Violation of the Substantial Provisions of Competition Law

(a) Nature of the sanctions

Depending on the competition regime, the sanctions that can be imposed for the infringement of the substantive provisions of competition law can be administrative, civil or criminal in nature. In practice, the nature of a determined sanction shall be given by virtue of the types of the proceedings in which these are imposed. In this sense, administrative sanctions will be imposed by administrative authorities, such as the competition authority, in administrative proceedings. On the contrary, with regard to civil and criminal sanctions, these will be imposed by judicial authorities in civil or criminal proceedings, respectively.

In addition to the aforementioned, the availability of these types of sanctions, with regard to their nature, varies from one competition regime to another. Accordingly, in some competition systems, the violation of the substantial provisions of competition law can be punished only with the imposition of administrative sanctions[572]. On the other hand, there are jurisdictions where the infringements of the substantial provisions of competition law are punished with criminal sanctions only[573].

(b) Persons who can be sanctioned for the breach of the substantive provisions of competition law

The persons who can be sanctioned for the infringement of the substantive provisions of competition law vary depending on the competition regime. As a general rule, most competition regimes allow the imposition of these sanctions on undertakings that have infringed the substantive provisions of competition law; moreover, in some competition regimes the imposition of sanctions is strictly restricted to undertakings[574]. Alternatively, in some competition regimes, beside the imposition of these sanctions on undertakings, the individuals responsible for the infringement in question can also be sanctioned for the breach of the substantive provisions of competition law[575]. The main differences that can be found in this regard are concerned with the types of the sanctions that can be imposed for these infringements.

As stated above, in practice, the types of sanctions that can be imposed for the infringement of substantial provisions of competition law on individuals and undertakings vary from one jurisdiction to another. Overall, in most competition regimes where sanctions for the infringement of the substantial provisions of competition law can be imposed on undertakings and individuals, both of them can be punished with the imposition of pecuniary penalties, irrespective of their nature. However, there are

[572] In the EU, according to the provisions of Regulation 1/2003, the penalties imposed by the European Commission for the infringement of the EU's competition provisions are of an administrative nature, moreover, Article 23(5) of the Regulation establishes expressly that the decisions of the Commission imposing fines shall not be of a criminal law nature. In Honduras, according to Article 36 of the Law for the Defense and Promotion of Competition, the infraction to the rules of the Law and its regulations must be sanctioned with administrative seizure by the Commission for the Defense and Promotion of Competition.

[573] In Ireland, criminal sanctions can be imposed both on companies and individuals for the breach of the competition provisions. For instance, hard-core cartel offenses are punishable, on summary conviction, with criminal fines not exceeding €3,000 and/or six month's imprisonment for individuals, and on indictment, by criminal fines of €4 million or 10% of turnover and/or five years' imprisonment in the case of individuals. In cases related to non-hard core breaches, penalties are limited to criminal fines.

[574] In the EU, according to the provisions of Regulation 1/2003, the penalties imposed by the European Commission for the infringement of the competition law provisions are imposed only on undertakings and association of undertakings.

[575] In Qatar, according to the provisions of the Article 18 of the Law on Protection of Competition and Prohibition of Monopolistic Practices, a fine may be imposed on any person responsible for the management of an undertaking that has been found to have violated the provisions of the Law who has knowledge of and has contributed to the violation.

sanctions which are excusive for the individuals, such as: imprisonment or director disqualification. Conversely, there are sanctions that by their nature can only be imposed on undertakings, such as the ineligibility for official financing or participation in public tenders.

(c) Types of sanctions imposed for the breach of the substantive provisions of competition law

1. Financial Penalties

The imposition of financial penalties is the most common approach used to sanction the infringement of the substantial provisions of competition law across jurisdictions. The fact that the costs of administering and the imposition of financial penalties are relatively low compared to other types of sanctions, such as imprisonment, make this option more appealing for most competition regimes. Additionally, the versatility of financial penalties has also contributed to the proliferation of this type of sanction among jurisdictions, for example, the possibility to impose these sanctions in administrative, civil or criminal proceedings, or the faculty to impose these sanctions on individuals and undertakings, ease the application of these penalties in cases related to the enforcement of the competition law provisions. Moreover, the imposition of financial penalties for the infringement of the substantial provisions of competition law serves many purposes and has different effects on competition, such as: deterrent effects, moral effects and may also raise the costs for participating in anticompetitive practices[576].

As to the enforcement authorities that are empowered to impose pecuniary penalties for the infringement of the substantial provisions of competition law, there is a variety of arrangements adopted in this regard that vary depending on the competition regime in question. Overall, depending on the nature of the pecuniary penalty, i.e. administrative, civil, or criminal, a different enforcement authority will be empowered to impose these types of sanctions. For instance, the imposition of administrative fines in administrative proceedings will be made by authorities within the administrative branch of the government, such as the competition authority[577]. On the contrary, the imposition of civil and criminal pecuniary penalties will be made in civil and criminal proceeding by judicial authorities of the relevant jurisdiction[578]. At least in one competition regime, only the Supreme Court, at the request of the competition authority, is empowered to impose financial penalties, both on individuals and undertakings, for the infringement of the substantial provisions of competition law[579].

Moreover, in relation to the persons who can be fined for the violation of the substantial provisions of competition law, different approaches have been adopted depending on the competition

[576] See, WILS (2006A), p. 11.
[577] In Germany, the Bundeskartellamt has authority to impose financial penalties for the infringement of the competition law provisions. In the UK, the Office of Fair Trading is empowered to impose financial penalties for the infringement of competition law.
[578] In Australia, the ACCC has to bring court actions for the imposition of financial penalties for the infringement of competition law. In Ireland, the Competition Authority is not a decision-making body; consequently, the latter has to bring court action in order to obtain the imposition of financial penalties for the infringement of the competition law provisions. In Sweden, the Competition Authority can bring actions against undertakings before the Stockholm District Court and request a judgment ordering the payment of fines for the infringement of the substantial provisions of competition law. In the US, federal courts hold jurisdiction to impose financial penalties for the infringement of the Sherman Act, moreover, these penalties are of a criminal nature and can be imposed both on individuals and undertakings.
[579] In Jamaica, pursuant to Article 47 of the Fair Competition Act, the Supreme Court can impose financial penalties on individuals and undertakings for the violation of the competition law provisions.

regime. Thus, in some regimes, the imposition of financial penalties for the infringement of the substantial provisions of competition law is restricted to undertakings only[580]. Alternatively, in other competition regimes, the imposition of financial penalties for these infringements can be inflicted upon undertakings and individuals[581]. The main purpose of allowing individuals to be fined for the infringement of the substantial provisions of competition law is to punish those who decide on the undertaking's business strategy. Thus the ultimate purpose of fining individuals for the breach of competition law is to recognize the liability of managers, director or employees for their participation in the infringement of competition law. In this sense, some competition regimes have established specific provisions that prohibit that the fines imposed on individuals are assumed by the undertakings on behalf of their employees, these prohibitions are intended safeguard the deterrent and punishment effects of the sanctions imposed on the individuals for their participation on the infringement of the competition law provisions[582]. However, in some competition systems, the undertakings are the guarantor of any fine imposed or damages claimed to be paid by the managers that have committed an infringement whether on their own behalf, or on the behalf of the undertakings[583].

In addition, in some competition regimes, financial penalties can be imposed on complainants for the amount that would have been imposed in case the reported infringement of the substantial provisions of competition law would have been declared, in cases where the complaint has been rejected and it has been demonstrated that the purpose of the complaint was to restrict competition, prevent the entry of new competitors to the market, or provoke the exit of a competitor from the market[584].

A fundamental issue for the imposition of financial penalties for the infringement of the substantial provisions of competition law is the one related to the maximum amount of the financial penalty. Most jurisdictions provide for a statutory limit for the imposition of financial penalties, accordingly, in practice, this issue is addressed in different ways depending on the competition regime in question. For instance, in some competition regimes the maximum amount of the financial penalty is expressed as a percentage of the turnover of the competition law offender[585]. Moreover, in some

[580] In the EU, according to the provisions of Regulation 1/2003, the European Commission cannot impose sanctions on individual directors, managers or employees of the undertakings that are responsible for the infringement of the competition law provisions.
[581] In Portugal, in December 2009, the Competition Authority fined €14,7 million on five (EUREST, TRIVALOR, UNISELF, ICA, SODEXO PORTUGAL) mass catering undertakings for anticompetitive practices in the market for meals and refectory, canteen and restaurant management services. In addition, the Competition Authority also delivered a guilty verdict in the case of five managers of the defendant undertakings, €20,000 were imposed on the managers of SODEXO, ICA/NORDIAGL, UNISELF, ITAU and GERTAL. See press release at: http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/2009_CA-imposes-fines-on-five-mass-catering-undertakings.aspx. In Denmark, on March 2011, the High Court of Eastern Denmark imposed a fine of DKK 500,000 on two environmental laboratories, Milana A/S and Miljolaboratoriet I/S, and fines of DKK 25,000 on the managers of the companies for bid-rigging.
[582] In Chile, according to Article 26 of the Antitrust Act, the fines imposed on individual cannot be paid by the legal persons where the former exercised their functions or by their shareholders. In New Zealand, according to Sections 80A and 80B of the Commerce Act, an undertaking cannot indemnify a director, servant, or agent of the undertaking for payment of a pecuniary penalty or costs incurred in defending or settling a proceeding where that director, servant, or agent is found to have engaged in price fixing. If an undertaking does indemnify a director, servant or agent for breaches of the price fixing prohibition the undertaking may have to pay additional penalties. In the US, in the case of conviction, undertakings are prohibited from paying the criminal fines of its employees unless expressly permitted to do so under state law (18 U.S.C. § 3572).
[583] In Qatar, see Article 18 of the Law on Protection of Competition and Prohibition of Monopolistic Practices.
[584] In Nicaragua, PROCOMPETENCIA can impose such financial penalties on complainants pursuant to Article 46(f) of the Law for the Promotion of Competition.
[585] In China, pursuant to Articles 46 to 48 of the Anti-monopoly Law, business operators that took part in an anticompetitive agreement or abused their dominant position shall be subject to the imposition of a fined between 1% and 10% of the sales revenue made in the previous years. In Hungary, pursuant to Article 78 of the Competition Act the maximum fine for the infringement of the substantial provisions of competition law may not exceed 10% of the net turnover achieved in the business year preceding that in

competition regimes, the maximum amount of the financial penalty will be determined in terms of a specific figure[586]. Additionally, in other competition regimes, the maximum amount of the financial penalties will be set by reference to a variable unit[587]. Finally, in some competition regimes, the maximum amount of the fine shall be equivalent to the amount of the economic benefit obtained for the infringement of the competition law provisions[588].

When calculating the amount of the financial penalty for the infringement of the substantial provisions of competition law, there are certain aggravating and attenuating circumstances that may affect the amount imposed. As to the aggravating circumstances, in some competition regimes, the amount of the financial penalty imposed for the infringement of the substantial provisions of competition law will be increased in cases where the competition law offender is a recidivist[589]. The rationale for increasing the amount of the penalty for repeating offenders is based on the premise that sanctioning repeat offenders more severely can be socially advantageous. Thus, from the deterrence perspective, making sanctions depend on offense history may be beneficial for two reasons. One, the use of offense history may create an additional incentive no to violate the law; provided that the detection of an infringement does not only imply an immediate sanction, but it also means a higher sanction for future violations, in this sense, repeating violators will be deterred more. Two, determine the level of sanctions on the offense history also allows society to take advantage of information about the dangerousness of individuals and the need to deter them[590]. In practice, there have been cases where the competition authority has considered recidivism as an aggravating factor and has increased the fine imposed by up to 100%[591].

Moreover, in some competition regimes, the amount of the financial penalty for the infringement of the substantial provisions of competition law may be increased in cases where the competition law offender has played an important role in the realization of the infringement[592]. Similarly, in some jurisdictions, the amount of the financial penalty will be increased where the competition law offender

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which the decision establishing the violation is reached. In the EU, according to Article 23(2) of Regulation 1/2003, the Commission is entitled to impose a maximum administrative fine of 10% of the undertaking's worldwide annual turnover.

[586] In Canada, administrative financial penalties may not exceed $10 million, on the other hand, criminal offenses, such as cartel agreements, can be punished by terms of imprisonment of up to 14 years and/or up to $25 million. In Jamaica, the Supreme Court may impose fines not exceeding 1 million dollars for individuals, and five million dollars for undertakings. In the US, according to Sections 1 and 2 of the Sherman Act, corporation and individuals that infringe these provisions can be punished by fine not exceeding $100 million, for corporations, and $1 million, for individuals.

[587] In Brazil, according to Article 37 of the Antitrust Law, infringing undertakings shall be subject to a fines from 0,1% to 20% of the gross pretax revenue during the latest financial year. In the case of managers liable for the infringement, a fine from 1% to 20% of the fine imposed to the undertaking shall apply.

[588] In Honduras, pursuant to Article 37 of the Law for the Defense and Promotion of Competition, the amount of the fine imposed for the antitrust infringement has to be equivalent to three times the amount of the economic benefit obtained by the economic agent responsible for the infringement of the competition law provisions.

[589] In Brazil, pursuant to Article 37 of the Antitrust Law, the financial penalties imposed for the infringement of the competition law provisions will be doubled in case the offender is a recidivist. Similarly, in Mexico, according to Article 35 of the Federal Law on Economic Competition, the recidivist offender can be sanctioned with a fine of up to the double amount of the financial penalty fixed by the Federal Competition Commission.

[590] POLINSKY & SHAVELL (2007), pp. 438-439.

[591] Under the 2006 EU Finning Guidelines, recidivism is an aggravating factor in respect of which the Commission can increase the fine by up to 100%, such was the case in the calcium carbide decision, where the Commission applied a 100% increase to the fine imposed on Akzo Noble, which was found guilty of involvement in four previous cartels (Case COMP/39.396 – Calcium Carbide and magnesium based reagents for the steel and gas industries).

[592] In the UK, according to the 2012 OFT's *Guidance as to the appropriate amount of a penalty*, the amount of the fine for the infringement of the competition law provisions can be increased in cases where the infringing undertaking has played the role of leader or instigator in the infringement.

has refused to cooperate with or has obstructed the investigation for the alleged infringement of the competition law provisions[593].

On the contrary, in some competition regimes, the amount of the financial penalty imposed for the violation of the substantial provisions of competition law will be reduced in cases where the conduct of the perpetrator of the antitrust infringement meets certain circumstances established by law. For instance, in jurisdictions where leniency programs have been established, the competition law offender will benefit from a reduction of the financial penalty or will be granted immunity from the fine if it discloses, in a manner specified by the relevant provisions, agreements or concerted practices between competing undertakings that have as main purpose, to directly or indirectly fix purchase or selling prices, to share markets, to collude tenders, or to allocate production or sales quotas. In practice, the leniency programs established in most competition regimes are very similar with regard to their requirements. Accordingly, most competition regimes restrict their leniency programs to cartel activities. In addition, most leniency programs grant total immunity from the financial penalty in cases where the competition authority is not aware of the anticompetitive agreement, and where the leniency applicant is the first one to request lenient treatment. Alternatively, in cases where the competition authority has already gained knowledge of the anticompetitive agreement, the latter will reduce the financial penalty of the person who provides the competition authority with information to fully clarify the facts of the case. Besides the requirement of being the first to apply, most competition regimes additionally require the leniency applicant to: stop the participation in the infringement in question; to fully cooperate with the competition authority to clarify the relevant facts in the case; and that the applicant has not forced any other person to participate in the infringement. A further issue related to the leniency programs is concerned with the persons who are allowed to apply for leniency. On the one hand, in competition regimes where financial penalties can be imposed only on undertakings, lenient treatment will only be available for undertakings[594]. On the other hand, in competition regimes where financial penalties can be imposed on undertakings and individuals[595], both undertakings and individuals will be allowed to apply for leniency individually[596].

Moreover, in some competition regimes with criminal sanctions for the infringement of the substantial provisions, the undertakings involved in anticompetitive practices may agree with the competition authority to plead guilty and to cooperate with the competition authority in the investigation in exchange of a reduction in the amount of the financial penalty[597].

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[593] In the EU, pursuant to the provisions of the European Commission's *Guidelines on the method of setting fines imposed pursuant to Article 2382)(a) of Regulation No 1/2003,* the amount of the fine can be increased when the competition law offender has refused to cooperate with or has obstructed the Commission in carrying out is investigation.

[594] In Austria, given that financial penalties can be imposed on undertakings only, then, only undertakings will require lenient treatment from the Federal Competition Authority.

[595] In Australia, where financial penalties maybe imposed on undertakings and individuals for the infringement of the cartel prohibitions, both undertakings and individuals can apply to the ACCC for leniency.

[596] In Portugal, the Competition Authority fined the managers of several undertakings involved in a cartel in the catering and related services and grated full immunity from the fine to one of the managers who applied for leniency individually. See press release at: http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/2009_CA-imposes-fines-on-five-mass-catering-undertakings.aspx

[597] In the US, Samsung agreed to plead guilty on color display tube price-fixing conspiracy, to cooperate with the Antitrust Division in the ongoing investigation and to pay a $32 million criminal fine. See the Department's press release at: http://www.justice.gov/atr/public/press_releases/2011/268592.htm.

Ultimately, in some jurisdictions, the amount of the financial penalty may be reduced when the offender has demonstrated that it has terminated the infringement as soon as the competition authority intervened; when the offender demonstrates that its participation in the infringement is limited; when the offender demonstrates that it is acting under severe duress or pressure; or when the offender demonstrates genuine uncertainty as to whether the anticompetitive practice constituted an infringement of the competition law provisions; among others.

Traditionally, the imposition of financial penalties for the infringement of the substantial provisions of competition law is made through a reasoned decision of the enforcement authority, i.e. competition authorities or judicial authorities. Furthermore, in most competition systems, the decisions of the competition authorities or the competent courts imposing financial penalties to the competition law offenders can be appealed before the competent appellate body[598].

Finally, with regard to the enforcement of a decision by the competition authority to impose a financial penalty on the perpetrator of an infringement of the competition law provisions, in most competition regimes, if a sanctioned individual or undertaking fails to pay within the period of time specified by the competition authority's decision, and no appeal has been commenced against the imposition or the amount of the financial penalty within the time allowed, or such an appeal has been made and the penalty upheld, the competition authority may commence proceedings before the competent court to recover the required amount as a civil debt. In other competition regimes, the competition authority will notify the tax administration the failure of the concerned person to pay the financial penalty imposed for the antitrust infringement[599]. Finally, in some competition regimes, the competition authority will vested with the same powers as a civil court for the purposes of the recovery of the amount of a financial penalty imposed for the infringement of the competition law provisions[600].

2. Imprisonment

Irrespective of the specific type of competition law sanction in question, one of the main functions of these sanctions is to deter market participants from engaging in anticompetitive practices. In particular, depending on the type of sanction, the level of deterrence may be higher or lower. In the case of financial penalties imposed for the violation of the substantial provisions of competition law, the amount of the financial penalty imposed is directly related to the deterrence level of this type of competition law sanction. Thus, in practice, this would mean that the higher the amount of the financial penalty, the higher the level of deterrence on the market participants to obey the competition law provisions. Even though, the amount of financial penalties imposed for the violation of the substantial provisions of competition

[598] In the UK, the decisions of the OFT imposing financial penalties for the infringement of the substantial provisions of competition law, can be appealed before the Competition Appeal Tribunal, the latter can impose, revoke, or vary the amount of the fine. Further appeal can be made before the Court of Appeal in England and Wales and Northern Ireland, and the Court of Session in Scotland.
[599] In Kosovo, if an enterprise fails to meet the deadline for payment of the pronounced punitive administrative measure, the Competition Authority shall notify the Kosovo Tax Administration, in the area where it resides or the seat of the sanctioned person, in order to force the enterprise to pay the punitive administrative measure pursuant to provisions for payment of taxes (Article 63 of the Law on Protection of Competition).
[600] In Pakistan, the Competition Commission has the same power of civil courts for the recovery of the amount of financial penalties (Section 40 of Act No XIX of 2010).

law has increased in the last decades[601], it has been stated that these are not high enough to comply with the desired deterrence effects of competition law sanctions. In this sense, in order to reach effective deterrence with only fines on companies, it would require impossibly high fines that are over the statutory ceilings of most competition regimes, and are likely to exceed the undertaking's ability to pay. This, in turn, would result in the fined undertakings being forced into bankruptcy, which would entail undesirable social costs[602].

Moreover, the fact that the majority of financial penalties imposed for the infringement of the substantial provisions of competition law are inflicted upon undertakings and not upon the individuals who decide on the undertaking's business strategy makes that the imposition of these financial penalties does not punish those who are actually responsible for the violation of the competition law provisions[603]. Accordingly, in order to prevent that undertakings assume the responsibility of their managers and employees, it would be advisable that the competition law provisions consider the possibility of sanctioning the actual individuals responsible for the breach of the substantial provisions of competition law.

In relation to the aforementioned, some competition regimes have established criminal sanctions on individuals, such as imprisonment, for the violation of the substantial provisions of competition law with the purpose of increasing deterrence and to sanction the individuals responsible for such violations. Even though, some competition regimes have established criminal sanctions on individuals since its inception[604], in recent years, there has been a trend to criminalize competition law sanctions; provided that the enforcement practice over the past years shows that the mere application of financial penalties on undertakings does not effectively deter market participants from violating the substantial provisions of competition law[605]. On the other hand, there are competition regimes where a decriminalization process has occurred. In these jurisdictions, there were criminal sanctions for the violation of the competition law provisions; however, these have been abolished from the antitrust provisions because these criminal systems were badly conceived and the criminal antitrust provisions were rarely applied[606].

With regard to the types of criminal sanctions for the infringement of the substantial provision of competition law, as previously seen, in some competition regimes, financial penalties of criminal nature

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[601] In the UE, the European Commission has imposed over €17 billion in fines for the infringement of competition law in the last decade (http://ec.europa.eu/competition/cartels/statistics/statistics.pdf). Similarly, in the US, the Antitrust Division has imposed over $5 billion in criminal antitrust fines in the same period (http://www.justice.gov/atr/public/division-update/2012/criminal-program.html#d2).

[602] WILS, Wouter P. J. (2008A), 'Efficiency and Justice in European Antitrust Enforcement'. Oxford: Hart Publishing, p. 63.

[603] CSERES, K.J., SCHINKEL, M.P., and VOGELAAR, F.O.W. (2006), 'Law and economics of criminal antitrust enforcement: an introduction'. In: CSERES, K.J., SCHINKEL, M.P., and VOGELAAR, F.O.W. (ed). *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States.* Cheltenham (UK); Northampton (USA): Edward Elgar, pp. 1-29. p. 7-8.

[604] In the US, since its adoption in 1890, the provisions of the Sherman Act impose criminal sanctions involving imprisonment on individuals in cases of competition law violation.

[605] In the UK, the Enterprise Act 2002 has added a criminal cartel offence, limited to hard-core cartels, punishable with imprisonment and/or fines for individuals only, as well as a sanction of director disqualification for individuals. Other jurisdictions such as: Canada, Cyprus, Estonia, Germany, Hungary, Ireland, Israel, Japan, and Malta have introduced criminal sanctions for the breach of the substantial provisions of competition law.

[606] In Austria, a long tradition of individual criminal sanctions for cartel agreements was abolished in 2002; nevertheless, imprisonment for bid-rigging is still available. In France, antitrust enforcement was exclusively criminal under the provisions of the competition acts of 1953 and 1958. After the reforms of 1977 and 1978, the enforcement of the competition provisions relies essentially on administrative fines on undertakings, imposed by the Competition Council. Similarly, in the Netherlands, after the reform of 1997, the sanctions for the infringement of the competition provisions are purely administrative.

can be imposed both on individuals and undertakings for the antitrust violation. However, in some competition regimes, and under certain circumstances, the individuals responsible for the infringement of the competition law provisions can be sanctioned to serve imprisonment terms for their participation in anticompetitive practices.

In practice, due to the seriousness of this type of criminal sanction, there are certain restrictions to the application of this kind of punishment. For instance, irrespective of the competition regime in question, the competence to order the imprisonment of an individual that has been convicted for violating the competition law provisions is always vested on judicial authorities. Even in competition regimes where the competition authority is empowered to declare the infringement of the competition law provisions and is entitled to impose certain sanctions, the ability to sentence individuals to imprisonment for breaching the antitrust rules is a prerogative of criminal courts[607]. This happens because criminal procedures tend to have stringer procedural protections that are designed to avoid false convictions. Hence, with the purpose of safeguarding the rights of the accused individuals in criminal proceedings, the enforcement functions in these procedures are separated within different enforcement authorities. As a consequence, in most competition regimes where individuals that infringe the substantial provisions of competition law can be punished with imprisonment, the traditional enforcement functions, i.e. investigation, prosecution, and adjudication, will be performed by different enforcement authorities with the purpose of safeguarding the procedural rights of the defendants[608].

Furthermore, in most competition systems, the anticompetitive conducts for which an individual can be sentenced to prison are also restricted. For example, in most jurisdictions, the imprisonment sanction is reserved for horizontal restrictive agreements or hard-core cartels that involve price-fixing arrangements, bid-rigging and market allocation schemes[609]. Furthermore, in some competition regimes, the possibility to impose imprisonment is limited exclusively to cases related to bid-rigging[610]. The scope of imprisonment has been restricted to the most harmful infringements of competition law because of the more onerous nature of this type of sanction compared to other punishments, like the imposition of administrative fines. The reason for this is that financial penalties are socially costless to impose; on the contrary, imprisonment is socially costly[611]. Nonetheless, at least in theory, in some competition regimes the criminal provisions apply to all types of horizontal restrictive agreements as well as unilateral monopolistic behavior[612].

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[607] In Germany, the Bundeskartellamt is empowered to impose financial penalties for the infringement of the competition law provisions. Nevertheless, criminal courts hold sole jurisdiction to imprisonment convictions in cases related to bid-rigging.

[608] For instance, in the US, the Antitrust Division of the Department of Justice is in charge of the investigation and participates as prosecutor in criminal cases; however, the decision-making function is vested on the federal courts.

[609] In the UK, individuals are guilty of a criminal offense and sanctioned with a maximum imprisonment of five years, in cases that involve agreements to fix prices, to limit or prevent supply, to limit or prevent production, to divide markets, to collude tenders (Section 188 of the Enterprise Act). In 2008, in the *Marine Hose Cartel*, three directors were sentenced to imprisonment for between two and a half and three years for cartel offences. The directors were also disqualified from acting as company directors for periods between five and seven years. See OFT's press release at: http://www.oft.gov.uk/news-and-updates/press/2008/72-08#.UL5GgZZmnTo.

[610] In Austria and Germany, imprisonment can only be imposed in cases related to bid-rigging.

[611] BENTHAM, Jeremy (1789), 'An Introduction to the Principles of Moral and Legislation'. In: *The Utilitarians,* New York: Anchor Books, 1973, p. 183.

[612] In the U.S., since the adoption of the Sherman Act in 1890, violations of Sections 1 and 2 of the Act have been punishable under U.S. federal law with criminal fines for both undertakings and individuals and with imprisonment for individuals, however, by long tradition the Antitrust Division restricts criminal prosecution to hard-core violations of Section 1 of the Sherman Act such as price-fixing, bid-rigging, and market or customer allocation.

Similarly to the possibility to reduce the amount of the financial penalty imposed for the infringement of the substantial provisions of competition law, in some competition regimes and under certain circumstances established by law, the terms of imprisonment imposed on individuals involved in anticompetitive practices can be reduced. For instance, in some jurisdictions the defendant may agree to plead guilty to a particular charge in return for some concessions, such as the reduction of the term of imprisonment[613]. Furthermore, in some regimes with imprisonment sanctions for individuals, leniency programs for individuals have been established[614]. In such cases, the individuals involved in anticompetitive practices can avoid criminal prosecution for the infringement of the substantial provisions of competition law by confessing their role in the illegal activities, fully cooperating with the competition authority, and meeting other specified requirements. Accordingly, this possibility allows directors, managers and employees of undertakings involves in cartel activities to come forward to the competition authority and apply for leniency to avoid criminal prosecution in exchange of cooperating with the competition authority to clarify the facts in the case. The individuals applying for leniency may do so independently from their undertakings, in such cases; the individual will be granted immunity from being prosecuted while the undertaking will face full responsibility for its involvement in the anticompetitive conduct. As stated before, the award of leniency is subject to the fulfillment of certain conditions established by law, in most competition regimes, individuals are required to meet the following conditions: that at the time the individual comes forward to the competition authority to report the anticompetitive activity, the authority has not received information about the illegal activity being reported from any other source; that the individual reports the illegal activity with candor and completeness and provides full, continuing and complete cooperation to the competition authority throughout the investigation; and that the individual did not coerce another party to participate in the illegal activity and was not the leader in, or the originator of, the activity[615].

Finally, with regard to the term of imprisonment established for the infringement of competition law, the period of time that the sanctioned individuals have to serve varies from one jurisdiction to another. There is not a simple formula for the optimal imprisonment term. According to the relevant literature, the optimal term of imprisonment could be such that there is either under-deterrence or over-deterrence. On the one hand, a low term of imprisonment might be socially desirable due to the fact that it means that the costs of imprisonment are reduced for those persons who commit harmful acts. On the other hand, a high term of imprisonment might be socially desirable given that it means that the costs of imprisonment are reduced because fewer persons would be committing harmful acts[616]. In practice, depending on the competition system, the maximum imprisonment terms range from one year to ten years

[613] In the U.S., on November 2012, a director of an automobile parts supplier pleaded guilty in a price-fixing and bid-rigging conspiracy and agreed to serve one year of imprisonment. See press release at: http://www.justice.gov/atr/public/press_releases/2012/288861.htm.
[614] For instance, individuals may apply for leniency to avoid criminal prosecution in Australia, the United Kingdom and the U.S.
[615] For additional information on leniency programs, please see Section IV, above.
[616] POLINSKY, A. Mitchell & SHAVELL, Steven (1984), 'The Optimal Use of Fines and Imprisonment', 24 *Journal of Public Economics*.

in the most stringent jurisdictions[617]. For example, just recently, the longest-ever prison sentence -five years- was imposed on an individual who participated in a price-fixing conspiracy[618].

3. Other sanctions for the breach of the substantial provisions of competition law

Besides the imposition of administrative financial penalties for the infringement of the substantial provisions of competition law, some competition systems have introduced other sanctions of an administrative nature with the purpose of punishing the perpetrators of the competition law violation. In practice, normally, the application of these other administrative sanctions for the infringement of the substantial provisions of competition law is made in conjunction with other sanctions, such as the imposition of financial penalties. Accordingly, the function of these administrative sanctions is supplementary to the imposition of other types of sanctions.

For instance, with regard to the application of these administrative sanctions, in some competition regimes, the competition authority will be empowered to confiscate the illegal gains of undertakings involved in anticompetitive practices, such as restrictive agreements or the abuse of a dominant position[619]. Similarly, in other regimes, the infringement of the substantial provisions of competition law may be sanctioned with the confiscation of permits or licenses required to operate in a determined activity[620]. Moreover, in some jurisdictions, the competition authority may order the publication of the decision declaring the infringement of the competition law provisions, in whole or in part, in an official gazette or a widely circulated newspaper at the expense of the perpetrator of the infringement[621]. Additionally, elsewhere, the persons involved in bid-rigging activities may be deprived of the right to participate in future government tenders[622]. In some regimes, the persons involved in anticompetitive practices related to the abuse of intellectual property rights can be required to grant compulsory licenses of the said intellectual property rights[623]. Moreover, in other countries, the competition law offenders may be prohibited from exercising commercial activities on their own or on representation of others[624]. Finally, in some competition regimes, the individuals responsible for the infringement of the substantial provisions of competition law can be disqualified from acting as a company director for a determined period of time[625].

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[617] Three years in Israel and Norway; five years in Canada, Ireland, Japan, Malaysia and the UK; six years in Argentina; ten years in South Africa and the U.S.

[618] On December 6, 2013, a U.S. Federal Judge sentenced the former president of SeaStar Line LLC to five years in prison for his participation in a price-fixing conspiracy (*United States v. Frank Peake*, Case No. 3:11-cr-00512, U.S. Dist. Ct., DPR.).

[619] In China, according to Articles 46 and 47 of the Anti-monopoly Law, the anti-monopoly authority is empowered to confiscate the illegal gains of business operators involved in monopoly agreements, and business operators that have abused their dominant position, besides the possibility to order the cease of the infringement and the imposition of a financial penalty.

[620] In Panama, the Ministry of Commerce and Industry is required to remove the commercial or industrial license from any natural or legal person that has been sanctioned more than once for being involved in monopolistic practices (Article 104 of Law Nº 45 of 31 October 2007).

[621] This possibility exists in Brazil, France and Portugal.

[622] In Brazil, according to Article 38 of the Antitrust Law, the persons involved in bid-rigging cannot participate in future government tender for a period of five years. In Portugal, according to Article 45 of the Competition Act, the undertakings cannot participate in public tenders for a period of two years.

[623] In Brazil, see Article 38 of the Antitrust Law.

[624] *Idem.*

[625] In the UK, directors that have been convicted for the criminal cartel offense of the Enterprise Act can be disqualified from acting as a company director for up to fifteen years (Company Directors Disqualification Act 1986 as amended by the Enterprise Act).

1.2.2. Sanctions for procedural violations

Apart from the preciously seen sanctions that can be imposed for the infringement of the substantial provisions of competition law, most competition regimes have established sanctions for procedural violations. Procedural violations are usually related to acts of individuals and undertakings that affect or impede the investigation and/or procedure for the alleged infringement of the competition law provisions. Accordingly, prior to the commitment of a procedural violation, the aim of these sanctions is to protect the integrity of the investigation and the procedure through their deterrent effects on individuals and undertakings, moreover, once a procedural violation has been committed, then the aim of these sanctions is to punish the persons responsible for the violation, and additionally, to compel the persons responsible to remedy the procedural violation.

Overall, the sanctions for procedural violations can be imposed for acts that are related to the investigation of an alleged infringement of competition law conducted by the competition authority, such as: the failure to comply with an order to provide information or documentation related to the investigation [626]; failure to comply with an order to give testimony[627]; the production of inaccurate, untimely, untrue, imprecise, misleading or incomplete information[628]; breaking the integrity or destroying seals affixed by the competition authority[629]; attempting to impede or prevent an investigation[630]; destroying or the falsification of documents[631]; interfering with the investigation of the competition authority[632]; obstructing an inspection by the competition authority[633]; assaulting an official of the competition authority[634]; willfully interrupt the proceedings or misbehaves in the place where the hearing is being conducted[635]; defamation of the enforcement authority or one of its members[636]; among others.

(a) Nature of the sanctions for procedural violations

The nature of the sanctions imposed for procedural violations varies from one jurisdiction to another. For instance, in some competition regimes, the sanctions for procedural violations have an administrative nature, given that these sanctions are imposed by administrative authorities such as the competition authority in administrative proceedings[637]. Alternatively, in other competition regimes, the sanctions for procedural violations have a criminal nature, in these cases; the sanctions are imposed by courts of criminal jurisdiction in criminal proceedings[638]. The main reason for these differences is that depending

[626] In South Africa, see Section 71(b)(ii) of the Competition Act.
[627] In Papua New Guinea, see Section 127 of the Independent Consumer and Competition Commission Act.
[628] In Malaysia, see Section 23 of the Competition Act. In Pakistan, see Section 38(d) of Act No. XIX of 2010. In Honduras, see Article 46 of Decree No. 357-2005.
[629] In Malaysia, see Section 25.7 of the Competition Act.
[630] In Canada, see Section 64.1 of the Competition Act.
[631] In Malaysia, see Section 24 of the Competition Act.
[632] In Sri Lanka, see Section 36(3)(b) of the Consumer Affairs Authority Act.
[633] In Bulgaria, see Section 100(6)(3) of the Law on Protection of Competition.
[634] In Barbados, the assault, obstruction or interference with any Commissioner is punished with a fine of $40.000 or imprisonment for 6 months, or both (Section 44 of the Fair Trade Commission Act).
[635] In South Africa, see Section 73 of the Competition Act.
[636] *Idem.*
[637] In the EU, according to Article 23.5 of Regulation 1/2003, the fines imposed by the Commission on undertakings and association of undertakings for the obstruction of an investigation for the infringement of competition law shall not be of a criminal law nature.
[638] In Canada, Section 64 of the Competition Act establishes that every person who in any matter impedes or prevents or attempt to impede or prevent any inquiry or examination under the provisions of the Act, is guilty of a criminal offense.

on the competition regime, the commitment of procedural violations may constitute an administrative offense, in jurisdictions where the offenders are punished with administrative sanctions, or conversely, may amount to a criminal offense, in jurisdictions where procedural violations sanctioned criminally.

(b) Persons who can be sanctioned for procedural violations

In relation to the persons that can be sanctioned for committing procedural violations, this issue varies from one jurisdiction to another. In this sense, in some competition regimes, the ability to impose sanctions for procedural violations is strictly restricted to undertakings[639]. On the contrary, in other competition regimes, this kind of sanctions can be imposed on both individuals and undertakings[640].

(c) Types of sanctions that can be imposed for procedural violations

The sanctions that can be imposed on undertakings and individuals for procedural violations are different depending on the competition regime in question. In the majority of competition regimes, the most common sanction for these procedural violations is the imposition of administrative fines by administrative authorities[641]. In addition in some cases, the commitment of procedural violations is sanctioned with an increase of the financial penalty imposed for the infringement of the substantial provisions of competition law[642]. Furthermore, in some competition regimes, the competition authority can impose periodic penalty payments with the purpose of compelling the offender to comply with an order by the competition authority[643]. Alternatively, in the most stringent jurisdictions, the commitment of procedural violations is sanctioned with the imposition of criminal sanctions, in such cases; these sanctions are imposed by the relevant court of criminal jurisdiction. The criminal sanctions for procedural violations include the imposition of financial penalties[644], and in the most extreme cases, the imposition of imprisonment[645].

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[639] In Switzerland, pursuant to Article 52 of the Federal Act on Cartels and other Restraints of Competition, only undertakings can be fined for the failure to submit requested information.

[640] In China, according to Article 52 of the Anti-monopoly Law, provides for fines to be imposed on entities and individuals for the failure to comply with a request for information. In Korea, both undertakings and individuals may be fine for the failure to comply with the requirements made by the FTC with a fine for negligence according to Article 69-2 of the Monopoly Regulation and Fair Trade Act. In Ireland, in 2005, a director was successfully prosecuted for an offense under Section 31(4)(a) of the Competition Act (failure to appear before the Competition Authority on foot of a witness summons). See the 2006 Annual Report of the Irish Competition Authority (Page 12), available at: http://www.tca.ie/EN/News--Publications/Annual-Reports.aspx.

[641] In Belgium, see Article 64 of the Act in the Protection of Economic Competition. In the EU, see Article 23 of Regulation 1/2003. In Romania, see Section 50 of the Competition Act. In Switzerland, see Article 52 of the Federal Act on Cartels and other Restraints of Competition. In Turkey, see Article 17 of the Law on the Protection of Competition. In the EU, in May 2011, the Commission fined Suez Environnement and Lyonnaise des Eaux €8 million for the breach of a seal during an inspection. Press release available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/632&type=HTML.

[642] In the EU, in November 2007, in a case for the price fixing cartel of professional videotape producers, the Commission increased the fine on Sony by 30% for obstructing the Commission's investigation during an on-site inspection. Press release available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1725.

[643] In Algeria, see Article 59 of the Competition Ordinance. In Bulgaria, see Article 100 of the Law on Protection of Competition. In Denmark, see Section 17 of the Competition Act. In the EU, see Article 24 of Regulation 1/2003. In Italy, see Section 14(5) of the Competition and Fair Trade Act.

[644] In the US, in October 2004, a fish distributor was charged with obstructing the grand jury investigation of a suspected conspiracy for price fixing for intentionally delaying the production of documents that the grand jury subpoenaed. Poll Fish Distributors was charged with obstruction of justice, which carries a maximum penalty for a corporation of a $500,000 fine. Press release available at: http://www.justice.gov/opa/pr/2004/October/04_at_705.htm.

[645] In the Fiji Islands, the failure to supply required information is an offense sanctioned with $1,000 and imprisonment for 12 months, for natural persons, and with a fine of $5,000 for legal persons (Section 119 of the Commerce Commission Decree). In Malta, the failure to comply is a criminal offense sanctioned with a criminal fine and imprisonment for up to six months (Section 23 of the Competition Act). In Mauritius, according to Section 52 of the Competition Act, a person who fails to comply with a request

Finally, there are other sanctions that can be imposed to the parties that have failed to comply with an order by, or have obstructed the investigation of, the competition authority, such as to order the parties to make a rectification within a time limit[646], or to order the arrest of a witness duly summoned who fails to appear before the competition authority[647].

1.2.3. Sanctions for the failure to comply with decisions by the authority

In most competition regimes the failure to comply with a decision by the relevant enforcement authority is subject to certain sanctions. Irrespective of the enforcement authority empowered to issue a determined decision concerned with the enforcement of the competition law provisions, most competition regimes sanction the failure to comply with decisions related to: the requirement to stop an infringement of the competition law provisions; the imposition of interim measures; the imposition of financial penalties for the infringement of the substantial provisions of competition law; the acceptance of commitments to terminate an investigation by the competition authority; the acceptance or prohibition of a proposed merger or acquisition; or the order to divest parts of business; among others.

In practice, the imposition of these sanctions is ancillary to the imposition of sanctions for the infringement of the substantial provisions of the competition law provisions. The main purpose of these sanctions is to compel the sanctioned party to comply with a determined decision issued in relation to the enforcement of the competition law provisions.

With regard to the nature of these types of sanctions, depending on the competition regime, they may be administrative or criminal, in nature. Thus, in cases where the failure to comply with a decision for the enforcement of the competition law provisions constitutes an administrative offense, the sanctions imposed against these violations will be of an administrative nature. Alternatively, in jurisdictions where the failure to comply with one on these orders amounts to a criminal offense, the sanctions imposed will have a criminal nature.

As to the sanctions that can be imposed for the failure to comply with an order for the enforcement of the competition law provisions, these vary from one jurisdiction to another. The most common approach is the imposition of financial penalties that have an administrative nature and are imposed by the competition authority[648]. Furthermore, in some competition regimes, the competition

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made by the Competition Commission shall be guilty of an offense, and sanctioned with a fine not exceeding 50,000 rupees and imprisonment for a term not exceeding 2 years, for natural person, and a fine not exceeding 200,000 rupees, for legal persons. In the UK, pursuant to Section 42 of the Competition Act, the failure to comply with a request by the OFT is a criminal offense punished with criminal fines or imprisonment for up to two years.

[646] In China, according to Article 52 of the Anti-monopoly Law, if business operators refuse to provide related materials and information, or refuse to or obstruct the investigation, the antimonopoly authority shall order them to make rectification or impose a fine.

[647] In Malta, see the Second Schedule (Article 37)(8) of the Competition and Consumer Affairs Authority Act.

[648] In Bosnia and Herzegovina, according to Section 48 of the Competition Act, the Council of Competition may impose a fine in the amount of up to 10% of the total annual income of the economic entity for the preceding year, for not acting according to decisions that: assess the compliance of an agreement with the provisions of the Act; establish exemptions for the prohibitions of the Act; declare the abuse of a dominant position; declare the compatibility of a concentration with the provisions of the Act; impose interim measures; or establish measures to re-establish effective competition.

authority may impose periodic penalty payments for non-compliance with its decisions[649]. Alternatively, in some competition regimes, the failure to comply with a decision by the competition authority is sanctioned with financial penalties of criminal nature and/or imprisonment[650]. Finally, in some regimes the non-compliance with the decisions by the competition authority can be sanctioned with the prohibition of the concerned persons to contract with the State[651]. Moreover, the persons that failed to comply with a decision by the competition authority may also be forced to close their businesses until they comply with the competition authority's decision[652].

2. Remedies

Normally, in relation to the enforcement of the competition law provisions, the implementation of remedies does not have a punitive nature like the imposition of sanctions, furthermore, the purpose of remedies is to maintain and/or restore competition in the future. In this sense, depending on the competition system, the imposition of remedies may be intended to end a determined competition law infringement, to compensate the victims of the competition law infringement, and to restore competition.

1. Types of Remedies

Depending on the type of remedy, these can be classified as behavioral remedies or structural remedies. Behavioral remedies usually are intended to modify or constrain the behavior of undertakings. On the other hand, structural remedies are intended to restore the competitive structure in a determined market.

(a) Interim Measures

Interim measures or preliminary injunctions are behavioral remedies granted as a preliminary measure during a pending case with the purpose of preventing an undertaking from infringing or continuing to infringe the substantial provisions of competition law. In practice, depending on the competition regime in question, the enforcement authority empowered to implement these types of remedies may be different. For instance, in some competition regimes where the competition authority is not a decision-making body, the power to impose interim measures will be vested on courts of general jurisdiction that have authority to decide on cases related to the enforcement of competition law[653]. Moreover, in other competition regimes where the competition authority does not have decision-making functions and where specialized courts have been established for the enforcement of the competition law provisions, the latter

[649] In Belgium, the Competition Council may impose periodic penalty payments on undertakings and association of undertakings of up to 5% of the average daily turnover for the non-compliance with orders imposing financial penalties for the infringement of the substantial provisions of competition law (Article 63 of the Act on the Protection of Economic Competition).
[650] In Botswana, according to Section 76 of the Competition Act, a person who fail to comply with a decision by the Competition Commission can be sanctioned with a fine not exceeding P500,000 or to imprisonment for a term not exceeding 10 years, or both.
[651] In Nicaragua, according to Article 37 of the Law for the Promotion of Competition, the economic agents that fail to comply with the decisions of PROCOMPETENCIA will be forbidden to contract with the government, additionally, PROCOMPETENCIA can request the policy for assistance to close the businesses of the concerned economic agents until they comply with its decisions.
[652] In Nicaragua, pursuant to Articles 37 and 46 of the Law for the Promotion of Competition, PROCOMPETENCIA can order the closure of the businesses of the economic agents that failed to comply with a decision for the enforcement of the competition law provisions.
[653] In Australia, the ACCC has to commence proceedings before the relevant court requesting the imposition of interim measures. In Ireland, the Competition Authority does not itself have powers to impose interim measures; it has to apply to the Circuit Court or the High Court for injunctive relief. In Panama, the Authority for the Protection of Consumer and the Defense of Competition has to request the relevant judicial authorities the imposition of interim measures. In the US, the FTC and the Antitrust Division are not empowered to impose interim measures; this power is vested on federal courts.

will be entitled to impose interim measures under the request of the competition authority[654]. Finally, in some competition regimes where the competition authority has been granted decision-making functions, the authority will be empowered to impose interim measure against anticompetitive conducts at its own discretion[655].

Due to the urgent nature of interim measures, in most competition regimes, the imposition of these remedies is subject to certain established conditions, provided that interim measures are urgent remedies which are imposed prior to the adoption of a final decision by the relevant enforcement authority declaring the infringement of the competition law provisions. As a general rule, the imposition of these remedies can be done only when there are serious indications that an infringement of the substantial provisions of competition law has occurred or is currently taking place[656]. Additionally, most competition provisions require for the imposition of interim measures the existence of a risk of serious and irreparable damage to: competition[657]; undertakings[658]; the general economic interest[659]; the interest of consumers[660]; or a particular person or category of persons[661]; among others.

With regard to the timing for the imposition of interim measures, most competition provisions allow the enforcement authorities to implement this kind of remedies at any time in the course of an investigation for the alleged infringement of competition law and during the proceedings for the declaration of such infringement. However, in some jurisdictions, the imposition of interim measures will be done only after the investigation for the alleged infringement of competition law has been concluded, and where the results of the investigation show a possible infringement of the substantial provisions of competition law[662].

In competition regimes where the competition authority is empowered to impose interim measures, the latter may do so on its own initiative or after receiving a request by a person affected by the alleged infringement of competition law[663]. In cases where the competition authority imposes interim measures on its own, it has to make sure that the conditions required for the imposition of these remedies are met and that such remedies are appropriate to prevent the negative effects they are trying to avoid. Instead, in the case that the imposition of interim measures is requested by someone outside the competition authority, besides the fulfillment of the required conditions for the imposition of interim

[654] In Austria, the Cartel Court, which is a specialized court responsible for the enforcement of competition law in Austria, has jurisdiction to decide on the applications made by the Federal Competition Authority requesting the imposition of interim measures. In South Africa the Competition Tribunal is entitled to impose interim measures at the request of the Competition Commission.
[655] In Bulgaria, the Commission for Protection of Competition is entitled to impose interim measures (Article 8 of the Law on Protection of Competition). In Germany, pursuant to the provisions of Section 32a of the Act Against Restraints of Competition, the Bundeskartellamt has authority to order interim measures if there is a risk of serious and irreparable damage to competition. In Kenya, the Competition Authority is empowered to implement interim measures pursuant to Section 37 of the Competition Act.
[656] In India, Section 33 of the Competition Act allows the Competition Commission to impose interim measures when it is satisfied that an infringement has been committed.
[657] In Bulgaria, see Article 56 of the Law on Protection of Competition.
[658] In Belgium, see Section 62 of the Act on the Protection of Economic Competition.
[659] In Kenya, see Section 37 of the Competition Act.
[660] In Bosnia and Herzegovina, see Article 40 of the Competition Act.
[661] In Malaysia, see Section 35 of the Competition Act.
[662] In Mexico, after the Executive Secretary of the Federal Competition Commission has concluded its investigation, it will issue a preliminary decision declaring the provable responsibility of the investigated person. Only after this preliminary decision has been issued, the Executive Secretary will be allowed to propose the adoption of interim measures (Article 34 bis 4 of the Federal Law on Economic Competition).
[663] In Albania, pursuant to the provisions of Article 44 of the Law on Competition Protection, the Competition Commission may adopt interim measures at any time of the procedure under its own initiative or at the request of the concerned undertakings.

measures, the requesting person will have to provide as much evidence as possible, demonstrating that the alleged violation of competition law is causing, or is likely to cause the negative effects that the award of interim measures is supposed to prevent. Furthermore, depending on the competition regime, other persons may also request the relevant enforcement authority the implementation of interim measures, such as consumers[664], or ministers[665].

On the other hand, in competition regimes where the imposition of interim measures is competence of the judicial authorities, the implementation of these remedies can be requested by the competition authority or by persons affected by the alleged infringement of the competition law provisions. With regard to the requests made by the competition authority, these will occur in jurisdictions where the competition authority is not empowered to issue a decision declaring the infringement of the competition law provisions, nor to award interim measures on its own, accordingly, the competition authority, in the course of an investigation or after the investigation is concluded, will bring a case before the relevant court for the declaration of the infringement of competition law and/or for the implementation of interim measures against anticompetitive conducts prior to the final determination of an infringement of competition law by the court handling the case[666]. As stated before, other persons than the competition authority may also bring an action before the competent court to declare the infringement of the competition law provisions and to request the award of interim measures in order to prevent loss or damage and preserve the status quo. However, since these proceedings are instituted by private parties in private proceedings, these do not correspond to this part of the study.

Irrespective of the enforcement authority that is empowered to impose interim measures against anticompetitive conducts, the latter has sole jurisdiction to determine the appropriateness of the requested interim measure. As a consequence, the enforcement authority will be allowed to dismiss an application made for the imposition of interim measures on its merits. Hence, in jurisdictions where the imposition of interim measures has been delegated to the competition authority, the latter will be allowed to dismiss any application by any person requiring the imposition of interim measures if it considers that such remedy is not appropriate[667]. Similarly, in jurisdictions where the judicial authorities are empowered to impose interim measures, these will be allowed to dismiss the applications made by the competition authority or by other interested persons[668]. Nevertheless, even though the enforcement authorities have sole jurisdictions to decide if an application for the imposition of interim measures is appropriate or not, in

[664] In Belgium, the Competition Prosecutor has decided that consumers are competent to ask for interim measures when they are the victim of restrictive practices (Decision of 27 September 2010).
[665] In Belgium, according to Article 62 of the Act on the Protection of Economic Competition, the imposition of interim measures may be requested by the person who made the complaint for the alleged infringement of competition law, the Minister for Economic Affairs, or the minister with responsibility for the sector concerned.
[666] In Australia, the ACCC does not have the power to impose interim or final relief, consequently, it has to commence proceedings for interim measures before the relevant court, and the latter will determine if the remedies sought by the ACCC are appropriate.
[667] In France, the *Autorité de la Concurrence*, in its decision of 10 January 2012, rejected Hewlett-Packard's request for interim measures against Oracle, provided that the conditions to grant interim measures, namely the existence of a serious and immediate threat of damage to the economy or the complainant, were not met in the case.
[668] In the USA, the FTC challenged LabCorp's $57.5 million acquisition of rival clinical laboratory testing company Westcliff Medical Laboratories, requesting the Federal District Court of California a preliminary injunction to prevent integration of a merger in the medical laboratory industry. The court rejected the FTC petition and denied the preliminary injunction, then, the FTC appealed the district court decision to the U.S. Court of Appeals for the 9th Circuit, which denied the FTC's appeal. On April 22, 2011 the FTC issued an order dismissing its complaint and closing its investigation. See: http://www.ftc.gov/os/adjpro/d9345/index.shtm

some competition regimes, these decisions by the enforcement authorities are subject to further review before the relevant appellate body[669].

In practice, in the majority of competition regimes, the competition authorities or the judicial authorities empowered to impose interim measures may implement such measures as they consider appropriate for the sake of competition, consumers and the concerned undertakings. Generally speaking, the authorities empowered to impose interim measures against anticompetitive practices will usually require the recipients of the interim measures to: enter or terminate specific contractual relationships[670], or to act or refrain from acting in a certain way[671].

Due to the extraordinary nature of this kind of remedy, the term of effect of the interim measures is limited in time in all regimes[672], however, if necessary, this time limit may be extended[673]. In most competition regimes, the enforcement authorities imposing the interim measures have wide jurisdiction to

[669] In Belgium, the decisions of the Competition Prosecutor determining that the request for the imposition of interim measures is inadmissible or unfounded can be appealed before the President of the Competition Council (Section 62 of the Act on the Protection of Economic Competition). In South Africa, the refusal of the Competition Tribunal to gran interim measures can be appealed before the Competition Appeal Court (Section 49C of the Competition Act).

[670] In the USA, the Antitrust Division of the DOJ has required two digital jukebox undertakings to end an illegal non-compete agreement as an interim measure. See the September 2, 2005 Division's complaint at: http://www.justice.gov/atr/cases/f210900/210960.htm. In France, in 2011, the *Autorité de la Concurrence* imposed interim measures suspending the execution of a contract between La Poste and Mondial Relay for the creation of a service which stores and distributes consumers' parcels outside their place of residence. Taking into account the strong market power of La Poste, the importance of Mondial Relay's network of collection point and the barriers to entry, the Competition Authority considered that the implementation of the agreement would marginalize actual and potential competitors. In Argentina, the Secretariat of National Commerce has imposed an interim measure in the cable television sector and ordered a leading cable television provider to refrain from certain contractual conditions that may be contrary to the competition law provisions. Decision of the National Commission for the Defense of Competition of August 17 2011, available at: http://www.cndc.gov.ar/dictamenes/RES%20Y%20DICT%20C.1397.pdf.

[671] In the UK, on February 2006, the OFT under the provisions of Section 35 of the Competition Act, imposed interim measures on London Metal Exchange (LME) at the petition of Spectron Group Plc. LME was ordered not to extend the trading hours on its electronic trading platform, because, according to Spectron, this would force Spectron's eMetal electronic trading platform, which competes with LME's platform, to exit the market. In France, the Apple's distribution model for the IPhone has been challenged by the *Autorité de la Concurrence*. On December 2008, the former Conseil de la Concurrence decided to suspend Apple's five years exclusive deal with France Telecom's Orange pending an in-depth investigation into the merits of the case (Décision n°08-MC-01 17 December 2008). In Belgium, on May 2012, the President of the Competition Council imposed interim measures to Port Real Estate SA at the request of Armajaro Trading Limited. The requested undertaking, a warehouse keeper, was ordered to maintain a minimum volume of loading out of Robusta coffee sold on the NYSE LIFFE Exchange in London. Press release of the Competition Council available at: http://economie.fgov.be/en/binaries/20120525_Press_Release_tcm327-178502.pdf. In another case, in a decision of 25 November 2010, the President of the Competition Council ordered De Beers to supply rough diamonds to Antwerp trader Spira. The decision follows a request for interim measures filed by Spira, awaiting the outcome of its complaint lodged with the Belgian Competition Authority in 2009. The European Commission imposed interim measures on the Chambre de Commerce et d'Industrie de Morlaix at the request of the Irish ferry operator, Irish Continental Group (ICG). The European Commission decided, prima facie, that the Chambre de Commerce had abused its dominant position as the operator of the Port of Roscoff by refusing ICG access to the port. The Commission has decided that the Chambre de Commerce must grant ICG access to the port of Roscoff by June 10th 1995. Press release available at: http://europa.eu/rapid/press-release_IP-95-492_en.htm?locale=en. In Italy, the Competition Authority brought a case for an alleged abuse of a dominant position against Merck, a multinational pharmaceutical, for the refusal to grant Dobfar, a chemical-pharmaceutical company, a license to produce the active ingredient needed for the manufacture of certain drugs. In this case, the Competition Authority considered that an infringement of the competition provisions had occurred and ordered Merck, by means of an interim measure, to grant the license (Italian Competition Authority, decision of 15 June 2005, A364 *Merck-Principi Attivi in Boll.* 23/2005).

[672] For instance, in Bosnia and Herzegovina interim measure can be imposed for three months; in Mexico for four months; in Croatia for six months; and in Malaysia for twelve months. In all the previous jurisdictions the term of effect of interim measures can be extended. In some jurisdictions like Germany, there is not a specific period of time; however, interim measures cannot be imposed for more than one year in total, i.e. including an extension of the period. Similarly in Pakistan, the order implementing interim measures shall remain in force for the period specified in the order but not beyond the date of the final order (Section 32 of Act No. XIX of 2010).

[673] In Switzerland, on May 2012, the Swiss Competition Commission decided to extend, for a period of one additional year, the interim measures that were ordered in 2011 with regard to the supply by the Swatch Group of mechanical watch movements and watch components. The extension has the purpose of allowing other companies in the watch industry to plan alternative sources of supply for the next year. See press release at: http://www.reuters.com/article/2012/05/15/watches-idUSL5E8GF40Z20120515.

terminate these measures and to review or modify them[674]. Provided that the imposition of interim measures is only temporary, in most competition regimes, once the competent authority has declared that the competition law provisions have been infringed, it may then replace the interim measures with a permanent or long-term cease or desist order or an order requesting a positive conduct from the defendant[675]. Additionally, an interim measure may be replaced, when appropriate, by the acceptance of binding commitments that terminate the anticompetitive conduct of the defendant, and as a consequence, the procedure for the declaration of the infringement of competition law is also terminated[676]. Moreover, the enforcement authority may withdraw the interim measures whenever it considers that this remedy is no longer necessary[677]. Finally, as a general rule, in case the interim measures are not replaced by permanent orders or by binding commitments, these will only last until the procedure for the alleged infringement of competition law is completed or terminated[678].

The imposition of interim measures is made in a reasoned decision by the enforcement authorities. Nonetheless, in most competition regimes, the decisions of the enforcement authorities imposing interim measures against anticompetitive practices can be appealed before the relevant appellate body[679]. As a consequence, the appellate bodies will be allowed to quash[680] or upheld[681] the orders imposing interim measures while reviewing the decisions of the enforcement authorities. Despite the preceding, in some jurisdictions, the decisions of the enforcement authority imposing interim measures

[674] In Malaysia, the Competition Commission may at any time withdraw a direction imposing an interim measure (Section 35 of the Competition Act). In Pakistan, an order for the imposition of interim measures may be reviewed, modified or canceled by the Competition Commission (Section 32 of Act No. XIX of 2010).

[675] In the US, in its final judgment, a court required two jukebox manufacturers to end an anticompetitive non-compete agreement, this remedy was previously requested by the Antitrust Division as preliminary injunction (United States v. Ecast, Inc. and NSM Music Group, Ltd., December 16, 2005).

[676] In France, the *Autorité de la Concurrence* received a complaint from Navx arguing that Google had abused its dominant position by suddenly terminating its contract on Adworks (Google's service to sell online advertisement space on Google), and showing discriminatory treatment. The Competition Authority considered that there was a *prima facie* case, provided that Google probably held a dominant position on the advertising market related to online searches, and that the wording of its terms and conditions lacked clarity. In this sense, the Competition Authority required Google to restore Navx's Adwords account, among other interim measures. After the measures imposed by the Competition Authority were adopted, Google offered commitments addressing the Authority's concerns (Décision nº 10-MC-01 du 30 juin 2010 relative à la demande de mesures conservatoires présentée par la société Navx. http://www.autoritedelaconcurrence.fr/pdf/avis/10mc01.pdf). Similarly, in France, the interim measures imposed by the *Autorité de la Concurrence* suspending the implementation of a cooperation agreement between La Poste and Mondial Relay in the parcel delivery sector in 2010 was included in the commitments that La Poste offered the Competition Authority in 2011.

[677] In the UK, the OFT decided that the interim measures requiring London Metal Exchange not to extend the trading hours on its electronic trading platform where no longer necessary to prevent serious and irreparable damage and to protect the public interest. See OFT's press release at: http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/london-metal-exchange#.ULMxspawVGw

[678] In El Salvador, according to Article 13 of the Competition Law, the interim measures imposed by the Superintendent will remain so long as the proceedings which led to their imposition. In Kenya, the interim measures imposed by the Competition Authority are adopted until the ongoing investigation is concluded (Section 37 of the Competition Act).

[679] In Israel, any party injured by a decision of the Antitrust Tribunal imposing interim measures may appeal against such decision to the Supreme Court (Section 39 of the Restrictive Trade Practices Law). In Kenya, the decisions of the Competition Authority imposing interim measures can be appealed before the Competition Tribunal (Section 73 of the Competition Act). In South Africa, the decisions of the Competition Tribunal imposing interim measures are appealed before the Competition Appeal Court (Section 37 of the Competition Act).

[680] In Germany, the Bundeskartellamt decided to order Scandlines, the owner of the Puttgarden terminal, to grant access to the terminal to competing ferry companies in interim proceedings, provided that the public's interest in opening up the market to competition outweighed Scandlines' interest in having the exclusive and unlimited use of its terminal. However, on August 2000, the Düsseldorf Regional High Court overturned the decision of the Bundeskartellamt ordering Scandlines to grant access to its terminal (OLG Düsseldorf WuW/E DE-R 569 – Puttgarden II (2000)).

[681] In France, on February 2009, the decision of the Conseil de la Concurrence imposing interim measures on Apple requiring the latter to suspend its five years exclusive deal with France Telecom's Orange was appealed before the Paris Court of Appeal, however, the decision imposing interim measures of the Conseil was upheld by the Court of Appeal (CA Paris 4 February 2009). Similarly, the decision of the Italian Competition Authority ordering Merck to grant another pharmaceutical the license to produce active ingredient needed for the manufacture of certain drugs, by means of an interim measure, was confirmed by the Italian Regional Administrative Tribunal of Lazio (Administrative Tribunal of Lazio 7 March 2006, nº 1713).

cannot be appealed[682]. Due to the urgent nature of interim measures, as a general rule, the commencement of an appeal against the decision by the enforcement authorities implementing the interim measures does not suspend the effects of these decisions[683].

Finally, in some competition regimes, the recipients of a decision by the enforcement authorities imposing interim measures are entitled to recover any damages that could arise from the imposition of the interim measures in question[684]. In this sense, in some competition regimes the enforcement authorities can require a bond from the applicant as a condition to grant interim measures[685], alternatively, in some jurisdictions, such bond will be requested by the party on which the interim measure is being imposed[686].

(b) Permanent Orders

Most competition provisions allow the enforcement authorities the imposition of permanent or long-term orders intended to bring an infringement of the substantial provisions of competition law to an end when the authorities have issued a decision declaring the breach of the competition provisions. In practice, in most competition regimes, the enforcement authorities are entitled to give such orders as they consider appropriate to bring the antitrust infringement in question to an end. Thus, the main purpose of this type of remedies is the immediate termination of an anticompetitive conduct. Even though, the effects and purpose of these orders may be similar to interim measures or preliminary injunctions, i.e. to terminate the infringement of competition law, the difference between these two types of remedies is concerned with the timing for the implementation of these remedies and their duration. Accordingly, the imposition of interim measures will be done, in most competition regimes, at any time during the proceedings for the declaration of the competition law violation and will last until the proceedings are completed, while the imposition of permanent or long-term orders will be done at the end of the said proceedings and once the enforcement authority has declared that the competition provisions have been breached, these orders are permanent.

The enforcement authorities empowered to impose these permanent or long-term orders may vary from one jurisdiction to another. Provided that the imposition of these types of orders is made once the infringement of the competition law provisions has been declared, and is usually annexed to the

[682] In Croatia, the decisions of the Competition Agency implementing interim measures cannot be appealed; however, the injured parties may take actions before the Administrative Court of the Republic of Croatia (Article 51 of the Competition Act).
[683] In Bulgaria, according to Article 56 of the Law on Protection of Competition, an appeal against the imposition of interim measures, shall not suspend the application of this type of remedy.
[684] In Canada, the Competition Tribunal has the power to order an inquiry into damages arising from an interim order by the Tribunal, but can refuse to order damages where there is a deliberate and flagrant breach of the interim order. In a case related to the chicken industry in Canada, Nadeau Poultry Farm Ltd. applied to the Competition Tribunal under the Competition Act's refusal to deal provisions to force Group Westco Inc. to continue supplying it with chickens. The Tribunal ordered Westco to continue supplying Nadeau pending the hearing of the application. However, Westco made changes to the way it supplied chickens to Nadeau, after the latter brought contempt proceedings, the Tribunal decided that Westco disobeyed the interim order and fined it $75,000. Westco applied to the Tribunal for an inquiry as to damages arising from the injunction, however, according to the Tribunal the fact that Westco had deliberately and flagrantly breached the interim order disentitled it to collect damages arising from the injunction (Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited v. Groupe Westco Inc. and Groupe Dynaco, Coopérative Agroalimentaire and Volailles Acadia S.E.C. Volailles Acadia Inc./and Acadia Poultry Inc. Available at: http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=293).
[685] In Chile, according to Article 25 of the Antitrust Act, the *Tribunal de Defensa de la Libre Competencia* can require, when necessary, a bond from the requesting party that covers any loss caused by the interim measure. In Hungary, the Competition Council may require a bond as a condition, if the interim measure is required by the party under investigation (Article 72 of the Competition Act).
[686] In Mexico, the recipient of an interim measure can request the Federal Competition Commission a bond that covers any harm to the process of competition (Article 34 bis 4 of the Federal Law on Economic Competition).

decision declaring the competition law breach, it is logic that the power to impose these remedies is vested on the enforcement authority that is responsible for the decision declaring the antitrust infringement. In line with this, in competition regimes where the competition authority does not have decision-making functions, the competent enforcement authority will be empowered to implement these permanent orders[687]. Conversely, in competition regimes where the competition authorities are decision-making bodies, the latter will be entitled to impose permanent orders for the termination of the antitrust infringement[688], additionally, in some jurisdictions, the competition authority can either order or recommend the termination of the infringement[689]. Nevertheless, there are jurisdictions where, even though the competition authority is not entitled to impose sanctions for the infringement of competition law, the authority is allowed to order the termination of the anticompetitive practices that are contrary to the competition law provisions[690].

These types of remedies are very versatile because they can be imposed on a variety of persons and on different situations. For instance, in most jurisdictions, these orders may be given to such persons as the enforcement authority deems appropriate, which depending on the competition regime will include individuals and undertakings. Moreover, in some competition systems, the ability to impose permanent orders is not restricted to the infringing undertakings, provided that the enforcement authorities can impose permanent orders addressed to, for instance, the parent company of an infringing undertaking which, though not the actual perpetrator of the violation, has a subsidiary which is the responsible for the antitrust infringement[691].

As stated before, these permanent orders requiring the termination of the competition law infringement may be imposed on a variety of situations which usually relate to the type of anticompetitive conduct in question. In particular, these orders may require the persons concerned to modify a determined agreement or conduct, or to terminate a determined agreement or cease the conduct. For instance, the enforcement authority may order a cartelist to terminate anticompetitive agreements[692], additionally; the authority may also order a dominant undertaking to stop abusing its dominant position[693], these directions

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[687] In the US, in civil matters, the FTC can seek an order from the district court requiring companies to cease unfair methods of competition or practices. In South Africa, according to Section 58 of the Competition Act, the Competition Tribunal has the power to order the termination of prohibited practices.

[688] In Botswana, when the Competition Commission determines that a breach of the prohibitions of the Competition Act has occurred, the Commission will give an enterprise or enterprises involved in any of the prohibited practices such directions as are necessary to bring the infringement to and end (Section 43 of the Competition Act). In China, according to Article 46 of the Anti-monopoly Law, where a business operator has violated the provisions of the Law by entering into a monopoly agreement, the NDRC or the SAIC shall order the business operator to stop the illegal act. In Italy, according to Article 15(1) of Law No. 287 of 1990, when the Competition Authority finds and infringement of the competition law provisions, it can order the companies involved to put an end to the infringement within the deadline that is establishes in its final decision.

[689] In Cyprus, according to Section 22 of the Protection of Competition Law, where the Competition Commission has found an infringement of the substantial provisions of competition law, it has authority to order or recommend to the enterprise or trade association concerned to terminate the infringement within a fixed period of time.

[690] In Finland, although the Finnish Competition Authority cannot impose sanctions for the infringement of the competition law provisions by itself, it has to propose the imposition of penalty payments to the Market Court; the Authority has the power to order an undertaking to terminate the infringing conduct or to impose a delivery obligation (Section 9 of the Competition Act).

[691] In the UK, see the OFT Enforcement Guideline of December 2004, at paragraph 2.2.

[692] In Lithuania, on December 2011, the Competition Council has concluded that since 1998 to 2011, the Lithuanian Shipbrokers and Agents Association and part of its members have agreed to apply minimal ship agency tariffs and to monitor the compliance thereof. For these prohibited agreements the Competition Council has imposed fines on the Lithuanian Shipbrokers and Agents Association and its 32 companies providing ship agency services for 12 million litas and ordered termination of the anticompetitive agreements. See press release at: http://kt.gov.lt/en/index.php?show=news_view&pr_id=945

[693] In Italy, the Competition Authority fined Pfizer, a leading pharmaceutical for abusing its dominant position by misusing its pharmaceutical patents to exclude generics from the Italian market. In its decision, the Competition Authority found that Pfizer had

are usually known as cease and desist orders. Furthermore, these permanent orders may also require a positive action from its recipient, such as: to inform concerned parties that the infringement has been terminated[694]; to publish the infringement decision and corrective orders[695]; to grant access to essential facilities[696]; to supply a service[697]; to give access to studies required for the production of certain products[698]; to modify anticompetitive agreements[699]; or to allow other undertakings to enter into a determined market[700].

These permanent or long-terms orders requiring the termination of the competition law infringement or the positive actuation of the recipient are usually implemented through a written reasoned decision, and are likely to from part of the infringement decision in cases where the decision and the permanent orders are addressed to the same person. In some competition regimes, the recipients of the permanent orders are notified with a draft of the decision that includes the facts on which the enforcement authority relies, the objection raised by the authority, the action proposed to take and the reasons backing the decision. This notification is made with purpose of allowing the recipients to make any appropriate representation against the proposed decision and the corrective directions[701].

Finally, in the majority of competition systems, the decisions by the enforcement authority imposing the permanent or long-term orders for the termination of the competition law infringement or the positive actuation of the recipient can be appealed before the competent appellate body. However, as a general rule, the commencement of an appeal against the decisions imposing these permanent orders does not suspend the effects of these directions.

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abused its dominant position, fined Pfizer €10.6 million and ordered to stop its abusive conducts (Decision of the Italian Competition Authority A431 - RATIOPHARM/PFIZER of 11 January 2012).

[694] In Switzerland, on May 2012, the Competition Commission found that BWM Ltd had foreclosed the Swiss market by preventing its dealers from selling BWM and MINI cars to Swiss customers. In order to remedy its anticompetitive conduct the Commission ordered BMW Ltd to inform its dealers that it will amend the contracts with its dealers by removing the export ban clause. See press release (in French) at: http://www.news.admin.ch/message/index.html?lang=fr&msg-id=44680.

[695] In Korea, the KFTC imposed a fine of 25.7 billion won on four telecommunication operators (KT, Dacom, Onse Telecom and Hanaro Telecom) for agreeing to jointly determine and maintain distance call rates. The KFTC also required the operators to publicize their violations and the corrective order on major daily newspapers.

[696] In Germany, the Bundeskartellamt prohibited Scandlines Deutschland GmbH from refusing competing ferry companies access to the Puttgarden terminal upon payment of an adequate fee. The Bundeskartellamt concluded that Scandlines had a dominant position both with respect to the control of the terminal facilities, and the downstream market of providing ferry services. The alternative transportation routes were not interchangeable with the Puttgarden-Rödby route, while legal and physical obstacles prevented the competitors from constructing their own terminal at Puttgarden. The Bundeskartellamt found that the public's interest in opening up the market to competition outweighed Scandlines' interest in having the exclusive and unlimited use of its terminal and ordered the latter to allow access to the terminal facilities.

[697] In Sweden, the Swedish Competition Authority ordered the sole electricity provider for the city of Haparanda, Ekfors Kraft AB, to supply energy to the city's street lightning facility (Decision of the Swedish Competition Authority (Ekfors) of 25 August 2010).

[698] In Italy, the Competition Authority fined Bayer Cropscience for refusing to provide access to studies required for market authorization of fungicides. In its decision of 5 July 2011, the Competition Authority fined Bayer Cropscience Srl and Bayer Cropscience AG €5,124 million for abuse of dominant position by refusing to provide Sapec Agro S.A, and other companies, to certain studies required to acquire market authorization for fosetyl-based products, and ordered Bayer to allow access to the said studies (Decision of the Italian Competition Authority of 11 May 2011, A415 - SAPEC AFRO/BAYER-HELM).

[699] In Switzerland, the Competition Commission has fined German BMW Ltd with 156 million Swiss Francs for preventing direct and parallel imports into the Swiss market. The Competition Commission determined that BMW foreclosed the Swiss market by prohibiting its dealers in the EEA from selling BMW and MINI cars to Swiss customers. The Competition Commission ordered BWM Ltd to amend its dealers 'contracts in the EEA by removing the export ban clause.

[700] In Lithuania, the Competition Authority fined the State-controlled operator of the national airport, Vilniaus tarptautinis oro uostas, for abusing its dominant position by preventing Naftelf from entering the market for the supply of aviation gasoline and jet fuels to airplanes in the Vilnius International Airport. In this case, the Competition Authority imposed a fine of LTL 171,00 on Vilniaus tarptautinis oro uostas and ordered to cease the anticompetitive conduct, and within not longer than three months to allow Naftelf the possibility to enter the market for the supply of aviation gasoline and jet fuels to airplanes in the Vilnius International Airport. See press release at: http://kt.gov.lt/en/index.php?show=news_view&pr_id=574

[701] In the UK, see Rule 5 of the OFT Rules (The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751)).

(c) Divestiture and Rescission

Divestiture is the most common structural remedy used in merger or acquisition cases. This type of structural remedy aims to make changes in asset or ownership structure of the merging undertakings in order to remove any anticompetitive concerned that the transaction in question may rise. In Practice, its application varies from one competition regime to another, and especially with regard to the merger notification system established in each regime. However, given that this type of remedy is one of the most drastic, it should be used to restore competition and not to punish those who restrain trade, moreover, it is not to be used indiscriminately, without regard to the type of violation or whether other remedies, less harsh, are available[702].

The purpose of divestiture is to address the possible lessening of competition by either creating a new source of competition through disposal of a business or assets from the merger parties to a new market participant or strengthening an existing source of competition through disposal of a business or assets to an existing market participant independent of the merging undertakings. The effects of a successful divestiture will be to address the loss of rivalry resulting from a merger by changing or restoring the structure of the market.

In competition regimes where a pre-merger notification system has been established, normally, the competition authorities evaluate the effects of the proposed merger or acquisition in advance. The early evaluation of the competition authorities in competition regimes that have established pre-merger notification systems permits competition authorities to assess any anticompetitive concern that the proposed transaction may provoke in the market where the merger will take effect. The fact the competition authorities in these competition regimes can scrutinize the anticompetitive effects of a proposed merger or acquisition in advance allows competition authorities to impose any appropriate remedy before the proposed transaction is completed. In these cases where the merging undertakings are obliged to notify the merger transaction before its actual implementation, one of the most common remedies imposed by competition authorities is the divestiture of specific parts of the undertakings involved in the transaction, i.e. a production site or a distribution network. In practice, depending on the competition regime in question, the imposition of this kind of remedy can be done under the sole discretion of the competition authority, or alternatively, it can be proposed by the undertakings involved in the transaction. In cases where the divestiture remedy is imposed by the competition authority at its sole discretion, after reviewing the prosed transaction and evidencing that if completed as proposed it will raise competition law issues, the competition authority will order the involved undertakings the divestiture of the specific parts of the undertakings that may be problematic from the competition law perspective[703]. Conversely, in competition regimes where the undertakings involved in the proposed transaction are allowed to suggest to the competition authority the divestiture remedy, the latter will do so

[702] *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 at 603, 71 S.Ct. 971 (1951).

[703] In Poland, the Competition Authority may either impose on the parties an obligation to, or accept an obligation proposed by the parties to divest part of their business. In 2007, the Polish Competition Authority conditionally cleared a merger that was referred back from the European Commission. In its decision the Competition Authority cleared the transaction consisting in Carrefour Nederland B.V. acquiring Ahold Polska Sp. Z o. o., by ordering that by the end of 2008 Carrefour disposes of any rights, including the right of ownership, the right of perpetual usufruct and the right to rent, the eight stores located in Grodzisk Mazowiecki, Jaworzno, Chrzanów, Pabiance, Sochaczew and Zamość (Decision of the President of UOKiK of 28 June 2007, No. DOK-86/2007).

in different situations depending on the competition regime. For instance, in some jurisdictions, the merging undertaking will be allowed to suggest the divestiture remedy once they have notified the transaction to the competition authority and the latter has considered that the transaction will raise competition law issues if completed as proposed, in those cases, as a way to remedy the anticompetitive effects of the prosed transaction in advance, the merging undertakings can suggest the divestiture of parts of their undertakings in order to remove any concern the competition authority may have[704]. On the other hand, in other competition regimes, the merging undertakings can hold informal consultations with the competition authority prior to formal notifications, in these cases, the competition authority examines the proposed transaction to determine if it will raise competition law issues, if it considers that the transaction is problematic, then the merging undertakings can propose the competition authority a remedial measure such as divestiture on a voluntary basis and prior to any formal notification[705].

In competition regimes where post-merger notification systems have been established, the application of the divestiture remedy is different from jurisdictions with pre-merger notification systems. Given that in these competition regimes the competition authority may interfere after the merger or acquisition in question has been fully completed, any remedy that the competition authority considers suitable will have to be imposed after the transaction has been implemented. In these cases, after the transaction has taken place, the competition authority will evaluate if the transaction is problematic from the competition law perspective, and if so, the competition authority may order the divestiture of specifics parts of the merged undertakings if it considers this remedy to be appropriate to solve the competition law problems the transaction provoked[706].

Moreover, the imposition of the divestiture remedy may also be implemented in competition regimes where the notification of a transaction that may raise competition law issues due to its size or other aspects, is not mandatory. In these cases, the competition authority may be entitled to order the divesture of transactions that have already been completed[707].

Finally, even though, the divestiture remedy is the most frequently used measure for the control of anticompetitive mergers and acquisitions, in some competition regimes, this kind of remedy may also be implemented in cases related to the abuse of a dominant position. In such cases, the competition

[704] In Turkey, the Competition Authority has cleared the acquisition by Mars Sinema Turizm ve Sportif Tesisler İşletmeciliği A.Ş., of the majority shares of AFM Uluslararası Film Prodüksiyon Ticaret ve Sanayi A.Ş. the two largest cinema chains in Turkey. The Competition Authority cleared the transaction subject to the proposed divesture of twelve cinemas and the notification of ticket prices (Decision 11-57/1473-539 of 17.11.2011).

[705] In Japan, the parties are allowed to hold voluntary prior consultations with the JFTC in advance to formal merger notifications. At this early stage, the JFTC evaluates the effects of the proposed transaction on competition and communicates its concerns to the merging undertakings, allowing them the possibility to submit a remedial measure on a voluntarily basis, the appropriateness of which is assessed by the JFTC.

[706] In Korea, according to the provisions of Article 16 of the Monopoly Regulation and Fair Trade Act and the Notice on Merger Remedies of June 2011, the Korean Fair Trade Commission is allowed to impose structural remedies, such as divestiture.

[707] In the UK, the Competition Commission has prohibited a completed merger in the healthcare waste services industry and required the divestment of the acquired businesses. On May 2012, the Commission has announced that it will require Stericycle Inc to sell Ecowaste Southwest Limited, which was acquired by the former on 2011. See press release at: http://www.competition-commission.org.uk/media-centre/latest-news/2012/mar/cc-requires-stericycle-to-sell-ecowaste-southwest.

authority may require the dominant undertaking to divest part of its business with the purpose of creating a new source of competition or strengthening an existing source of competition in a determined market[708].

With regard to the rescission remedy, the main purpose of this type of measure is the abrogation of a determined transaction, which is effective from its inception, and is intended to restore the merging undertakings to the positions they would have occupied if the transaction had ever been completed. In most competition regimes where this type of remedy is available it is considered to be an *ultima ratio* measure, which is implemented when competition cannot be preserved by any other means. In practice, through the imposition of this type of remedy, the competition authority may order the partial or total desconcentration of transactions which are contrary to the competition law provisions[709].

(d) Commitments or Undertakings

Most competition regimes allow the possibility for competition authorities to accept commitments or undertakings offered by a person or persons if they consider that those commitments or undertakings will eliminate any concern about the lawfulness of the allegedly anticompetitive practices. These are voluntary remedies which are offered by the concerned undertakings, accordingly, these kinds of remedies cannot be ordered by the competition authority or a judicial authority. As a general rule, the persons concerned with the investigation by the competition authority are allowed to offer commitments at any stage of the investigation and up until a decision is made[710], however, in some competition regimes, the concerned parties have to submit the commitments before the statement of objections has been notified[711]. As a result, the main effect that the acceptance of the proposed commitments by the competition authority has is the immediate termination of the investigation for the alleged infringement of the substantial provisions of competition law.

In addition to the timing requirement for the acceptance of commitments, depending on the competition regime in question, there are other additional requirements that may have to be fulfilled in order for the proposed commitments to be accepted. For instance, in some competition regimes, the ability of the parties involved in suspected anticompetitive practices to be allowed to propose commitments for the termination of the proceedings for the declaration of the antitrust infringement will be restricted in the frequency in which they can offer commitments[712]. Moreover, in some competition regimes, the acceptance of a commitment proposed in exchange for the termination of an investigation for the alleged infringement of the substantial provisions of competition law may be subject to the payment

[708] In Armenia, pursuant to Article 19 of the Law on Protection of Economic Competition, the Commission for the Protection of Economic Competition is empowered to order the disaggregation of economic entities abusing their dominant position twice or more within a year. In France, the *Autorité de la Concurrence* may, in the case of an abuse of dominant position or a state of economic dependency, impose a transfer of assets or the cancellation of joint control that contributed to the emergence of market power, even if the acquisition of these assets or joint control had previously been authorized in the context of a merger control review (Article L. 430-9 of the Commercial Code).
[709] In Mexico, according to Article 35(II) of the Federal Law on Economic Competition, the Federal Competition Commission is empowered to order the total or partial desconcentration of a concentration that is forbidden by the provisions of the Law.
[710] In Mexico, according to Article 33 bis 2 of the Federal on Economic Competition, the concerned parties may offer commitments before a final decision for the infringement of the substantial provisions of competition law is reached.
[711] In Croatia, the concerned parties can offer commitments following the initiation of an investigation for the alleged infringement of competition law and at the latest before the statement of objections has been notified (Article 49 of the Competition Act).
[712] In Mexico, according to Article 33 bis 2 of the Federal Law on Economic Competition, the concerned parties will be allowed to offer commitment only once every five years.

by the proposing undertakings of a sum of money[713]. Nevertheless, in some competition regimes, such obligation to pay may only be required in cases that are concerned with cartel infringements[714].

In particular, in most competition regimes, the decision to accept commitments, and consequently, to terminate the proceedings for the declaration of the infringement of competition law is at the sole discretion of the competition authority. Nonetheless, some competition authorities have developed guidelines as to the circumstances in which it may be appropriate to accept commitments[715]. Despite the preceding, in some jurisdictions, there are circumstances established by the competition provisions under which the competition authorities cannot accept commitments from the concerned undertakings. For instance, in some competition regimes, the competition authority will not adopt commitment decisions in cases of serious infringements of the competition law provisions[716]. Moreover, in some jurisdictions, the competition authority will not accept commitments in cases involving secret cartels between competitors, which may include: price-fixing; bid-rigging; establishment of output restrictions or quotas; sharing markets; and dividing markets[717]. Finally, in other competition regimes, the competition authority will not accept commitments in cases where the conduct of the concerned undertakings has resulted in a substantial distortion of competition[718].

As to the nature of the proposed commitments, these can be structural or behavioral, or even a combination of both. For example, commitments might involve a person agreeing to cease or modify its conduct in a particular area[719]. Moreover, commitments may also require a person granting licenses related to intellectual property rights[720]. In some cases, the concerned commitments may remove a particular anticompetitive clause from an agreement[721]. Furthermore, the proposed commitments may oblige the concerned undertakings to refrain from abusing their dominant position by applying anticompetitive conditions[722]. Additionally, in some cases the proposed commitments may require the

[713] In Israel, pursuant to Section 50B of the Restrictive Trade Practices Law, the consent decree agreed between the General Director of the Antitrust Authority and the concerned undertakings may include an obligation to pay a sum of money to the State Treasury.
[714] In Brazil, according to Article 85 of the Antitrust Law, the proposed commitments have to include a pecuniary contribution to the *Fundo de Defesa de Direitos Difusos* in cases related to cartel infringements.
[715] In the UK, see the OFT's guidance as to the circumstances in which it may be appropriate to accept commitments.
[716] In Bulgaria, pursuant to the provisions of Article 75 of the Law on Protection of Competition, the Commission for the Protection of Competition shall not issue a decision accepting commitments in cases of serious infringements of the Law.
[717] In the UK, see paragraph 4.4 of the OFT's 2004 Guidance note on Enforcement.
[718] In the Czech Republic, the Office for the Protection of Competition shall not issue a commitment decision in cases where the conduct of the concerned undertakings has resulted or could have resulted in the substantial distortion of competition (Article 7 of the Act on the Protection of Competition).
[719] In France, on July 2012, the *Autorité de la Concurrence* accepted commitments from eleven banks to abolish the main interbank fees applicable to the use of non-cash means of payment from 1 September 2013 onwards. See press release at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=1895. In Germany, the Bundeskartellamt accepted the commitments offered by the League Association and the German Football League (DFL) relating to the joint award of media rights and declared them binding. The commitments include e.g. guarantees concerning the application of a fair, non-discriminatory and transparent award procedure. See press release at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2012/2012-01-13_PR_DFL_E.pdf.
[720] In Italy, on March 2007, the Italian Competition Authority accepted and made obligatory Merck's commitment to grant free licenses to allow the manufacture and sale in Italy of the active ingredient finasteride and related generic drugs two years before Merck's exclusive rights were due to expire. This decision terminates the proceedings brought by the Authority in relation to Merck's alleged abuse of its dominant position in the production and sale of certain active pharmaceutical ingredients.
[721] In Portugal, in the Bayer / Sapec case, concerning a non-compete clause included in a contract between the two companies for the distribution of various agro-chemical products. The proceedings were terminated in 2007 by the competition authority with a commitment decision requiring Bayer to suppress the anticompetitive clause in its relationship with the distributors.
[722] In Lithuania, the Competition Council closed an investigation into a possible infringement of the abuse of dominance provisions by Viasat World Limited and Viasat AS, which are companies in the distribution of TV channels, following the commitments proposed by Viasat World Limited. The proposed commitments included the obligation to apply non-discriminatory distribution terms for the Viasat Sport Baltic channel to all providers of multichannel subscriber television services. See press release at: http://kt.gov.lt/en/index.php?show=news_view&pr_id=941. In Poland, the Competition Authority accepted commitments offered by Polskie Górnictwo Naftowe i Gazownictwo (PGNiG) and closed the proceedings related to an alleged abuse of dominant position

concerned undertakings to disgorge a portion of their ill-gotten gains from their illegal behavior[723]. Finally, commitment decisions may also require structural remedies such as divestiture[724].

With regard to the effects of the decisions accepting commitments, as a general rule, these commitments are binding on the proposing parties[725]. As stated before, the main effect that these commitments have is the immediate termination of the investigation and the proceedings for the alleged infringement of the competition law provisions conducted by the competition authority. Thus, if the competition authority accepts the commitments, its decision makes them binding upon the parties and concludes that there are no longer grounds for action, thereby closing the investigation of the case without any infringement decision. As opposed to infringement decisions, the commitment decisions do not draw conclusions on the anticompetitive nature of the litigious practice. They terminate the procedure without any recognition of liability of the parties, or imposing any sanction on them. Accordingly, in practice, the fact that the competition authority has accepted binding commitments does not preclude third parties from bringing private actions before civil courts.

Nonetheless, despite the fact that the competition authority has to terminate the investigation and the proceedings that were related to the subject matter of the proposed commitments, the competition authority can reopen the investigation in cases where the circumstances have changed since the commitments were accepted; the persons bound by the commitments have failed to comply to the terms of the commitments; or the information that led the competition authority to accept the commitments was incomplete, false or misleading[726].

Moreover, in some competition regimes, the competition authority can review the proposed commitments and modify them if the authority believes that the conditions of the proposed commitments constitute an excessive burden for the concerned undertakings, if such alteration does not harm others or the public interest[727]. Additionally, in some jurisdictions, the proposed commitments can be released by

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on the Polish natural gas market. The alleged abuse consisted in PGNiG impeding its industrial customers' ability to switch suppliers. On April 2012, the Authority closed its investigation and refrained from imposing fines in exchange of the abolition of the contractual clauses that impeded PGNiG's customers to switch supplier. In addition, if PGNiG fails to execute Authority's decision, it may be fined with up to €10,000 per day of failure to comply. See press release at: http://www.uokik.gov.pl/news.php?news_id=3360.

[723] In the US, the federal district court in the New York City decided that the Department of Justice was entitled to seek disgorgement as a remedy for an alleged Sherman Act violation, accordingly, the Court approved a consent decree, which required KeySpan to pay $12 million to settle a federal antitrust lawsuit brought by the Antitrust Division (February 2, 2011, Memorandum and Order in *U.S. v. KeySpan Corp*., 10-cv-1415 (WHP).

[724] In Turkey, the Competition Authority has cleared the acquisition by Mars Sinema Turizm ve Sportif Tesisler İşletmeciliği A.Ş., of the majority shares of AFM Uluslararası Film Prodüksiyon Ticaret ve Sanayi A.Ş. the two largest cinema chains in Turkey. The Competition Authority cleared the transaction subject to the proposed divesture of twelve cinemas and the notification of ticket prices (Decision 11-57/1473-539 of 17.11.2011).

[725] In Croatia, pursuant to Article 49 of the Competition Act, the Competition Agency shall by means of a decision make the proposed commitments binding on the undertakings. In Germany, according to Section 32b of the Act Against Restraints of Competition, the Bundeskartellamt may by way of a decision declare the proposed commitments to be binding on the concerned undertakings.

[726] In Croatia, see Article 49 of the Competition Act. In the Czech Republic, see Article 7 of the Act on the Protection of Competition. In Germany, see Section 32b of the Act Against Restrictions of Competition.

[727] In Brazil, according to Article 85 of the Law Nº 12.529, of 30 November of 2011, the CADE is empowered to modify the conditions of the proposed commitments is these suppose an excessive burden on the concerned undertakings, if the modification does not harm other or the public interest.

the competition authority where, it is requested by the persons who gave the commitments[728], or the competition concerns identified at the time of their acceptance no longer arise[729].

In most competition regimes, in practice, the accepted commitments have the same force and effects of the other remedies implemented unilaterally by the competition authority, provided that these commitments are accepted via a reasoned decision by the competition authority. As a general rule the decision accepting commitments has to be published with the purpose of allowing interested third parties the possibility to make any representations against the proposed commitments. Ultimately, in most competition regimes, the decision of the competition authority accepting commitments can be reviewed at the request of any sufficiently interested person before the relevant appellate body.

Finally, in competition regimes where the competition authority does not have the power to issue a decision declaring the infringement of the substantial provisions of competition law, the latter will also lack competence to terminate a proceeding that has been instituted before the relevant enforcement authority. Accordingly, during the investigative stage, in cases where the competition authority has not yet instituted a court action for the declaration of the antitrust infringement, the authority may agree with the investigated undertakings not to proceed with a court action in exchange for commitments to terminate any conduct the authority considers contrary to the competition law provisions[730]. Furthermore, in cases where the competition authority has already brought a court action for the declaration of the antitrust infringement, any agreement between the competition authority and the defendant for the termination of the anticompetitive practice will have to be approved by the court handling the case[731]. Finally, in some jurisdictions, the competent court may, at the request of the competition authority, accept the commitments agreed between the competition authority and the concerned undertakings[732].

(e) Restitution to Injured Parties

Finally, in some competition regimes, as a way of remedying the harmful effects of the anticompetitive conduct of the perpetrators of the competition law infringement, there is the possibility to order or accord the restitution to those who have suffered harm resulting from the said anticompetitive conduct. Unlike civil actions for damages, where the injured parties bring a private action before the relevant court with the purpose of recovering the amount suffered in damages caused by the anticompetitive conduct of the competition law offender, in these cases, the restitution for the harm suffered for the competition law infringement is awarded by the competition authority in public proceedings. As stated before, depending

[728] In Israel, the competent court may amend the provisions of the consent decree when all the parties to the consent decree file a consensual request to amend the decree.
[729] In Singapore, the Competition Commission may release an accepted commitment for the termination of the proceedings where it has reasonable grounds for believing that the commitment is no longer necessary or appropriate for the purpose of remedying, mitigating or preventing the substantial lessening of competition (Section 60A of the Competition Act).
[730] In Ireland, in the course of an investigation for the alleged infringement of competition law, the competition authority may agree with the concerned undertakings not to bring a court action in exchange of commitments aimed removing any anticompetitive concern.
[731] In the US, the Antitrust Division may negotiate consent decrees with the concerned undertakings to bring the alleged infringement of the competition law provisions to an end. However, these consent decrees have to be submitted to a federal court for approval.
[732] In Israel, according to Section 50B of the Restrictive Trade Practices Law, any court of competent jurisdiction may, upon the request of the General Director of the Antitrust Authority, accord the force of a ruling to a consent agreement reached between the General Director and another person.

on the competition regime, the restitution of injured parties may be ordered by the competition authority, or alternatively, this remedy may be accorded between the competition authority, the perpetrator of the competition law infringement and the injured parties. In cases where the restitution remedy is ordered by the competition authority, the latter will, at the time of issuing a final decision declaring the infringement of the competition law provisions, order a compensation payment for the harm caused by the anticompetitive conduct of the competition law offender. Furthermore, in such cases, the restitution remedy is usually coupled with other sanctions or remedies, such as the imposition of financial penalties or the order to terminate anticompetitive practices[733].

On the other hand, in some competition regimes, the restitution of the injured parties can be accorded between the competition authority, the persons involved in practices that are supposed to be contrary to the competition law provisions and the injured parties. In practice, this type of remedy is available before the relevant authority has reached a decision declaring the infringement of the competition law provisions and it is instituted as an agreement between the competition authority and the concerned persons to compensate and terminate the alleged anticompetitive practices in exchange for closing the investigation for the infringement of competition law[734].

VII. REVIEW AND APPEALS

1. Introduction

In most jurisdictions the initial decisions of the relevant enforcement authorities applying the provisions of competition law are subject to be reviewed by the competent authority. Provided that some decisions for the enforcement of competition law tend to restrict and limit the rights and freedoms of their addressees -decisions that restrict the ability of their recipients to contract, or decisions imposing sanctions on their addressees-, it is fundamental for every competition regime to address the possibility of the concerned persons to seek some kind of review against the decisions of the enforcement authorities in competition law cases.

In practice, flawed decisions of the enforcement authorities in competition law cases can harm the rights of their addressees, third parties and the public interest. Accordingly, in order to avoid flawed decisions by the enforcement authorities, most competition regimes have established mechanisms to ensure that the decisions issued by the enforcement authorities are fair and lawful. In this sense, the recipients of these competition law decisions are entitled to request their review before the competent authority.

[733] In Indonesia, pursuant to Article 47 of Law 5/1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, the Business Competition Supervisory Commission is allowed to impose sanctions in the form of administrative measures against undertakings violating the provisions of the Law, *inter alia*, stipulating a compensation payment to the injured parties resulting from the anticompetitive conduct of the infringing undertakings.

[734] In South Africa, according to Section 49D of the Competition Act, in the course of an investigation of a complaint, the Competition Commission may agree with the respondent of the complaint the termination of the investigation, such agreement will binding with the approval of the Competition Tribunal, and may include, with the consent of the complainant, the award of damages to the complainant.

The possibility to request the revision of a decision by a public authority, such as the competition authority or judicial authorities empowered to decide on competition law cases is a fundamental guarantee to due process. The main purpose of allowing the recipients of the decisions and possibly affected third parties to request the review of a determined decision is to permit them to challenge the acts of public entities when these have acted abusively or unlawfully. Moreover, the availability of reviewing mechanisms for the decisions by public authorities creates strong incentives for these authorities to comply with the due process when adopting their decisions and to be more meticulous in the decision-making process, given that the possibility of their decisions being challenged and quashed constitutes a strong incentive for the enforcement authorities.

Due to the particularities of each competition regime, the appellate process in competition law cases may be different from one competition regime to another. In particular, most differences are concerned with the types of decisions that can be reviewed or appealed; the person who are entitled to bring an appeal against a competition law decision; the authorities that are allowed to review the competition law decisions; the standard of the review in each competition system; the effects of the review; and the decisions of the reviewing authorities.

2. Types of Decisions that can be reviewed

In the same way in which the authorities in charge of issuing the initial competition law decision and the authorities in charge of the review of such decisions vary from one jurisdiction to another, the decisions of the enforcement authorities that can be challenged also vary strongly from one competition regime to the other.

Overall, in competition regimes where the competition authority is empowered to issue decisions in relation to the infringement of the competition law provisions, provided that the authority is an administrative body within the administrative branch of the government, every decision of the competition authority that has the nature of an administrative act shall be subject to be appealed before the competent appellate body. Conversely, in competition systems where the power to adopt decisions concerned with the infringement of the competition law provisions is hold by courts of general jurisdiction, these courts will be allowed to adopt any decision that is contemplated in the general rules of civil or criminal procedure, moreover, the appellate process in such cases will also follow these general rules.

Irrespective of the fact that, depending on the jurisdiction, the initial decisions for the infringement of the competition law provisions can be issued by different enforcement authorities, such as competition authorities or courts of general jurisdiction, in practice, there are several competition law decisions of these enforcement authorities issued in the course of the investigations and the proceedings for the alleged infringement of the competition law provisions that can be appealed before the relevant

appellate authority. There are, however, competition regimes where the relevant provisions establish restrictive lists of the decisions by the competition authority that are subject to be appealed[735].

From a chronological perspective, some of the decisions of the enforcement authorities issued in the course of an investigation for the alleged infringement of the competition law provisions can be appealed before the competent appellate authority, such decisions may include: decisions imposing interim measures[736]; decisions accepting commitments[737]; or decisions ordering the inspection of premises[738]. Additionally, in some competition regimes, the investigated undertakings can lodge an appeal against the actions of the officials of the competition authority that conducted the investigation[739]. Furthermore, prior to the initiation of the formal proceedings for the alleged infringement of the competition law provisions, certain decisions of the enforcement authorities can be appealed by the parties interested in the initiation of the said proceedings, for instance, in some competition regimes, the decisions of the enforcement authority declining the initiation of the proceeding for the alleged infringement of competition law can be appealed by the interested parties[740], instead, there are other jurisdictions where the decisions to initiate proceedings is at the sole jurisdiction of the enforcement authority, and consequently, no appeal is allowed against such a decision[741]. Ultimately, the decisions of the enforcement authorities at the end of the proceedings for the alleged infringement of the competition law provisions can be appealed before the competent appellate bodies, depending on the competition regime in question, such decisions may include: decisions declaring the infringement[742], or the non-infringement of the competition law provisions[743]; decisions granting or denying exemptions to restrictive agreements[744]; decisions ordering the termination of an anticompetitive practice[745]; decisions ordering the divestiture of assets of infringing undertakings[746]; decisions imposing financial penalties for the infringement of the competition law provisions[747]; decisions declaring the dominance of a determined

[735] In Sweden, the Article 1 of the Chapter 7 of the Competition Act provides for a restrictive list of decisions by the Competition authority that can be appealed before the Market Court.
[736] In Malaysia, the decisions of the Competition Commission imposing interim measures in the course of an investigation can be appealed before the Competition Appeal Tribunal (Section 51 of the Competition Act).
[737] In Kenya, a person aggrieved by a determination of the Competition Authority to enter into an agreement of settlement with the undertakings concerned with an investigation for the alleged infringement of the competition law provisions, can bring an appeal before the Competition Tribunal (Section 40 of the Competition Act).
[738] In France, the concerned parties can challenge the validity of an order authorizing the inspection and the conditions in which the inspection itself was performed before the First President of the Court of Appeal (Article L. 450-4 of the Commercial Code).
[739] In Lithuania, according to Article 27 of the Law on Competition, the undertakings under investigation can appeal the actions of the investigating officers; such an appeal is made before the Competition Council.
[740] In Argentina, pursuant to Article 52 of the Law for Defense of Competition, the dismissal of an accusation by the Tribunal for the Defense of Competition can be appealed.
[741] In Bosnia and Herzegovina, pursuant to Article 32 of the Competition Act, the decisions of the Council of Competition declining the initiation of proceedings cannot be appealed. Similarly, in Bulgaria, the decision of the Commission on Protection of Competition to initiate proceedings cannot be appealed according to Article 92(c) of the Law on Protection of Competition.
[742] In Singapore, the decisions of the Competition Commission declaring the infringement of the competition law provisions can be appealed before the Competition Appeal Board (Section 71 of the Competition Act).
[743] In Malaysia, the decisions of the Competition Commission declaring the infringement or the non-infringement of the competition law provisions can be appealed before the Competition Appeal Tribunal (Section 51 of the Competition Act).
[744] In Tanzania, the decisions of the Fair Trading Commission granting or denying exemptions to certain restrictive agreements or proposed mergers can be appealed before the Fair Competition Tribunal (Section 61 of the Fair Competition Act).
[745] In Turkey, pursuant to Article 55 of the Act on the Protection of Competition, the decisions of the Competition Board ordering the termination of an infringement can be appealed before the Council of State as the court of first instance.
[746] In India, according to Section 53A of the Competition Act, the decisions of the Competition Commission ordering the divestiture of assets or businesses of an undertaking enjoying a dominant position can be appealed before the Competition Appellate Tribunal.
[747] In the UK, according to Section 46 of the Competition Act, the decisions of the Director General of Fair Trading imposing financial penalties for the infringement of competition law and the amount of such penalties may be appealed to the Competition Commission.

undertaking[748]; decisions amending former orders issued by the competition authority[749]; or decisions allowing, prohibiting or allowing proposed mergers subject to certain conditions[750]; among others.

In some competition regimes, the infringement of the substantial provisions of competition law is determined via a decision by the competition authority. Alternatively, other actions by the competition authority, such as, the request of information in the course of an investigation for the alleged infringement of the competition law provisions or the imposition of interim measures, are adopted via a resolution by the competition authority. From the perspective of the appeal process, the decisions issued by the competition authority are final and are subject an administrative dispute before the competent court. On the other hand, with regard to the resolutions issued by the competition authority, these will be reviewed by the competition authority itself in administrative proceedings[751].

Finally, not only the actuation of the enforcement authorities can be subject to an appeal before the competent appellate authorities provided that in some competition regimes the failure by the enforcement authority to take a certain action that it is obliged to carry out can be appealed. However, in order for the failure to act of the enforcement authority to be appealable, the actuation of the enforcement authority has to be requested by an applicant that is entitled to demand such an action and the enforcement authority has failed to act within a reasonable period of time[752].

3. Persons who can Appeal Competition Law Decisions

The legal standing to bring an action against the decisions by the enforcement authorities for the infringement of the competition law provisions varies widely from one competition regime to another. For instance, in the most stringent competition regimes, the ability to appeal a competition law decision by the enforcement authority is restricted to the parties in the proceedings for the alleged infringement of the competition law provisions, i.e. the complainant and the concerned undertakings[753]. Additionally, in some competition regimes, the competition law decisions of the enforcement authorities can be appealed by the parties to the proceedings and by any third person that has legal interest[754]. In some competition

[748] In Denmark, the decisions of the Competition Council declaring that one or more undertakings hold a dominant position can be appealed before the Competition Appeal Tribunal (Section 19 of the Competition Act.

[749] In India, pursuant to Section 38 of the Competition Act, the Competition Commission may review any order it has passed with the purpose of rectifying any mistake included in such order. However, the decision of the Commission rectifying the passed order can be appealed before the Competition Appellate Tribunal by any affected person (Section 53D of the Competition Act).

[750] In Israel, the decisions of the General Director of the Antitrust Authority objecting a merger or imposing conditions to the parties in the transaction can be appealed by the merging parties. In addition, the decisions of the General Director allowing proposed mergers can be appealed by any affected person before the Antitrust Tribunal (Section 22 of the Restrictive Trade Practices Law). In Ireland, the decision of the Competition Authority allowing mergers subject to certain conditions and prohibiting mergers can be appealed by the merging undertakings before the High Court (Section 24 of the Competition Act).

[751] In Serbia, against the decisions of the Commission for Protection of Competition, i.e. declaring the infringement of the competition law provisions, administrative disputes can be initiated by the concerned parties. Alternatively, with regard to the resolutions of the Commission, i.e. ordering the production of information or imposing interim measure, these can be reviewed by the Commission itself (Article 38 of the Law on Protection of Competition).

[752] In the EU, according to Article 265 of the TFEU, it is possible to bring an action before the General Court, and ultimately to the Court of Justice, for the failure to act of the Commission. In Germany, pursuant to Section 63 of the Act Against Restraints of Competition, the failure of the cartel authority to take a decision in a reasonable period of time can be appealed.

[753] In Germany, according to Sections 63 and 54 of the Act Against Restraints of Competition, the right to appeal against the decisions of the cartel authority is restricted to those who applied for the institution of proceedings and to cartels, undertakings, trade and industry associations or professional organizations against which the proceedings are directed.

[754] In Bulgaria, pursuant to Article 64 of the Law on Protection of Competition, the decisions of the Commission on Protection of Competition may be appealed before the Supreme Administrative Court by the parties to the proceedings and by third persons that have legal interest.

regimes, the right to appeal competition law decisions by the enforcement authorities can be exercised by consumers who are interested parties in the proceedings for the alleged violation of competition law[755]. Moreover, in some competition regimes, certain Ministers may appeal the competition law decisions of the enforcement authorities[756]. Finally, in some competition regimes, the authorities of the public administration can appeal the competition law decisions of the enforcement authorities[757].

4. Authorities Responsible for the Review of Competition Law Decisions

Just as the enforcement authorities that are allowed to issue decisions for the infringement of the competition law provisions, the type of decisions that can be appealed and the persons who can bring such an appeal vary from jurisdiction to jurisdiction, the authorities empowered to review the competition law decisions of the enforcement authorities also vary from one jurisdiction to another.

Whenever the recipient of a competition law decision by the enforcement authorities believes that the decision is in violation if its rights and freedoms, and contrary to the law, it may bring an action before the competent authority to review the decision of the enforcement authorities. Depending on the competition system, the review of the competition law decisions will be made by the competition authority itself, by general administrative courts, by specialized administrative courts, by judicial courts, by certain Ministers, or by the Supreme Court of the jurisdiction in question.

5. Different Types of Review

(a) Administrative Review by the Competition Authority

As stated before, in some competition regimes the decisions of the competition authority in relation to the infringement of the competition law provisions can be reviewed by the competition authority itself. However, depending on the jurisdiction, this review by the competition authority does not constitute an appeal of the contested decisions, but it is a faculty granted to the competition authority to review its decisions before these can be challenged in judicial proceedings. Accordingly, the review of the competition law decisions made by the competition authority is performed in administrative proceedings.

In some competition regimes, the possibility of requesting the administrative review by the competition authority of the decisions for the infringement of the competition law provisions rests on the discretion of the parties concerned with the decisions. Hence, in such jurisdictions, the parties affected by a decision of the competition authority may choose to file an appeal before the competition authority requesting the review of the contested decision, or alternatively, they may choose to file a lawsuit before

[755] In Barbados, pursuant to Section 37 of the Fair Trading Commission Act, the decisions of the Fair Trading Commission can be appealed by consumers who are interested parties in the proceedings.
[756] In France, the parties and the Minister of Economy can lodge an appeal for annulment or reversal of the Authority's decisions enforcing the competition law provisions before the Paris Court of Appeal (Article L. 464-8 of the Commercial Code).
[757] In Moldova, according to Article 27 of the Law on the Protection of Competition, public administration authorities can appeal the decisions of the National Agency for the Protection of Competition. In Romania, according to Article 9 of the Competition Act, central or local public administration authorities can appeal the decisions of the Competition Council before the Bucharest Court of Appeal.

the relevant court requesting the judicial review of the decision in question[758]. Conversely, in some competition regimes, the affected parties by the competition law decision of the competition authority are obliged to request the administrative review of the competition authority in first instance, once the authority has issued a decision concerned with the requested review, if the concerned parties are not satisfied with such decision they can bring an appeal before the competent judicial authority[759].

With regard to the procedure before the competition authority to review the contested decisions for the infringement of competition law, this varies depending on the jurisdiction. For instance, in some competition regimes, the competition law decision will be reviewed by all the members of the competition authority in a plenary session[760]. Moreover, in other competition regimes, the administrative review of the competition authority decision is resolved by the head of the authority[761]. Furthermore, in some jurisdictions, the decisions of the competition authority may be reviewed by a corporate body within the competition authority[762]. Finally, in some competition regimes, the decisions of the competition authority are reviewed by collegiate body formed by some of the members of the competition authority that sit specifically to review the competition law decisions[763].

In most jurisdictions where the decisions of the competition authority can be reviewed by the latter, the decisions of the authority in relation to such reviews are not definitive. Thus, in practice, a variety of authorities may review the decisions of the authority related to the administrative review of the contested decisions related to the infringement of the competition law provisions. For example, in some competition regimes, the decisions of the competition authority reviewing contested decisions for the infringement of the competition law provisions can be further reviewed by courts or general jurisdiction[764] or by the Supreme Court[765]. Moreover, in some jurisdictions, the decisions of the competition authority related to the review of contested decisions can be appealed before administrative courts[766]. Additionally, in some competition regimes, the decisions of the competition authority in cases related to the administrative review of challenged decisions for the infringement of competition law can be appealed before appellate courts specialized in competition law matters[767]. Finally, in some countries,

[758] In Korea, the parties affected by a decision of the KFTC may file an appeal before the Commission requesting the revision of the concerned decision (Article 53 of the Monopoly Regulation and Fair Trade Act), in addition, the affected parties may also file a lawsuit before the Seoul Appellate Court requesting the judicial review of the KFTC's decision (Article 54 of the Act).
[759] In China, according to Article 53 of the Anti-Monopoly Law, the persons who disagree with a decision of the SAIC or the NDRC may apply for administrative review. These reviews will be undertaken by the SAIC or the NDRC themselves. Further appeals may be brought via an administrative lawsuit to the courts.
[760] In Korea, the administrative review of the KFTC's decisions is deliberated in plenary session by all the members of the KFTC (Article 37-3 of the Monopoly Regulation and Fair Trade Act).
[761] In Nicaragua, according to Article 39 of the Law for the Promotion of Competition, the decisions issued by the President of PROCOMPETENCIA are reviewed by the latter, which is the head of the competition authority.
[762] In El Salvador, the decisions of the Superintendence of Competition are reviewed by the Directive Council, which is a corporate body within the Superintendence.
[763] In Pakistan, the decisions of the Competition Commission are reviewed by the Appellate Bench of the Commission, which is an appellate bench constituted by at least two members of the Competition Commission.
[764] In the US, in administrative procedures, the decisions of the FTC can be appealed before the Commission; further appeal can be made before a federal circuit court of appeals.
[765] In Barbados, the decisions of the Fair Competition Commission reviewing its own decisions can be appealed before the High Court.
[766] In Mexico, the decisions of the Federal Competition Commission related to the administrative review of challenged decisions can be appealed in administrative proceedings before District Courts.
[767] In Pakistan, the decisions of the Appellate Bench of the Commission reviewing the decisions of the Competition Commission can be appealed before the Competition Appellate Tribunal.

the decisions of the competition authority reviewing contested decisions for the infringement of competition law can be further reviewed by the competition authority[768].

Finally, in most competition regimes where this possibility of the competition authority to review its own decisions for the infringement of the competition law provisions exists, such administrative review is normally made at the request of the parties affected by the decision in question, notwithstanding the preceding, in some competition regimes, this administrative review can be performed at the request of the concerned parties or at the sole discretion of the competition authority[769]. Moreover, in some competition regimes where the request for the judicial review of the competition decision has to be lodge to the competition authority, the latter, without remitting the appeal to the appellate court, may revoke or change the contested decision in whole or in part if it considers the appeal to be justified[770].

(b) Administrative Review by Ministries

In some competition regimes there are other mechanisms to review the decisions of the competition authority that have an administrative nature. For instance, in such competition regimes, there may be the possibility to request a determined Ministry the administrative review of the decisions of the competition authority in respect to the infringement of the competition law provisions. Usually, this happens, in competition regimes where the competition authority is somehow related to the Ministry in question[771].

(c) Judicial Review by Administrative Courts

Apart from the previously studied possibility for the concerned persons to request the competition authority the administrative review of its decisions in relation to the infringement of the competition law provisions, in some competition regimes, the decisions of the authority can be appealed by the interested parties before courts of administrative jurisdiction. In most competition regimes where the competition authority is empowered to issue decisions for the infringement of the competition law provisions, provided that the authority and the proceedings in which it issues the decisions are of an administrative nature, the appeal process follows the general rules of administrative law. Hence, in such cases, the judicial review of the decisions by the competition authority will be handled by administrative courts. Depending on the competition regime, the decisions of the administrative courts may be final[772], or alternatively, further appeals may be lodge before the competent court[773].

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[768] In Nicaragua, the decisions of the President of PROCOMPETENCIA reviewing challenged decisions for the antitrust infringement may be further reviewed by the Directive Council of PROCOMPETENCIA.

[769] In Barbados, the decisions of the Fair Trading Commission can be review by the Commission at the request of the interested parties or at its own motion.

[770] In Poland, the decisions of the Office of Competition and Consumer Protection are subject to appeal before the Court of Consumer and Competition Protection. In case of an appeal, the interested parties will file the appeal before the President of the Office who will remit the appeal to the Court; however, if the President considers that the appeal is justified, the latter will revoke or modify the contested decision without remitting the case to the Court. The parties that lodged the appeal will be informed that the decision has been revoked or modified.

[771] In Norway, some of the decisions of the Competition Authority are subject to appeal before the Ministry of Government Administration, Reform and Church Affairs.

[772] In Bulgaria, the decisions of the Competition Commission can be appealed before the Supreme Administrative Court, the decisions of which are final. In Croatia, the decisions of the Competition Agency are appealable before the Administrative Court of the Republic of Croatia. In Finland, the decisions of the Supreme Administrative Court against the decisions of the Market Court for

(d) Judicial Review by Specialized Competition Courts

In some competition regimes, courts or tribunals specialized in competition law matters have been established for the review of the decisions of the competition authorities in relation to the infringement of the competition law provisions. The purpose of creating these specialized courts or tribunals is to enhance the expertise of the authorities responsible for the review of the competition law decisions. In addition, the availability of such specialized bodies contributes to the development of a sound jurisprudence in the application of the competition law provisions. Thus, in practice, several competition regimes have established this type of specialized courts in competition law matters to review the decisions of the competition authorities for the infringement of the competition law provisions[774]. Finally, the decisions of these specialized competition courts or tribunals are not final in most competition regimes, which mean that such decisions can be further appeal before the competent appellate authority, normally the highest court of the jurisdiction in question[775], notwithstanding the preceding, there are competition regimes where the decisions of the specialized tribunals reviewing the decisions of the competition authorities are final[776].

(e) Judicial Review by Judicial Courts

In competition regimes where the competition authority lacks jurisdiction to adopt decisions for the infringement of the competition law provisions, usually, such task has been awarded to courts of general jurisdiction, which will be responsible for the decision-making process in competition law matters. In these jurisdictions, the role of general courts is fundamental in the development and enforcement of competition law. Moreover, the appellate process in these jurisdictions follows the general rules of civil or criminal procedure, depending on the jurisdiction and the infringement of competition law. In practice, the role of the judicial courts while reviewing the competition law decisions of general courts of a lower instance is to decide if the initial competition law decisions have been adopted in a fair way, respecting the procedural rights of the parties and in compliance with due process.

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the infringement of the competition law provisions are final. In Serbia, the decisions of the Commission for Protection of Competition can be appealed before the Administrative Court.

[773] In Greece, the decisions of the Hellenic Competition Commission can be appealed before the Athens Administrative Court; further appeal may be lodge before the Supreme Administrative Court. In Switzerland, the decisions of the Competition Commission can be appealed, in first instance, before the Federal Administrative Court. Appeals against the decisions of the latter, in points of law, can be made before the Federal Supreme Court.

[774] In Denmark, the Competition Appeal Tribunal; in India, the Competition Appeal Tribunal; in Israel, the Antitrust Tribunal; in Malaysia, the Competition Appeal Tribunal; in Malta, the Competition and Consumer Appeal Tribunal; in Pakistan, the Competition Appellate Tribunal; in Poland, the Court of Consumer and Competition Protection; in Seychelles, the Appeal Tribunal; in Singapore, the Competition Appeal Board; in South Africa, the Competition Appeal Court; in Tanzania, the Fair Competition Tribunal; in the UK, the Competition Appeal Tribunal; in Zambia, the Competition and Consumer Protection Tribunal.

[775] In India, the decisions of the Competition Appeal Tribunal are reviewed by the Supreme Court of India. In Israel, the decisions of the Antitrust Tribunal are appealed before the Supreme Court. In Seychelles, the decisions of the Appeal Tribunal can be reviewed by the Supreme Court. In Pakistan, the decisions of the Competition Appellate Tribunal are reviewed by the Supreme Court. In South Africa, the decisions of the Competition Appeal Court can be reviewed by the Supreme Court, or under certain circumstances, by the Constitutional Court. In the UK, the decisions of the Competition Appeal Tribunal are reviewed by the Court of Appeal in proceedings in England and Wales, in proceedings in Scotland, before the Court of Session, and in proceedings in Northern Ireland, before the Court of Appeal in Northern Ireland. In Zambia, the decisions of the Competition and Consumer Tribunal can be reviewed by the High Court.

[776] In Tanzania, the decisions of the Fair Competition Tribunal while reviewing the decisions of the Fair Competition Commission are final (Section 61 of the Fair Competition Act).

Generally speaking, the judicial review by general courts of the decisions in relation to the infringement of the competition law provisions that have been adopted by lower courts of general jurisdictions that have authority to decide on cases that are related to the application of the competition law provisions is performed in competition regimes where the competition authority is not empowered with decision-making functions[777]. Notwithstanding the preceding, in some competition regimes where the competition authority is entitled to adopt an initial decision in relation to the infringement of the competition law provision, the review of such decisions is also made by judicial courts of general jurisdiction[778]. In addition, in some competition regimes, the initial competition law decisions of the competition authority can, at the discretion of the concerned parties, be appealed before courts of general jurisdiction or reviewed by the competition authority itself[779]. Moreover, in some competition regimes, the decisions of the competition authority can be appealed before arbitration courts[780].

Finally, irrespective of the enforcement authority responsible for the adoption of the initial decision for the infringement of the competition law provisions, the decisions of the judicial courts handling the appeal action are usually subject to further judicial review by a judicial court of last instance[781].

(f) Judicial Review by the Supreme Court

In some competition regimes, the judicial review of the decisions by the competition authority in relation to the infringement of the competition law provisions is made by the Supreme Court of the jurisdiction in question[782]. The main virtue of this appeal mechanism is that the review of the competition law decisions is handled by a single court, such as the Supreme Court. This exclusive faculty of the Supreme Court to review the decisions of the competition authority enhances the expertise of the judges reviewing such decisions and also contributes to the creation of a uniform and sound case law on competition law matters. As to the disadvantages of this approach, due to the fact that Supreme Courts are courts of last

[777] In Ireland, the Competition Authority does not have the power to issue decisions in respect to the infringement of the competition law provisions, provided that this competence is reserved for courts. In practice, court decisions in competition law cases can be appealed in the same way that other civil or criminal cases may be appealed. Thus, decisions of the Circuit Court can be appealed to the High Court, and decisions of the High Court can be appealed to the Supreme Court. In New Zealand, the High Court of New Zealand holds jurisdiction to decide in the cartel prohibitions have been infringed and to impose financial penalties for such an infringements. The decisions of the High court in competition law cases can be appealed before the Court of Appeal. In the US, the FTC and the Antitrust Division do not have authority to impose fines or declare the infringement of competition law in civil or criminal cases; rather, they have to bring an action before courts to adjudicate the alleged violations. The defendants in such actions have the right to appeal the final decisions or remedies imposed to the federal circuit court of appeals and ultimately to the Supreme Court.

[778] In Belgium, pursuant to Article 75 of the Act on the Protection of Economic Competition, the decisions of the Competition Council and of its president may be appealed against the Brussels Court of Appeal. In France, according to Article L.464-8 of the Commercial Code, the decisions of the *Autorité de la Concurrence* can be appealed before the Paris Court of Appeal. In Germany, according to Section 63 of the Act Against Restraints of Competition, the decisions of the Bundeskartellamt are subject to appeal to the Higher Regional Court in Düsseldorf.

[779] In Korea, the decisions of the KFTC may be appealed before the Seoul High Court, or alternatively, these can be reviewed by the KFTC itself. These possibilities rest on the discretion of the concerned parties.

[780] In Russia, according to Article 52 of the Federal Law on Protection of Competition, the decisions and determinations of the Antimonopoly Authority can be appealed to an arbitration court.

[781] In France, the decisions of the Paris Court of Appeal can be reviewed by the Commercial Chamber of the *Cour de Cassation.* In Germany, the decisions of the Higher Regional Court of Düsseldorf can be appealed to the Federal Supreme Court. In Ireland, the decision of the High Court can be appealed to the Supreme Court. In Korea, the decisions of the Seoul High Court can be appealed to the Supreme Court. In the USA, the decisions of the federal circuit court of appeals can be appealed before the Supreme Court.

[782] In Austria, the decisions of the Cartel Court can be appealed to the Supreme Court as the Higher Cartel Court. In Bosnia and Herzegovina, the decision of the Competition Council can be appealed to the Court of Bosnia and Herzegovina. In Chile the decisions of the *Tribunal de Defensa de la Libre Competencia* can be appealed before the Supreme Court. In Cyprus, the decisions of the Commission for the Protection of Competition can be appealed in last instance to the Supreme Court.

instance, the decisions of these courts are final and do not admit further review. Nevertheless, in some competition regimes, before the Supreme Court makes a final decision on the cases, the Court can remit the contested decision to the competition authority for reconsideration[783].

6. Standard of Review

The standard of review in the appeal process against decisions of the competition authorities in respect to the infringement of the competition law provisions is concerned with the degree of examination allowed in the appeal process. As with other characteristic of the appeal process, the standard of review varies widely from one jurisdiction to another. Generally speaking, the standard of review in appeals against competition law decisions may range from a marginal test of review restricted to aspects related to the procedure and manifest errors of law of the challenged competition law decision to an intense review that may even be concerned with the merits of the case.

In competition regimes with the lowest level of standard review the courts responsible for the judicial review of the challenged competition law decision will only assess any manifest error that the competition authority may have committed in the application of the law. In such cases, the appellate authority will be entitled to cancel any obviously unreasonable decisions. In these competition regimes, the standard of review allows the judicial authorities to review whether the competition authority has acted within its jurisdiction and whether it has respected the basic principles of procedural fairness[784].

In competition regimes with a higher standard of review, the judicial authority will be empowered to assess the legality of the competition law decisions that is being challenged, additionally, the appellate court will also assess if the challenged decision complies with the procedural requirements. Moreover, while doing this, the judicial authority will determine if the competition authority has correctly interpreted and applied the competition law provisions when adopting the contested competition law decision[785].

Moreover, higher standards of review can be allowed in competition regimes where the judicial authority responsible for the judicial review of contested competition law decisions can fully review the merits of the case by assessing all relevant facts in addition to the correct interpretation and application of the competition law provisions to the facts. In practice, this standard of review permits the judicial

[783] In Mauritius, when the Supreme Court is reviewing the decisions of the Competition Commission, the Court may, before making a final determination on the case, remit the contested decision to the Commission for reconsideration.
[784] In Cyprus, the appeals against the decisions of the Commission for the Protection of Competition are handled by the Supreme Court. While reviewing the decisions of the Commission, the Supreme Court is limited to assess the legality of the competition law decisions and is not allowed to review the merits of the case or to substitute the decision of the Commission with its own decision.
[785] In Belgium, the Brussels Court of Appeal, which is the authority responsible for the judicial review of the decisions by the Competition Council, is entitled to decide on both facts and the law. However, it has developed a restrictive view of its functions as an appellate body. According to its decision in the *Honda* case, the Court will limit itself to verifying compliance with procedural requirements, whether the facts have been correctly established and whether the Council has not made any manifest error in the application of competition law or has exceeded its powers (Brussels Court of Appeal Judgment, February 2, 2009, 18th Chamber, Cases 2005/MR/3 and 2005/MR/4).

authority to go beyond the control of legality, provided that the reviewing court also needs to assess the factual evidence at the basis of the contested competition law decision[786].

Ultimately, in competition regimes with the highest standard of review, the judicial authorities responsible for the review of the challenged decisions by the competition authority will be allowed to review the case fully, in addition, the judicial authority will also be entitled to substitute its own analysis to the assessment of the competition authority[787].

A further issue related to the standard of review of competition law decisions is the possibility of admitting new evidence in the appeal process. The possibility to admit new evidence will appear in jurisdictions where the appellate authority is allowed to examine the factual basis of the challenged decision by the competition authority. Accordingly, depending on the competition regime, some jurisdictions will admit new evidence in the course of the appeal process without any restriction[788]. Alternatively, in some competition regimes the admissibility of new evidence in the appeal process will only occur in cases where the evidence could not have been known earlier[789]. Ultimately, in some competition regime the appellate authority can only consider the evidence that was available to the competition authority at the time the decision was adopted[790].

7. Effects of the Judicial Review

Another important issue related to the appeal process of competition law decisions is the one concerned with the effects of an appeal in relation to the application of the competition law decision that is being challenged. In particular, depending on the competition regime in question, the initiation of the appeal process against a competition law decision may have different effects on the application of the contested competition law decisions. For instance, in some competition regimes, an appeal against a competition law decision does not suspend the obligation of the addressees to comply with the decision of the competition authority during the period of its examination[791]. On the other hand, in some competition

[786] In Italy, according to the Council of State's case law, the administrative courts' standard of review allow the latter to fully review the accuracy of the findings of fact made by the Competition Authority. This allows appellate courts to assess the proofs collected by the Competition Authority, as well as the evidence presented by the parties in the proceeding, given that the courts' access to the facts is not restricted. Thus, if judicial review is to be effective, the standard of review cannot be limited to the external review by the appellate courts, but must entail a penetrating control of Authority's decisions by the courts (See Judgments Nos. 926 of March 2, 2004, *Gemeaz Cusin/ICA*; 280 of February 3, 2005, *Codacons/ICA*; 1271 of March 10, 2006, *ICA/Telecom Italia*; and 1397 of March 16, 2006, *Assobiomedica/ICA*).

[787] In Malaysia, the Competition Appeal Tribunal, which is the authority responsible for the judicial review of the decisions by the Competition Commission, has wide powers to exercise during the appeal process, such as: to summon the parties to the proceedings or any other person; to procure and receive evidence and to examine all such persons as witnesses as it considers; to require the production of any information, document or other thing in the possession of the requested person; to administer any oath; to admit or reject evidence adduced; among others (Section 57 of the Competition Act). At the conclusion of the appeal process, the Tribunal may confirm, annul, modify, or issue a new decision. In addition, the Tribunal may remit the decision to the Competition Commission for reconsideration, and give any order or direction as the Commission could itself have given.

[788] In Germany, according to Section 63 of the Act Against Restraints of Competition, an appeal against the decisions of the cartel authority may be based upon new facts and evidence.

[789] In the Czech Republic, while reviewing the decisions of the Office for Protection of Economic Competition, the Chairman may examine new facts and evidence only if they could not have been known earlier (See Decision of the Chairman of the Office for Protection of Economic Competition ref. No. R 059-070, 075-078/2007).

[790] In Papua New Guinea, according to Section 43 of the Independent Consumer and Competition Commission Act, the Appeals Panel, while reviewing the decisions of the Independent Consumer and Competition Commission, can only consider the information that was available to the Commission when it made the decision that is the subject of the application for review.

[791] In Moldova, according to Article 27 of the Law on the Protection of Competition, an appeal to a court against the decisions of the National Agency for the Protection of Competition does not suspend the obligation to comply with the decision, unless the court decides otherwise.

regimes the initiation of an appeal may have suspensory effects on the application of the contested decision[792]. Moreover, in some competition regimes the judicial review of a competition decision does not have a suspensive effect on its own, in such cases; the interested parties may require the appellate court the suspension of the execution of the contested decision[793]. Furthermore, in some competition regimes, the suspension of the effects of the competition decisions can be made by the appellate court under its own discretion[794].

8. Different Types of Decisions

Finally, once the appellate authority has examined an appeal that has been lodged against a decision by the competition authority for the infringement of the competition law provisions, there is a variety of decisions to be issued at the culmination of the appeal process that vary from one competition system to another. Despite the differences that one may encounter from legislation to legislation, in some jurisdictions the competition law provisions provide for the following decisions in relation to the termination of appeal process: to confirm the contested decision[795]; to fully or partially annul the contested decision[796]; to modify the contested decision[797]; to issue a new decision[798]; to remit the contested decision to the competition authority for further examination[799]; to revoke, increase or reduce a financial penalty[800]; to substitute directions by the competitions by the competition authority or to give new directions[801].

[792] In Argentina, pursuant to Article 52 the Law for Defense of Competition, an appeal against the imposition of financial penalties for the infringement of competition law has suspensive effects. The situation is similar in Singapore and the UK, pursuant to Section 71 and Section 46 of the Competition Acts, respectively.
[793] In Belgium, at the petition of the interested parties, the Brussels Court of Appeal may suspend, in all or in part, the enforcement of the contested decisions of the Competition Council (Article 75 of the Act on the Protection of Economic Competition).
[794] In the US, the sentencing court has the discretion to suspend the payment of a fine while the defendant brings an appeal against the decision imposing the financial penalty. However, in suspending the payment of the fine, the court may request the defendant to deposit all or part of the fine into the court's registry pending appeal or to post a bond.
[795] Barbados; India; Ireland; Israel; Jamaica; Kenya; Latvia; Lithuania; Malaysia; Malta; Mauritius; Mexico; Moldova; New Zealand; Papua New Guinea; Singapore; South Africa
[796] Barbados; India; Israel; Ireland; Jamaica; Kenya; Latvia; Lithuania; Malaysia; Malta; Mauritius; Mexico; Moldova; New Zealand; Singapore; South Africa
[797] India; Ireland; Israel; Jamaica; Kanya; Latvia; Lithuania; Malaysia; Mauritius; Mexico; New Zealand; Singapore; South Africa
[798] Malaysia; Mauritius; New Zealand; Singapore
[799] Barbados; Jamaica; Lithuania; Malaysia; Mauritius; New Zealand; Papua New Guinea; Singapore; South Africa
[800] Barbados; Malaysia; Malta; Mauritius; New Zealand; Singapore
[801] Barbados; Malaysia; Mauritius; New Zealand; Singapore

CHAPTER THREE
Private Enforcement of Competition Law

I. INTRODUCTION

1. Introduction

The enforcement of competition law is characterized by a multiplicity of enforcers, remedies and procedures. This characteristic is due to the fact that a single competition law infringement may harm a variety of individuals in different ways, thus, giving rise to a series of public and private actions. In most competition law regimes both private parties and public institutions have standing to file an action, either public or private, to remedy the anticompetitive effects of a determined conduct. Since the possibility of concurrent proceedings exists in the enforcement of competition law, most jurisdictions have established mechanisms through which those proceedings can safely interact with each other.

Even though, the possibility to privately enforce the competition law provisions is available in many jurisdictions, most competition systems rely on an enforcement model based on the application of the antitrust provisions by the government. Accordingly, in many competition regimes there is a governmental monopoly of competition law enforcement, which is the de facto rule in many countries[1].

Irrespective of the other possible procedures that may arise from the infringement of competition law, this part of the study focuses on the private enforcement of the competition rules. Throughout this chapter, an effort has been made in order to refer to the most important and peculiar procedures, rules, cases, and enforcers concerned with private antitrust enforcement. Even though this chapter does not only comprise the most traditional comparison between the USA and EU competition law, this is by no means an exhaustive study of all the jurisdictions reviewed, provided that some of them have been studied more thoroughly than others. Additionally, due to the fact that in the majority of jurisdictions most of the substantive and procedural issues are grounded on general provisions, it would require a tremendous work to compile an exhaustive study concerning all the procedural aspects of most competition law regimes due to the vast universe of general civil and commercial rules that are applied in conjunction with the competition rules. Furthermore, the fact that most jurisdictions have established wide and abstract competition law provisions regarding private antitrust enforcement, coupled with the lack of sound case

[1] CRANE, Daniel A. (2010), 'Optimizing Private Antitrust Enforcement'. 63,3 *Vanderbilt Law Review*, p. 677.

law on the subject, enhances the difficulty to make a complete study of private enforcement on those countries. Finally, the purpose of this chapter is to provide the reader with insightful information about some of the most important private procedures in the application of competition law by highlighting the peculiarities found in some jurisdictions that are not found in others, in order to draw a comprehensive picture of the private enforcement of competition law around the world.

2. Definition

In order to study the private enforcement of competition law, it is fundamental to provide for a definition of what should be considered as private antitrust enforcement. For the purposes of this study, which intends to describe and compare the application made by private plaintiffs of the competition provisions across jurisdictions, a broad definition of such subject will be better suited. Thus, such a definition would entail the enforcement of the competition rules instigated or through the intervention of private parties. However, such definition shall not include the claims interposed by private parties to the competition authorities (privately triggered public enforcement), provided that the procedure in those kind of actions is public/administrative, and also, the nature of the remedies available in such proceedings is public/administrative too.

From the stated above, it is evident that a proper definition of private enforcement of competition law should be refined a bit more. Consequently, by developing on the characteristics of the private antitrust actions one may evidence that: on the one hand, the individuals who instigate the private action before courts have to act as a party in the subsequent proceedings, unlike what happens in some public antitrust actions where the private individuals who instigate the action do not necessarily take part in the public procedure; and on the other hand, the litigation has to end with some kind of civil remedy such as: the nullity of the challenged agreement, injunctive or declaratory relief, and/or the award of damages. Thus, the private enforcement of competition law would entail a procedure in which a private party interposes a civil claim or counterclaim regarding an infringement of the competition rules, and which ultimately ends with the imposition of a civil remedy.

3. Modalities of Litigation in Private Antitrust Actions

(a) Sword Litigation and Shield Litigation

On the one hand, the competition rules in private antitrust litigation can be brought before courts as a shield. For instance, in disputes related to contractual liability, when a plaintiff claims the performance of a contract, or claims damages for the breach of the contract by the defendant, in such cases, the defendant may use the competition rules as a shield and raise the nullity of the contract with the purpose of avoiding its contractual obligations. On the other hand, competition rules can also be used as a sword in civil proceedings, in those cases; the plaintiff brings a civil action claiming damages, nullity, injunctive relief, or declaratory relief. This modality of enforcement aims to end the infringement of the competition rules and/or to remedy the harm inflicted on the antitrust victims.

(b) À Titre Principal and À Titre Incident

Regarding the enforcement of competition rules as the main issue *(à titre principal),* this kind of actions can be filed, on the one hand, before specialized competition law courts, where such courts will primarily determine the application of the competition law provisions to the case; and on the other hand, before ordinary courts, where the latter will determine the applicability of the competition rules to the defendant's conduct as the main issue and disregarding its civil consequences. Furthermore, the competition law provisions may also be applied as a secondary issue *(à titre incident)*, for instance, in disputes concerned with the nullity of an agreement, the competition law provisions will be applied as a secondary issue in determining if the contested agreement is subject to the antitrust rules.

(c) Stand-Alone Actions and Follow-On Actions

In stand-alone actions, the application of the competition rules occurs without the existence of a previous decision of the competition authority declaring the infringement of the competition provisions. Thus, the ability to bring a stand-alone action depends on the capacity of the plaintiffs to discover the wrongdoing through their own means. On the contrary, follow-on actions take place once a public authority has issued a decision condemning the defendant's conduct as unlawful, in those cases, the private plaintiffs will be allowed to rely on the findings of the competition authority.

4. Desirability and Benefits of Private Antitrust Enforcement

Even though it has been suggested that the public enforcement of competition law is superior to and better suited than private enforcement[2], and that the application of the antitrust provisions are a matter of public policy[3]; private actions for the infringement of the antitrust provisions provide for some attractive benefits to competition in general and for the welfare of consumers. The recent trend to strengthen and encourage the proliferation of private antitrust actions shows the determination of jurisdictions to establish a competition law regime where both public and private enforcement complement each other[4].

Private enforcement can benefit the overall enforcement of competition law by assisting the government in the application of the competition provisions; given that, even the best funded agencies in the world do not have enough resources to pursue all the antitrust infringements. In such cases, the possibility of private parties to enforce the competition provisions can save the taxpayer a significant

[2] WILS, Wouter P.J. (2005B), 'Principles of European Antitrust Enforcement'. Oxford [etc.]: Hart Publishing, p. 118. The author states that since the main goal of the enforcement of competition law is to ensure that the antitrust prohibitions are not violated, public enforcement is inherently superior over private enforcement, mainly for three reasons: (i) public enforcement benefits from more effective investigative and sanctioning powers; (ii) as private enforcement is driven by the private profit motive, it systematically diverges from the general interest; and (iii) private enforcement is more expensive than public enforcement.

[3] European Commission, *Proposal for a Directive of the European Parliament and the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union* (Proposal Directive for damages actions), 2013.

[4] The private enforcement of competition law has been a fundamental issue in the modernization process of EU competition law. Back in 2004, the European Commission carried out the *Study on the conditions of claims for damages in case of the violation of EC competition rules* (Ashurst Report), to try to identify the obstacles to successful actions for damages. In 2005, the Commission published the Green Paper to identify the main obstacles to a more efficient system of damages claims and to set out different options for further reflection and possible actions to improve damages claims both in follow-on and stand –alone cases (Green Paper on Damages actions for breach of the EC antitrust rules, COM(2005) 672, 19.12.2005). In 2008 the Commission issued its White Paper that suggests specific policy options and measures aimed at helping all victims of EU antitrust infringements get access to effective redress mechanisms (White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, 2.4.2008). Finally, in 2013, was elaborated the Proposal for a Directive for damages actions, *supra* note 3.

amount by shifting the costs and risks of public antitrust litigation[5]. Furthermore, private parties applying the competition rules can reinforce the efficiency of competition law in cases where the public authorities would not intervene – for priority reasons[6], or when private parties are better suited to apply the competition provisions –, because the former may have better information about the market and the infringement (cases brought by competitors). As a result, the availability of private antitrust enforcement would entail that the work load of competition authorities will be lowered, thus, allowing public enforcers to focus their resources on the most harmful anticompetitive practices. Finally, given that the public application of the competition law provisions produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which the competent courts must enforce, the latter play a fundamental role in the enforcement of competition law[7].

For the reasons stated above, it has been noted that private antitrust enforcement can be a significant complement to public enforcement, which can enhance the effectiveness of a determined competition law regime by strengthening deterrence and compliance, providing compensation to the antitrust victims, and also, by helping to create a sound competition culture[8]. Furthermore, a public governmental monopoly in the enforcement of the antitrust provisions may be as negative as the private economic monopolies controlled by competition law[9].

5. Objectives of Private Antitrust Enforcement

The primary objective of private antitrust enforcement is the compensation of the antitrust victims, provided that no other kind of enforcement, in particular public enforcement, may comply with this fundamental endeavor. In particular, the compensation objective of competition law enforcement requires the private application of the antitrust provisions, given that this enforcement objective cannot be achieved through public enforcement because the award of damages is outside the field of competence of competition authorities[10]. However, private enforcement of competition law can additionally serve other enforcement objectives. Generally speaking, competition law enforcement pursues three different objectives. The first is to prevent the antitrust violations, or when they have taken place already, to bring them to an end. The second is to remedy the negative effects caused by the infringement of the competition law provisions. And the third is to punish the infringer for its anticompetitive conduct and to deter him and others from violating the competition law provisions in the future. In practice, it has been argued that, in a well-designed competition law regime, these three objectives can be accomplished through private actions applying the competition law provisions. For instance, the first objective would be satisfied through cease and desist orders and negative or positive injunctions imposed by civil courts. As to the second objective, private antitrust enforcement can remedy the antitrust infringement by

[5] LANDE, Robert H. & DAVIS, Joshua P. (2008), 'Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases'. *University of San Francisco Law Review*. Vol. 42.
[6] See the Case Selection and Prioritization of Chapter Two (III.2).
[7] European Commission (2013), p. 21.
[8] OECD, *Private Remedies*, 2007, p. 10.
[9] CRANE (2010), p. 677.
[10] European Commission (2013), p. 2.

compensating the victims for the harm suffered. Finally, the third objective can be satisfied through the award of punitive damages in civil actions[11].

Despite the preceding and the alleged benefits of private antitrust enforcement, there is only one jurisdiction in the world where private enforcement far outnumbers public enforcement[12]. In such jurisdiction, there is a 10 to 1 rate between private antitrust actions and public actions applying competition law[13]. Even though there are other countries that have achieved a decent level of private enforcement, in the majority of jurisdictions this kind of actions have not yet flourished do to a variety of obstacles faced by private enforcers.

II. PRIVATE ACTIONS FOR THE INFRINGEMENT OF COMPETITION LAW

1. Introduction

Actions for damages constitute the bulk of private enforcement of competition law; moreover, as stated before, in some countries there is a 10 to 1 rate between private actions for damages and public actions applying competition law. However, not all competition law regimes have obtained this rate of success regarding the application of the competition rules by private plaintiffs. This lack of private enforcement of the competition provisions is due to a series of factors, such as: the absence of specific statutory basis; lengthy proceedings; lack of specialization of general courts; limitations on standing and on the aggregation of damages claims; difficulties in proving causation and the extent of harm; uncertainty with regard to the availability and scope of the passing-on defense; uncertainty in the calculation of damages; absence of punitive damages; short limitation periods, difficulties in recovering litigation costs and fees; absence of contingency fees; non-binding effect of competition authorities' infringement decisions; and restrictive rules of evidence[14].

Private actions for the infringement of competition law serve different objectives than public enforcement. Thus, the main function of an action for damages is primarily to compensate the harm caused to the victims of an anticompetitive practice. Albeit, private actions for damages may also serve other enforcement objectives, such as: the punishment of past infringements and deterrence of future infringements. Additionally, private actions for damages help the persecution of anticompetitive practices by introducing private resources into the enforcement process, and therefore, saving public resources and allowing public authorities to pursue the most harmful cases.

[11] KOMNINOS, Assimakis P. (2008), 'EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts'. Oxford [etc.]: Hart Publishing, p. 8.
[12] CRANE, Daniel A. (2011A), 'Enforcing Competition Law with Multiple Agencies and Private Enforcers'. *Hokkaido Journal of New Global Law and Policy,* Vol 10, p. 66.
[13] See: Sourcebook of Criminal justice Statistics, available at: http://www.albany.edu/sourcebook/pdf/t5412004.pdf
[14] VAN GERVEN, Walter (2005), 'Private Enforcement of EC Competition Rules'. Paper presented at the Joint IBA and European Commission Conference on Antitrust Reform in Europe: A Year in Practice (Brussels, 9-11 March 2005). Available at: http://www.ibanet.org/Conferences/05_confs_antitrust_reform_in__Eu_A_year_in_Practice_papers.aspx

2. Statutory Basis for the Private Enforcement of Competition Law

With respect to the statutory basis for the private enforcement of competition law, the approach used in most legal systems can be generally divided in two. On the one hand, some countries have opted to implement specific competition law provisions establishing the right of antitrust victims to privately enforce the competition provisions[15], or declaring the obligation of competition law violators to compensate the victims for the harm caused by their anticompetitive conduct[16]. On the other hand, most legal systems do not have specific statutory basis for the private enforcement of competition law but base the latter on general civil or commercial law provisions[17]. Additionally, in some jurisdictions the right of victims to receive compensation for any harm caused -not necessarily antitrust harm, is considered as a Constitutional principle, and therefore, is contemplated in the Constitution of these countries[18].

Irrespective of whether a competition law regime has adopted specific competition law provisions regarding private antitrust actions or not, all jurisdictions that allow private plaintiffs to sue for the harm caused by an anticompetitive conduct refer, at least in some degree, to general provisions for the substantive and procedural rules governing such claims[19]. In consequence, the specific competition provisions merely establish the right of the victims to bring a civil action, or the obligation of the perpetrator to compensate the victims and rely on general civil or commercial regulations to deal with all procedural and substantive issues[20]. Moreover, in some jurisdictions with specific competition rules allowing a victim to file a civil claim, the latter may also bring private actions for the infringement of the competition law provisions, which are grounded on general provisions[21].

The specific provisions concerned with the private enforcement of competition law may additionally contain other issues besides the right of antitrust victims to be compensated. Thus, in some jurisdictions these provisions may deal with issues such as: the legal standing, the legal forum, the calculation of damages, interests, and collective claims, among others.

On the one hand, regarding who has standing to bring a private antitrust action, the legal provisions of some jurisdictions establish the *locus standi* of legitimated plaintiffs. A variety of natural

[15] In Canada, Section 36 of the Competition Act allows any person who has suffered loss or damage arising from a competition law infringement to sue for the injury caused.
[16] For instance, in Taiwan, Section 31 of the Fair Trade Act establishes that any enterprise that infringes any of the Act's provisions and consequently the rights and interests of others shall be liable for damages.
[17] In Belgium, private actions for the infringement of the competition provisions are not mandated by statute, thus, the victims of the infringement have to file a general civil or commercial law action before a civil or commercial judge, basing their claims on the relevant provisions of the Belgian Civil Code or the Act on Unfair Trading Practices in conjunction with EU or Belgian competition law. In Greece, there are no especial provisions for the private enforcement of competition law. Actions for damages in civil courts must be based on the general tort provisions of the Greek Civil Code (Article 914). Similarly, in Italy actions for damages resulting from the infringement of competition law may be brought under Article 2043 or Article 1218 of the Civil Code for claims based on tort or contract law respectively.
[18] The Brazilian Federal Constitution, in its Article 5, item XXXV establishes the right to sue for any injury or the threat of a determined right, however, this provision is not exclusive for competition law infringements.
[19] For instance, in Israel, the specific competition law provisions rely on general tort provisions to compensate antitrust victims. Section 50 of the Israeli Competition Act establishes that a violation of the Act constitutes tort, thus, referring the issue to the tort provisions. According to Section 71 of the Tort Ordinance, courts have to grant compensatory damages or issue an order designed to remedy the tortuous injury.
[20] In Finland, Section 20(1) of the Finnish Competition Act recognizes the duty of the infringing undertakings to compensate for the damage caused by their anticompetitive conducts, while paragraph (2) of the same provision refers to the Tort Liability Act for the procedural issues of damages claims.
[21] In Canada, antitrust victims may bring an action for damages based on Section 36 of the Competition Act; furthermore, a plaintiff may also bring an action under the common law. The most frequent claim based in common law is the tort of conspiracy (*Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.,* [1983] 1 S.C.R. 452).

and legal persons are allowed to bring private actions for the infringement of the antitrust provisions depending on each legal system, thus, some jurisdictions have adopted a wide approach allowing any injured person to sue for the damages caused by an anticompetitive conduct, including natural persons, undertakings, organizations and public bodies. Conversely, other jurisdictions have more restrictive provisions and may only allow undertakings to claim damages. Likewise, there are competition law provisions that regulate the plaintiffs' standing in collective actions.

On the other hand, there are competition law provisions that establish who shall be liable for the infringement of the competition law provisions. Thus, in those jurisdictions, the specific competition law provisions will determine who shall be responsible for the infringement of the competition rules, depending on which jurisdiction, such responsibility can rely on: undertakings and trade associations[22], or even managers[23].

The main argument for the implementation of specific competition law provisions is that these may facilitate private enforcement of competition law and encourage private plaintiffs to sue for the violation of the antitrust rules. In practice, the existence of a specific rule allowing private antitrust plaintiffs to bring an action before courts in order to remedy the injury caused by the antitrust violator serves as an incentive to private enforcers. Moreover, in some jurisdictions, the adoption of specific competition provisions has been coupled with other measures with the purpose of facilitating private antitrust enforcement, this measures may include: the alleviation of the standard of proof, the availability of collective redress mechanisms, or the existence of measures that assist with the calculation of damages, among others.

Notwithstanding, in some legal regimes, the adoption of specific legal provisions may restrict the possibilities to file private claims. For instance, in some countries the competition law provisions may grant standing to bring an action for damages only to undertakings or to plaintiffs that have a contractual relationship with the perpetrator related to the anticompetitive conduct in question[24], thus, restricting the standing to bring an action for damages. Moreover, other restriction imposed by specific competition law provisions is the requirement of a prior decision of the competition authority declaring the infringement of the competition rules; as a consequence, in those jurisdictions stand-alone actions are not permitted[25].

3. Legal Forum for Private Antitrust Claims

The legal forum for private actions for the breach of competition law varies widely from one jurisdiction to another. The following are the most commonly used rules for the designation of competent courts in competition law related matters.

[22] In Japan, Section 25 of the Antimonopoly Act establishes that any undertaking or trade association in violation of the provisions of the Act shall be liable for damages.
[23] In Ireland, Section 14(1)(b) of the Competition Act allows any person injured by the violation of the competition rules to bring an action against the undertakings itself or any director, manager or other officer of such an undertaking.
[24] Before 2005, the Swedish Competition Act used to allow only companies and contracting parties to claim damages under the Competition Act.
[25] Section 65 of the South African Competition Act, establishes that antitrust victims will be allowed to seek compensation for damages before civil courts only after the competition authorities (Competition Commission, Competition Tribunal and the Competition Appeal Court) have reached a final decision declaring the unlawfulness of a certain conduct. Consequently, only follow-on actions are allowed under South African law.

As a general rule, most countries grant jurisdiction to general courts to handle competition law disputes. This approach is based on general civil or commercial rules and does not require any degree of specialization or expertise to decide on competition matters[26]. It is worth noticing that this approach is not exclusive for countries that do not have specific competition law provisions, given that jurisdictions with competition rules on private actions for damages may also refer this disputes to general courts[27]. On the one hand, this method to grant jurisdiction has the virtue of being inexpensive and is not a burden to the already limited judicial resources. On the other hand, the lack of expertise of general courts in competition matters enhances the desirability of specialized courts.

There are some legal regimes that restrict a bit more the number of general courts that have jurisdiction on competition law disputes. This may be the case where competition disputes are decided only by commercial courts[28]. This reference to commercial courts is due to a certain degree of specialization of commercial courts because they usually handle disputes between persons engaged in commerce, disputes between undertakings, or cases related to commercial acts. By contrast, civil courts are generally concerned with disputes between individuals.

Another measure to restrict the number of general courts that have jurisdiction over competition matters is to assign private antitrust disputes to specific civil or commercial courts[29]. By doing so, the general courts designated gain experience and expertise in the application of competition law and will eventually become some sort of specialized courts in competition law matters. As an advantage, the jurisdictions that have adopted this measure will avoid the expenditure of extra resources in the creation of specialized competition courts.

In other systems, first instance jurisdiction in competition cases is given to higher general courts than would normally be competent in other types of civil actions for damages[30]. The idea again is to assign competition cases to higher courts that have more expertise and experience in the application of the competition rules in order to obtain better judgments. By building a strong and sound competition case law, the legal certainty in antitrust disputes will be enhanced, and as a result, this will contribute as an incentive for the private enforcement of competition law. Notwithstanding, assigning private antitrust actions to higher courts may increase obstacles to private enforcement as well. Thus, on the one hand,

[26] The most significant example of such system is the US where all antitrust litigation is handled by general courts, however, since competition law disputes have been decided by general courts since the enactment of the Sherman Act in 1890, the US judicial system has developed an important and sound jurisprudence on which general courts may rely.

[27] For instance, in Argentina according to Article 51 of the Law for Defense of Competition, any affected person by a prohibited act shall exercise the action to recover damages before a competent judge pursuant to the civil law.

[28] In Austria, commercial courts are empowered to handle the infringement of the Federal Act against Unfair Competition. Similarly, pursuant to Section 69(2) of the Croatian Competition Act, commercial courts have jurisdiction in all damages claims based on infringements of the Act. In the Czech Republic, Section 9(3)(k) of the Civil Procedure Code, lists the protection of competition as a commercial matter and grants jurisdiction to regional courts to decide in first instance. In France, eight specified *Tribunaux de Commerce* are competent to decide on competition matters pursuant to *Loi sur les nouvelles regulations economic du 15 mai 2001*. In Spain, pursuant to the First Additional Provision of the 2007 Competition Act, Commercial Courts will have jurisdiction to apply the competition provisions in private proceedings according to Article 86 ter (f) of *Ley Orgánica 6/1985 del Poder Judicial*, notwithstanding, civil courts may have jurisdiction to handle follow-on actions for damages according to a Court Order of the *Audiencia Provincial de Madrid* (Court Order of Audiencia Provincial de Madrid of April 10, 2008, *Vodafone, 83/2008*).

[29] For instance in France, pursuant to Article L.420-7 all competition matters are allocated to specialized chambers within eight civil courts (*Tribunaux de Grande Instance*) and eight commercial courts (*Tribunaux de Commerce*). All decisions of these courts are appealed before the Appeal Court of Paris (*Cour d'appel de Paris*).

[30] In Germany, all cases in which competition law is applied, even if the only question is whether or not competition law is applicable, are exclusively handled by regional courts (*Landgericht*), the second tier in the hierarchy of ordinary courts (Section 87 of the Act against Restraints of Competition).

claims before higher courts are usually more expensive and more time consuming than would be under normal circumstances. And on the other hand, higher courts may not be suitable for small consumer's claims.

Another measure to limit the number of competent courts is to repeal the common provisions delimitating the court's jurisdiction by virtue of the value of the claim. For instance, in some countries, in general actions for damages there is a common delineation of competences between district and circuit courts regarding the value of the subject matter of the dispute. However, in competition law cases this delineation may be abolished and always grant jurisdiction to the circuit court irrespective of the value of the claim[31]. This measure increases the degree of expertise in competition cases, but at the same time, it may also suppose higher costs and procedural burdens on private enforcers for the reasons stated above. Similarly, in some jurisdictions the competence of a determined court may be dependent on the amount of damages that a certain court may award for the infringement of competition law[32].

Some legal systems establish that when any ordinary court is deciding on a competition matter it will always form a panel to reach the final decision[33]. Moreover, for more expertise, there is also the possibility to refer the competition case to a specific panel in a specific court that has a certain level of expertise in competition law cases[34]. Additional expertise will result in jurisdictions where these specific panels are also in charge of the judicial review of the competition authority's decisions[35]. Finally, special competition law panels may be formed at the appeal level to review the inferior court's decisions[36].

The competence of a determined court in competition cases may also depend on which set of competition law rules the court applies. For instance, in some countries which are part of international organizations, their courts are obliged to apply both national and supranational competition law[37]. In such cases, some courts may be granted jurisdiction to enforce the national competition law provisions, while other courts will be in charge of the enforcement of the international competition rules[38].

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[31] In Slovenia, the general delineation line between the district and circuit courts is 20.000 EUR, however, pursuant to Article 32(2) of the Civil Procedure Act, in disputes concerning the protection of competition the circuit courts shall have jurisdiction irrespective of the value of the subject-matter.

[32] In Australia, pursuant to Section 86AA of the Competition and Consumer Act 2010, Federal Magistrates Courts may enforce the provisions of the Act but they cannot award damages greater than A$750,000.

[33] In Slovenia, whenever a circuit court is hearing a competition law case, the court must decide in a panel formed by one professional judge and two lay members (Article 33(3) of the Civil Procedure Act). However, this only happens where competition law is raised *à titre principal*.

[34] In the UK, the Chancery Division of the High Court has jurisdiction to hear private actions regarding competition law.

[35] In Sweden, pursuant to Section 3:26 of the Competition Act, the Stockholm District Court is competent in the first instance to decide on competition law cases. The Stockholm District Court will refer competition law cases to a specific chamber composed by judges and economic experts. This specific court is deemed to be better suited for competition law issues provided that the Swedish Competition Authority's decisions are appealed before this specific chamber.

[36] In Germany, special panels at the Higher Regional Courts (*Oberlandesgericht*) handle appeals from damages claims (Section 91 of the Act against Restraints of Competition). Further appeals on issues of law are assigned to a special panel at the Federal Court of Justice (*Bundesgerichtshof*) (Section 94 of the Act against Restraints of Competition).

[37] At the European Union level, national courts are obliged to apply the EU competition rules (Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] ECR 1-6297; and Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi et al* v *Lloyd Adriatico Assicurazioni SpA et al* [2006] ECR 1-6619).

[38] In the European Union, the national courts of the Member States are obliged to directly enforce the EU competition law provisions. In practice, in some Member States different courts enforce the EU and the national competition law rules. For instance, in Italy actions based on EU competition law are handled by local courts of first instance (*Tribunali Ordinary*), and actions based on Italian competition law are filed before the competent Court of Appeal (*Corte d'Appello*).

A similar scenario appears in countries that have a federal governmental structure. Here the plaintiff has the possibility to choose whether to apply federal or state law[39]. In such cases when the plaintiff sues under federal law, jurisdiction will be granted to federal courts. On the other hand, when the plaintiff applies state law, the competent court will be the respective state court. In practice, this possibility may stimulate forum shopping. Notwithstanding, in some circumstances this availability may serve as an incentive for the plaintiff, provided that it will be able to choose which legislation and which court is better suited for its claim[40].

Furthermore, the jurisdiction of a court may be subject to the plaintiff's decision in some jurisdictions. This may be the case where the plaintiff has the possibility to sue for the recovery of damages under the general civil provisions, and additionally, the plaintiff also has the possibility to file a claim based on specific competition rules. In the first scenario, general courts will have jurisdiction to decide in cases enforcing the general civil provisions. In the second scenario, the enforcement of specific competition rules may be granted to specific courts empowered to handle competition matters[41].

The jurisdiction of a court may also be different when a public entity is a party in the proceeding[42]. In these cases, jurisdiction will be granted to administrative courts which usually handle the disputes between private parties and the government. As a result, administrative courts will decide on cases where a public entity has infringed the competition provisions in the exercise of its public authority, or where a public entity has brought an action seeking compensation or the annulment of a determined agreement infringing the competition rules[43].

A determined court may be competent to decide on a competition law matter depending on the type of action filed before it. Some legal regimes may determine the jurisdiction of a court based on if the competition rules are applied as the main or principal issue of the dispute (*à titre principal*) or only as a subsidiary issue (*à titre d'incident*)[44]. Likewise, in some countries the jurisdiction of a court may also vary depending on whether the plaintiff is filing a stand-alone or follow-on action[45]. Moreover, the jurisdiction of a court may also be different regarding the kind of action or remedy sought by the plaintiff, for instance, in some legal regimes a certain court may only be competent to decide on actions for damages and a different court may have jurisdiction to hear actions seeking injunctive or declaratory

[39] See 15 U.S.C §15, Clayton Act.
[40] The US federal system allows prospective plaintiffs to sue before federal or state courts, and to either apply federal or state law. For instance, after the *Illinois Brick* case, indirect purchasers are not allowed to sue for damages before federal courts *(Illinois Brick Co. v. Illinois*, 431 US 720 (1977)), however, indirect purchasers have the possibility to bring actions for damages under state law.
[41] In Sweden, according to Chapter 10 of the Code of Judicial Procedure, a plaintiff may bring an action before the competent court for tort claims. Additionally, pursuant to Section 3:26 of the Competition Act, a plaintiff will be able to bring an action for damages for the breach of competition law before the Stockholm City Court. In Germany, a plaintiff may choose to bring an action before a regional court or may choose to sue before a specific chamber for commercial matters at regional courts (*Landgericht*) (Section 87 of Act against Restraints of Competition).
[42] France, Lithuania, Portugal.
[43] For instance, in France see the case involving the railway company: Administrative Supreme Court, 19 December 2007, *SNCF v Campenon*; and 19 March 2008, *SNCF v. Fougerolle Ballot* and *SNCF v. Dumez*.
[44] In Slovenia, the special panel formed in the circuit courts (Article 34 Civil Procedure Act) has only jurisdiction in cases where the competition rules are applied *à titre principal.* In Ireland, pursuant to Section 14 of the Competition Act, private actions can be filed to the Circuit Court or the High Court; however, the latter will only handle cases where competition law is applied *à titre principal.*
[45] In the UK the Competition Appeal Tribunal has only jurisdiction to hear follow-on cases, thus, stand-alone cases will have to be filed to the High Court.

relief[46]. Finally, in some countries, a determined court will be competent to enforce the competition law provisions depending on whether the case concerns a collective claim or just an individual claim[47].

In some legal regimes, the jurisdiction to handle competition law disputes may be delegated to intellectual property courts[48]. This is due to the close relationship between competition law and the protection of intellectual property rights. Nevertheless, in practice, the interaction between competition law and intellectual property has to be well balanced, provided that the abusive exercise of intellectual property rights may seriously harm competition[49], and at the same time, the over-enforcement of competition law may reduce innovation[50]. The interaction between intellectual property rights and competition law, not only has to do with the jurisdiction of the courts, provided that in some countries, both competition law and intellectual property may be assigned to the same public authority[51], or the process of obtaining evidence for competition law cases may be governed by intellectual property rules[52].

In some jurisdictions, there is a specialized competition tribunal that has jurisdiction to decide on private antitrust disputes. At this moment, a differentiation should be made between: (i) general courts with specialist judges or panels; (ii) specialized competition courts that have administrative jurisdiction; (iii) and specialized courts that have authority to decide on private claims. The first kind of court is just a general court that has been entrusted with the application of competition law in private disputes. The second kind is a specialized court which has been created specifically to apply competition law but lacks authority to handle private claims[53]. Finally, the third kind is a specialized court which is formed by specialized members and that has competence to handle private claims related to the application of competition law[54].

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[46] In the UK, the High Court may handle both injunctive relief and damages claims; on the contrary, the Competition Appeal Tribunal may only handle actions for damages.

[47] In Sweden, pursuant to Section 3 of the Swedish Group Proceedings Act, group actions are handed by specifically assigned district courts in each Swedish county. Moreover, in the UK, the Competition Appeal Tribunal is competent to handle representative actions for damages according to Section 47B of the Competition Act.

[48] The Chinese Supreme Court has determined that all antimonopoly cases, including private enforcement, must be resolved at the Intellectual Property Court.

[49] In China, Article 55 of the Antimonopoly Law establishes that a business operator's conduct to eliminate or restrict market competition by abusing their intellectual property rights shall be governed by the provisions of the Act.

[50] In Korea, pursuant to Article 59 of the Monopoly Regulation and Fair Trade Act no action for damages will be interposed against the legitimate exercise of intellectual property rights. Additionally, the Korean Fair Trade Commission has released the *Guidelines of Reviewing Undue Exercise of Intellectual Property Rights* to establish which practices amount to the abusive exercise of those rights.

[51] In Peru, the *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI) is a public authority in charge of both competition law and intellectual property issues. Moreover, there is also a tribunal that handles the two subjects, the Tribunal of Defense of Competition and Intellectual Property; however, this is an administrative court which is not related to the private enforcement of competition law.

[52] See Article 121 of the Italian Industrial Property Code.

[53] The Australian Competition Tribunal is a specialist tribunal which has the power to authorize proposed acquisitions that would otherwise breach the competition provisions if the acquisition would result in a public benefit. The Tribunal has also authority to review the decisions of the ACCC, but cannot award civil remedies. In Austria, the Cartel Court, which is a specialized court, is not empowered to award private remedies for the infringement of competition law. See cases: Austrian Supreme Court, 16 Ok 14/04, Judgment of 11 October 2004; and Austrian Supreme Court, 16 Ok 10/02, Judgment of 16 December 2002. In Denmark, the Competition Appeals Tribunal is an administrative body in charge of the judicial review of the decisions issued by the Danish Competition Authority (*Konkurrencestyrelsen*) and the Danish Competition Council (*Konkurrencerådet*). In Peru, the Tribunal for the Defense of Competition and Intellectual Property is not allowed to award damages for the violation of competition law.

[54] The Competition Appeal Tribunal in the UK is a tribunal that is specialized in competition law matters and was created by Section 12 and Schedule 2 of the Enterprise Act 2002. The CAT has jurisdiction to hear actions for damages and other monetary claims where there exists a prior decision by the OFT or the European Commission. However, the CAT has also other functions, such as: the review of the Office of Fair Trading decisions and other sector regulators and the review of decisions issued by the secretary of State, the OFT and the Competition Commission in merger cases.

Furthermore, in some competition law regimes, the award of damages is conducted by the competition authority, provided that ordinary courts are not empowered to apply the competition law provisions[55]. Moreover, in some jurisdictions, administrative courts specialized in competition law matters can award damages whenever the competition authority and the investigated undertaking have reached an agreement in the course of the investigation. The award of damages will be included in the agreement if such an award has been requested by the party that has filed the complaint to the competition authority in the first place[56]. However, these two last proceedings are of an administrative nature and consequently do not comply with the characteristics of private antitrust enforcement.

Finally, with the globalization of commerce the infringement of competition law is taking an international perspective, provided that a certain anticompetitive conduct may harm several persons in various jurisdictions. Accordingly, the internationalization of antitrust infringements plus the raise of private antitrust enforcement has increased the number of cross-border antitrust cases. International antitrust litigation raises questions about the jurisdiction and the choice of law; however, since these matters are governed by the principles of private international law, they are excluded from this study[57].

4. Standing to Bring a Private Action for the Breach of Competition Law

An infringement of the competition law provisions may harm different market participants, such as competitors, direct purchasers and indirect purchasers, among others. Thus, every competition law regime must establish which market participant(s) should be entitled to bring a private action for the infringement of the competition law provisions. As a result, the question of who has standing to sue for the damages suffered due to an anticompetitive conduct constitutes a fundamental issue concerning the private enforcement of competition law.

As a general civil rule, in most jurisdictions any natural or legal person of full capacity has standing to sue or be sued in courts of the state of his domicile. Notwithstanding, this principle has been limited in order to avoid unmeritorious claims. For instance, in most jurisdictions a plaintiff will only be allowed to bring an action for damages if its rights or interest have been affected by the defendant's conduct, also known as genuine grievance. Depending on which jurisdiction, the type of interest required will be defined as: personal, existing, real[58], sufficient[59], legal[60].

In addition, in systems where the competition law provisions have a protective purpose, the standing to sue for damages is reserved to those plaintiffs who can assert the violation of a rule of law that has as main purpose the protection of the plaintiff against the alleged harm. This requirement is based on

[55] In Indonesia, the Commission for Supervision of Business Competition (*Komisi Pengawas Persaingan Usaha,* or KPPU) is an independent institution that reports only to the President and the Parliament. Pursuant to the provisions of Law No. 5 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition (Indonesian Competition Act), the KPPU has authority to award private remedies such as the nullity declaration of anticompetitive agreements and the award of damages to injured parties. This is because the Indonesian competition regimen does not allow private actions for the infringement of competition law.
[56] In South Africa, the Competition Tribunal can award damages in the agreement reached between the Competition Commission and the investigated undertaking if such a remedy has been requested by the party who file the complaint to the Competition Commission (Section 49D(3) of the Competition Act).
[57] For additional information about international antitrust litigation, please see Chapter One, Section 10 (c).
[58] In France, in order to pursue a claim the plaintiff must have an interest in the case which has to be personal, existing and real.
[59] In the Netherlands, the plaintiff is required to have sufficient interest in the case pursuant to Section 3:303 of the Dutch Civil Code. However, in practice, such interest is presumed, but this presumption is rebuttable.
[60] In Italy, legal interest is required from the plaintiff in order to bring an action for damages.

the German doctrine of the protective purpose of the norm (*Schutznormtheorie*) which determines that if a certain law (competition law in our case) is meant to safeguard a defined subject or a determined group of people, a person who does not belong to that specific group does not have standing to sue based on that particular norm[61].

Some competition law regimes have adopted specific competition rules regarding the standing of private plaintiffs in actions for damages. Some of these specific provisions have established terms such as "affected parties"[62], "injured in his business or property"[63], or "potentially injured"[64] with the purpose of determining who has standing to sue for the infringement of competition law. Depending on which jurisdiction, the spectrum of individuals allowed to sue for damages will be wider or narrower. Thus, in some competition law regimes any person or entity harmed by the anticompetitive conduct of the defendant will have standing to sue for the damages arising from such unlawful conduct[65]. Conversely, some jurisdictions have opted to establish exclusive lists of individuals who have standing to bring an action for damages, such lists may include: affected parties[66], competitors[67], undertakings[68], plaintiffs who have a contractual relationship with the defendant[69], specified bodies[70], associations with legal capacity[71], or public entities[72].

Furthermore, in some jurisdictions the standing to sue for damages is related to the goals and objectives of the competition law regime in question. For instance, in countries where the competition rules have as objective the protection of competition and not of competitors for their own sake[73], standing will be denied to plaintiffs claiming injuries that are not of the type that the competition provisions are intended to prevent. As a result, in those jurisdictions, the potential plaintiff will have to prove not only

[61] The German doctrine of S*chutznorm,* is also followed, in different extents, in Austria, Italy, Greece and the Netherlands. However, in Germany, the 7th amendment of the Act against Restraints of Competition abolished this provision in German law.
[62] Section 33 of the German Act against Restraints of Competition.
[63] Section 4 of the Clayton Act, 15 U.S.C. §15.
[64] Article 29 of the Antitrust Law.
[65] In Australia, see Section 82 of the Competition and Consumer Act. In Canada, see Section 36 of the Competition Act. In Israel, see Section 50 of the Competition Act. In the US, see Section 4 of the Clayton Act, 15 U.S.C. §15.
[66] In Germany, see Section 33(1) of the Act against Restraints of Competition. In Japan, see Section 25 of the Japanese Antimonopoly Act. In Peru, see Section 58 of the Antitrust Law.
[67] In Turkey, pursuant to Article 58 of the Competition Act competing undertakings affected by the limitation of competition are allowed to sue for damages.
[68] In Finland, pursuant to Article 18(a) of the Act on Competition Restrictions, only business undertakings are allowed to bring an action for damages for the infringement of the provisions of the Act, however, other plaintiffs may sue for damages based on general tort provisions. Similarly, in Sweden only undertakings and contracting parties were allowed to bring actions for damages, however, this provision has been repealed in 2005 and now anyone who has suffered harm caused by an infringement of the competition rules is allowed to claim damages before Swedish courts.
[69] In Finland, before the 1998 amendment of the Act on Competition Restrictions, only business undertakings that had a contractual relationship with the defendant were allowed to sue for damages. In Sweden before the 2005 amendment, only undertakings and contracting parties could bring an action for damages under the Competition Act.
[70] In the UK, Section 47B of the Competition Act allows specified bodies to bring representative follow-on actions on behalf of named consumers. Pursuant to Section 47B(9) of the Competition Act, a specified body is an entity which has been specified by an order made by the Secretary of State.
[71] In Germany, according to Section 33(2) of the Act against Restraints of Competition, associations with legal capacity for the promotion of commercial or independent professional interests may sue for damages if they have a significant number of member undertakings selling goods or services of a similar or related type on the same market.
[72] Pursuant to Section 53N of the Indian Competition Act, the Central or a State Government or a local authority, along with any enterprise or any person, may file an application for compensation to the Appellate Tribunal, the latter, however, is an administrative tribunal.
[73] The US Supreme Court in *Brown Shoe Co., v. United States*, established the fundamental US antitrust objective of protection of competition and not competitors (Brown Shoe Co., Inc. v. United States – 370 U.S. 294 (1962)).

the injury suffered due to the defendant's conduct, but that the injury is actually the result of a practice that has lessened competition in order to be granted standing to sue for damages[74].

4.1. Potential Private Plaintiffs

In practice, the potential claimants who can bring an action for damages for the infringement of the competition rules may be divided in two categories. The first category includes the third parties to the anti-competitive agreements, persons who did not take part in the alleged unlawful agreement but suffer the anticompetitive effects of the latter. The second category consists of the parties participating in the anti-competitive agreements; these are the co-contracting parties to the unlawful agreement.

(a) Third Party Plaintiffs

As to the first category, the list of potential third parties may include: (i) Direct purchasers; (ii) Indirect purchasers; (iii) Competitors; and (iv) Other third party plaintiffs, such as: shareholders, suppliers, employees and associations.

(i) Direct Purchasers

Direct purchasers have been commonly recognized to have standing to sue for the damages arising from an anticompetitive practice before ordinary courts[75]. This posture has been widely acknowledged by courts and legislators across the world as a prerogative of direct purchasers given to the close relationship between the latter and the perpetrators[76]. This close relationship is due to the fact that these plaintiffs have directly purchased from the defendant a product or service with a price that has been artificially inflated by the anticompetitive conduct of the antitrust offender. The most frequent claim filed by direct purchasers is for the overcharges suffered due to the price inflation; this is the difference between the price actually paid to the monopolist or cartelist for the affected product and the price that would have prevailed but for the anticompetitive conduct of the perpetrator. Finally, in some jurisdictions, the possibility to recover damages is restricted to direct purchasers only; the rationale behind this limitation is related to concerns about multiple recoveries of damages[77].

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[74] In the US case law, it has been established in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* that a plaintiff cannot recover damages if it have not demonstrated that the challenged conduct has created anticompetitive effects. In that case, the plaintiff who was the owner of some bowling alleys claimed that a rival's purchase of a large number of bowling alleys infringed the antitrust provisions by reducing competition. However, the court found that since the defendant had acquired otherwise failing bowling alleys, the defendant had actually preserved competition (Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. – 429 U.S. 477 (1977)). Similarly, in Israel a plaintiff will only be granted standing to sue if it shows that it has suffered an antitrust injury of the type the competition rules are aimed to prevent (CrimC (Jer) 417/97 *State of Israel v. Israel Phoenix Ins. Co.* [2001] ISRDC, Antitrust 5000788; CrimA 4855/02 *State of Israel v. Burovitch* [2005] ISRSC, 59(6) 776).

[75] According to the US case law, only direct purchasers are allowed to sue for damages based on federal law (Clayton Act). In the *Illinois Brick* case (*supra* note 40), the court disallowed indirect purchasers to bring damages claims for the infringement of the federal competition law provisions. Furthermore, in the *Hannover Shoe* case the court held that direct purchasers are the best suited to effectively enforce the antitrust statutes and were the appropriate plaintiffs to claim for damages (*Hannover Shoe, Inc. v. United Shoe. Mach. Corp.*, 329 US 481 (1968)). Moreover, the Supreme Court established three federal antitrust policy goals related to the exclusion of indirect purchasers litigation: (1) avoiding unnecessary complicated litigation; (2) providing direct purchasers with incentives to bring private antitrust actions; and (3) avoiding multiple liability of defendants. Despite the above, indirect purchasers in the US are allowed to recover damages based on the law of many states.

[76] For instance, the Turkish Supreme Court has confirmed that persons who have purchased directly from the perpetrator of an anticompetitive conduct have clear standing to sue for damages based on Article 58 of the Competition Act (Decision of the 19th Civil Law Chamber: E: 1999/3350 K: 1999/6364, 01.11.1999; E:2002/2827 K:2002/7580, 29.11.2002).

[77] ROACH, Kent & TREBILCOCK, Michael J. (1996), 'Private Enforcement of Competition Laws'. *Osgoode Hall Law Journal*. Vol. 34, No. 3, p. 502.

(ii) Indirect Purchasers

An indirect purchaser is one who is not the immediate buyer from the alleged competition law violator[78], or one who does not purchase directly from the defendant[79]. Most frequently, when indirect purchasers sue for damages they tend to claim the recovery of the amount of the unlawful overcharge that has been passed on to them; this is the difference between the price actually paid and the price that would have been paid in the absence of the antitrust violation. Nevertheless, occasionally, indirect purchasers may also sue for the lost profits; this is the loss resulting from the reduction of sales caused by the increase in prices.

The issue of the indirect purchasers' standing to sue for antitrust damages is very controversial and there is a divided opinion among legislations on whether to allow or disallow such type of claims. On the one hand, there are jurisdictions that have expressly barred indirect purchasers from recovering damages arising from an antitrust infringement due to the difficulty involved in such kind of claims and to the risks those actions can suppose to the defendants and to the judicial system itself. On the other hand, some competition law regimes clearly allow and encourage the possibility of indirect purchasers to bring damages claims for the harm suffered by an anticompetitive conduct, provided that this kind of claims are supported by the enforcement objectives of compensation of the antitrust victims and deterrence of future infringement of competition law.

The main argument against granting standing to sue for damages to indirect purchasers is that the harm suffered by such plaintiffs is too remote from the supposed infringement, and therefore, private actions for antitrust damages would turn to be too complicated due to the extremely difficult task of showing the exact effects of the anticompetitive overcharge. In such cases, the compensation objective of antitrust enforcement would not be accomplished as the real economic victims of mist competition law infringements are normally downstream consumers who are too numerous and remote from the infringement to locate and compensate[80]. This being the case, by allowing such distant claims the risk of duplicative recoveries would increase because direct and indirect purchasers will be allowed to recover from a single overcharge[81]. Similarly, the burden of proof required to demonstrate such remote harm will be too complex and expensive, provided that in most cases the overcharged amount to the indirect purchasers might be insignificant compared to the litigation costs involved in such complex litigations[82]. Finally, in some countries, the courts have considered indirect purchasers to be secondary recipients of the competition rules[83], or that they do not have a legitimate cause of action to claim damages[84], and as a consequence denying the latter standing to bring an action before courts.

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[78] *Kansas v. Utilicorp United, Inc.,* 497 US 199, 207 (1990)
[79] *California v. ARC Am. Corp*., 490 US 93, 97 (1989)
[80] CRANE (2010), p. 677.
[81] *Illinois Brick Co v. Illinois* (*supra* note 40).
[82] The US Supreme Court denied indirect purchasers standing to sue for damages based on the Clayton Act, given that for procedural economy reasons, direct purchasers are considered to be a more efficient plaintiff and a better private attorney-general (*Illinois Brick Co. v. Illinois*, *supra* note 40). In response to this decision, state legislatures and courts have permitted indirect purchasers to file antitrust damages claims grounded on state law. Consequently, the rule limiting federal antitrust recoveries to direct purchasers does not prevent indirect purchasers from recovering damages flowing from state antitrust law violations.
[83] In Italy the Supreme Court denied indirect purchasers standing because they were indirect beneficiaries of the competition rules (Corte di Cassazione, judgment n. 1811 of March 4, 1999, *Montanari c. Cassa Risparmio Genova e* Imperia; Corte di Cassazione,

Conversely, the idea of impeding indirect purchasers from recovering antitrust damages has been considered to be contrary to the competition law objective of compensation of antitrust victims and deterrence of future antitrust violations[85]. Moreover, in most competition law regimes the principle of full compensation of antitrust victims is recognized, thus, a limitation on the possibility of indirect purchasers that have been affected by the unlawful conduct of the defendant will be contrary to such fundamental principle. To minimize the risk of multiple recoveries of damages by indirect purchasers, a possible approach would allow indirect purchasers standing to bring an action, while exercising caution in awarding damages to reduce the risk of duplicative recovery[86]. Generally speaking, in the majority of jurisdictions, actions for damages by indirect purchasers are in theory possible. Nevertheless, the lack of specific provisions and of relevant case law, plus the difficulties faced by such plaintiff in establishing causation and damages, has prevented the proliferation of this kind of actions. There are however, some cases where courts applying the competition law provisions have recognized the right of indirect purchasers to be compensated for the damages arising from a competition law violation[87].

(iii) Competitors

A competitor is an individual in the same industry or a similar industry which offers a similar product or service. Usually, competitors of competition law infringing parties may have a claim against the latter based on the losses suffered due to the anticompetitive conduct of the violator. In practice, competitors' claims may be based on actual and potential losses, thus, not only actual competitors will have standing to sue, but also, potential competitors. Potential competitors will usually claim that the unlawful conduct of the defendant is preventing them from entering the market, therefore, in order to recover damages they will have to prove their actual intention to enter the market and that they were prepared to do so within a reasonable period of time[88].

Traditionally, antitrust case law has established that competitors can indeed suffer antitrust injury of the type the competition rules are meant to prevent, and therefore, it is widely accepted that competitors have standing to sue for competition infringements as affected parties[89]. Additionally, in jurisdictions where a legal interest is required in order to bring an action before courts, competitors are

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judgment n. 17475 of December 9, 2002, *Axa Assicurazioni c. Larato*). However, this posture has been repealed by the *Unipol* case (Corte di Cassazione *(Sezioni Unite)*, judgment n. 2207 of February 4, 2005, *Unipol Assicurazioni c. Ricciardelli).*

[84] In Canada, in April 2011, the Court of Appeal of British Columbia denied standing to indirect purchasers by reversing certification orders in the *Microsoft* and *Sun-Rype* cases by determining that indirect purchasers have no cause of action recognized in law and as a consequence no capacity to sue to recover an alleged overcharge (*Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2011 BCCA 186; and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2011 BCCA 187).

[85] European Commission, *Staff Working Paper, Annex to the Green Paper on Damages actions for breach of the EC antitrust rules*, 2005, para. 179.

[86] ROACH & TREBILCOCK (1996), p. 502.

[87] At the European Union's level the ECJ has determined that *any individual* who has suffered actual loss caused by a contract or by conduct liable to restrict or distort competition must be entitled to compensation before a national court (*Courage* case; and *Manfredi* case, *supra* note 37). In Italy, according to the Supreme Court's case law indirect purchasers have standing to sue for damages provided that competition law aims to protect all market participants (*Unipol Assicurazioni c. Ricciardelli*, *supra* note 83). In Japan, a person or entity, including indirect purchasers, has standing to bring actions for damages based on Sec 25 of the AMA or Sec 709 of the Civil Code (Case No. Showa 60 (O) 933, MINSHU vol. 43, No. 11, p. 1259 (Supreme Court, Dec. 8, 1989)). In Poland, an indirect purchaser successfully recovered damages based on Article 405 of the Civil Code in relation to the provisions of the Unfair Competition act (Judgment of 10 August 2006, ref. no. V CSK 237/06).

[88] *Grip-Pak, Inc. v. Illinois Tool Works, Inc*, 649 F2d 466, 475 (7th Cir. 1982)

[89] *Carpet Group International; Emmert Elseav.oriental Rug Importers Association, Inc.; Bashian Bros., Inc.; Alfandari and Etessami Oriental Rug Co., Inc.; Moussa Etessami & Sons Corp.; Noonoo Rug Co.; Pande Cameron & Co. of New York; Kelaty Rugs International; Daniel Hodges; George Newman; Isaac Etessami,carpet Group International Corporation and Emmert Elsea, Appellants*., 227 F.3d 62, 77 (3d Cir. 2000).

considered to have sufficient interest to bring an action before courts[90]. Finally, in jurisdictions where the competition rules have a protective purpose, competitors are considered to have standing provided that they are subject to the protective scope of competition law.

Finally, in some jurisdictions with specific competition rules on standing, such provisions have expressly acknowledged the standing of competitors to sue for the harm caused to them as a result of the infringement of the competition provisions[91]. Moreover, in some competition law regimes that expressly allow competitors to sue for damages, the latter are allowed to recover all the damages caused to them, while other plaintiffs may only recover the overcharge caused by the defendant's conduct[92].

(iv) Other Third Party Plaintiffs

Besides the previously seen more traditional antitrust plaintiffs, there are other third party plaintiffs who may initiate an action for damages for the infringement of the competition rules, such as: **shareholders,** which may seek compensation from the infringing party due to the damages caused to their corporation[93]; **suppliers** to market participants may have standing in cases where the plaintiff is harmed by a price-fixing conspiracy formed by its buyers that have lowered the market price[94]; **employees**, who just like suppliers supply labor, have standing to sue when there is a conspiracy between the employer and others to lower wages or impose other conditions of employment[95]; **associations** that have purchased products that were the subject of anticompetitive conduct[96].

(b) Parties to the Anti-competitive Agreement as Potential Plaintiffs

Regarding the second category, the parties to an infringing agreement may also bring an action for damages for the violation of the competition provisions, as long as the co-contracting party did not bear a significant responsibility for the infringement. This limitation aims at preventing litigants to profit from their own unlawful conduct, and as a consequence, the award of damages will not be available when a party is found to bear significant responsibility for the violation of the competition rules[97].

Finally, in practice, in the most developed competition law regimes, the competent courts have placed limits on individuals who can bring a suit for the violation of the competition provisions, thus, determining who has standing to sue. However, this issue is unresolved in young competition regimes that have not yet developed a sound jurisprudence on this matter. Hence, despite the fact that a certain competition regime has or not specific competition rules on standing, ultimately, the competent courts will decide who has standing to sue for a determined antitrust infraction.

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[90] According to the Austrian Supreme Court, both competitors and consumers may sue for damages under the Federal Act against Unfair Competition and the Civil Code (Austrian Supreme Court, 4 Ob 53/98t, Judgment of 24 February 1998).
[91] In Germany, the Act against Restraints of Competition in Section 33(1) expressly recognizes competitors as an affected party and grant standing to the latter to bring actions for damages.
[92] Pursuant to Article 58 of the Turkish Competition Act, competing undertakings are allowed to recover all the damages caused by the defendant's conduct, while other plaintiffs can only recover as damages the difference between the cost they paid and the cost they would have paid if competition had not been limited.
[93] *Loeb v. Eastman Kodak Co.* 183 F. 704 (3d Cir. 1910)
[94] *SAS of P.R. v. P.R. Tel. Co*., 48 F.3d 39, 44 (1st Cir. 1995)
[95] *Eichron v. AT&T Corp*., 248 F.3d 131 (3d Cir. 2001)
[96] *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 531 (3d Cir. 2004)
[97] In the European Union's case law, the right of co-contracting parties in an anticompetitive agreement to sue for damages has been established in the *Courage* case (*supra* note 37).

5. Collective and Representative Claims

The availability of mechanisms that allow classes of market participants and consumers to exercise their rights collectively is considered to be an incentive for a more efficient private enforcement of competition law[98]. The incorporation of such mechanisms is intended to pursue objectives like: procedural economy, the reduction of the litigation costs and the saving of judicial resources.

Competition law infringements usually have widespread effects on the market, and as a result, such infringements may injure a variety of market participants. Thus, it is fundamental that the victims of the anticompetitive conducts have effective mechanisms through which they can remedy the injury inflicted upon them by the unlawful conduct of the competition law violator. The possibility to collectively sue for the infringement of competition law results especially appealing to certain groups of antitrust victims, such as: plaintiffs with limited resources, plaintiffs with small claims and indirect purchasers.

In cases where the victims of the antitrust violations have enough resources to cover their litigation expenses, the costs associated to the proceedings will not deter the plaintiff from filing a damages claim. However, in cases where the plaintiff has limited resources to file the claim, the litigation costs will act as a strong deterrent, especially in competition law cases due to the complexity and expensiveness of such kind of claims. Likewise, plaintiffs with small claims will normally be reluctant to file a claim for damages provided that the amount recoverable will be too small to turn its individual claim cost effective[99]. Finally, the obstacles faced by indirect purchaser in order to successfully claim for damages may be reduced if some form of collective redress would be available.

Accordingly, in order to accomplish the competition law enforcement objectives of compensation of victims and deterrence of future infractions, and to avoid the reluctance to sue of antitrust victims with limited resources or with small claims and indirect purchasers, all competition law regimes should consider the implementation of mechanisms that allow groups of plaintiffs to exercise their rights collectively to create an efficient enforcement of competition law[100]. Ultimately, the availability of such mechanisms will also benefit the judicial system by reducing the costs and waste of judicial resources[101].

The possibility to collectively claim for the infringement of the competition rules is not restricted to actions aimed at the award of damages. Many countries have included collective and representative

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[98] In France, Conseil de la concurrence, *Avis du 21 Septembre relatif à l'introduction de l'action de groupe en matière de pratiques anticoncurrentielles*, recommended the implementation of a collective redress mechanism to encourage private claims.

[99] "*It will be very unlikely for practical reasons, if not impossible, that consumers and purchasers with small claims will bring an action for damages for breach of antitrust law. Consideration should therefore be given to ways in which these interests can be better protected by collective actions. Beyond the specific protection of consumer interests, collective actions can serve to consolidate a large number of smaller claims into one action, thereby saving time and money".* Commission's Green Paper (*supra* note 3), p. 8.

[100] In its White Paper (*supra* note 3), the European Commission has proposed two collective redress mechanisms: (1) representative action, where damages actions are brought by certified entities on behalf of injured parties; and (2) opt-in collective actions, where injured parties join their single actions (page 4).

[101] For instance, in France, the lack of a collective redress mechanism for victims of competition law infractions resulted in an aggregation of claims, filed by the *Association de Défense des Consommateurs UFC-Que Choisir*, contained of the individual claims of 3.606 consumers affected by a telecommunication cartel that was previously condemned by the French Competition Council for unlawful collusive behavior.

actions for plaintiffs seeking injunctive and/or declaratory relief. Moreover, some competition law regimes with specific competition rules allowing some mechanism to collectively pursue a civil claim for the violation of the competition provisions restrict this kind of actions to the award of injunctive relief[102]. The reason for this restriction is that in damages claims the courts need to know a series of factors about each particular victim –actual loss, fault of the victim, causal link- in order to determine if such person has truly suffered the kind of injury claimed, and in practice, this kind of assessment can only be done individually. Notwithstanding the above, there are also specific competition provisions that provide for both injunctive and monetary relief for collective plaintiffs[103].

The spectrum of collective redress mechanisms varies widely across jurisdictions. Firstly, the majority of these collective proceedings are based on general provisions, and consequently, they are not exclusive for competition law matters. Secondly, there are some collective proceedings that are based on rules related to the protection of consumers[104]. Thirdly, some of these proceedings are grounded on unfair competition provisions[105]. And finally, there are specific competition law regulations allowing individual plaintiffs to collectively enforce the competition rules[106]. As a result of the diversity of collective proceedings some jurisdictions have more than one mechanism to join individual claims, and these may be grounded on more than one set of rules[107].

5.1. Types of Collective Redress Mechanisms

In a broad sense, collective redress mechanism used to remedy the infringement of the competition law provisions may be summarized in: public interest litigation, class actions, collective claims, representative actions, joint actions, and assignment of claims. The reader must be advised that the use of these terms is made in a broad sense, provided that the definitions and characteristics of these legal mechanisms may vary from one jurisdiction to another.

(a) Public Interest Litigation

This kind of action is usually brought by a representative organization and it is not made on behalf of any identified individuals but for the benefit of the public at large[108]. The difference between this kind of

[102] Section 14 of the Austrian Act against Unfair Competition provides for collective actions seeking injunction, these may be brought by associations that promote the economic interest of entrepreneurs, provided that such associations represent interest which are affected by the offence or by the Federal Chamber of Labor, the Federal Economic Chamber, the Presidential Conference of the Austrian Chambers of Agriculture or by the Austrian Trade Union Federation.

[103] In Italy, consumers' associations may bring collective actions for damages and for injunctive relief on behalf of their represented consumers according to Article 140-bis and 137 of Law 260/2005, respectively. See also Article 47 of the Brazilian Antitrust Law.

[104] In Italy, Law 260/2005 (Consumer Code) allows consumers' associations with nationwide presence which have been registered in the Ministry of Economic Development to bring private actions for damages (Article 140-bis) and for injunction (Article 137) on behalf of their represented consumers. Similarly, in Estonia the Consumer Protection Board can file collective claims related to consumer protection.

[105] In the Czech Republic collective actions are grounded the unfair competition provisions of the Commercial Code (Section 53 *et seq*).

[106] In Germany, Section 33(2) of the Act against Restraints of Competition; in India, Section 53N(4) of the Competition Act.

[107] For instance, Taiwan's Code of Civil Procedure allows joining multiple parties and claims, and follows an opt-in approach for aggregating claims and parties. It also allows representative claims where all individuals have to be identified and named. Additionally, the Consumer Protection Law also provides for a mechanism where a qualified consumer's group may bring in its own name an action for damages approved by the Consumer Ombudsman. Also, where multiple consumers are injured, a consumers' protection group may accept assignment of the rights of claims of consumers and bring an action in its own name. Finally, an association or foundation may bring an injunctive relief action against an undertaking that has harmed the interests of the general public.

[108] For instance, in Sweden pursuant to the Group Proceedings Act, an action may be brought by an authority appointed by the government to act on behalf on a group of individuals, pursuing claims of public interest.

proceeding and other collective actions for the infringement of competition law is that the amount awarded as damages is somehow returned to the general public, given that there is not an identified group of victims[109]. Furthermore, this kind of proceedings may in some cases end up in a court declaration establishing the competition law infringement and consequently the civil liability of the perpetrator. After the civil liability of the defendant has been declared, the victims of the antitrust infringement can file an action claiming damages[110]. Moreover, in some competition law regimes, the competition authority has standing to bring a collective civil action for damages on behalf of a large group of persons or consumers[111].

(b) Class Actions

In this kind of procedure, one party or a group of parties brings an action as representative of a larger class of unidentified individuals. Class action proceeding may be based either on an *opt-in* or *opt-out* system. On the one hand, in class actions which are based on an *opt-in* system, each individual victim has to manifest expressly its desire to be considered as a member of the class. On the other hand, in class actions based on an *opt-out* system, only those class members who have previously opted-out of the class action are not bound by the judgment in the case. With regard to the amount awarded as damages, this is granted to the members of the class as a whole. Consequently, each member of the class will be entitled to a part of the amount awarded. A clarification has to be made regarding class actions. The "class action" terminology was conceived in the USA litigation, and accordingly, collective actions that correspond to the characteristics of the term only exist in the US. Notwithstanding the foregoing, some jurisdictions have, to some extent, adopted collective proceedings that resemble in some aspects to US-style class actions[112].

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[109] In Greece, the Consumer Protection Law (L.2251/1994) authorizes consumer protection organizations to bring collective claims on behalf of consumers in general against an undertaking infringing the consumer protection rules (Article 10.16). Any amount recovered by this action is made to the organization and will be spent to promote the protection of consumers.

[110] In Brazil after the Public Prosecutor's Office has filed an action to declare the defendant's civil liability, any injured party has to file a claim to qualify as victim (Article 82 of the Consumers Defense Code (Law N° 8.078/90)). If nobody qualifies as a victim, the amount recovered will go to the Found for diffuse Rights. Similarly in Greece, according to Article 10 of the Consumer Protection Law a consumer protection organization may file an action to court requesting a declaratory decision for the right of consumers to recover damages.

[111] In Australia, the Australian Competition and Consumer Commission may bring a collective action for damages on behalf of persons who have suffered loss or damage, provided that those affected are identified in the proceeding and have consented to the proceeding (Section 87(1B) of the Competition and Consumer Act). In Hungary, the Competition Authority may file a civil law suit on behalf of consumers who were injured by a competition law infringement pursuant to Section 92 of the Competition Act. In Peru, the Competition Authority (Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual) has the ability to bring collective actions on behalf of consumers (Legislative Decree 716, Article 51, as amended by Legislative Decree 807 of 1996). The INDECOPI besides has authority to empower any public or private entity to bring collective actions on behalf of consumers (Directiva Nº 001-2003-INDECOPI/DIR sobre Normas para la Intervención de Asociaciones de Consumidores en Procedimientos Administrativos ante la Comisión de Protección al Consumidor y demás Organismos Funcionales del Indecopi (22/07/2003)). The Peruvian Competition Authority's collective action is based in an opt-out system, and it is the duty of the competition authority to distribute the amount of damages awarded to consumers that can prove an injury and a legitimate interest in the claim.

[112] In Australia, a very similar US-Style class action based on an opt-out system has been established in Part IVA of the Federal Court of Australia Act; in Austria, an opt-in class action proceeding is possible under Section 29 of the Consumer Protection Act; in Canada, two or more "identifiable" persons can bring a class action, subclasses may be created where the members have claims that raise common issues not shared by all class members, such that they need distinct representation to safeguard their interests; in Denmark, individual plaintiffs have some kind of class action proceeding to collectively claim compensation; in Finland, the Act on Class Actions allows class actions brought by consumers only –not undertakings, however, since Article 18a of the Act on Competition Restrictions only allows undertakings to sue for damages, it is not clear if the provisions of the Act on Class Actions will apply to actions related to competition law; in Israel, Section 4 of the Class Action Law establishes that injured parties may bring a class action, and also, under some conditions, qualified entities, such consumer associations, on behalf of identified victims; in Italy, Article 140-bis of Law 260/2005 provides for an opt-in class action aimed expressly at the recovery of damages; in Portugal, Article 2 of the Constitution of the Portuguese Republic allows the *acção popular,* which is a kind of opt-out class action for the protection of general interests, such as consumer protection, and consequently, applicable to competition disputes; in

(c) Collective Claims

It is a civil proceeding where a single claim is interposed on behalf of a group of identified or identifiable individuals. The amount of damages granted will be awarded to the group as a whole[113]. Some jurisdictions have proceedings where the court can approve collective settlements, in such cases, the parties that have resolved their dispute out of the tribunals can ask the court to declare the settlement fair and binding[114].

(d) Representative Actions

It is a form of collective action consisting on a single claim which is brought by a representative association on behalf of a group of identified individuals, where the award of damages is granted to the individual members. A representative organization is a foundation or an association which represents the interests of other persons in accordance with the objectives described in its articles of association. This kind of procedure is reserved to actions ending in the award of injunctive relief in some competition law regimes[115]; however, there are also some jurisdictions that allow this kind of proceeding for damages claims[116], or for both kinds of actions[117]. Additionally, representative actions may be reserved to consumers only, given that this kind of actions may be based on consumer protection legislation[118].

(e) Joint Actions

Most jurisdictions allow this kind of civil collective proceeding where individual actions of several plaintiffs are joined by the judge. This kind of proceeding allows several plaintiffs to individually pursue their claims in a single action. In joint actions, the judge hearing the case will decide to join separate claims provided that there is a connecting link between the individual claims. The connecting link may be

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Sweden, the Group Proceedings Act provides for three types of class actions (Public, organizational and private) (Sections 1 and 4-6 of the Group Proceedings Act).

[113] In Australia, any person who has a personal claim may bring a representative proceeding on behalf of other persons according to the Federal Court of Australia Act. In India, Section 53N(4) of the Competition Act establishes that where any loss or damage is caused to numerous persons having the same interest, one or more of such persons may make an application on behalf of other persons interested under the provision of the Code of Civil Procedure. In Korea, Article 53 of the Civil Procedure Act allows multiple claimants to bring together an action for damages. In Spain, pursuant to Article 11(2) of the Civil Procedure Act, a group of identifiable harmed consumers or users may collectively sue for the injury suffered.

[114] This possibility exists in Dutch law and is based on an opt-out mechanism, thus, the settlement will be binding even to non-parties if they did not expressed their desire to opt-out from the settlement (Articles 7:907-910 of the Dutch Civil Code and 1013-1018 of the Dutch Code of Civil Procedure). To see some examples of collective settlements approved by the Amsterdam Court of Appeal, go to: www.shellsettlement.com or www.vediorsettlement.com

[115] Section 14 of the Austrian Act against Unfair Competition provides for a kind of collective action for injunction that may be brought by associations that represent interests which are affected by the infringement of the competition rules. The Czech Commercial Code (Section 54(1)) allows representative actions brought by consumers or undertakings associations seeking injunctive relief. In the Netherlands, pursuant to section 3:305a-c of the Civil Code, collective actions by representative organizations may bring an action for declaration or injunction, but not for monetary relief.

[116] In the UK, pursuant to Section 47B of the Competition Act an action for damages or other sums of money may be filed to the Competition Appeal Tribunal by a specified body on behalf of a group of individually named consumers. Bodies may be specified in an Order made by the Secretary of State pursuant to section 47B(9) of the Competition Act. This kind of actions is restricted to actions where the infringement has already been established by a decision of the OFT, European Commission or Tribunal (follow-on action only). See case: Consumers' Association v JJB Sports (Case No 1078/7/9/07).

[117] In Germany, Section 33(2) of the Act against Restraints of Competition provides that certain associations have standing to bring actions for damages and for injunctive relief.

[118] In Brazil, Article 47 of the Antitrust Law, referring to Article 82 of the Consumer Defense Code, provides for a civil collective action brought by a civil association which objectives are the protection of the rights protected by the Consumer Defense Code. In Croatia, representative actions can be brought under the Consumer Protection Act. In France there is the possibility to bring representative claims by consumers' association. The association must be registered and recognized as representative, moreover, the association has to be mandated by at least two consumers that suffered an injury caused by the same conduct (article L.422-1 of the Consumer Code). In Spain, Article 11 of the Civil Procedure Act provides for a representative action brought by consumers associations involving the protection of the general interests of the consumers and users.

that the separate claims are suited against the same defendant or that the harm caused to the plaintiffs arose from the same infringement. Unlike class actions or collective claims, joint actions are put together only for procedural economy reasons. Hence, when the judge is making his decision, he will manage individually each joined claim and damage award[119].

(f) Assignment of Claims

A group of potential claimants may assign their rights to sue to an unconnected third party who will litigate in its own name for its own account. This is a growing practice where a third party collects the assignments of damages claims of cartels victims and files the action for damages on its behalf against the cartel members[120]. In this kind of actions, the third party holds a previously determined percentage of any recovered amount.

(g) Parens patriae Litigation

It is a kind of collective action brought by public officials, such as the public prosecutor, Ombudsmen, or any other public authority, on behalf of specific individuals[121]. These actions may have some advantages with regard to other collective actions, for instance, in some cases, the public authority will not need to pay court fees or other expenses upfront, plus the losing collective plaintiff is not condemned to pay the legal expenses of the winning party, unless malicious prosecution is proven[122].

6. Fault Requirement

As with other questions regarding the private enforcement of competition law, the fault requirement manifests the interaction between competition law and the general civil rules of liability. Accordingly, the majority of jurisdictions refer the issue of the fault requirement to the general civil provision; however, there are some jurisdictions that have adopted specific competition law provision regarding this matter[123].

To establish the civil liability for damages in competition law cases, most jurisdictions require proof of the existence of an antitrust violation and an injury resulting directly from the infringement in question. Additionally, some legal systems require the existence of fault; this requirement will be fulfilled either by showing intent or negligence on the hand of the violator of the competition provisions. The requirement of fault varies from one legal system to another, in this regard: some jurisdictions require both illegality and fault to successfully claim damages; in others, once the requirement of illegality has

[119] For instance see Section 11 of the Austrian Civil Procedure Act. In Croatia, see Article 196 of the Civil Procedure Act. In the Czech Republic, see Section 112(1) of the Czech Civil Procedure Code. In Spain, see Articles 12 and 72 of the Civil Procedure Act. In the Netherlands, see Chapter 14 of the Dutch Code of Judicial Procedure. In Peru, see the Civil Procedure Code Articles 85 and 89.

[120] For instance, in Germany, Cartel Damage Claims SA, a Belgian company, acquired and got assigned the damages actions for the cement cartel of 29 individual customers and filed an action before the Düsseldorf District Court. For details, visit: http://www.carteldamageclaims.com/German%20Cement

[121] In Austria, an action for injunctive relief may be brought by the Federal Chamber of Labor, the Federal Economic Chamber, and the Presidential Conference of the Austrian Chambers of Agriculture or the Austrian Trade Union Federation, pursuant to Section 14 of the Austrian Act against Unfair Competition. In the US, state attorneys general can bring *parens patriae* actions under 15 U.S.C. §15c, also, under state law, state attorneys general can bring an action on behalf of their citizens.

[122] For instance, in Brazil when the Federal or State Prosecutor's Office files a public collective action for the declaration of the civil liability of the antitrust violator, the Office will not have to pay any expenses or fess up front, and at the end of the proceeding if the Office is not successful in its claim it cannot be ordered to pay the legal expenses of the prevailing party.

[123] For instance, Section 33(3) of the German Act against Restraints of Competition provides the right of compensation for any injury caused by the infringement of competition law that has been committed negligently or by willful act.

been fulfilled by finding the infringement of competition law, the fault element is automatically presumed; finally, in some jurisdictions liability may also exist where there is fault even in the absence of an unlawful conduct, in such cases the violation is in itself considered to establish fault.

In the first scenario, apart from a proven infringement of the competition rules, the presence of fault on the side of the perpetrator is required in order to establish the civil liability of the defendant. As a consequence, the plaintiff will have to demonstrate that the infringement from which the harm suffered arose was committed negligently or intentionally by the defendant[124]. In some countries this has to be generally established in relation to the infringement of the competition provisions[125], while in others, the fault has to be proven with regard to the effects of the infringement[126].

In second scenario, the element of fault is presumed if illegality is shown. Hence, there is a rebuttable presumption regarding the fault requirement whenever there is a proven infringement of the competition rules. In such cases, the burden of demonstrating the fault element is reversed to the defendant, therefore, the defendant will be able to absolve himself from any civil liability by proving that it did not act intentionally or negligently[127]. In these regimes, the presumption of fault is a way to facilitate private enforcement of competition law, provided that the claimant is relieved from the burden of proving fault.

In the third scenario, the violation of the competition rules (illegality) will suffice to determine that the perpetrator acted with fault[128]. Consequently, the finding of an infringement of the competition provisions, either by a competition authority or by a court declaration, will presuppose *ipso facto* that the fault requirement is satisfied[129]. In these legal systems, the antitrust infringement constitutes fault by itself, provided the serious consequences of the latter[130].

III. RULES OF EVIDENCE

There are mainly two issues related to the rules of evidence in antitrust private actions for damages. The first is who bears the burden of proof, and the second is what has to be proven to successfully bring an action for damages. As to the first issue, it is widely accepted that it is the plaintiff who bears the burden

[124] In Greece, the plaintiff has to prove the existence of fault, whether intentional or negligent, on the part of the defendant (Articles 914 and 330 of the Greek Civil Code).
[125] See Section 33 of the German Act against Restraints of Competition.
[126] See Article 33(1) of the Swedish Competition Act.
[127] In Austria, it is the plaintiff who has to prove the anticompetitive behavior, damage, causation and fault, nonetheless, the burden of proof is reversed with respect to the fault requirement in cases where the defendant has violated contractual obligations or an act with protective effect, such as the competition rules (Section 1311 of the Austrian Civil Code). In Lithuania, the defendant's fault is presumed when the latter's conduct has been declared unlawful; nonetheless, this presumption is rebuttable (Article 6.248(1) of the Civil Code).
[128] The Japanese approach is based on the strict liability of the perpetrator. Pursuant to Section 25(b) of the Japanese Antimonopoly Act, the violator of the competition provisions may not be exempted of its civil liability by proving the non-existence of intention or negligence on its part. Similar is the situation in the Czech Republic that follows the strict liability approach (Commercial Code Sections 373-386).
[129] The European Commission in the Opinion 11 of its Green Paper on Damages determined that proof of the infringement should be sufficient to determine the liability of the defendant. Similarly, the ECJ in the *Manfredi* case (*supra* note 37) established the constitutive conditions of individual civil liability without making any reference to the fault requirement.
[130] See the Commission Staff Working Paper, Annex to the Green Paper on Damages (*supra* note 85), at paragraph 109.

of proof in actions for damages[131]. Regarding the second issue, widely speaking, most jurisdictions require the plaintiff to prove: the competition law infringement, the injury suffered, and the causal link between the infringement and the injury. However, this list is by no means exhaustive, provided that some competition law regimes may additionally require other facts to be proven in order to award damages.

1. Burden of Proof

Traditionally, the fact that the burden of proof is borne by the plaintiff has been considered a serious obstacle for the private enforcement of competition law[132]. Along with the high standard of evidence required by most competition law regimes, these heavy tasks imposed on private plaintiffs have impeded the proliferation of damages claims for the infringement of the antitrust provisions almost around the world[133]. Moreover, this situation worsens in stand-alone cases given that the plaintiff cannot rely on the previous findings of the competition authority to support its claim.

For the reasons stated above, some competition law regimes have, in some ways, alleviated the burden of proof imposed on the plaintiff. Therefore, some of these regimes have opted to establish legal presumptions as a manner of relieving the plaintiff from such a demanding duty. Others have instituted the concept of *prima facie* case or evidence as a way of reducing, in principle, the load of evidence required from the plaintiff. Additionally, some jurisdictions have included situations that lead to a reversal of the burden of proof. Finally, the burden of proof required from the plaintiff may be lowered depending on the type of anticompetitive conduct and on the legal provisions on which these actions are grounded.

(a) Legal Presumptions

Regarding the alleviation of the burden of proof, as stated before, some competition law regimes have established legal presumptions that work as a way to decrease the load imposed on the plaintiff. For instance, in some jurisdictions the fault requirement is presumed, in those regimes, the unlawful conduct of the defendant will automatically presume fault[134]. Moreover, some competition law provisions establish legal presumptions with regard to amounts or figures that otherwise would have to be calculated by the parties in the proceeding, such as, the market share of a dominant undertaking or the price increased by the anticompetitive conduct. The reason for the establishment of such presumptions is that the calculation of those elements, especially in competition law matters, might constitute a very overwhelming task for private plaintiffs[135]. Additionally, some competition law regimes have introduced a legal presumption by which harm is presumed if a dominant undertaking offers goods or services bellow its cost price unless the defendant provides an objective justification[136]. Finally, there are antitrust

[131] For example, at the European Union's level, Article 2 of Regulation 1/2003 establishes that the burden of proving an infringement of the competition rules rest on the party alleging the infringement.
[132] See the Commission Staff Working Paper, Annex to the Green Paper on Damages (*supra* note 85), at para 33.
[133] With few exceptions like the 10 to 1 rate in the US.
[134] See Section II. 6. above.
[135] For instance, Section 10(3) of the Czech Competition Act establishes that it is presumed that an undertaking that has less than 40% of market share in the relevant market is not dominant. Additionally, Section 88(c) of the Hungarian Competition Act establishes a legal presumption in cases related to hard-core cartels, in such cases, it will be presumed that the infringement has raised the prices by 10%.
[136] See Section 20(4) Sentence 2 of the German Act against Restraints of Competition.

provisions that establish rebuttable presumptions regarding to the authorship of certain documents in a proceeding grounded on the competition rules[137].

(b) Prima Facie Evidence

As to the *prima facie* evidence, some jurisdictions have instituted this legal concept in order to lower, in principle, the burden of proof borne by the plaintiff. In such cases, in principle, it will be sufficient for the claimant to prove a determined fact within the sphere of the defendant in order to discharge his burden of proof, which then turns into the defendant to disprove. The most common case is that where a competition authority has declared that a certain conduct constitutes an infringement of competition law. Thus, in follow-on actions for damages the competition authority's declaration will be considered by civil courts as *prima facie* evidence of an antitrust violation, and as a result, the plaintiff will no longer have to prove that the defendant's conduct resulted in a violation of the competition provisions[138]. In other legal systems, private plaintiffs will be able to rely on judgment or decree in a preexisting civil or criminal action by the government and use it as *prima facie* evidence of an antitrust violation[139].

(c) Reversal of the Burden of Proof

There are also competition law regimes that have introduced situations that lead to a reversal of the burden of proof as a way to incentive private claims. Those situations may take place, for example, when the burden of proving that the defendant acted intentionally or negligently is turned to the defendant. A similar scenario may occur in cases concerning the abuse of dominance; here the competition provisions shift the burden of proof to the alleged dominant undertaking[140]. Moreover, in competition law regimes that provide for some kind of exemption to prohibited practices provided that those conducts produce more desirable effects than harm to competition, the burden of proof will shift to the defendant who will have to show that its conduct shall be exempted from the application of the competition provisions due to its desirable effects[141].

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[137] Section 12 of the Irish Competition Act establishes a list of legal presumptions regarding the authorship of documents that applies both for civil and criminal proceedings.

[138] In this respect see Section 43 of the Israeli Competition Act, according to which the infringement declaration issued by the Israeli Antitrust Authority is considered as *prima facie* evidence.

[139] In Australia, private plaintiffs can rely on the findings of facts made by a court as *prima facie* evidence of those facts pursuant to Section 83 of the Trade Practices Act. Additionally, Section 33(4) of the German Act against Restraints of Competition establishes that whenever there is a final decision made by the cartel authority, the European Commission, or the competition authority –or court acting as such- in another Member State of the European Community, declaring the infringement of the German or EU competition provisions, the court will be bound by such decision. In the US, Section 5 of the Clayton Act relieves private plaintiffs of having to prove the infringement on the antitrust rules by allowing them to introduce as *prima facie* evidence in their actions for damages a judgment or decree obtained from a successful government antitrust case against the same defendant.

[140] In Austria, pursuant to Section 5(2) of the Austrian Cartel Act, the dominant undertaking has to prove the absence of below cost pricing. In Germany, in cases related to the abuse of a dominant position the burden of proof of a justification is shifted to the defendant (Section 20 of the Act against Restraints of Competition). In Estonia, the Supreme Court has determined that in abuse of dominant position cases, the challenged undertaking has to prove that its activities are in compliance with the competition provisions (Case No 3-3-1-66-02).

[141] At the EU level, the provisions of Article 101(3) of the TFEU (ex Article 81(3) TEC) establish that the competition provisions of the act shall not a apply to agreements and concerted practices which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. In such cases, according to Article 2 of Regulation 1/2003, the undertaking or association of undertakings claiming the benefit of Article 81(3) shall bear the burden of proving that the conditions of that paragraph are fulfilled.

(d) Burden of Proof Depending on the Type of Challenged Conduct and Legal Provisions

Finally, the burden of proof in competition law matters may vary depending on the type of anticompetitive conduct and on the legal provisions on which these actions are grounded. In the first case, some competition regimes may require a lower standard of proof in cases related to anticompetitive conducts that are unlawful by its object, given that such conducts are deemed so harmful to competition that they are intrinsically unlawful without the need to assess their effects on the market – price-fixing, bid-rigging, or market and customer allocation[142]. In the second case, the burden of proof laid on the plaintiff will be minor if its claim is grounded on specific competition provisions, conversely, if its action is based on general provisions the burden of proof may be heavier[143].

2. Standard of Proof

Regarding the standard of proof, most civil law countries do not have established concepts regarding the standard of proof like the ones forged in common law jurisdictions. Furthermore, most countries do not have provisions regulating the standard of proof for cases related to the infringement of the competition rules. As a result, in those countries, general civil standards will apply.

On the one hand, in common law countries, there are general definitions regarding the standard of proof, such as: *"preponderance of evidence"*, *"balance of probabilities"* or *"preponderance of probabilities"*, and *"beyond all reasonable doubt"*. These general definitions have been transposed to competition law litigation as they are frequently used by common law courts in competition law related matters. The first three (*preponderance of evidence, balance of probabilities* and *preponderance of probabilities*) are associated to private actions for damages, while the third one (*beyond all reasonable doubt*) is used in antitrust criminal proceedings. This differentiation is given by virtue of the nature of the proceedings and the remedies sought by the plaintiff in each kind of action[144]. Despite the preceding, some civil law countries have adopted the common law definitions in some ways, nonetheless, even in its broadest sense; these are not fully equivalent to the standard of proof required in most common law countries[145].

On the other hand, in civil law countries, there are no specific definitions for the standard of proof. Nonetheless, the vast majority of civil law jurisdictions have furnished a standard of proof that

[142] In the US, these kinds of practices are deemed to be illegal *per se*; consequently, courts have declared that these practices always or almost always tend to restrict competition. In these cases, the plaintiff will only have to prove the existence of the conspiracy to establish that the practice restricts trade. Conversely, in claims against vertical price-fixing, exclusivity arrangements, boycotts, tying, etc., the illegality of the conduct will be measured through the "rule of reason" test. In such cases, the plaintiff will have to prove that the practice has unreasonably restricted competition. Similarly, in Switzerland, according to Section 5 of the Cartel Act price fixing agreements, agreements that reduce the quantities of goods or services to be produced, and agreements to allocate markets are presumed to lead to the elimination of effective competition.

[143] For instance, in Korea if the plaintiff bases its claim on the provisions of the Civil Code, he will have to prove: the existence of the infringement, the defendant's intentionality or negligence, the illegality of the conduct, the existence of harm, and the causal link between the infringement and the injury. However, if the plaintiff grounds its claim on the provisions of the Monopoly Regulation and Fair Trade Act, it will be relieved from proving the defendant's intentionality or negligence (Article 56 of the MRFTA).

[144] In Australia, Canada, Ireland, Singapore, the UK and US (India does not have criminal provisions for the infringement of competition law), when the public authority is enforcing the competition rules in criminal proceedings it has to prove the facts of its allegation *"beyond all reasonable doubt"*. In the same countries, when the competition rules are enforced by private plaintiffs in civil proceedings, they will only have to prove their allegations under the *"preponderance of evidence"* (US) *"preponderance of probabilities"* (India) or the *"balance of probabilities"* standards (Australia, Canada, Ireland, Singapore and the UK).

[145] For instance, in Greece the plaintiff will have to prove beyond reasonable doubt the existence of breach, the damage suffered and the causal link.

requires, in a broad sense, that the plaintiff wins the conviction of the judge handling the case. Additionally, some civil law countries have introduced its own terminology regarding the standard of proof required in civil law claims, such as: *"proven"* or *"shown"* (Sweden), *"almost certainty"* (Latvia), *"no reasonable doubts"* (Lithuania), *"entire conviction"* (Luxembourg), *"plausible"* (Netherlands), *"practical certainty"* (Poland).

3. Admissible Forms of Evidence

As with other procedural issues related to the private enforcement of competition law, the admissible forms of evidence are governed by general civil provisions. These general provisions vary widely among jurisdictions; however, some general observations can be made about the forms of evidence.

The first differentiation that can be made regarding the admissibility of evidence is concerned with the forms of evidence available. In this regard, in some jurisdictions the party who bears the burden of proof is restricted to an exhaustive list of forms of admissible evidence[146]. Conversely, in other jurisdictions, the party who bears the burden of proof is not limited by the form of evidence that can be presented in the proceeding[147]. Additionally, there are countries that provide for a non-restrictive list of forms of evidence allowed, thus, the party who bears the burden of proof will be allow to present other forms of evidence besides the ones expressly stated in the concerned provisions[148]. Finally, some jurisdictions may provide for a list of forms of evidence which are not allowed before courts[149].

Widely speaking, the most common forms of evidence permitted by courts are: (i) documents, either public or private; (ii) electronic documents; (iii) material evidence; (iv) cross-examination; (v) confessions or statements made by the parties; (vi) questioning of witnesses; (vii) experts opinions; (viii) affidavits; (ix) reports and statements of competent bodies, individuals or legal entities; and (x) judicial inspections.

In some jurisdictions, there is a hierarchy regarding the forms of evidence available. In this sense, some jurisdictions attribute greater evidential value to certain forms of evidence. In most countries where such a differentiation exists, documental evidence forms the backbone of the evidence adduced by the parties in the proceeding[150]. The term "document", however, has been given a wide interpretation by most legislations and courts, and as a consequence, it may include all notes, records, tapes, electronic media or anything on which evidence or information is recorded in an intelligible manner. Additionally, live testimonies may be preferred over written statements in some jurisdictions[151]. Finally, in some jurisdictions, written evidence may have a higher evidential value than verbal testimonies[152].

[146] Estonia, France, Germany, Greece, Italy, Latvia, Switzerland.
[147] Austria, Belgium, Canada, Cyprus, Czech Republic, Denmark, Finland, Hungary, India, Ireland, Japan, Korea, Lithuania, Luxembourg, Malta, Mexico, Netherlands, Poland, Portugal, Slovenia, Slovakia, Sweden, UK, Ukraine, US.
[148] See the Argentinean Civil and Commercial Code (Sections 387 to 480) which establishes a non-restrictive list of forms of evidence. See also Article 299 of the Spanish Civil Procedure Act.
[149] See Section 56 of the Australian Evidence Act.
[150] Belgium, France, UK.
[151] In Sweden, the evidential value of live testimonies is higher than any written statement, moreover, written statements will only be allowed under certain circumstances (See Chapter 35 of the Code of Judicial Procedure).
[152] Belgium and Luxembourg.

4. Disclosure of evidence

In practice, antitrust litigation is conventionally fact-intensive. As a consequence, the burden of proof borne by private plaintiffs in competition cases is one of the main obstacles for the proliferation of this kind of actions, provided that the plaintiff has to sufficiently prove to the court the infringement of the competition rules, the harm suffered and the causal link. A particularity of antitrust litigation is the existence of an asymmetry with regard to the information held or known by the litigating parties, as a result, it is a laborious endeavor for the plaintiff to produce all the necessary evidence in order to sustain its claim due to the fact that most of the relevant information is usually concealed and in the possession of the defendant or of third parties, and in most cases, the plaintiff does not even know of its existence.

It has been argued that the lack of mechanisms that facilitate the collection of all the relevant evidence is one of the main impediments to bring private damages actions for the infringement of the competition rules[153]. This scenario worsens in stand-alone actions, given that in such actions, the plaintiff cannot rely on the previous findings of the competition authority, and therefore, the burden of proof on the plaintiff is even heavier. On the other hand, in jurisdictions where the litigating parties have broad rights to demand the disclosure of evidence, the discovery process can be abused with the purpose of prolonging the case for strategic reasons, to gain access to confidential information, and to impose unjustified costs on a party[154].

The general framework concerning the gathering of evidence in private actions for damages in competition law cases can be divided in two. On the one hand, there are the civil law countries; in these countries the parties have limited powers to compel the other party or third parties to produce relevant evidence. However, in most cases, the parties may request the judge to order the other party or third parties to disclose the requested evidence. On the other hand, there are the common law countries, where disclosure is almost entirely conducted by the parties with minimal intervention of the judge. Unlike in civil law countries, under this system the parties are under the obligation to produce all relevant evidence without a formal requirement of the other party.

(a) Disclosure in civil law countries

In civil law countries the parties requiring the production of evidence rely on the judge who is entitled to demand the disclosure of evidence from the other parties. Thus, in most of these countries, the disclosure of relevant evidence can be made at the request of one of the parties in the litigation, or the production of evidence can also be ordered *ex officio* by the judge[155], however this situation rarely occurs[156].

[153] Considering the low number of actions where damages were claimed in the EU, the Commission assigned a study to the law firm *Ashurst* in 2004 (Ashurst Report, *supra* note 3). The study has a comparative description of the legal obstacles for antitrust victims to recover the damages suffered by virtue of the infringement. Regarding the access to evidence, the Report established that the fact that in most Member States parties are not under the obligation to produce relevant information is a clear obstacle to private actions for damages. See pages 4 and 5 of the Report.

[154] WITHROW, J.R. & LARM, R.P. (1976), 'The "Big" Antitrust Case: 25 Years of Sisyphean Labor'. 62 *Cornell Law Review,* 1, pp. 26-28.

[155] In Germany, see Section 142 of the Civil Procedure Code. In Turkey, see Article 75(3) of the Code of Civil Procedure.

[156] In most civil law countries, judges apply the *actori incumbit probatio* principle, by virtue of this principle; courts will rarely order other parties to summit requested evidence.

The most determinant element when requesting the production of evidence is the level of specification or identification of the requested documents. Depending on the jurisdiction, the requesting party will have to specify with more or less detail the documents it seeks to obtain from the other party. At the end of the spectrum, there are the most stringent jurisdictions, which demand that the requesting party specifically identifies the document that is requesting to the other party[157]. However, the identification requirement varies among jurisdictions and some countries may be more lenient in this aspect. Finally, some other requirements may be demanded before awarding an order for the disclosure of requested evidence. For instance, some jurisdictions may require that the requesting party must have a legitimate interest in obtaining the evidence and that documents in question concern a legal relationship[158].

Irrespective of the level of identification demanded to the requesting party seeking the production of a determined document, the decision to whether or not grant an order for the disclosure of the documents will ultimately rely on the judge's discretion. In most jurisdictions, the judge will only grant an order for disclosure once he has evaluated the relevance of the document and its connection with case, and when he considers that there is not another way to obtain the requested document that is more convenient, less burdensome, or less expensive.

The scope of an order to disclose evidence awarded by a court includes the parties in the proceeding, third parties who might have relevant information concerned with the case[159] and even public bodies, such as a competition authority[160]. Further, the scope of the order is not limited to the documents that are under the possession of the requested parties, but extents to documents to which the requested party has a legal right of access.

The disclosure mechanisms established in civil law countries, where the plaintiff only has limited power to compel the production of evidence, induces the plaintiff to depend on the voluntary cooperation of the requested party, or to seek the uncommon intervention of the courts, and as a consequence, have been deemed insufficient for the purpose of gathering evidence in competition law cases. Subsequently, the difficulty of obtaining evidence in civil law jurisdictions has been identified as one of the major obstacles to private actions for damages for the infringement of competition law[161].

The problem with these procedures of disclosure is that in most jurisdictions, the requesting party has to identify, almost precisely, all documents demanded to the courts, and since in most antitrust cases, especially hard-core violations, all incriminating information will be hidden and in possession of the defendant, it is very difficult for the plaintiff to extensively identify that kind of evidence provided that, generally, the plaintiff will not even be aware of the existence of the most incriminating documents.

[157] In Germany, see Section 422 of the Civil Procedure Code. In France, see Article 142 Civil Procedure Code. In Spain, see Articles 256 and 328 of the Civil Procedure Act.
[158] See Article 843(a) of the Dutch Civil Code of Procedure.
[159] See Article 139 of the French Civil Procedure Code.
[160] In France, the court can request the production of documents held by public bodies such as the French Competition Authority pursuant to Article 11 of the Civil Procedure Code. The same happens in Sweden according to Chapter 38 of the Code of Judicial Procedure.
[161] See pages 4 and 5 of the Ashurst Report (*supra* note 3).

On the contrary, the argument in favor of this high degree of identification is that by raising the level of specification, all unmeritorious claims and fishing expeditions[162] will be avoided.

Moreover, with regard to the authority of judges to order the production of certain evidence requested by a party to the proceeding, courts will rarely use its power to *ex officio* request relevant information, especially in jurisdictions where the courts apply the *actori incumbit probatio* principle (on the plaintiff rests the proving), and as a result, the courts will only asses the evidence produced by the parties in the proceeding when deciding on the case.

From the evidenced above, the disclosure mechanisms of civil law countries are considered to be insufficient to gather all the necessary information to sustain a private damages action for the infringement of the competition rules. In that sense, some suggestions have been made in order to overcome this obstacle, such as: the creation of specialized courts that are better suited to handle competition cases[163], the availability of gaining access to the files of the competition authority[164], and some kind of court controlled discovery procedure[165].

(b) Disclosure in common law countries

In common law countries, apart from the general duty of disclosing relevant information and the authority vested on the judges to order the production of specific documents, the parties in the proceeding can obtain evidence through pre-trial discovery. Pre-trial discovery is conceived as the pre-trial compulsory disclosure of all relevant documents to the case. During the discovery process, the parties may request the disclosure of and inspect any information from the other party with regard to the facts in the case. The discovery procedure also covers the information possessed by third parties; nevertheless, this kind of discovery is usually more restricted.

The scope of the discovery process varies among jurisdictions. Some common law countries have a very broad scope, given that the parties to a civil lawsuit are under the obligation to disclose all relevant evidence without awaiting a discovery request from the other party[166]. Furthermore, the parties may obtain discovery regarding any matter, which is not protected, that is relevant to the claim or defense of a party in the litigation, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter[167].

The amount of documents than can be disclosed through the discovery process may be broader depending on the jurisdiction. For instance, some countries may require that the parties in the proceeding disclose all the documents on which they rely on, and also those documents which either adversely affect

[162] The term "fishing expedition" describes a strategy to obtain evidence in an unfocused manner, through very broad discovery requests, from another party in the hope that some relevant evidence for a damages claim might be found.
[163] OECD (2007), p. 133.
[164] See Option 6 of the Commission Staff Working Paper, Annex to the Green Paper on Damages (*supra* note 85).
[165] At the EU level, the White Paper on Damages (*supra* note 3) established a form of court-ordered discovery based on fact-pleading, in this procedure the plaintiff will expose the relevant facts in detail and present all the available evidence supporting his allegations (pages 4 and 5). This proposal is resembles the approach of the Intellectual Property Directive (Directive 2004/48/EC).
[166] See Rule 26(a)(1) of the US Federal Rules of Civil Procedure.
[167] See Rule 26(b)(1) of the US Federal Rules of Civil Procedure.

their own case or the other party's case, or even the ones that support another party's case[168]. Moreover, the discovery process may not be restricted to only documents under the physical possession of the requested party, but may extent to documents that have been under the control of the requested party in the past, or documents that the latter had a right to possession, or a right to inspect or take copies[169].

Other jurisdictions have restricted a bit more the discovery process. For instance, in some countries, the parties in the proceeding may only request documents that are relevant to the matters in dispute and that their disclosure is necessary to dispose fairly of the case or to minimize costs. In such cases, the requesting party will have to specify the precise category of documents demanded and the reasons why they are required[170]. Another restriction occurs in jurisdictions where there is not automatic discovery, thus, the obligation to disclose can only be ordered by the court[171].

With regard to non-party discovery, usually this kind of disclosure is stricter than inter-party discovery, thus, discovery against third parties or public authorities who are not directly involved in the proceedings will normally be more restricted[172]. Likewise, in some countries, non-party discovery will only happen after it has been ordered by the court[173]. Finally, in the more stringent jurisdictions, non-party discovery may not be permitted at all[174].

Finally, common law pre-trial discovery has its own drawbacks. It has been argued that this kind of procedure can be expensive and time consuming, provided that the parties will have to spend a lot of time and resources on producing all the documents to the other party[175], additionally, it also may impose an overly broad and burdensome disclosure obligation on the litigating parties [176]. Furthermore, the introduction of pre-trial discovery should not be regarded as the panacea that will eliminate the obstacles faced by victims of the competition law infringement seeking compensation for the harm suffered in civil law countries, provided that only in one common law country with pre-trial discovery (USA) the number of private enforcement actions is significantly higher with respect to other countries that have similar disclosure procedures[177].

5. Limits of disclosure

In most jurisdictions there are some limitations for the production of evidence in damages actions for the infringement of competition law. In such cases, a party may refuse to disclose certain evidence provided

[168] See Rule 31.6 of the UK Civil Procedure Rules. In the process of disclosure, the parties are required to conduct a "reasonable search" for the documents concerned (Rule 31.7 of the Civil Procedure Rules).
[169] Rule 31.8 of the UK Civil Procedure Rules.
[170] This is the situation in Ireland.
[171] In the UK, discovery is restricted to what is necessary in the individual case, observing the overriding objective of handling cases justly (Rule 1.1 of the Civil Procedure Rules). In the UK there is not automatic discovery, however, in practice; the parties in the litigation will agree disclosure among themselves, provided that the court will order it anyway.
[172] In Ireland, non-party discovery is more restricted than inter-party discovery, and the judge has authority to refuse an order for non-party discovery.
[173] See Rule 31.17 of the UK Civil Procedure Rules, according to this rule, the Office of Fair Trading may be requested to provide certain documents.
[174] In Cyprus, there is no non-party discovery. However, third parties may be ordered by the court to disclose relevant information during the trial.
[175] See the Commission Staff Working Paper, Annex to the Green Paper on Damages (*supra* note 85), at para 56.
[176] See the Commission's White Paper on Damages (*supra* note 3), at page 5.
[177] OECD (2007), p. 133.

that such information may be protected by virtue of the professional secrecy privilege, the protection of trade secrets, or when it is part of an administrative/public proceeding.

(a) Professional secrecy

The professional secrecy is a legal privilege that protects communications between a professional legal adviser and its clients from being discovered where these contain confidential information supplied by a client to its legal adviser, or advice supplied by the latter to its clients[178]. The main purpose of this legal principle is the protection of the confidentiality of certain communications[179], like: lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, or the identity of an informer[180]. The importance of the protection of such communication is fundamental to guarantee a fair access to the judicial system, and has even been recognized by the Constitutions of some countries[181].

In practice, the scope of this legal principle varies from one jurisdiction to another. The main point of divergence related to the professional privilege is the extent of the protection conferred by this privilege. In jurisdictions where the professional privilege has a wide angle of protection, all disclosure will be protected by the professional secrecy privilege, in such cases; all privileged information will be safe from disclosure. For instance, in some jurisdictions, attorney-client communications will not be disclosed even if they are contained in the records of public authorities[182], moreover, a party may even claim the professional secrecy privilege as an objection to interrogatories, requests for admission, depositions, or a court may quash or modify a subpoena whenever the disclosure of privileged information is being required[183].

Some jurisdictions differentiate legal assistance from legal advice with respect to whether or not apply the professional privilege. The former, would concern the instructions from a legal adviser on how to complete a legal mortgage, which will not be protected by the professional privilege if they are not related to the conduct of litigation[184]. And the latter, will be protected by professional privilege, given that it is presumed that when an individual seeks legal advice he is more prone to litigate[185].

Finally, some countries provide that only the communications between independent attorneys and its clients will be protected by the professional privilege, and conversely, the communications sustained by an in-house attorney and its client will not be covered by the professional secrecy

[178] See Rule 26(b)(1) of the USA Federal Rules of Civil Procedure, which states that the parties may gain through discovery any *non-privileged* matter.
[179] *Perrigon v. Bergen Brunswig Corp*., 77 F.R.D. 455, 458 (D.C. Cal. 1978).
[180] Rule 501 of the US Federal Rules of Evidence.
[181] In Spain, attorney-client communications are privileged according to Article 24 of the Spanish Constitution. The Spanish Competition Authority acknowledged this in its Decision of July 22, 2002, *Pepsi-Cola v. Coca-Cola,* exp. R508/02. See also Article 2 paragraph 18 of the Peruvian Constitution.
[182] In the US, pursuant to the Freedom of Information Act, a party in a proceeding has the right to make a request seeking all relevant public information contained in the administration records. However, privileged information, such as attorney-client communications are protected from being disclosed in such a manner (5 U.S.C. §552(B)(4)).
[183] See Rules 33(b)(4), 36(a)(1), 26()(1) and 45(c)(3)(A) of the USA Federal Rules of Civil Procedure.
[184] See Irish case law: *Smurfit Paribas Bank Ltd. V AAB Export Finance Ltd* [1990] 1 IR 473.
[185] See Irish case law: *Smurfit Paribas Bank Ltd. V AAB Export Finance Ltd (No 2)* [1991] 2 IR 19.

privilege[186]. Nevertheless, in some countries, the clients of in-house attorneys may claim legal privilege concerning their communications with those attorneys[187].

(b) Trade secrets

A party in a proceeding may also refuse to disclose certain evidence, provided that such information is considered to be a trade secret[188]. The extent to which disclosure can be refused based on the protection of trade secrets also varies among jurisdictions. In some countries, only third parties may refuse to disclose evidence on the grounds of trade secrets protection[189]. In other countries, the court may decide to held, the whole or parts of, the hearing behind closed doors for the purpose of protecting trade secrets from being revealed[190]. The level of protection differs depending on what kind of documents may be refused from disclosure: some may protect only trade secrets or information on the structure of competitors[191], while others may cover technical work equipment and working methods[192]. Finally, in some jurisdictions, the disclosure of trade secrets is entirely up to the discretion of the court[193], and in some cases, the parties to a proceeding may not refuse to produce certain evidence based on trade secret protection[194].

(c) Privileged information in public documents

Some documents contained in public records may also be exempted from disclosure given that they may be privileged or may contain sensitive information, e.g. trade secrets about a party in a civil procedure[195]. In such cases, the request for disclosure will be sent to the public body holding the information –patent office, competition authority, or any other public authority. With regard to the access to public documents a bunch of countries have specific regulations concerning the access to information hold by public bodies[196]. Since the nature of such information is considered to be public, in theory, it should be accessible to any citizen, in some cases including foreigners[197], who requires it. However, there are exceptions to the duty of disclosure of public documents which may be based on legal privilege, the protection of trade secrets, or the principle of secrecy of criminal investigations, among others.

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[186] In Sweden, the Stockholm City Court determined that an independent foreign attorney (from Scotland) was protected by legal privilege (Ä 10773-03, *Konkurrensverket v. Nynäs AB et al.,* July 14, 2003). This is also the position at EU level (Joined cases T-125/03 and T-253/03, *Akzo Nobel Chamicals Ltd and Akcros Chemicals Ltd v. Commission of the European Communities* [2007] ECR II-03523).

[187] Ireland.

[188] Under Article 843 of the Dutch Civil Code of Procedure, a party in a proceeding may request the production of certain documents, unless these are considered trade secrets. Moreover, in Sweden the disclosure of trade secrets is protected by the Act on Protection of Trade Secrets. In the US a party may refuse to disclose trade secrets information pursuant to Rule 26 of the Federal Rules of Civil Procedure. In the UK, in proceedings before the Competition Appeal Tribunal, the latter may be prevented from disclosing business secrets (CAT Rule 53).

[189] See Section 142(2) of the German Civil Procedure Code.

[190] In the US, the court may order a party who is refusing to produce certain evidence to disclose the documents to the court in camera, in order to determine if those documents may be withheld from disclosure on grounds of privilege (*Privilege,* in the sense of Rule 501 of the Federal Rules of Evidence. Similar is the situation in Denmark where the court may hold the hearing behind closed doors to protect trade secrets.

[191] France.

[192] Germany.

[193] In Israel, the court will disapprove the disclosure of trade secrets whenever it may affect the competitive environment.

[194] Cyprus, Estonia, Italy, Malta, Portugal.

[195] For instance, in Spain pursuant to Article 42 of the Competition Act, all confidential documents in the antitrust procedure are exempted from being disclosed in court.

[196] For example, in the US the Freedom of Information Act (5 U.S.S. §552 (2000 & Supp. IV 2004)); in France, Law of 17 July 1978 (Loi n078-753 du 17 juillet 1978 portant diverses mesures d'amelioration des relations entre l'administration et Ie public et diverses dispositions d'ordre administratif, social et fiscal); or in Sweden the Publicity and Secrecy Act.

[197] In Sweden, any individual, including foreigners, may access information held by public institutions thanks to the constitutional principles guaranteeing public access to information.

With regard to the disclosure of information held by the competition authorities, most of them will refuse to provide to civil courts sensitive information obtained in a prior investigation or public proceeding about a party now litigating in a civil dispute[198]. Additionally, the competition authorities are generally reluctant to provide confidential information provided by the defendant in a leniency application[199]. This is mainly because the disclosure of information acquired by the competition authority via leniency applications can severely affect the effectiveness of leniency programs, as potential applicants will be discouraged to come forward and report the cartel[200].

6. Sanctions for the failure to disclose

In most countries a party that refuses to disclose requested evidence is subject to penalties. The sanctions that may be imposed range from financial penalties to imprisonment in the more stringent jurisdictions.

Even in common law countries, which characterize for having broad pre-trial discovery procedures, where the parties conduct most of the process without the intervention of the judge, there are some mechanisms to compel the refusing party to produce the evidence required. In those cases, the court may first require that the parties meet to try to reach a mutually agreeable solution, if the parties request the intervention of the court via a motion to compel discovery without meeting previously, the court can deny the motion on that basis alone[201]. If after meeting the parties cannot reach an agreement, then the court will grant a motion to compel if it considers that the refuse to disclose is not substantially justified. Furthermore, if the compelled party does not produce the requested evidence after being ordered by the court, then the court may impose a series of sanctions on the non-complying party[202].

The most common penalty for the failure to disclose requested evidence is monetary sanction. The monetary sanctions may be imposed on the parties to the proceeding[203], to third parties that were requested to produce certain evidence[204], and additionally, against the party's attorneys[205]. Moreover, the financial penalties may take different forms, such as fines, payment of damages or periodic penalty payments[206].

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[198] In Peru, Article 32 of the Antitrust Law determines the obligation of the competition authority of keeping confidential any sensitive information gathered during its investigation. In Switzerland, according to Articles 25 and 40 of the Cartel Act, the competition authorities are bound by professional secrecy, thus, the information collected in the performance of their duties can only be used for the purpose of the investigation.

[199] The French Competition Authority established in its 2005 annual report that the effectiveness of leniency programs would be affected by the disclosure of privileged information and business secrets when required by courts (Annual Report 2005, *Etude thématique*, p. 145).

[200] For additional information on the protection of documents contained in leniency applications, please see Chapter Two, Section IV.6. Additionally, for information about the disclosure of leniency applications in follow-on civil procedures, please see Section VIII.4, below.

[201] Rule 37(a)(1) of the US Federal Rules of Civil Procedure. See also *Use Techno Corp. v. Kenko USA, Inc.,* No 06-02754, 2007 WL 3045996 (N.D. Cal. Oct. 18, 2007).

[202] Pursuant to Rule 37(b) of the US Federal Rules of Civil Procedure, the judge may impose a variety of sanctions on the requested party: (1) consider the matters or facts that were the subject of the order compelling discovery to be established for the purposes of litigation; (2) prohibit the non-compliant party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence; (3) strike pleadings in whole or in part; (4) stay proceedings until the order is complied with; (5) dismiss the action in whole or in part; (6) render default judgment against the non-compliant party; (7) consider as contempt of court the failure to comply with the order.

[203] Hungary, Latvia, Lithuania, Poland, Portugal, Slovakia, Spain, Sweden.

[204] Belgium, Czech Republic and Denmark.

[205] Rules 37(b)(2)(c) of the US Federal Rules of Civil Procedure.

[206] France and Estonia. Also in Germany but only when disclosure is demanded from a third party.

In the most stringent jurisdictions, the courts may sanction a party that refuses to comply with a disclosure order: with imprisonment (only third parties)[207], commit them to legal custody (only third parties)[208], or order a writ of attachment against them[209]. Moreover, some courts may opt to dismiss the action in case of a non-complying plaintiff, or struck out the defense in case of a non-complying defendant[210].

In other jurisdictions, the courts may draw conclusions from the refusal to comply with an order to produce certain information. The extent of the conclusions drawn varies among jurisdictions. In some countries, the refusal to disclose will lead the judge to consider that the matter or facts that were subject to the order of disclosure are established for the purposes of the proceeding[211]. However, in other jurisdictions the refusal may not be conclusive and other evidence will be required[212].

Finally, in the less intrusive jurisdictions, the courts cannot order the disclosure of evidence which is requested inter-parties[213].

7. Admissibility of expert witnesses

Due to the multidisciplinary nature of antitrust litigation, experts are a necessary asset for an effective enforcement of the competition rules. The experts provide the specific knowledge or technical expertise required in the most complex antitrust cases. In competition law litigation, experts from fields like economics, statistics, econometrics, industries and markets are employed by courts and by the litigating parties to assist them on specific issues such as: to determine if a certain market is conducive to collusion, to calculate the market share of a determined undertaking, to calculate the amount of damages that rise from an anticompetitive conduct, or if there is a procompetitive rationale to sustain the defendant's conduct.

The approach most jurisdictions have with regard to the appointment of experts can be summarized in two systems. In the first one, the courts are empowered to appoint an expert to provide the court with specialized advice concerning certain facts of the case; such appointment can be done at the request of the parties in the dispute or *ex officio* by the court. In the second one, the parties in the proceeding will hire experts on their own either to provide them with specific advice before filing the case, or to testify before the court as expert witnesses supporting the party's allegations.

There are some issues with these two approaches however. On the one hand, when the judge appoints an expert to assist him in the decision process, the parties may often decide to challenge any opinion of the expert which is unfavorable for the party's case. On the other hand, when the parties appoint an expert to advise them or to testify as an expert witness, the opinion of the latter will be biased or impartial most of the times, provided that the experts are paid by the parties to sustain the facts alleged

[207] In Germany, the court may order the imprisonment for up to six months of a non-complying third party in case of repeated disobedience.
[208] In Denmark, the court may commit a non-complying third party to legal custody for a period no longer of six months.
[209] Ireland.
[210] Ireland.
[211] Germany, Latvia, US.
[212] France, Hungary, Italy.
[213] Denmark, Germany.

in their claims, consequently, the other party will more than frequently challenge the report or testimony presented by the other's party expert. As a solution to these issues, it has been proposed a mixed system where the court's expert assists the court in evaluating the evidence submitted by the parties' experts[214].

The evidence produced by an expert is always submitted to the court as a written report, irrespectively if it is made by an expert appointed by the court or by the experts hired by the parties. Additionally, the experts' evidence may take the form of a testimony when the expert appears as a witness in the proceeding. As with other procedural issues related to the private enforcement of competition law, the experts matter is mostly regulated by general civil provisions. Notwithstanding, there are some competition law regimes that have specific competition law provisions allowing parties to appoint their experts to provide them with specific evidence in proceedings concerning the infringement of the competition rules[215].

(a) Experts Appointed by Courts

The appointment of an expert in civil litigation may be done in most countries by the court acting *ex officio* whenever the court believes it needs an expert opinion in a specific matter[216]. In most cases, the experts appointed by the courts work under the supervision of the latter, and the judge will not be bound by the conclusions made by the expert[217]. Moreover, the court will reserve for itself the ability to instruct the expert on the form, extent and scope of the report[218]. Under some jurisdictions, the parties might have to ask the permission of the court before making any question to the testimony or comment on the report submitted by the expert appointed by the court[219]. Albeit, in other countries the parties are free to ask and comment on the evidence presented by the court's expert[220]. Additionally, in some countries, the parties in the proceeding may be under the obligation to cooperate with the court's expert when the latter is gathering all the evidence it considers relevant to the establishment of the case[221]. Moreover, the appointment of the expert in some countries may not be precluded to the assistance of the court with regard to specific disciplines, such as economy or specific industries, but it may also be used to help the court on issues that are more typical to the judiciary, i.e. assist the court to conduct the discovery process among the litigating parties[222].

Depending on the jurisdiction, whenever a party makes a request for the appointment of an expert, the courts will be more or less prone to accept the party's request. In some countries, the appointment of an expert at the request of a party is entirely up to the discretion of the judge; hence, the

[214] OECD (2007), p. 13.
[215] See Section 9 of the Irish Competition Act.
[216] In some countries the appointment of exerts can only be done by the courts acting at its own motion. In Denmark, pursuant to the Administration of Justice Act, only the court may appoint experts. Similarly, in Taiwan, only the court may appoint experts at the petition of the parties (Article 325 and 326 of the Code of Civil Procedure).
[217] See Article 246 of the French Code of Civil Procedure.
[218] Denmark, Italy, Germany.
[219] Denmark.
[220] Germany, the Netherlands.
[221] In the Netherlands the parties are obliged to assist the court's expert in its information gathering, the failure to do so may allow the court to draw whatever concussions it considers necessary. In Turkey, according to Article 75(3) of the Code of Civil Procedure the parties have to produce all the necessary evidence required by the expert, and the failure to such order will drive the court to make a negative inference on the disputed matter.
[222] See Article 75 of the Turkish Code of Civil Procedure.

judge will freely accept or reject the request of the parties[223]. The courts may sometimes require the participation of the parties when appointing an expert. Thus, in some jurisdictions, the parties will be allowed to make a statement with their opinion before the appointment of the expert[224]. Moreover, in other countries, the courts may not deny a request made by a party asking for the appointment of an expert in the proceeding[225].

(b) Experts Hired by the Parties

The parties may freely appoint experts to assist them in proving its case in some countries[226]. The most frequent task of experts assigned by the parties is to assist the latter with the calculation of the damages that the plaintiff has suffered for the alleged anticompetitive conduct of the defendant[227]. The experts hired by the parties may, in some circumstances, have to interact with the experts appointed by the courts, thus, the experts of the parties will have to ask questions to the court's expert witness, or comment on the report issued by the court's expert[228].

In order to foster the objectivity in the proceeding of the experts hired by the parties, some jurisdiction, may require that the experts states under oath that he has acted as objectively as possible with regard to all facts that could benefit or harm either parties in the proceedings, and that he is aware of the criminal sanctions which might be incurred if fails to fulfill his duty as an expert[229]. Moreover, in some jurisdictions, the parties are under the obligation to disclose to the other parties the identity of the person being assigned as an expert before the beginning of the trial[230].

(c) Requisites to be appointed as an Expert

In some jurisdictions not any person can be appointed as an expert in a proceeding. Some countries have list of authorized experts and institutions from which the court may select an expert to appear in the proceeding[231]. In addition, some courts have refined the requirements that an expert has to fulfill in order to be appointed by the judge. For instance, a court may only accept experts that by reason of their training, experience or knowledge satisfy the expectations of the court[232]. Furthermore, in some jurisdictions, the courts may call as an expert a determined public authority, or officer qualified on the matter at trial[233]. Even though, these are not experts appointed either by the judge or by the parties, in some countries, the evidence provided by the experts appointed by the competition authorities in their

[223] Germany.
[224] In Hungary, at least in theory, the parties should be heard before the appointment of the expert, and if possible, their opinions should be taken into account.
[225] Canada, UK, US.
[226] Australia, Canada, France, Germany, Ireland, Italy, Peru, Spain, UK, US, Norway,
[227] In Canada, see cases: Axiom Plastics Inc. v. E.I. DuPont Canada Co., [2007] O.J. No 3327 (S.C.J.), aff'd [2008] O.J. No 1973 (Div. Ct.); or Irving Paper Ltd. V. Atofina Chemicals Inc. [2009] O.J. No 4021 (S.C.J.), leave to appeal refused [2010] O.J. No 2472 (S.C.J.).
[228] Italy.
[229] See Article 335(2) of the Spanish Civil Procedure Act.
[230] Rule 26(a)(2)(B) of the US Federal Rules of Civil Procedure.
[231] In France, the courts will only appoint independent and registered experts (Code of Civil Procedure, Article 232 *et seq*). In Ireland, a non-exhaustive list of categories of experts is provided for in the Rules of the Superior Court, which includes: scientists, architects, dentists, doctors, engineers, accountants and actuaries.
[232] In Ireland, see case: Attorney General (Ruddy) v. Kenny (1960) 94 I.L.T. 185, 190.
[233] In Sweden, see Chapter 40, Section 1 of the Code of judicial Procedure.

own investigations or in public actions for the infringement of the competition rules, may be used later by a private enforcer in a civil action for the violation of competition law[234].

(d) Evidential Value of the Experts' Report

Generally, the value of the evidence submitted by an expert may vary depending if the latter was appointed by the court or by the parties. Usually, the evidential value of the report or testimony presented by an expert that has been appointed by the court is higher than the evidence submitted by the expert hired by the parties. Furthermore, the evidential value of an expert's report may only be admitted by the court if such a report is submitted by a recognized expert[235]. Additionally, in some jurisdictions, the opinion of an expert hired by the parties is not considered as expert evidence, but it is merely a substantiated party statement[236]. Moreover, in some jurisdictions, the evidence submitted by an expert hired by a party may be accepted or rejected under the sole discretion of the court[237]. Finally, in some countries, the finding of an infringement of the competition rules is considered as a legal issue that should only be decided by the court; consequently, the courts will not admit any expert evidence in this regard[238].

8. Level of Causation

In any antitrust action for damages the requirement of causation, i.e. causal link between the harm suffered and the infringement of the competition rules, must be fulfilled in order to recover damages. Thus, through the element of causation, the courts will determine the defendant's liability that arises from its alleged anticompetitive conduct.

The element of causation in competition law cases may be too complex to prove for private plaintiffs, thus, the parties will often utilize economic experts and statistical experts to help them satisfy the causation requirement. The damage suffered by an antitrust victim is most of the times incarnated as the financial loss caused to the victim by the unlawful conduct of the defendant, which is reflected as the payment of supra-competitive prices. In those cases, the victim will have to prove that the payment of a supra-competitive price is the consequence of the alleged anticompetitive conduct of the defendant in order to be awarded damages. Nevertheless, the defendant may allege that such price increase is not caused by its unlawful conduct, but is the consequence of the normal functioning of the market or of the actions of third parties. As a result, proving causation will require, in most cases, heavy economic analysis which may be too burdensome for individual plaintiffs with little claims and especially in stand-alone actions.

The level of causation required in private competition law litigation is extremely diverse among jurisdictions, plus, the fact that there are no competition law cases in most countries that clarify this issue reduces the availability of a clear picture on this matter.

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[234] India and Turkey.
[235] In Ireland there is a non-exhaustive list of experts in the Rules of the Superior Court, which includes: scientists, architects, dentists, doctors, engineers, accountants and actuaries
[236] Germany.
[237] For instance, in Spain a court decided a case basing its decision on the evidence presented by the claimant's expert, and considered that the defendant's expert evidence stating that no injury was caused was not credible (Decision of October 9, 2009 of the Audiencia Provincial de Valladolid).
[238] Hungary.

8.1. Direct and Indirect Causal Link

In a broad sense, the requirement of causation may be divided in jurisdictions that require a direct causal link; and jurisdictions that require an indirect causal link between the infringement of the competition rules and the harm suffered by the plaintiff. Therefore, in practice the success of an action for damages will be subject to the demonstration of the required level of causation. Thus, in some countries, the courts may require direct causation in order to award damages[239], i.e. the damage would not have occurred to the same extent in the absence of (*but for*)[240] the plaintiff's behavior, or that the infringement of the competition rules is a *condicio sine qua non*[241] of the damage. However, other jurisdictions refer to terms such as: adequacy[242], reasonable causation[243], proximate causation[244], remoteness or directness[245] in order to determine causation.

Finally, some jurisdictions may lower the requirements to prove causation, or even turn the burden of proof to the defendant. For instance, when a defendant has created a risk of damage and actually damage subsequently occurred, then the level of causation will lower for the plaintiff[246]. Moreover, in some jurisdictions the burden of proof is shifted if the defendant acted grossly negligent[247].

IV. GROUNDS OF JUSTIFICATION

The grounds of justification are special circumstances that make the infringement of a right or breach of a duty reasonable and therefore lawful. In private antitrust litigation, the defendant may be capable of exonerate himself from the civil liability that arises from the infringement of the competition provisions caused by its anticompetitive conduct, based on such grounds of justification. Normally, in those cases, the onus of proving that the practice is not unlawful is on the defendant.

There are some general grounds of justification that may be applied to competition law matters. For instance, the *force major* justification may apply in competition law cases, which consists in an event that is unpredictable, irresistible and independent of the defendant's willfulness. Also, in cases where the defendant has acted in a state of emergency or out of necessity, its actions will be justified, and therefore, not be considered as unlawful. Additionally, an anticompetitive conduct may be justified in cases of self-defense, when the anticompetitive conduct is in response to the anticompetitive conduct of another party.

There is no closed list of grounds of justifications, however, the most commonly used in competition law cases are: (i) the act of the state that encourages or compels the infringement; (ii) the

[239] Austria, France, Ireland, Italy, Luxembourg, Malta, Portugal, Sweden, UK, US.
[240] Taiwan, US.
[241] Germany, Italy.
[242] France.
[243] Korea.
[244] *In re Warfarin Sodium Antitrust Litig*. (*supra* note 96); *Catlin v. Wash. Energy Co*., 791 F2d 1343, 1350 (9th Cir. 1986); *Mid-West Paper Prods. Co. v. Continental Group, Inc*., 596 F. 2d 573, 591-92 (3d Cir. 1979); *Reibert v. Atl. Richfield Co.*, 471 F.2d 727, 731 (10th Cir. 1973).
[245] UK.
[246] The Netherlands.
[247] Denmark.

consent of the plaintiff to the unlawful conduct of the defendant; (iii) the passing-on defense; and (iv) the contributory negligence of the plaintiff.

(a) The Act of the State that Encourages or Compels the Infringement

The anticompetitive practices of the defendant may be justified whenever a public body has encouraged or compelled the anticompetitive conduct. Such will be the case where a public authority passes a specific compulsory legislation, in those specific cases; the complained conduct will be justified provided that the compulsory legislation requires the perpetration of the anticompetitive conduct[248].

Furthermore, some anticompetitive practices may be authorized by competition authorities, given that such conducts would result in a public benefit that outweighs the anticompetitive detriment[249]. Additionally, in some competition law regimes, the government may exempt any class of enterprises from the application of the competition provisions in the interest of security of the State or public interest[250]. Finally, state monopolies are exempted from the application of the competition provisions in some countries, and hence, these are allowed[251].

(b) The Consent of the Plaintiff to the Unlawful Conduct of the Defendant

Some jurisdictions recognize the possibility to justify the anticompetitive conduct of the defendant based on the fact that the victim has given its consent to the conduct in question. Nevertheless, the consent justification may be limited in some extent in jurisdictions where the liability of the defendant cannot be excluded in its totality unless the responsibility of the plaintiff is *"significant"*[252]. Furthermore, in some countries, the consent of the defendant would constitute an infringement of the competition rules in itself, hence, the fact that the claimant has given its consent to the anticompetitive conduct does not qualify as a justification for the defendant.

(c) The Passing-on Defense

An anticompetitive conduct may harm market participants in different layers of the distribution chain, as a consequence, such behavior does not only injures the purchasers in the subsequent downstream market,

[248] Article L. 420-4 of the French Commercial Code provides that practices that result from the application of laws are not caught by the provisions regarding anticompetitive practices. The same consequence applies to practices whose perpetrators can prove that they have the effect of ensuring economic progress, including by creating or maintaining jobs, and that they reserve a share of the resulting profit to the users, without giving the opportunity to the undertakings involved to eliminate competition for a substantial part of the products in question.

[249] With regard to the grounds of justification at the EU level, an anticompetitive conduct may be justified if the latter contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit (Article 101(3) of the TFEU). Most Member States have introduced to their national law equivalent provisions to justify anticompetitive conducts that comply with the TFEU requirements (In Finland, Section 6 of the Competition Act; in Germany, Section 2 of the Act against Restraints of Competition; in Malta, Section 5(3) of the Competition Act; in Portugal Section 5 of the Competition Act; in Spain, Article 1.3 of the Competition Act). However, there are some non-EU countries that have similar provisions, see: Sections 88 and 90 of the Australian Competition and Consumer Act; the third schedule of the Singaporean Competition Act; Section 10 of the South African Competition Act; or Article 5(2) of the Swiss Federal Act on Cartels and Other Restraints of Competition.

[250] See Section 54 of the Indian Competition Act.

[251] In Mexico, state monopolies are allowed by Article 28 of the Mexican Constitution, provided that they serve the public interest.

[252] See: the *Courage* case (*supra* note 37), at para 31. In this case, the ECJ established a series of parameters that can be used in order to determine the responsibility of the co-contracting parties: (i) the economic and legal context of each case; (ii) the respective bargaining power and conduct of each of the co-contractors; (iii) whether a party is in such a substantially weak position that it cannot negotiate the contractual terms freely; and (iv) the cumulative effects on competition of any other similar contracts, if parts of a network.

given that the antitrust damage may be inflicted upon purchasers and non-purchasers at all levels of the supply chain.

If a cartel or a dominant company sells its goods at supra-competitive prices, a direct purchaser, e.g. a wholesaler, suffers as a result of having paid a price that is in excess of the competitive price. However, the direct purchaser may be able to pass-on all or some of the loss to the next purchaser in the chain, e.g. a retailer or a consumer. These purchasers, who are only indirectly linked with the seller, e.g. a cartelist or a dominant firm engaged in anti-competitive behavior, in turn suffer a loss by paying a supra-competitive price which has been passed-on to them.

The passing-on defense is a justification raised by the defendant in a private action for damages grounded on the infringement of the competition rules, where the latter alleges that the plaintiff has been able to pass the damage in whole or in part on to his customers by raising prices correspondingly, and as a result, the plaintiff has not suffered any damage himself[253]. The passing-on defense raises two questions concerning the private enforcement of competition law. The first is related to the availability of such a defense in competition law cases. And the second is concerned with the standing of indirect purchasers to sue for the harm suffered due to the defendant's anticompetitive conduct.

With regard to the discussed above, the existence of the passing-on defense as a justification for the defendant's conduct should be closely connected to the standing of indirect purchasers. For instance, if on the one hand, a determined jurisdiction decides not to allow the passing-on defense to the defendant, and on the other hand, courts grant standing to indirect purchasers to sue for damages, this situation would expose the defendant to cumulated claims. Oppositely, if the passing-on defense and the indirect purchasers' standing are not allowed, then, the direct purchaser plaintiff would enricher at the expense of the indirect purchaser who is actually the one that suffered the antitrust damage.

Some jurisdictions, have considered that the complexity of calculating the overcharged passed-on down the supply chain, coupled with the availability of treble damages and the risk of duplicative recovery, would require additional long and complicated proceedings involving massive evidence and complicated theories. Moreover, if a direct purchaser would be subject to a defense that it has passed-on the overcharge to its own customers, the claim for damages would keep running all the way down in the supply chain until the end consumers, who would only have suffered a small overcharge, maybe even too small to make their claims cost-effective. Consequently, in those cases, only direct purchasers would be allowed recover the entire amount of the overcharge[254]. However, some exceptions apply to this approach. The first occurs when the direct purchaser has sold the goods in question to an indirect purchaser pursuant to a pre-existing cost-plus contract[255]. And the second, happens when the indirect purchaser actually owns or controls the direct purchaser[256].

[253] For techniques on how to measure the impact of the passing-on see the study made by the law firm Ashurst for the European Commission with regard to economic models for the calculation of damages: *Study on the conditions of claims for damages in case of infringement of EC competition rules: Analysis of economic models for the calculation of damages*, 2004, at pages 33 and 34.
[254] In the US, see *Hannover Shoe, Inc. v. United Shoe Machinery Corp.* (*supra* note 75); and *Illinois Brick Co. v. Illinois* (*supra* note 40).
[255] See *Illinois Brick,* at 732, n. 12. This exception was also acknowledged in *Hannover Shoe,* at 494 (*supra* note 40).
[256] See *Illinois Brick,* at 736, n. 16 (*supra* note 40).

Similarly, in one jurisdiction, a provincial court has denied the availability of the passing-on defense, provided that indirect purchasers do not have a cause of action under the competition provisions[257]. Finally, in some countries, even though, there are no specific provisions repealing the passing-on defense or do not have relevant case law on the subject, the passing-on defense is not allowed based on general civil rules[258].

Despite the above, most competition law regimes, at least in theory, recognize the possibility of the defendant to allege the passing-on defense. However, the majority of countries, either does not have specific provisions regulating the matter of the passing-on defense[259], or does not have relevant case law regarding this issue[260]. Irrespective of the fact that most competition law regimes do not have specific rules allowing the passing-on defense, the possibility to invoke such defense may be grounded in the general principles of compensation of the damage caused (allowing indirect purchasers to recover the damage suffered), and the prohibition of the unjust enrichment of the plaintiff in actions for damages (allowing the passing-on defense).

(d) Contributory Negligence

Contributory negligence is a type of defense to a civil claim which is grounded on the negligence of the plaintiff. In order for the contributory negligence defense to apply the plaintiff has to contribute to the harm suffered through his own negligence or fault. Most jurisdictions provide for a reduction in the amount of damages whenever the claimant has contributed to the infringement on which the claim is

[257] In Canada, the British Columbia Court of Appeal in two recent cases expressly established the inexistence of the passing-on defense and the ability of indirect purchasers to sue for damages (*Pro-Sys Consultants Ltd. v. Microsoft Corporation;* and *Sun-Rype Products ltd. v. Archer Daniels Midland Company* (*supra* note 84).

[258] In Cyprus the courts may be reluctant to allow the passing-on defense. In Lithuania, even if it is proved beyond reasonable doubt that the purchaser has passed-on the overcharge, such a defense is not considered relevant or appropriate if undue benefits were obtained unjustly by the defendant.

[259] As an exception, Germany has adopted specific competition provisions regarding the passing-on defense: "*If a good or a service was purchased at an inflated price, the existence of damage is not precluded because the good or the service was resold*" (Section 33(3) of the Act against Restraints of Competition).

[260] In Denmark, the court in: GT-Linien under konkurs v. De Danske Statsbaner DSB; Ekko A/S v. Brandt Group Norden A/S, acknowledged the availability of the passing-on defense. In France, the courts have decided on the passing-on issue in three occasions. On May 2006, the Nanterre Commercial Court dismissed the damages claim of the pharmaceutical company *Arkopharma*. The plaintiff claimed that it had suffered harm from the overcharge imposed by its suppliers *Roche* and *Hoffman La Roche*, both members of the "Vitamins Cartel". In that case, the court determined that *Arkopharma* had the opportunity to pass-on the overcharge by raising its own resale prices, given that the increase was applied by all the industry (*Arkopharma v Roache and Hoffmann-La Roche,* Nanterre Commercial Court, 11 May 2006). On January 2007, the Paris Commercial Court also dismissed a claim for damages of the pharmaceutical *Juva Santé* and *Juva Producition*. The plaintiffs in the case alleged that damages where inflicted by the anticompetitive behavior of their suppliers: *Hoffman La Roche* and subsidiaries. The plaintiffs argued that they could not have passed the overcharge on to their customers since the increase would have resulted in a loss of their market shares (Paris Commercial Court, 26 January 2007, *Juva Santé et Juva Production SED c/ Société Hoffman La Roche AG*). Finally, on June 2010, the French Commercial Supreme Court acknowledged the passing-on defense in follow-on actions for damages brought by *Doux Aliments*. The plaintiffs claimed that they had suffered from the overcharge imposed by their supplier, the company *Ajinomoto Eurolyne*. The Court of Cassation rejected their claim and decided that they have passed the raw material increase on their own prices to customers and thus have not suffered from any damage pursuant to Article 1382 of the Civil Code France. In Germany, on June 28 of 2011, the German Supreme Court finally shed light on the indirect purchasers' standing and the availability of the passing-on defense. The case was brought by *Kreissparkasse Steinfurt*, a savings bank that pursued the damage claims of an insolvent printing firm on the basis of an assignment of claims against *Papierfabrik August Koehler AG*, a papermaker fined by the European Commission for being part of a price fixing cartel in 2001 (Decision 2004/337/EC of 20 December 2001). In its decision, the Supreme Court established that indirect purchasers of the members of a cartel can bring direct damages claims against the members of the latter. Furthermore, the Supreme Court confirmed that the members of a cartel can defend themselves against a damage claim by arguing that the purchasers had actually been able to pass-on the overcharge to their customers (BGH 28.6.2011, KZR 75/10 – *Papierfabrik August Koehler AG*). In Italy, the courts have also decided on the passing-on defense. In the *Juventus* case, the Turin Court of Appeal considered the passing-on as a sort of contributory negligence and denied to award damages to the plaintiff who had intentionally passed the overcharge to the final consumer (Turin Court of Appeal, 6 July 2000, *Indaba Incentive co.* v. S*ocietà Juventus F. C. S.p.A.*). In the UK, the Court of Appeal in 2010 acknowledged that British Airways could plead the passing-on defense against some of the members of the class. Even though British Airways did not invoke the passing-on defense, the court's decision implies that such a defense is available in the UK.

based[261]. This kind of defense is contained in general principles of civil law; thus, it is not exclusive for competition law litigation.

In practice, the contributory negligence defense will result in the reduction of the amount of damages in proportion to the contributory negligence. However, the degree of success of the contributory negligence defense varies among jurisdictions and ranges from the reduction of the amount of damages to the full absolution of the defendant.

Remarkably, the contributory negligence defense will be allowed even in jurisdictions where the element of fault is not needed in order to establish the civil liability of the defendant for the infringement. As a result, the fault element will not be necessary to establish the defendant's liability for the infringement; however, the plaintiff's fault in contributing to the infringement will be taken into account as a way to reduce damages[262].

The reduction of the award of damages may also be subject to the duty of plaintiffs to mitigate the potential losses caused by the infringement of the competition rules. In such cases, the amount of damages required from the defendant will be reduced whenever the plaintiff fails to take the appropriate measures to restrict the damage. Likewise, in most countries, the amount awarded in damages to the claimant may be reduced if the latter has benefited from the challenged infringement of the competition rules. This reduction is grounded on the principle that the claimant may only be compensated for the harm actually suffered, thus precluding, the plaintiff from being unjustly enriched.

V. LIMITATION PERIODS

As a general civil rule, all jurisdictions have limitation periods which determine that after their expiration any damages claim becomes statute barred. Particularly in competition law litigation, limitation periods, on the one hand, serve the fundamental principle of legal certainty by ensuring that the legal position of the parties becomes irreversible at a certain point in time, and on the other hand, limitation periods may turn out to be significant restrictions for the private enforcement of competition law depending on its duration, the moment they begin to run and whether or not they can be suspended.

(a) Initiation of the Limitation Periods

Just like with other procedural issues, limitation periods regarding private actions for the infringement of the competition law provisions vary widely between jurisdictions. The first difference evidenced is the time from which the limitation periods begin to run. In some countries, the limitation periods are set irrespective of the knowledge of the plaintiff, in such cases; the statutory limitation begins to run from the date on which the infringement took place[263]. Oppositely, in other countries, the beginning of the

[261] However, in the UK, since non-contractual competition law-based damages actions are brought for the breach of statutory duty, there is no fault requirement and consequently the award of damages will not be reduced due to the fault of the plaintiff.
[262] For instance, in France, the mere infringement of the competition provisions presupposes the existence of fault on behalf of the defendant. As to the plaintiff's fault, this will not affect the defendant's liability for the infringement of the competition rules, but it will reduce the amount of damages that the defendant is obliged to pay.
[263] Australia, Canada, Israel, Mexico, Scotland, Sweden, UK, Ukraine, US.

statutory limitation will depend on the subjective knowledge of the potential plaintiff, then, the limitation period will run from the date the damage was detected or ought to have been detected[264]. Moreover, in some countries, both statutory limitation approaches apply; on the one hand, there is a subjective limitation period which depends on the subjective knowledge of the plaintiff, and on the other hand, there is an objective or absolute limitation period, which is usually longer than the latter, and begins to run irrespectively of the plaintiff's knowledge[265]. Finally, in competition regimes where stand-alone damages actions for the infringement of the competition provisions are not allowed, the limitation period will begin to run after the decision of the competition authority finding the anticompetitive conduct of the defendant becomes final[266]. In follow-on actions, the main rule is that the limitation period begins to run from the date on which the decision finding an infringement of the competition provision becomes final, either because the decision can no longer be appealed, or because the action accrued[267]. Notwithstanding, some competition regimes allow courts to grant permission to the victims of an anticompetitive conduct to file an action for damages before the decision declaring the infringement becomes final[268].

Moreover, in some jurisdictions the courts have made determinations with respect to when the limitation period actually begins to run in order to prevent the expiration of the victims' right of action[269]. In such cases, the limitation periods are not suspended but its beginning will only happen under certain circumstances for the purpose of favoring the potential plaintiffs[270].

(b) Duration of the Limitation Periods

The duration of the limitation periods to bring an action for the infringement of the competition law provisions also differs among jurisdictions. As a consequence, the statutory limitation to bring a private

[264] Austria, Belgium, France, Netherlands, Spain.
[265] Korea, Portugal, Switzerland, Taiwan, Turkey.
[266] See Article 26(2) of the Japanese Antimonopoly Act that establishes a three year limitation period from the date on which the cease and desist order or the payment order or the decision of the Japanese Fair Trade Commission becomes final and binding. In Singapore, pursuant to Section 86 of the Competition Act, a private action concerning the application of the competition provisions has to be brought within two years from the date that the Competition Commission of Singapore makes a decision or upon the determination of any appeal. Similarly, in South Africa, Section 65(9)(a) and (b) of the Competition Act establishes that a person's right to bring an action for damages comes into existence on the date that the Competition Tribunal made a determination in respect of a matter that affects that person; or in case of an appeal, on the date that the appeal is concluded.
[267] This approach was proposed by the European Commission in its White Paper on Damages, suggesting that a new limitation period of at least two years should start once the infringement decision becomes final (page 9).
[268] See Rule 31(3) of the Competition Appeal Tribunal Rules. The CAT granted the plaintiffs permission to bring its claim before the defendant's right of appeal was exhausted, provided that the CAT considered that there was a serious risk that certain evidence in the possession of the defendant would not be available for disclosure if the plaintiffs were supposed to wait until the decision became final (*Emerson Electric Co. and others v Morgan Crucible Company PLC,* Case No. 1077/5/7/07, [2007] CAT 30).
[269] At the EU level, the European Commission in its White Paper on Damages has proposed that limitation periods should not start to run: in cases of continuous or repeated infringement, before the day in which the infringement ceases; or before the victim can reasonably be expected to have knowledge of the infringement and the injury (page 8).
[270] Under Italian law, the five year limitation period starts running from the date in which the right at issue can be exercised, however, the Supreme Court has determined that the limitation periods in private antitrust actions start running only when the plaintiff can reasonably perceive that certain conduct may be infringing the competition provisions (Corte di Cassazione, judgment n. 2305 of February 2 2007, *Fondiaria-SAI Assicurazioni c. Nigriello*). Similarly, in the Netherlands, the five year limitation period begins to run on the date on which the plaintiff becomes aware of the injury and the liable party. The Rotterdam Court of First Instance in the *CEF/Bestuurders* case determined that the limitation period may start to run upon the media coverage of a dawn raid by the Netherlands Competition Authority (Rotterdam Court of First Instance, 7 March 2007, *CEF/Bestuurders*, LJN BA 0926). In Spain, regarding the one year limitation period that begins to run from the date the victim has knowledge of the injury; the Supreme Court has established the "accomplishment theory", which determines that the statutory limitation begins to run when the plaintiff's action is capable of being successful (Judgment of the Supreme Court of 8 June 2007, case 625/2007). In application of this theory, the Supreme Court allowed the initiation of a follow-on action for damages more than one year after the victim had gained knowledge of the injury, and determined that the claim was only possible after unlawfulness of the defendant's conduct was ruled by the European Commission, and as a consequence, the limitation period had not expired (Judgment of the Supreme Court of October 2, 2008, case 870/2008).

action can last: one year[271]; two years[272]; three years[273]; four years[274]; five years[275]; six years[276]; seven years[277]; ten years[278]; twenty years[279]; or thirty years[280], as the longest period. However, in some jurisdictions, the duration of the limitation period will vary depending on if it is a stand-alone or follow-on action[281].

(c) Interruption of the Limitation Periods

Some jurisdictions allow the possibility to suspend the running of the limitation periods under some circumstances. The ability to suspend the limitation periods to bring a private action for the infringement of the competition rules concerns the relationship between public and private enforcement of competition law.

The adoption of a final decision by a competition authority may take a long time due to the difficulties that most competition cases represent for public enforcers. This time period may be further enlarged by appeals or any other judicial review of the competition authority's decision. As a consequence, the limitation period to bring a private action for the infringement of the competition rules, when too short or not suspended, may expire while the public procedures are still ongoing[282].

To avoid this from happening and to provide the antitrust victim a fair chance to remedy the harm inflicted by bringing an action before civil courts, some competition regimes allow the suspension of the limitation period whenever: a competition authority has commenced investigations on the same matter[283]; a plaintiff has filed claim before the court[284]; the perpetrator has committed a new infraction[285];

[271] Spain, Switzerland (Subjective limitation period), Turkey (Subjective limitation period)
[272] Canada, China, Peru, Singapore, Taiwan (Subjective limitation period), UK (follow-on actions before the CAT)
[273] Austria, Brazil, Germany, India, Japan, Korea (Subjective limitation period), Portugal (Subjective limitation period)
[274] US.
[275] Argentina, Belgium, France, Italy, Mexico, Netherlands, Scotland, Ukraine.
[276] Australia, UK (stand-alone actions before the High Court)
[277] Israel.
[278] Korea (Objective limitation period), Sweden, Switzerland, Taiwan (Objective limitation period), Turkey (Objective limitation period)
[279] Portugal (Objective limitation period)
[280] Austria, Germany.
[281] In the England, the limitation period for a stand-alone action brought before the High Court is six years, whereas the limitation period for a follow-on action brought before CAT is two years after the relevant date, which is the later of: (i) the date of the final infringement decision, once the period for appealing the infringement decision has expired with no appeal having been made or, if there was an appeal, the appeal has been finally determined; or (ii) the date on which the cause of action accrued (Rule 31 of the CAT Rules 2003).
[282] "[*a*] *national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposes a short limitation period which is not capable of being suspended*" (*Manfredi* (*supra* note 37), at para. 78).
[283] In Germany, according to Section 33(5) of the Act against Restraints of Competition and Section 204(2) of the Civil Code, the limitation period of a claim for damages shall be suspended if proceedings are initiated by the cartel authority, the European Commission or the competition authority of another Member State.
[284] In Argentina, according to Article 55 of the Law for Defense of Competition, the limitation period to bring an action will be interrupted whenever a plaintiff files a claim before the court.
[285] In Argentina, the limitation period will be interrupted by a new infringement of the defendant (Article 55 of the Law for Defense of Competition).

an action has been initiated by the government[286]; an antitrust class action has been filed[287]; or the doctrines of fraudulent concealment[288], duress[289] or equitable estoppel apply[290].

VI. REMEDIES OF PRIVATE ANTITRUST LITIGATION

1. Nullity of Anticompetitive Agreements

One of the civil remedies that can be used in private antitrust litigation is the declaration of nullity of prohibited agreements. In this kind of action, the plaintiff requires the court to declare a determined contract null and void. Actions seeking nullity are usually grounded on general civil regulations; however, some legal regimes contain specific competition law provisions declaring the nullity of prohibited anticompetitive agreements. Regardless of whether the nullity is determined by a specific competition legal instrument or by general contract rules, the nullity of a determined agreement primarily affects the contractual relationship between the signing parties.

1.1. Competent Courts

Generally speaking, civil courts hold exclusive jurisdiction to declare the nullity of a determined contract irrespectively of whether the action is based on general contract regulation or on specific competition rules. However, in some legal systems, the competition authority is empowered to declare the nullity of an anticompetitive agreement, provided that in those regimes private actions for the infringement of competition law are not allowed[291]. Moreover, in some jurisdictions, only specific administrative courts in charge of competition law matters may declare the nullity of an agreement that is contrary to the competition provisions[292]. These last two procedures are not of a civil nature, thus, they do not correspond to this chapter.

1.2. Nature, Standing, Effects and Prescription of Nullity Actions

Even though the nullity of an anticompetitive agreement may be invoked by any contracting party, in practice, this kind of action is usually regarded as *shield litigation*. In contractual liability cases, when a co-contracting party claims the performance of the other party, or seeks compensation for the breach of

[286] In the US, whenever any civil or criminal antitrust proceedings is instituted by the government, the running of the statute of limitations in respect to every private or State right of action shall be suspended during the pendency thereof and for one year thereafter (15 USC Section 16(i)).
[287] *Crown, Cork & Seal Co v. Parker*, 462 US 345 (1983).
[288] *In re Scrap Metal Antitrust Litig.*, 527 F3d 517, 536-38 (6th Cir 2008); and *In re Linerboard Antitrust Litig.*, 305 F3d 145, 160 (3d Cir 2002).
[289] *Willmar Poultry Co v. Morton-Norwich Products*, *Inc.,* 520 F2d 289 (8th Cir 1975); and *PhilCo Corp v. RCA*, 186 FSupp 155, 161-62 (ED Pa 1960).
[290] *American Pipe & Construction Co v. Utah*, 414 US 538, 559 (1974).
[291] In Indonesia, the Commission for Supervision of Business Competition according to the provisions of the Law on the Prohibition of Monopolistic Practices and Unfair Business Competition is empowered to declare the nullity of anticompetitive agreements as well as to award damages to injured parties.
[292] In South Africa, even though an affected party may bring an action for damages before a civil court, albeit only on a follow-on basis, only the Competition Tribunal or the Competition Appeal Court, both administrative courts, may declare void an agreement that is prohibited under the terms of the Act (Section 65(1) of the Competition Act). Furthermore, since South African law only allows follow-on actions, the provisions of the Act determine that in any action brought in a civil court concerning the application of the competition provisions the court must not consider it on its merits, unless the issue has been subject to an order made by the Competition Tribunal or the Competition Appeal Court, in which case, the civil court must apply the determination of the latter to the issue (Section 65(2) of the Competition Act).

the contract, the defendant may invoke the nullity of the anticompetitive agreement as a defense in order to avoid its obligations pursuant to the contract.

As to the standing for this kind of action, as stated above, these proceedings may be initiated by co-contracting parties, and additionally, even affected third parties may request the court the nullity of an anticompetitive agreement that has a negative impact on its business[293]. Regarding the nature and effects of a nullity declaration, the nature of the latter is absolute and it has *erga omnes* effects. Additionally, the nullity sanction for an anticompetitive agreement has retroactive effects; this means that the agreement will be null and void from the time of its conclusion. In order to avoid an excessive degree of legal uncertainty, actions for nullity are subject to prescription and in most countries the general prescription regime applicable to civil actions applies. And finally, the nullity is automatic as it comes as an *ipso jure* consequence of the application of the competition rules and does not need a prior administrative or judicial decision.

1.3. Extent of the Nullity Declaration

The motive of the nullity declaration will vary depending on the provisions on which such a declaration is grounded. On the one hand, competition law regulations base the nullity declaration of a determined agreement on the anticompetitive effects of the contract in question. On the other hand, when an action for nullity is grounded on contractual law, the agreement will be declared null and void because it is in breach of a mandatory provision (such as the competition rules), or because the agreement has been concluded evading legal regulation[294], or when the subject matter of the contract is unlawful[295].

In most competition law regimes, the nullity provisions appear to be limited to forbidden cartel agreements[296]. Notwithstanding, there are a few specific nullity provisions for competition law infringements related to the abuse of a dominant position[297]. This may be so, because abuse of dominance practices are not usually incarnated in legal documents, like forbidden cartel agreements, but are based on factual situations. Notwithstanding, the abuse of a dominant position may be grounded on a legal document which may produce legally enforceable rights and obligations[298]. Irrespective of the existence or not of specific rules declaring the nullity of infringements related to the abuse of dominance, in order to avoid inconsistencies between public and private enforcement of competition law, those legal

[293] In the European Union, the ECJ in the *Courage* case, and later in the *Manfredi* case, determined that the nullity of an agreement may be invoked by co-contracting parties and also by third parties (*supre* note 37).
[294] See Section 200(2) of the Hungarian Civil Code
[295] See Article 1418 of the Italian Civil Code, which establishes that a contract that is in violation of mandatory provisions shall be void. Also establishes that a contract may be declared void by virtue of the unlawfulness of its cause (subject matter).
[296] Some competition law regimes have introduced regulations that resemble the provisions of Article 101.2 of the TFEU which declares *automatically void* all cartels and restrictive agreements. However, the TFEU, as most of the similar provisions, does not have a similar rule for agreements related to the abuse of a dominant position (Article 102 TFEU).
[297] In France, Article L420-3 of the *Code de Commerce* declares null any agreement prohibited by the competition provisions, among them, the abuse of a dominant position. In Romania, the Competition Act declares that any agreements, conventions or contractual clauses, either public or secret, that violate the provisions of Articles 5 (restrictive agreements) and 6 (abuse of dominance) of the Competition Act, are null and void. In Singapore, Section 34(3) of the Competition Act declares void all prohibited agreements.
[298] In Italy, the *Corte d'Appello di Milano* declared null and void the pricing clauses of gas supply agreements, provided that these imposed excessive prices running contrary to Article 3 of Law 287/90 which prohibits excessive prices by a dominant company (Corte d'Appello di Milano, September 16 2006, *Avir c. ENI*). In Sweden, the Svea Court of Appeal ruled in favor of the plaintiff in the *Scandinavian Airlines System v. Staten genon Luftfartsverket.* The plaintiff brought an action against the airport operator requesting that the clauses in the agreement that regulates airport fees be declared null and void given that such clauses were contrary to the abuse of dominant position competition provisions (Svea Court of Appeal, T 33-00, *Staten genon Luftfartsverket v. Scandinavian Airlines System,* April 27 2001).

documents should be also declared null and void. Contrarily, an abuse of dominance practice that has been declared unlawful and punished by a public authority will give rise to enforceable rights and obligations before a civil court. Thus, in countries with no specific nullity provisions for agreements connected to the abuse of a dominant position, general civil rules will apply[299]. For instance, some legal systems will declare the nullity of legal documents related to the abuse of a dominant position by determining that any agreement that is incompatible with a legal prohibition shall be null and void[300]. In other countries, any agreement that is contrary to the provisions of a mandatory rule, such as the competition regulations, will be declared null and void[301]. Finally, any agreement may be declared null if its subject matter is unlawful[302].

In addition to the stated above, in some competition law regimes, private plaintiffs may also request general courts to declare null and void merger agreements that provoke anticompetitive effects on their businesses, or agreements that have not been previously notified for clearance to the competition authority, or any other competent public body, when required[303]. Nevertheless, the authority to declare merger agreements null and void is not exclusive for civil courts. Some competition agencies, or other public authorities, such as ministries or sector regulators, may be empowered to annul and void merger agreements that produce negative effects on competition or those which have not been notified, when required, to the competent public authority for clearance.

1.4. Right of Restitution

The right of restitution resulting from a nullity declaration varies widely among jurisdictions. For instance, in some countries the *restitutio in integrum* principle will apply. This principle establishes the restitution of things to the status they were in, as there had never been a contract. The restitution includes all the goods and amounts of money that were the subject matter of the contested agreement[304]. In other countries, the restitution right that arises from a declaration of nullity will be based on unjust enrichment regulation. The restitution through unjust enrichment provisions is set to avoid that a party in the void agreement unjustly enriches at the expense of another[305]. In some countries, the right of restitution based on the principle of unjust enrichment is independent of liability for wrongdoing, and consequently, the restitution is allowed between co-contracting parties irrespective of their liability for the anticompetitive practice[306]. On the contrary, in other jurisdictions the principle of *in pari delicto potior est conditio*

[299] In Lithuania, anticompetitive agreements in breach of Article 5 are null and void *ad initio* (Article 5(1) of the Lithuanian Competition Act). Even though it is not expressly indicated in Article 9 (abuse of a dominant position provision), the same sanction by virtue of the civil law rules on nullity of agreements (Article 1.80 of the Civil Code), will apply to contractual provisions considered abusive (KESERAUSKAS, Šarūnas, & MAKAUSKAITĖ, Agnė (2007), "Lithuania". HOLMES, M. & DAVEY L. (eds). *A Practical Guide to National Competition Rules across Europe*. Second Edition. The Netherlands: Kluwer Law International, p. 532)

[300] In Germany, see Section 134 Civil Code. In Greece, see Article 174 of the Civil Code.

[301] In France, see Articles 6 and 1131 of the Code Civil. In Italy, see Article 1418 of the Civil Code.

[302] In Italy, see Article 1418 of the Civil Code.

[303] In the Netherlands, any interested party may bring an action for nullity before a District Court for the violation of Articles 6 (Restrictive Agreements), 24 (Abuse of Dominance), and 34 (Mergers) of the Competition Act.

[304] Article 1.2 of the Spanish Competition Act (which resembles the provisions of Article 101.2 TFEU) is applied in conjunction with Article 1300 and following of the Civil Code, which establishes the *restitutio in integrum* principle under Spanish law.

[305] In Turkey, after a nullity declaration pursuant to Article 56 of the Competition Act, an affected party may request restitution by applying the unjust enrichment regulation contained in Articles 63 and 64 of the Code of Obligations.

[306] In Sweden, the Svea Court of Appeal declared that the plaintiff, a co-contracting party to a null anticompetitive agreement, had the right to be repaid for the excessive price it paid during the contract period. The court considered that the Competition Act was

defendentis prohibits restitution between parties that are engaged in unlawful practices. In such cases, contracting parties that are mutually or equally at fault and whose conduct is equally wrongful cannot claim restitution or satisfaction from the other(s)[307]. In other regimes, when a contract is null and void for being contrary to the competition provisions, contracting parties are obliged to repay any good, service or amount of money received by virtue of the contract, whenever this amounts to unjust enrichment. However, if the plaintiff is responsible for the imposition of the anticompetitive clause or contract on the other party, it will not have right to demand restitution. Additionally, other jurisdictions establish that when a party in a contract knew or should have known that the agreement was invalid and did not informed the other party, the former is obliged to pay the latter the damages caused as a consequence of having entered into an invalid contract[308].

1.5. Severance

The nullity sanction of an anticompetitive agreement may apply to the whole contract or only to those parts or clauses that are affected by the prohibition. The nullity will apply to the whole contract when the unlawful parts cannot be severed from the agreement[309], and oppositely, when the anticompetitive clauses are severable, the nullity will apply only to the latter[310]. In practice, in most countries, civil regulation on the severance of contracts will apply to determine if the nullity applies just to the unlawful parts or to the contract as a whole.

1.6. Nullity of Related Contracts

Another issue related to the nullity of restrictive agreements is the validity of independent but somehow connected contracts with the main anticompetitive agreement. Subsidiary or complementary contracts which are related to previously annulled contracts may be valid or declared null too, depending on whether or not the competition prohibitions also apply to them. On the one hand, independent but ancillary contracts that aim directly at securing the performance of the contractual obligations of the anticompetitive agreement constitute an inseparable whole with the basic agreement and consequently should also be declared null and void. On the other hand, independent but consequential contracts signed with third parties that aim at indirectly giving effect to the obligations grounded on the anticompetitive contract, such as employment contracts, contracts for the supply of materials, contracts for the lease of buildings, and others, should not be declared null and void since these agreements do not affect competition by themselves, and consequently, should not be caught under the competition prohibitions.

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applicable to the anticompetitive agreements the defendant used to abuse its dominant position by charging higher airport fees (*Staten genon Luftfartsverket v. Scandinavian Airlines System*, *supra* note 298).

[307] In Germany, see Section 817 Civil Code. In Spain, see Article 1306 of the Civil Code.

[308] See Article 1338 of the Italian Civil Code.

[309] According to the Austrian Supreme Court a contractual provision infringing competition law may entail total voidness of the contract in question given that the provision cannot be separated from the rest of the contract (OGH 22.02.2001, 6 Ob 322/00x).

[310] In Luxembourg, *Soluver S.A* requested the court to declare null a franchising agreement signed with the German company *Wintergarden Feddersen*, in order to recover the fee *Soluver* paid to *Wintergarden* by virtue of the franchising agreement. The *Tribunal d'arrondissement* of Luxembourg rejected *Soulver's* petition and considered that the contract was not null, because the clauses in the contract that were allegedly in contravention with the provisions of Article 81 EC were severable from the contract. In consequence, the nullity of the anticompetitive clauses did not affect the rest of the contract (Tribunal d'arrondissement Luxembourg, 9 March 1990, Wintergarden Feddersen/Soluver).

Finally, in some countries, contracting parties may introduce separability clauses in a certain agreement. By introducing these clauses, the parties prevent that a nullity declaration invalidates the contract as a whole. Consequently, if a contract is null because it infringes the competition provisions, the nullity sanction will only affect the anticompetitive parts of the agreement, and the separability clauses will save the rest of the contract from being annulled. Notwithstanding, when the mere purpose of a separability clause is to preserve the otherwise annullable anticompetitive parts of a determined agreement, then the clause itself will be declared null and void provided that its primary intention is to avoid the nullity sanction of an anticompetitive agreement[311].

2. Injunctive Relief

2.1. Permanent Injunctive Relief

Injunctive relief is another civil remedy available for private plaintiffs for the infringement of competition law. Injunctions are court ordered measures forcing the defendant to cease any anticompetitive conduct and desist from such conduct in the future. Injunctions can be positive or negative, the former would require the defendant's performance, while the latter will require the plaintiff to cease and desist the performance of a determined conduct.

As other civil remedies concerned with the application of competition law, injunctive relief may be embodied in the general provisions of civil or commercial law, or in some cases, it may be established in specific competition law provisions. Traditionally, however, the majority of jurisdictions refer this issue to the general civil or commercial rules[312]; nevertheless, there are some competition law regimes that have introduced specific antitrust rules establishing the availability of injunctive relief in private antitrust litigation[313].

In practice, injunctive relief actions are better suited for cases related to the abuse of dominance, provided that in such disputes, the victim of the dominant undertaking usually seeks to enjoin the latter to cease its abusive behavior[314]. In abuse of dominance cases, injunctions can be positive or negative, for instance, a positive injunction would require the defendant the continuation of a relationship in case of a

[311] The German Supreme Court declared that a separability clause that affects the scope of the provisions of Article 81 EC or the equivalent national rule shall be declared null and void (Supreme Court, 8 February, 1994, KZR 2/93, *Pronuptia II* (1994) 44 *WuW* 547).

[312] In Belgium, injunctions can be based on unfair competition law (Article 54 of the 1971 Act on Commercial Practices). In France, Article L442-6(3)(b) of the Code de Commerce, grants the public prosecutor and the Minister of Economy *locus standi* to request an injunction. In Greece, injunction is grounded on the provisions of the Civil Code (Articles 914, 281, 288 and 297 of the Civil Code). Similarly, in Italy the provisions of the Civil Code regulate the award of injunctive relief (Article 2599 of the Civil Code).

[313] In Austria, Section 1 of the Federal Act against Unfair Competition; in Japan, Section 24 of the Antimonopoly Act; in Germany, Section 33(1) of the Act against Restraints of Competition; in Ireland, Section 14(5)(a) of the Competition Act; in Sweden, Chapter 3, Section 2 of the Competition Act; in the USA, Section 16 of the Clayton Act.

[314] Case T-24/90 *Automec Sri v Commission (II)* [1992] ECR II-2223. In this case before the Court of First instance the complainant was refused an injunction by the Commission requiring BMW to supply it with cars. The Court held that the Commission could not order a party to enter into a contractual relationship and that the principle of freedom of contract was applicable. The Commission held that such purely positive measures were more suitable for cases related to Article 82 EC (abuse of dominance).

brefusal to supply[315]; alternatively, a negative injunction would require the defendant to restrain from conduct contrary to the competition law provisions[316].

Injunctive relief actions differ from damages claims in some aspects: (i) injunctive relief actions do not include a monetary compensation; (ii) injunctive relief is available to antitrust plaintiffs even if the latter have not yet suffered any actual injury; (iii) injunctive relief serves different objectives than damages claims (deterrence of future infringements); (iv) the standard of proof is usually lower than the one required in damages claims (probability[317], *prima facie*[318]).

Finally, even though injunctive relief is available in most jurisdictions, there are some differences found across jurisdiction in the application of this remedy in private antitrust litigation. For instance, in some common law countries, injunctive relief will only be awarded if damages are not an adequate remedy for the dispute[319]. Similarly, in some competition regimes, injunctive relief is not available to private parties seeking to oppose a merger[320]. Moreover, in some other countries injunction is reserved only for competitors[321], associations[322], or undertakings[323]. Also, in some competition law regimes, an action seeking injunctive relief can be filed by the competition authority[324]. Finally, with regard to collective actions, some jurisdictions allow some mechanisms to collectively seek injunction[325].

2.2. Preliminary Injunctive Relief

Another equitable remedy that can be asserted by a plaintiff in competition law cases is preliminary injunctive relief. As its name suggests, this kind of remedy is awarded prior to the end of the litigation, this is contrary to the permanent injunctions which usually are granted at the end of the proceeding. The aim of preliminary civil injunctions is the protection of private interests by provisionally securing civil claims.

Normally, the award of preliminary relief has to do with the protection of the parties' interests related to the civil action[326], however, in some cases, the court may order special measures as preliminary

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[315] For instance, the Milan Court of Appeal found that the denial to supply to the wholesaler constituted an abuse of dominant position under Italian competition law, in consequence, the court decided to order the manufacturer to supply the wholesaler (Corte d'Appello di Milano, Order of July 23, 2005, *Farmacie Petrone* c. *Pharmacia Italia e Pfizer Italia*).

[316] In the UK, the High Court of Justice in the *Attherace v British Horseracing Boar* case, ordered the defendant to restraint from ordering, instructing, requesting or otherwise soliciting or encouraging their contractual partners or anyone else to cut off or otherwise interfere with the supply of pre-race data to the plaintiff (High Court of Justice, *Attheraces Ltd v British Horseracing Board Ltd* [2005] EWHC 1553).

[317] Cyprus, Denmark, Germany, Greece, Luxembourg, Poland.

[318] Austria, Italy, Malta.

[319] In the UK see case: *American Cyanamid Co v Ethicon* [1975] AC 396, establishing that injunction shall be only awarded if damages are not a suitable remedy.

[320] In Australia according to the provisions of the Trade Practices Act, private plaintiffs are allowed to seek declarations and divestitures in the case of mergers, but nor interim relief.

[321] In Austria, see Section 14(1) of the Federal Act against Unfair Competition.

[322] *Idem*

[323] In Sweden, see Chapter 3, Section 2 of the Competition Act.

[324] In Australia, an application for injunctive relief can be made by the Australian Competition and Consumer Commission pursuant to Section 80 of the Competition and Consumers Act.

[325] Section 14 of the Austrian Act against Unfair Competition provides for collective actions seeking injunction, these may be brought by associations that promote the economic interest of entrepreneurs, provided that such associations represent interest which are affected by the offence or by the Federal Chamber of Labor, the Federal Economic Chamber, the Presidential Conference of the Austrian Chambers of Agriculture or by the Austrian Trade Union Federation.

[326] In Ireland, see case: *Patrick Dunlea &Sons v Nissan (Ireland) Ltd,* [1992] ECC 169; in the UK, see case; *Cutsforth v Mansfield Inns* [1986] All.ER 577 (QB); in the US, see case: SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991).

injunction, like: press announcements communicating the illegality of a determined practice[327], or provisional interim damages if the court believes, at a preliminary stage, that an anti-competitive act has taken place[328].

3. Declaratory Relief

Declaratory actions are also recognized by most legal systems as a remedy for the breach of competition law. This remedy is based on a judicial declaration about the legality or illegality of certain facts alleged by the plaintiff. In the private enforcement of competition law, the purpose of this action is to obtain a judicial declaration with a *res judicata* effect *inter partes* about the legality or illegality of a determined agreement or practice. As stated above, this kind of actions can declare either the legality[329] or the illegality of a determined conduct[330], additionally; this kind of actions may also directly declare the civil liability of defendant to pay damages to the affected parties[331]. Moreover, this kind of proceeding can be grounded on specific competition law provisions in some countries[332].

In some jurisdictions, there are collective redress mechanisms through which the plaintiffs can collectively bring a declaratory action. This kind of procedure is usually brought by a public entity or a legitimate association, who will sue on behalf of the affected parties in order to obtain a court order declaring the civil liability of the defendant. Usually, once the civil liability of the defendant has been declared, the affected parties can bring damages claims to recover the damages inflicted upon them by the unlawful conduct of the defendant[333].

4. Non-monetary Relief

Some competition law infringements can lead to substantial non-monetary relief. For instance, in 2000 after Christie's sought and obtained amnesty from the USA Department of Justice, many class actions were consolidated in the Southern District of New York. By the end of 2000 a settlement was reached between the parties for the amount of $412 million in cash and $100 million in discount certificates[334]. In the *El Paso* case, thirteen million California consumers and three thousand businesses benefited from a settlement that included more than $1.552 billion, of which $125 million were rate reductions on electricity, El Paso lowered its prices to the California Department of Water so that class members would benefit from reduced natural gas bills[335]. The *Insurance* case is a very peculiar one because of the

[327] In the Netherlands, see case: Pres. Rechtbank Utrecht, 11.2.92, *FNK/SCK*.
[328] IN the UK, courts have awarded damages as an interim measure as long as this measure is considered to be a suitable final remedy, see case: *Healthcare at Home Ltd v Genzyme Ltd*, Case No. 1060/5/7/06, [2006] CAT 29.
[329] Tribunale di Milano, judgment of May 8, 2009, *ENI et al.* c. *Pirelli Tyre et al.*
[330] *THI-Hawaii, Inc. v. First Commerce Fin. Corp*., 627 F.2d 991, 996 (9th Cir. 1980).
[331] Stockholm City Court, T 8122-00, *Weba Kemi AB v. Aria ekonomisk forening,*October 9, 2002,
[332] In Australia, any person may commence a proceeding for declaratory relief according to Section 163A of the Competition and Consumers Act.
[333] For instance, in Brazil, there is a collective mechanism through which the Public Prosecutor's Office can file an action to declare the defendant's civil liability, following this action; any affected party has to file a claim to qualify as a victim in order to recover damages (Article 82 of the Consumers Defense Code). In Greece, pursuant to Article 10 of the Consumer Protection Law, a consumer protection association can file an action requesting a court order declaring the liability of the defendant with the purpose of allowing victims to recover damages.
[334] *In re Auction Houses Antitrust Litig.*, 164 F. Supp. 2d 345 (S.D.N.Y. 2001), aff'd, 2002 U.S. App. LEXIS 15327(2d Cir. 2002); and *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir. 2002).
[335] *Natural Gas Antitrust Cases I, II, III & IV. Sweetie's, v. El Paso Corporation, No. 319840 (S.F. Super. Ct.); Continental Forge Company v. Southern California Gas Co., No. BC237336 (L.A. Super. Ct.); Berg v. Southern California Gas Co., No. BC241951 (L.A. Super. Ct.); City of Long Beach v. Southern California Gas Co., No. BC247114 (L.A. Super. Ct.); City of L.A. v. Southern*

remedies and legal principles it established. The case was settled and ordered through an injunction the restructuration of the industry-wide mechanism for providing support and advisory services to Commercial General Liability insurance. The defendants also paid $36 million in cash, of which a part was destined to attorneys' fees[336], and the rest granted as a remedy for the victims in the form of *cy pres* funds[337]. These grants were used to fund the development of a Public Entity that provides risk management education and technical services to small businesses, public entities, and non-profits; and to fund the States for the development of a risk database for municipalities and local governments[338]. Other cases can lead to the restructuration of a determined industry. For instance, the *VISA/MASTERCARD* case is very important not only because it represents the largest settlement in antitrust history, but also because both firms agreed to implement a variety of injunctive relief characterized by the judge as of "substantial" value. The firms agreed to significantly reduce their charges for debit transactions, saving more than $1 billion to merchants. Merchants were free to choose the firms' products based on quality, speed, safety and price, and no longer were obliged to accept debit cards if they take credit cards[339].

5. Damages

The main objective of an award of damages in competition law litigation is the compensation of the victims for the harm suffered due to the anticompetitive conduct of the defendant. Notwithstanding, in some jurisdictions, such objectives are not the only rationale to the award of damages, thus, there are some other justifications that may be used to grant damages, such as: the recovery of the benefits gained by the defendant through its unlawful conduct, or the punishment or deterrence of the wrongdoer by the imposition of punitive or exemplary damages.

(a) Damages as Monetary Compensation

Monetary compensation for the harm suffered by the victim of an anticompetitive conduct is available in most jurisdictions. Monetary compensation is different from restitution in that the latter has as the main purpose to put the victim in the situation he was prior to the violation of the competition rules, while compensation is the grant of an equivalent in kind or in money for the harm sustained by the antitrust victim. Restitution is the main remedy available for plaintiffs in many legal regimes[340], however, to restore the plaintiff to the situation he would have been had the infringement not taken place may not be always possible or may be excessively difficult. Hence, whenever restitution is unavailable the plaintiffs

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California Gas Col, No. BC265905 (L.A. Super. Ct.); Phillip v. El Paso Merchant Energy LP, No. GIC 759425 (San Diego Super. Ct.); and Phillip v. El Paso Merchant Energy LP, No. GIC 759426 (San Diego Super. Ct.). (El Paso).

[336] 27.2% of the total amount paid.

[337] "*Cy pres"* from the French "cy pres comme possible", meaning as near as possible. Cy pres funds typically result as a remedy from class action lawsuits when there are funds left over after the class members were compensated, or when it is either impossible or impractical to distribute the funds directly to the individuals who were injured. In those cases, the court may order that the funds be used for grants to benefit the class members indirectly or as near as possible in order to remedy or compensate them for the injury inflicted. In Canada for cases where cy pres was granted see, *Currie v. McDonald's Restaurants of Canada Ltd.,* 2006 Carswel l Ont 1213 (S.C.J.); *Alfresh Beverages Canada Corp v. Hoechst AG et al.,* [2002] O.J. No. 79 (S.C.J.); and *Sutherland v. Boots Pharmaceutical PLC,* [2002] O.J. No. 1361 (S.C.J.).

[338] *In Re Insurance Antitrust Litigation*, 723 F. Supp. 464 (N.D. CA 1989); reversed, 938 F. 2d 919 (9th Cir. 1991); affirmed sub nom Hartford Ins. Co. v. California, 509 U.S. 764 (1993).

[339] *In Re Visa Check/MasterMoney Antitrust Litigation, a/k/a Wal-Mart Stores, Inc. et. al v. Visa U.S.A. Inc. and MasterCard International Inc.,* 396 F. 3d 96, 114 (2d Cir. 2005).

[340] Austria, Denmark, Germany, Portugal.

may request compensation[341]; moreover, in some jurisdictions compensation will only be allowed in cases where restitution is not possible[342].

(b) Damages as the Recovery of Illegal Gains

In some countries, a damages claim may be structured as an action for the recovery of the illegal gains made by the defendant as a result of its anticompetitive conduct. In such cases, the injury sustained by the plaintiff will not be grounded on the actual loss suffered by the claimant, but on the illegal gains that the infringer has made as a result of the violation of the competition rules[343].

(c) Damages as Punishment

With regard to exemplary or punitive damages, these are mainly awarded as a punishment to the defendant for the infringement of the competition rules. Additionally, this kind of damages serves as deterrence to prevent the infringement of the competition provisions in the future. As a consequence, the extent of exemplary or punitive damages surpasses the restitution and compensation objectives to accomplish punishment and deterrence.

5.1. Economic Models for the Calculation of Damages

The main objective of damages awards is compensation, thus, to achieve this objective courts will have to assess the amount of damages through calculations in order to reconstruct the state of the world without the alleged harm. Such assessment will normally require the intervention of qualified experts with specific knowledge on the market, the industry and the infringement of the competition rules. The cumbersome exercise of calculating the quantum of damages has been considered *excessively difficult* or even *practically impossible* when such calculation requires the exact amount of the harm suffered[344]. Additionally, in some cases, the claim of the victim may be too small compared to calculation requirements imposed, thus, turning the claim not cost-effective[345].

Different kinds of damages may arise from a single competition law infringement. Broadly speaking, the most common antitrust damages may be resumed in: the overcharge damage, lost profits and damage resulting from a terminated or disadvantaged business. However, in practice, the bulk of damages claims related to the infringement of the competition rules surge from cartel agreements, in those cases, the victims will sue for the damages caused to them by the overcharged price paid due to the anticompetitive agreement. With regard to the other kinds of damages, these are usually very difficult to calculate and require individual assessment in order to measure the amount of the damage; therefore, the calculation of such damages is carried on a case by case basis by the courts deciding the dispute. For

[341] In the Czech Republic the default form of damages is monetary compensation, however, when possible, the plaintiff may require restitution to the state before of the harmful event (Section 378 of the Commercial Code).
[342] Belgium, Germany, Hungary, Portugal.
[343] In Germany, according to Section 33(3) of the Act against Restraints of Competition, the assessment of the size of the damage may take into account the proportion of the profit obtained by the undertaking due to the infringement of the competition provisions. In Italy, pursuant to article 125 of the Italian Intellectual Property Code, there are three criteria to calculate damages: (a) the loss of profit of the claimant; (b) the disgorgement of profits of the infringer; and (c) applicable to cases involving both IP and antitrust issues is the amount of reasonable royalties. In the Netherlands, damages may be calculated in the basis of the profits made by the party that has breached the competition provisions (Section 6:104 of the Civil Code).
[344] See the Commission's White Paper on Damages (*supra* note 3), at p. 7.
[345] *Idem*

those reasons, the calculation of damages discussed in this part of the study will focus on the calculation of damages concerning the monetary compensation that arise from cartel agreements.

In most jurisdictions, the award of damages will include the compensation of both direct damages (*damnum emergens*), which is the victim's actual loss for the overcharged price paid due to the anticompetitive conduct of the defendant; and loss of profit (*lucrum cessans*)[346], which includes any loss of commercial opportunities[347]. The compensation under this approach will serve mainly the purpose of restoring the injured party to the position it would have occupied had the infringement not occurred through monetary compensation.

Different approaches have been adopted for the calculation of damages in competition law litigation. The most commonly used methods to calculate the situation of the victim in the absence of the infringement are described below:

(a) The Before and After Method

This method is the most simple and it is based in a simple comparison of prices during the period of the alleged anticompetitive conduct with the prices in the period before and/or after the infringement, assuming that these provide a reasonable approximation of the price levels in the absence of the anticompetitive conduct[348].

(b) The Yardstick Method

The yardstick method uses a comparison of the market where the anticompetitive conduct is alleged to have taken place with a similar market unaffected by the infringement. The market used as reference will need to have similar competitive characteristics to the affected market in order to allow attributing the differences in the prices between the two markets to the effects of the anticompetitive conduct[349].

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[346] The European Commission in its Staff Working Paper, Annex to the Green Paper on Damages (*supra* note 85), established the need to compensate the victims of antitrust violations for the actual loss and for the lost profits as well (para 149). In that line, the European Court of Justice in the *Manfredi* case determined the right of individuals to seek compensation not only for actual loss but also for loss of profit plus interests (*Manfredi* (*supra* note 37), at para 100).

[347] In Australia, the High Court determined that the loss of a commercial opportunity may have a present value, and consequently, be compensable (*Sellars v. Adelaide Petroleum NL* (1994) 179 CLR 332, 355-6. See also: *Hubbards Pty Ltd v Simpson Ltd* (1982) 41 ALR 509, 518) In Italy, the Corte d'Appello di Milano and Corte d'Apello di Roma, determined that the calculation of damages included the loss of chance or opportunity *(lucro cessante)* (Corte d'Appello di Milano, judgements of July 18, 1995 and December 24, 1996, *Telsystem c. SIP-Telecom Italia*) and (Corte d'Apello di Roma, judgement of January 20, 2003, *Albacom c. Telecom Italia*). In Spain, the Court of first instance of Madrid in application of the principle contained in Article 1106 of the Civil Code, determined that a claimant can recover the direct loss suffered from the anticompetitive conduct as well as the loss of profit (Decision of the Court of first instance N. 4 of Madrid, of June 7, 2005, *Antena 3 v. National Professional Football League*).

[348] In Germany, the courts used the price after the termination of the cartel activities to determine the overcharge and the consequent loss of the plaintiffs (LG Dortmund 0 55/ 02 Kart Vitaminkartell III, Decision, April 1st 2004, and Oberlandesgericht Düsseldorf, Berliner Transportbeton I, KRB 2/05, Decision, June 28th 2005). In the US, a court used the costs and advertising revenue trends of the plaintiff in a period before the infringement in order to calculate projected revenues and costs for the infringement period (*Apollo Theater Foundation Inc. v. Western International*, United States District Court of New York, 02 Civ 10037 (DLC), Decision, May 5th 2005).

[349] In Italy, a plaintiff in a follow-on action relied on the findings of the Italian Competition Authority, which had used the yardstick method in calculating the cartel overcharge by comparing the prices in the cartelized Italian market with the average European prices in other non-cartelized markets. The Guidice di Pace di Bitonto accepted the findings of the competition authority and awarded double damages to the plaintiff (Giudice di Pace di Bitonto, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA,* judgment of May 21, 2007). In the US, *Conwood Co. v. US Tobacco Co*., 290 F.3d 768, 793 n.8 (6th Cir. 2002); *Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc.,* 213 F.3d 198,207 n.17 (5th Cir. 2000); and *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 (5th Cir. 1974).

(c) The Cost-Based Method

The cost-based method allows establishing the hypothetical market price by adding to the average production costs of the product in question a hypothetical profit margin considered to be appropriate under competitive conditions[350].

(d) The Price Prediction Method

The price prediction method is based on econometric modeling which seeks to predict prices in a *"but for"* scenario on the basis of past determinants of prices in the market or between the market in question and yardstick markets. The accuracy of this method depends on the quality of the data available[351].

(e) The Theoretical Modeling Simulation Method

The theoretical modeling simulation method involves the use of an oligopolistic model to determine the effects of the anticompetitive practice. This method may calculate damages in two ways: either by representing the market structure by statistical interrelations of relevant variables or by means of an independent economic model[352].

(f) The Multiple Regression Analysis Method

The multiple regression analysis is a method that attempts to estimate the amount of damages suffered by the plaintiffs by determining the effect that two or more independent variables have on a single dependent variable[353].

In practice, since in most competition law regimes the nature of a damages award is compensatory, therefore, most courts will calculate the amount of damages by comparing the plaintiff's actual position after the injury suffered due to the anticompetitive practice with the hypothetical position which would have existed had the infringement not occurred in order to determine the quantum of the damage[354].

In order to encourage private actions for damages concerning the infringement of the competition rules, some competition law regimes have incorporated specific provisions in order to facilitate the calculation and recovery of damages arising from competition law infringements. For instance, some competition law regimes have provisions that determine what a competition law victim may claim as damages for the harm suffered as a result of the anticompetitive conduct of the defendant[355].

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[350] Cour d'Appel de Paris, *S.A. Mors v. S.A. Labinal*, judgment of 30 September 1998. In this case the expert appointed by the court identified the scenario in the absence of the anticompetitive conduct of the defendant in order to *inter alia* determine the loss of opportunity of the plaintiff by assessing the productions costs of the product in question.

[351] *In re Aluminum Phosphide Antitrust Litg.*, 839 F.Supp. 1497, 1507 (D.Kan. 1995).

[352] In Spain, in a case involving exclusionary practices, the plaintiff's expert used an oligopoly model that provided an econometric study in which *Conduit's* lost market share in Spain was calculated by an econometric model that took the UK as a comparator market. Both markets were opened to competition at similar times, having been previously controlled by the incumbent telephony operator. In the UK, other operators rapidly gained market share, while in Spain the incumbent retained the largest share in the market, the experts argued that *Conduit* would have gained a greater market share in Spain in the absence of the exclusionary conduct by *Telefónica* (Juzgado de lo Mercantil Madrid (Madrid Commercial Court), *Conduit Europe, S.A. v. Telefónica de España S.A.U*, judgment of November 11th 2005).

[353] *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co*., 998 F.2d 1224, 1238 (3d Cir. 1993). In this case, the court determined that the multiple regression analysis is a reliable method for damages calculation.

[354] In German law *Differenzhypothese.*

[355] In Australia, according to Section 82(1) of the Competition and Consumer Act, any affected person by a conduct in contravention of the provisions of the Act may recover the amount of the loss or damage. In Canada, Section 36 of the Competition establishes

Furthermore, some competition law regimes have adopted specific provisions regarding the calculation of damages in order to facilitate to the courts the measurement of the amount of the injury suffered by the victims[356]. With regard to collective claims, some competition regimes have permitted the aggregation of damages in order to simplify the calculation of the damages suffered by collective claimants, the purpose of this aggregation is to enable independent victims who have suffered a small injury to recover the amount of damages from the violator of the competition provisions in a simple way[357]. Oppositely, in other jurisdictions, each member of the class in a collective proceeding for the recovery of damages has to prove the amount of the damage that has been inflicted upon him[358].

Additionally, in some competition law regimes, the courts have established legal presumptions in order to facilitate the calculation of damages in cartel related cases. In such jurisdictions, the courts have determined that whenever the prediction of the competitive price that the victim would have paid had the infringement of the competition rules not existed is too difficult to sustain, the courts will consider the prices charged just before the start of the cartel activity as the competitive market prices[359].

In the same line, some courts have recognized the difficulty on the plaintiffs to prove the amount of damages suffered as a consequence of the antitrust infringement, and as a result, have lowered the standards required to prove the quantum of the injury[360]. Furthermore, when a plaintiff has demonstrated the existence of a competition law infringement, the subsequent requirement of showing the extent of the damages may also be relaxed[361].

Furthermore, due to the fact that the calculation of the quantum of damages in competition law litigation represents such a heavy duty on the plaintiffs and on courts, some competition law regimes have

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that any person, who has suffered loss or damage as a result of a conduct contrary to the provisions of the Act, may sue for and recover an amount equal to the loss or damage. In Turkey, pursuant to Article 58 of the Competition Act, a person affected by the prevention, distortion or reduction of competition can claim as damage the difference between the cost paid and the cost that should have been paid if the competition had not been limited.

[356] For instance, in Germany, Section 33(3) Sentence 3 of the Act against Restraints of Competition establishes that courts may take into account, when calculating the amount of damages, the proportion of the profit which the undertaking has derived from the infringement. In Turkey, Section 58 of the Competition Act states that in determining the damage, all profits expected to be gained by the injured undertakings are calculated by taking into account the balance sheets of the previous years as well.

[357] In *Axiom Plastics Inc. v. E.I. DuPont Canada Co.* (*supra* note 227), the court established that the aggregate damages provisions of the Ontario Class Proceedings Act (1992, Sections 23 and 24) may be invoked in a competition law case in order to calculate damages. Similarly, in *Irving Paper Ltd. V. Atofina Chamicals Inc.* (*supra* note 227), the court held that the aggregate provisions are available when the claimants have proved the "potential liability" of the defendant.

[358] In Israel, see the Supreme Court decision: CA 345/03 *Dan Reichart v. The Heirs of Moshe Shemesh* [2007] ISRDC (not published).

[359] MIYAKAWA, Hiromitsu (2010), "Japan". FOER, A., CUNEO, J. (ed). *The International Handbook on Private Enforcement of Competition Law*. UK: Edward Elgar Publishing Limited, p. 536.

[360] In the US, according to the Supreme Court the relaxation of the burden of proving the amount of damages prevents the wrongdoer to profit from its wrongdoing at the expense of the victim (*Bigelow v. RKO Radio Pictures, Inc*., 327 US 251, 264, 66 S. Ct. 574 (1946)). In another case, a court determined that although the most common methods of quantifying antitrust damages are "before and after" and "yardstick" measures of loss profits, the plaintiff may use different measures tailored to the facts of the case if estimates and assumptions rest on adequate data (Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc., 213 F.3d 198,207 (5th Cir. 2000)). In Italy the court may decide on the calculation of damages based on an equitable basis whenever practical problems of determination arise, for instance, the Corte d'Appello di Milano, measured the reputational damages upon an equitable basis (Corte d'Appello di Milano, judgment of July 11, 2003, *Bluvacanze c. Viaggi del Ventaglio, Turisanda e Hotelplan Italia*).

[361] In the *Eleven Line* case, the court established that once the fact of antitrust damage is proven, the burden of proving the amount of damages is more relaxed (*Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc*. (*supra* note 349). See also, *Allied Accessories & Auto Parts Co. v. Gen. Motors Corp.,* 901 F.2d 1322, 1326 (6th Cir. 1990), where the court decided that it will be enough if the plaintiff shows the extent of damages as a matter of just and reasonable inference, and consequently, the defendant will not be allowed to complain that the amount of damages cannot be measured exactly.

opted for the elaboration of certain guidelines to assist the courts and the parties in the calculation process[362].

5.2. Discretion of Courts when Awarding Damages for the Breach of Competition Law

The discretion of the courts is primarily restricted by the compensatory nature of the damages award. Notwithstanding, in most jurisdictions, the procedural rules permit a court to determine damages by estimating a reasonable amount where either full proof cannot be presented at all, or only with difficulty, or where the costs or inconvenience of fully proving the damages would be disproportionately high considering the scope of the harm and the amount of compensation sought[363]. Furthermore, in jurisdictions where there are no specific methods for the calculation of the quantum of damages suffered due to a competition law infringement, the amount of damages is determined under the sole discretion of the courts in a case by case basis[364].

5.3. Limitations on the Amount Awarded as Damages

Provided that in most countries the nature of an award of damages is merely compensatory, any amount granted by a court as damages for the infringement of the competition provisions must not exceed the quantum of the damages actually suffered by the victim taking into account both the actual damage and the loss of profit. In most countries, any award of damages contrary to these precepts would foster the unjust enrichment of the plaintiff. Consequently, when awarding damages, the courts are only limited by the compensatory nature of this kind of remedy, and as a result, the amount of damages granted to the victims is irrelevant as long as the victims are fully compensated for the harmful event.

5.4. Availability of Punitive, Exemplary or Multiplied Damages

The availability of punitive, exemplary or multiplied damages allows the victim of a competition law violation to recover more than just the actual damage suffered as a consequence of the harmful event. The possibility of the plaintiff to claim more than just the actual damage suffered as a consequence of the unlawful act of the defendant serves other objectives besides mere compensation for the injury, such as: the punishment of past infringements and the deterrence of future violations of the competition provisions.

Even though, the great majority of legal regimes award only the actual amount of damages provided that the main function of this kind of civil remedy is the compensation for the injury suffered by the victim, some competition law regimes allow the victims to recover punitive, exemplary or multiplied damages.

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[362] At the EU level, the Commission has recognized the need of a framework with pragmatic, non-binding guidance for the quantification of damages in antitrust cases (Page 7 of the Commission's White Paper on Damages). In order to elaborate the non-binding guidelines for the quantification of harm in antitrust damages actions, the European Commission ordered an external study on the quantification of antitrust damages prepared by economists and a multijurisdictional team of lawyers ("Quantifying antitrust damages", Towards non-binding guidance for courts, Study prepared for the European Commission, Oxera and a multijurisdictional team of lawyers led by Dr. Assimakis Komninos).

[363] In Croatia, see Article 223 of the Civil Procedure Act. In the Czech Republic, see Section 136 of the Commercial Code. In Finland, see Section 17:6 of the Code of Judicial Procedure. In Germany, see Section 287 of the Code of Civil Procedure. In Hungary, see Section 2006(3) of the Civil Procedure Act. In Sweden, see Chapter 35 §5 of the Code of Judicial Procedure. In Turkey, see Article 43 of the Code of Obligations.

[364] For instance, in France, the judge handling the case has wide discretion in the determination of the amount of damages.

(a) Punitive Damages

With regard to punitive damages, these are awarded to punish the antitrust violator or to deter him from future infringements. In practice, this kind of damages is rarely awarded by the courts. In order for the plaintiff to recover punitive damages, it has to show that the behavior of the defendant is particularly repulsive or that the defendant is a recidivist[365].

(b) Exemplary Damages

As to exemplary damages, they resemble to punitive damages in that its imposition serves the objectives of punishment and deterrence of future infringements[366]. Similarly, the award of exemplary damages is only under exceptional circumstances, such as when there has been a deliberate and conscious violation of rights, or when the defendant's conduct has been calculated to make a profit larger than the compensation payable to the plaintiff[367]. Furthermore, the defendant's conduct must be extremely malicious or socially harmful to the extent that courts decide to make an example of the defendant for reasons of public policy[368]. Finally, the award of exemplary damages may be restricted to stand-alone actions given that in follow-on cases the fines imposed by the competition authorities have already fulfilled the punishment and deterrence objectives[369].

(c) Multiplied Damages

Finally, some jurisdictions allow antitrust victims to recover multiplied damages from the defendant[370]. The objective of this kind of damages just like with punitive and exemplary damages goes beyond the simple compensation of the plaintiff and additionally seeks to punish the violator of the competition provisions and to deter future infringements[371]. In this regard, commentators have stated that private enforcement, and more specifically, multiplied damages claims, can fulfill the goals of deterrence and compensation[372]. The main difference between multiplied damages and punitive or exemplary damages is how the quantum of the damage is calculated; however, some scholars have indicated that multiplied damages can also serve a punishment objective[373]. In the former, the actual damages are multiplied by the

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[365] In Canada, even though Section 36 of the Competition Act does not allow plaintiffs to claim punitive damages, in practice, Section 36 claims are coupled with claims for damages for the common law torts of conspiracy or intentional interference with economic relations which may include punitive damages. In Cyprus, in the case *Papakokkinou v. Kanther* the court awarded punitive damages because it considered that the conduct of the defendant demonstrates arrogance, immoral motive or tendency to humility the other party (*Papakokkinou & others vs Kanther* (1982) Cyprus Law Reports p.65).

[366] *Broome v. Cassell & Co. Ltd.* [1972] AC 1072, 1073.

[367] *Rookes v. Banard* [1964] AC 1129, 1226.

[368] In Ireland, Section 14(5)(b) of the Competition Act allows antitrust victims to recover exemplary damages, in practice, the amount granted as exemplary damages is usually a fraction of the general damages award, and not multiples like treble damages in the US.

[369] In the UK, the *Devenish Nutrition v. Sanofi-Aventis & Others* case decided on the availability of exemplary damages in follow-on actions. The High Court determined that the award of exemplary damages in follow-on cases is contrary to the Community principle of *ne bis in idem*, also the court determined that since the claimants were not the only affected –since there were a bunch of potential claimants- the award of exemplary damages should not apply to the case (*Devenish Nutrition Limited v. Sanofi-Aventis SA (France) & Others* [2007] EWHC 2394 (Ch))

[370] Taiwan, Article 32(1) of the Fair Trade Law. Turkey, Section 58 of the Competition Act. US, Section 4 of the Clayton Act.

[371] In Italy, even though the award of multiplied damages is not available in its legislation, the Giudice di Pace di Bitonio in the *Manfredi* case, which was later referred to the ECJ, determined that when calculating the amount of damages, courts should consider the deterrent effect of the award. Consequently, the judge in that case awarded not only the actual damages suffered by the claimant but also intended to set off any profit gained by the defendant by awarding double damages to the plaintiff (*Manfredi c. Lloyd Adriatico Assicurazioni*, *supra* note 349).

[372] WHEELER, Malcom E. (1973), 'Antitrust Treble-Damage Actions: Do They Work?'. 61 *California Law Review*, p. 1319.

[373] WALLER, Spencer W. (2003), 'The Incoherence of Punishment in Antitrust'. 78 *Chicago Kent Law Review*, 207, pp. 212-213.

court in the proceedings[374]. In the latter, the amount of punitive or exemplary damages is a fraction of the general damages award. With regard to the multiplication of the amount of damages, this can be done automatically after the court has reached a decision, or can be made at the request of the plaintiff, depending on which jurisdiction[375]

6. Interest

Pursuant to general rules in civil proceedings, the prevailing plaintiff should have the right to obtain interests in order to compensate the successful claimant for being deprived of compensation between the date on which the damage occurred and the date of the damage award. In relation to private antitrust litigation, it has been established that the successful plaintiff should receive full compensation for the harm suffered due to the anticompetitive conduct of the defendant, which includes: actual loss, loss of profit plus interests[376].

The main issue regarding the award of interests in the private enforcement of competition law is to determine the period from which interests should start to run. With regard to the periods associated to the accrual of interests, in a broad sense, interests can be classified in: pre-judgment interests, which run from the date of the infringement or injury to the beginning of the action; and post-judgment interests, which run from the date of the judgment.

6.1. Post-judgment interests

In civil litigation a successful plaintiff can obtain post-judgment interests. The purpose of the award of post-judgment interests is to compensate the victim for the period between the entry of the judgment and the payment of the judgment by the defendant[377]. The award of post-judgment interest may be mandatory according to the provisions of some jurisdictions[378].

6.2. Pre-judgment interests

As a general rule, in civil proceedings interests are awarded after the judgment. In practice, the possibility of the plaintiff to recover pre-judgment interests in competition law litigation can end up in a substantial increase in the amount of damages recovered by the successful plaintiff. Moreover, it has been stated that since the availability of pre-judgment interests can significantly increase the amount of damages recovered, such an award may enhance the effectiveness of private enforcement of competition law by compensating the victims while deterring future infractions without the establishment of punitive or treble

[374] In Taiwan, Turkey and the US, the amount of damages is multiplied by three (treble damages).
[375] In the US, the trebling of damages is done automatically by the judge at the end of the proceedings. Conversely, in Taiwan and Turkey, the trebling of damages is done at the request of the plaintiff and is decided entirely under the discretion of the court.
[376] At the European Union level, it has been established that antitrust victims should be allowed to recover the actual loss, the loss of profit, and interests (*Manfredi* case, *supra* note 37). Additionally, the European Commission in page 7 of its White Paper on Damages (*supra* note 3) has welcomed the decision of the court regarding the rights of antitrust victims to recover the actual loss of the harm, the loss profit plus interests. Furthermore, the Ashurst Report (*supra* note 3) has identified the restrictions on level and duration of application of interest rates as a disincentive to private action given that such restrictions may reduce the potential award of damages (page 8).
[377] *H.J. Inc. v. Flygt Corp.,* 925 F.2d 257, 261 (8th Cir. 1991).
[378] In the US, see 28 USC Section 1961 (2000).

damages[379]. Nevertheless, some competition law regimes have restricted the award of pre-judgment interests to certain circumstances. For instance, a court may only grant pre-judgment interests when the bad faith on the part of the defendant has caused a material delay in the adjudication of the dispute[380].

Finally, in an effort to facilitate private actions for damages for the infringement of the competition law provisions, some competition law regimes have introduced specific provisions dealing with the award of interests[381]. Additionally, in some jurisdictions, pre-judgment interest may be awarded only in actions brought for the infringement of the competition law provisions[382].

VII. LITIGATION EXPENSES

1. Litigation Costs

Even though the most important thing that drives private plaintiffs to bring a private action for the infringement of the competition law provisions is the likelihood of winning the dispute, the litigation costs involved in this kind of procedures can be a strong disincentive to file such an action before civil courts, provided that these may be significantly higher than in most other civil disputes due to the peculiar characteristics of most competition law cases.

The litigation costs in competition law disputes generally cover two kinds of expenses. On the one hand, there are the court costs which are any costs generated by the court in the proceedings, such as: court fees; the costs for appointing an expert, or the expenses of witnesses. On the other hand, there are the party costs which may include: the attorneys' fees, the costs of retrieving evidence, the costs for retaining an expert, and any other costs that the parties bear during the proceedings.

As stated before, the litigation costs linked to the private enforcement of competition law have been considered as a disincentive to private plaintiffs willing to sue for the violation of the competition provisions provided that the costs involved with the initiation of a private antitrust action are particularly higher compared to other civil actions[383]. This situation is evidenced with regard to both court costs and party costs. On the one hand, in most competition cases, the court fees are required to be paid upfront by the plaintiff, and these may involve a large amount given that its level may be calculated as a percentage of the value of the claim, consequently, since the amount of antitrust claims tends to be large in order to make the actions cost-effective, then, the court fees calculated with respect to the value of the claims will be as high as the latter. On the other hand, due to the complexity of most competition law cases, the party costs are usually high too because these may include exorbitant attorneys' fees, plus all the expenses required to sustain the claim in the proceeding.

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[379] SMITH, V., MATON, A., CAMPBELL, S. (2010), "England and Wales". In: Foer A. & Cuneo J. (eds) *The International Handbook on Private Enforcement of Competition Law*, p. 310. The authors state that since the amount of damages can significantly increase due to the award of pre-judgment interest, these can act as an effective equivalent to treble damages.

[380] In the US, see Clayton Act, 15 U.S.C. §15(A)(1-3) (2009). See also cases: *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 435-36 (2d Cir. 2007); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 561 (7th Cir. 1986); and *In re Linerboard Antitrust Litig*., 504 F. Supp. 2d 38, 64-66 (E.D. Pa. 2007).

[381] In Germany, see Section 33(3) of the Act against Restraints of Competition.

[382] Under German law, in general civil actions for damages the plaintiff may be awarded statutory interest from the moment of default in payment. However, in damages actions for the infringement of the competition rules, the plaintiff may claim pre-judgment interest calculated from the moment in which the damage has occurred (Section 33(3) of the Act against Restraints of Competition).

[383] See the Commission's White Paper on Damages (*supra* note 3), at page 9.

In practice, the fact that most jurisdictions require the plaintiff the payment of courts fees upfront, which as stated before may be a considerable amount, plus the fact that most courts apply the loser pays principle, which requires the unsuccessful party to pay the litigation expenses of the prevailing party, can truly work as an obstacle to the private enforcement of competition law. This situation is due to the complexity and length of most competition law cases, additionally, the fact that the outcome of such disputes cannot be assessed by the claimant prior to initiation of the action contributes to the reluctance of private plaintiffs to sue for damages.

(a) Court Costs

In most jurisdictions court fees are payable upfront by the plaintiff as a general rule. Court fees may either be calculated as a fixed sum or as a percentage of the value of the claim. In some cases, due to the high value of the claim, the level of the court fees may be considerable, and as a consequence, act as a disincentive for potential plaintiffs. Nevertheless, in some jurisdictions, there is a chance to recover the court expenses if the plaintiff prevails over the defendant. In order to safeguard the right of individuals to get access to courts, to have a fair hearing by a tribunal, and to encourage private antitrust actions, some regimes have adopted certain measures regarding the payment of court fees. For instance, some jurisdictions have relieved the plaintiff from its obligation to pay upfront the court fees in collective actions brought by certain entities against undertakings that have injured the interests of consumers[384]. Moreover, in some countries, parties with limited or scarce resources will be exempted from paying court fees[385]. Finally, in some jurisdictions, even though the general rule is that the losing party has to bear the court costs, the judge has wide discretion to order another party to pay the judicial costs, in whole or in part, by issuing a reasoned decision[386].

(b) Party Costs

As a general rule, each party must bear its own legal costs in the course of the proceedings. However, in most jurisdictions, the prevailing party may recover its litigation costs from the losing party either wholly or partly depending on the degree of success of its claim. The party costs may include: attorneys' fees, expert fees, the costs for the production of evidence, and others, which may result in a significant amount for the parties. The fact that the outcome of the trial is hard to predict due to the characteristics of most competition law cases, plus the high level of the litigation expenses serve as a strong deterrent for private plaintiffs to bring an action before courts. Additionally, the application of the loser pays principle in civil cases exacerbates this situation provided that the claimant will face the dilemma of having to bear its own elevated litigation costs plus the defendant's expenses. However, there are some mechanisms through which the parties can finance their litigation expenses[387].

[384] In Brazil, according to Article 87 of the Consumers Defense Code, the legitimated bodies to bring collective actions for the protection of the consumers' interest are excused from paying court fees, unless malicious prosecution is proven.
[385] In Germany, Section 89a of the Act against Restraints of Competition establishes that the court fees may be reduced based on the value of the claim and the party's economic situation. In Lithuania, the court may take into consideration the economic situation of the claimant and either reduce the amount of the court fees or defer its payment until the court reaches a decision. In Poland, parties with no possibilities to pay court fees are exempted from this obligation. In Spain, pursuant to Law 53/2002, some plaintiffs may be exempted from paying court fees: individuals, non-profit organizations, some legal entities and small companies.
[386] See Article 696 of the French Code of Civil Procedure.
[387] See Section VII, below.

2. Recoverability of Legal Expenses

As discussed before, many jurisdictions apply the loser pays principle according to which the prevailing party may recover its litigation costs from the losing party. However, in practice there are some shades in the application of this principle. First, most courts take into account the level of success of the parties before making a determination with regard to the awarding of litigation expenses, thus, if neither party's position is fully upheld, the litigation costs will be bear proportionally to the success of each party in the proceedings. Second, the courts have wide discretion to award the recovery of litigation expenses in some countries[388]. In such cases, the court will have authority to order the payment of the legal costs to either party irrespective of its success in the proceedings, this approach ensures that risk-adverse plaintiffs with meritorious claims do not refrain from filing an action under the fear of having to bear the litigation expenses of the defendant in case of losing the dispute[389]. Third, as a general rule the successful party may recuperate all its litigation expenses, however, in some jurisdictions not all litigation costs are recoverable[390], and additionally, the amounts recovered may be subject to limitations[391], which in practice means, that the successful plaintiff will rarely recover its full costs. Finally, some competition regimes have adopted specific competition law provisions regarding the allocation of litigation costs which encourage the bringing of private actions for the infringement of the competition rules[392].

[388] In Finland, the courts have discretion to order the payment of litigation costs to the successful party if it deems that the losing party had a justified reason to litigate due to the ambiguities of the case. In Italy, the court may order that each party bears its own litigation costs whenever the case presents complex or unusual legal issues, or when there are conflicting court precedents regarding those issues, or when the courts believes there are justified reasons to order that each party bears its own litigation expenses. In Lithuania, the court may take into account the economic situation of the claimant and reduce the amount of court fees, or delay its payment until the court issues a decision. In Peru, the courts may exempt the losing party from its obligation to pay the legal expenses of the other party when the court believes that the unsuccessful plaintiff had reasonable grounds to file the action, or when the defenses raised by the unsuccessful defendant were based on reasonable grounds. In Spain, the losing party has to bear the litigation costs, unless the court determines that the case raised serious legal or factual doubts. In the UK the courts and the CAT have discretion to award the litigation cost to either party.

[389] This approach has been suggested in the Commission's White Paper on Damages (*supra* note 3), which encourages Member States to make the recovery of litigation costs dependent on a court order that may depart from the loser pays principle in order to guarantee that the plaintiff, even if unsuccessful, would not have to pay the defendant's litigation costs (Page 10).

[390] In Taiwan, only court fees are recoverable by the successful party, thus, each party has to bear its own party costs, such as attorney's fees, unless the attorney of the losing party was appointed by the court, or in litigation before the Supreme Court.

[391] In most jurisdictions the amounts recovered do not cover the actual expenses of the parties. In Germany, the winning party may only recover attorney's fees no higher than the statutory rate. In Korea, the courts determine the amount of the successful party litigation costs based on the Supreme Court Notice Nº 1829, *The Rule on Remuneration of Attorney and Calculation of Litigation Costs*. In Lithuania, attorneys' fees are only recoverable to the extent permitted by law, which is determined by the Minister of Justice Recommendations on the Maximum Amounts of Attorney Fees that can be recovered in Civil Proceedings. In Turkey, the attorneys' fees recoverable by the successful plaintiff are determined by the fixed rate established in the Minimum Tariff Schedule of the Act on Attorneyship.

[392] In Canada, pursuant to Section 36 of the Competition Act, the court may award the plaintiff up to the full amount of its legal costs incurred in the investigation of its claim. In Germany, as a general rule, the litigation expenses are calculated on the basis of the value of the claim, however, pursuant to Section 89a of the Act against Restraints of Competition if a party sufficiently proves that its economic situation would be seriously jeopardized if it had to bear the cost of litigation calculated on the basis of the full value in dispute, the court may order the payment of the court fees based on a calculation made with respect to the economic situation of the requesting party. Additionally, the court may order that the benefiting party has to pay its attorney's fees according to the adjusted part of the value on dispute. Moreover, if the benefiting party is order to pay the litigation expenses of the other party, it will only reimburse the opposing party for the paid court fees and the fees of its attorney only on a pro-rata basis. Finally, if litigation costs are imposed on the other party, the attorney of the benefiting party may recover his fees from the other party according to full value of the dispute. In the UK, the Competition Appeal Tribunal may, at its discretion, order the payment of litigation expenses to either party irrespective of its success; furthermore, the CAT may issue this order at any stage of the proceedings, even upfront. In the USA, pursuant to Section 15 of the Clayton Act, only the successful plaintiff has the right to recover its costs of suit plus reasonable attorney's fees. In this respect, the Fifth Court denied a successful defendant the recovery of its legal expenses because by definition, only plaintiffs may recover legal costs under the provisions of the Clayton Act (*J.T. Gibbons, Inc. v. Crawford Fitting Co.,* 790 F.2d 1193, 1194-95 (5th Cir. 1986)).

3. Funding Litigation

Normally, due to the complexity of most antitrust cases, competition law litigation can be very expensive for the parties involved in the proceedings provided that they will have to bear such expenses as: court fees, attorneys' fees, expert fees, costs for the production of evidence, translators, transportations, costs of witnesses, and others, to sustain its position before courts. In practice, these expenses will be higher for plaintiffs, given that they have to pay the court fees upfront and that the burden of proving the infringement of the competition rules and causality between the perpetrator's conduct and the injury suffered rests on them. As consequence, unless the plaintiff has considerable economic resources which can fund its litigation expenses, this burden may be unbearable for most private plaintiff such as little enterprises or end consumers.

In order to avoid that private plaintiffs with meritorious claims refrain from filing a private action for the infringement of the competition provisions due to the lack of resources to fund its litigation costs, most jurisdictions allow some mechanisms through which potential plaintiffs can finance their claims, such as: (a) legal aid; (b) contingency fees; (c) conditional fee arrangements; (d) professional party funders; and (e) legal aid insurance or after the event insurance.

(a) Legal Aid

A number of countries provide legal aid for individuals with no resources to bring an action before courts. There are some issues related to the award of legal aid concerning the private enforcement of competition law: first, in some legal systems, this possibility may not be available for competition law cases[393]; second, the amount granted as legal aid in most cases is not high enough to cover the expensive litigation costs involved with the private enforcement of competition law[394]; third, in some jurisdictions, legal aid is only available for individuals and not for undertakings which in competition law cases may also be potential plaintiffs[395].

(b) Contingency Fees

Contingency fees are a kind of fee arrangement for the funding of civil disputes through which the payment of the attorney's legal services depends on, or is contingent to, the existence of some recovery or award in the case. The payment is then a percentage of the amount recovered. On the one hand, these kinds of fee arrangements are explicitly allowed in some jurisdictions[396]. While on the other hand, in

[393] In Italy and Spain legal aid is not allowed in competition law cases.

[394] See the "Netherlands" chapter in the *International Handbook on Private Enforcement of Competition Law* (*supra* note 359) where the author states that the amounts granted as legal aid are fairly limited and may not be suited to antitrust damages claims (Page 377). See also the "Conclusions and Recommendations" chapter in *A Practical Guide to National Competition Rules Across Europe* (*supra* note 299) where the author asserts that the importance of legal aid in competition law litigation has declined in the UK due to the reductions made by the Government to the legal aid resources (Page 26).

[395] In the UK, legal aid is restricted only to individuals. In the Netherlands, pursuant to the Legal Aid Act, undertakings will only be granted legal aid under certain circumstances. In Switzerland, legal aid for individuals only is established as a constitutional principle.

[396] In the US, the majority of private antitrust actions are funded through contingency fees, which are one of the most representative characteristics of the private antitrust enforcement of the US. The availability of this kind of fee arrangement in the US is established by Rule 1.5 of the ABA Model Rules of Professional Conduct. Despite that the parties and its attorneys are free to determine the level of compensation for the legal services of the later; the US courts have discretion to ensure that the attorneys do not recover abusive amounts for its services. For instance, in the *In re Visa Check/Master Money* case, the judge determined that plaintiff attorney's request was "excessive" and "absurd" (*In re Visa Check/Master Money Antitrust Litig.,* 297 F. Supp. 2d 503, 522

some jurisdiction, contingency fees may be expressly prohibited[397], or exceptionally be permitted under certain circumstances[398].

(c) Conditional Fee Arrangements

Is an agreement between the client and its attorney by which the payment of the attorney's fees is only due if the proceedings are successful. Conditional fee arrangements differ from contingency fees in that the fixed fees are not a percentage of the amount awarded to the client, but are an additional success fee for the efforts of the attorney in winning the case[399].

Finally, although in some jurisdictions contingency fees or conditional fee arrangements are not allowed because they are considered to lead to abuses and excesses[400], in most of these countries, the possibility of using bonuses, which are an increase in the attorney's fees that is calculated in function of the size of the award[401]; or uplifts, which are also an increase on the amount payable to the successful attorney, however, its calculation does not take into account the size of the award[402], may have the same effects of contingency or conditional fees.

(d) Professional Funders

These are specialized companies in the purchase, the preparation and enforcement of damages claims arising from the infringement of competition law[403]. Professional funders provide for capital to fund the litigation expenses of the claimant in return of a proportion of the plaintiff's eventual recovery on success, however, if the plaintiff is unsuccessful in its claim, the professional funders cannot recover the amount granted to fund the litigation[404]. Traditionally, this practice has been forbidden in some legal systems for its connection with the torts of maintenance[405] and champerty[406]. At present, however, professional

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(Dec. 19, 2003)). Other jurisdictions such as Australia, Brazil, Canada, Italy, Japan, Korea, or New Zealand, also permit contingency fees.

[397] In France, true contingency fees are prohibited by Article 11 of the National Bar Rules. In India, attorneys are barred from acting on a contingency fees basis according to the professional ethics of the Bar Council of India. In Luxembourg and Portugal, attorneys are forbidden from fixing their fess by reference to a *quota litis* arrangement that makes the amount of fees exclusively dependent on the outcome of the proceeding. In the Netherlands, attorneys are not allowed to have a financial interest in the claim of their clients; consequently, contingency fees are prohibited. In Singapore, attorneys are not allowed to arrange the payment of its fees only in the event of success of the claim, moreover, attorneys are also forbidden from agreeing with their clients a remuneration proportionate to the amount which may be recovered by the client.

[398] In Germany, contingency fees are prohibited as a general rule (Section 49(b)(2) of the Federal Lawyer Regulations), however, according to the German Lawyers' Fee Act, contingency fees may be allowed only in individual cases where the plaintiff would not file the action due the lack of economic resources.

[399] Conditional fee arrangements are available in the UK, where the attorney may agree to receive no payment at all or a reduced one if the client's claim is not successful, and to receive normal or higher than normal payment, with a limitation of no higher than 100%, if the claim is successful. Ireland and the Netherlands also allow conditional fee arrangements.

[400] In the US the availability of contingency fee arrangements plus the provisions of the Clayton Act (Section 15) recognizing the possibility of recovering attorneys' fees has led to cases where the amount recovered as attorneys' fees was immensely disproportionate to the amount recovered by the clients. For instance, in the *United States Football League v. National Football League* case the court awarded the plaintiff $1.00, trebled to $3.00 in damages, and $5,529,247.25 in attorney's fees (704 F.Supp. 474 (S.D.N.Y. 1989).

[401] In Greece, attorneys and clients may agree the amount of the former's fees depending on the outcome of the case; such amount may not be higher than 20% of the amount claimed in the proceeding.

[402] In Luxembourg, attorneys may receive an increase in its fees; however, this cannot be subject to the outcome of the case. In the Netherlands, attorneys may receive a success fee only if the latter has been agreed irrespective of the outcome of the dispute. In Switzerland, attorneys can, considering the outcome of the proceeding, agree on an additional premium *(pactum de palmario)*.

[403] For more information on litigation funding companies visit: http://www.claimsfunding.eu/, or http://www.carteldamageclaims.com/

[404] In a case in the UK, the professional funders could not recover the amount granted to fund the claim from the unsuccessful plaintiff, and additionally, they had to pay the defendants' attorneys' fees (*Arkin v Bouchard Lines Ltd.* [2005]1 WLR 3055).

[405] Maintenance is the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognized by the law as justifying his interference.

funding in competition law cases is a practice that is increasing and no longer considered contrary to the law[407]. In some jurisdictions, private plaintiffs may benefit from public funds to finance its claim under the condition of repaying the amount granted by the fund plus a percentage of any settlement or award achieved[408].

(e) Legal Aid Insurance or After the Event Insurance

This is a special type of insurance that covers the legal fees of a determined dispute. In these cases, the insurer indemnifies the client for any litigation expenses imposed on the latter, who in return has to pay a premium calculated by the insurer. This kind of insurance is available in most jurisdictions; however, it is rarely used in competition law disputes, or may not be available for such kind of disputes[409].

VIII. INTERACTION BETWEEN PRIVATE AND PUBLIC PROCEEDINGS

1. Introduction

In legal systems where both public and private enforcement of the competition provisions exist, these two possibilities interact at different levels with each other. Albeit, public and private enforcement serve primarily different enforcement objectives –deterrence and punishment the former, and compensation the latter- it is important to combine these two to achieve the main goals of competition law. Accordingly, it has been argued that in order to provide for an effective enforcement system of competition law both alternatives have to complement each other[410].

In practice, private actions should complement the public enforcement of competition law, and *vice versa*, in order to catch, punish and deter the majority of anticompetitive practices. Therefore, in stand-alone actions, private claims enforcing the competition provisions will cover the cases that the public authorities do not investigate for reasons of lack of resources or public priorities, and additionally, in follow-on actions, private claims will fulfill the compensation objectives of the competition provisions by initiating an action for damages arising from the decision of the competition authority finding the infringement of the competition provisions.

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[406] Champerty occurs whenever a party agrees to maintain another to bring a claim on the basis that the third party funder shall receive a share of the amount recovered in the action, is a tort that applies to both litigation and arbitration proceedings.

[407] In Australia, the professional funding is no longer prohibited as maintenance and champerty (*Campbells Cash & Carry Pty. Ltd. v. Fostif Pty. Ltd.* (2006) 229 CLR 386). Similarly, in Canada the Ontario Court in a class action case allowed a private funding agreement by which the funder *Claims Funding International PLC.*, has agreed to indemnify the plaintiffs against costs in return for a 7% of any award or settlement (Dugal v. Manulife Financial Corporation, 2011 ONSC 1785). In Singapore, the Court of Appeal determined that where a third party funder has a genuine pre-existing commercial or substantial interest in enforcing the proceedings, the funding may not be champertous (*Lim Lie Hoa and another v. Ong Jane Rebecca* [1997] 1 SLR(R) 775).

[408] In Canada, in the province of Ontario, plaintiffs in class action proceedings may apply to a public fund from the *Class Proceedings Fund* to cover the class litigation expenses. The benefiting plaintiff has the obligation to repay the amount granted by the fund plus a 10% of any award or settlement. For more information, visit: http://www.lawfoundation.on.ca

[409] For instance, in Germany legal aid insurance is not allowed for competition law disputes pursuant to the provisions of the General Policy Conditions of Defense Insurance.

[410] See the page 8 of the Commission' Staff Working Paper, Annex to the Green Paper on Damages (*supra* note 85), stating that private actions before national courts are a complement to public enforcement.

2. Interaction between the Competition Authority Proceedings and Court Proceedings

The public proceedings initiated by competition authorities interrelate with private civil actions brought by private parties fundamentally in two aspects. The first aspect concerns the decision of a competition authority finding the infringement of competition law and how this decision affects the civil proceeding initiated by a private plaintiff. The second aspect relates to the concurrency of both administrative and civil proceedings and whether the competition authority or the ordinary courts are under the obligation to stay their proceedings provided that the other has initiated its own procedure.

2.1. The Requirement of a Prior Decision by the Competition Authority

Most jurisdictions do not require the existence of a prior decision finding the infringement of the competition provisions issued by the competition authority in order to allow private plaintiffs to bring a civil action for the damages arising from the anticompetitive conduct of the defendant, in such cases, antitrust victims will be able to freely sue for damages irrespective of the existence of a competition authority's decision. Despite the above, there are competition law regimes that establish the requirement of the existence of such a decision as a prerequisite for bringing a private action for damages before ordinary courts, consequently, in such jurisdictions antitrust victims will only be allowed to bring follow-on actions[411].

Moreover, in some competition law regimes that require a prior decision of a public authority in order to bring a civil action for damages, ordinary courts may be under the obligation to not consider any stand-alone action for damages on its merits[412] or to refer the issue to the public authority if the claim complies with certain conditions[413]. Moreover, some competition law regimes may actually require that the private plaintiff accompanies its claim with the decision of the public authority finding the infringement[414], or even to file with its claim a notice issued by the public authority certifying that the conduct on which the claim is based has been found to be contrary to the competition provisions and stating the date of the decision and the legal provision under which the public authority has based its decision[415].

2.2. Concurrency of Public and Private Proceedings

The same competition law infringement can be the subject of administrative proceedings by a public authority which may declare the unlawfulness of the conduct, and at the same time, of civil proceedings before ordinary courts where the plaintiffs will claim to recover the damages suffered due to the anticompetitive conduct in question. Whenever, public and private proceedings concur because the same

[411] India, Mexico, Peru, Singapore, South Africa.
[412] In South Africa, pursuant to Section 65(2) of the Competition Act, if party raises an issue concerning a conduct that is prohibited under the provisions of the Act in an action before a civil court, the latter must not consider that issue in its merits.
[413] In South Africa, pursuant to Section 65(2)(b)(i) and (ii) of the Competition Act, civil courts have discretion to refer a stand-alone damages claim to the Competition Tribunal if they deem that the issue has not been raised in a frivolous or vexatious manner and the resolution of the issue is required to determine the final outcome of the action.
[414] See Section 53N(2) of the Indian Competition Act, however, it has to be noticed that antitrust actions for damages in India are conducted by the Appellate Tribunal which is an administrative court in charge of the judicial review of the decisions of the Competition Commission of India.
[415] See Section 65(6)(b) of the South African Competition Act.

legal or factual issues are being contested in more than one procedure, one set of proceedings may be stayed to await the resolution of the other.

In practice, most ordinary courts are not under the obligation to stay its proceedings but they may do so at their own discretion or at the request of the parties. The parties will be interested in staying the civil proceedings especially if the decisions reached in administrative proceedings are binding on ordinary courts, given that the declaration of the infringement will compensate for any delay in the civil proceeding[416]. Additionally, a court may decide to stay its proceedings when an issue *sub judice* in another proceeding is important for the adjudication of the case handled by the court[417]. However, in some jurisdictions, ordinary courts may be statutorily obliged to stay its proceedings until a decision is reached by the competition authority once the later has initiated proceedings on the same matter[418]. Finally, in competition law regimes where the competition authority is just an investigating body and the courts are the decision making body, the court handling the case will not have to stay its proceeding because there are not concurrent proceedings provided that courts are the only bodies with authority to initiate and to decide on competition law matters[419].

With regard to competition authorities, most of them do not have to stay their proceedings once an ordinary court has initiated proceedings on the same matter. Notwithstanding, some may do so in application of their discretion in selecting cases depending on their enforcement-priorities[420] and whether or not they consider that private litigation is a better alternative than public enforcement[421].

3. Rules of Evidence Regarding the Interaction between Public and Private Proceedings

3.1. Access to Documents Held by the Competition Authority and Courts

In most competition law cases, potential plaintiffs usually face the burdensome task of proving the competition law infringement, among other things, in order to recover damages in civil proceedings. This imposition on potential plaintiffs is one of the major obstacles for private enforcement because of the latent asymmetry regarding the information held or known by the litigating parties, provided that most of the relevant evidence of the infringement will be in the possession of the defendant or third parties. In such cases, the competition authorities will be better suited to determine the infringement of the competition law provisions because they have intrusive powers to obtain all the relevant information from the undertakings under investigation and from third parties. In those cases, the information obtained by

[416] NAZZINI, Renato (2004A), 'Concurrent Proceedings in Competition Law: Procedure, Evidence and Remedies'. Oxford; New York: Oxford University Press, p. 9, para 1.23.
[417] Section 32:5 of the Swedish Code of Judicial Procedure.
[418] Pursuant to Article 88/B (6) of the Hungarian Competition Act, courts handling competition related cases shall stay their proceedings upon a notification of the Hungarian Competition Authority stating that it has initiated proceedings until the expiry of the time limit for filing an action in the court against the decision reached in the competition supervision proceedings or in cases where an action is filed against that decision, until the date on which the decision of the review court becomes final.
[419] This is the situation in Ireland where the Competition Authority is only an investigating body and does not have authority to issue a decision concerning the infringement of the competition law provisions.
[420] Pursuant to the *Prioritization Principles* published by the UK's Office of Fair Trading, the OFT has discretion to initiate an investigation or not. One of the issues taken into account by the OFT is whether it is best placed to initiate proceedings with respect to private enforcement.
[421] In the Netherlands the *Nederlandse Mededingingsautoriteit* (The Netherlands Competition Authority, NMa) has rejected a complaint to start investigations in a few cases because a civil procedure had been already initiated on the same matter (Decision by the director-general of the NMa of 19 February 1999, Case nr. 1006/15; Decision by the director-general of the NMa, Case nr. 3576/55, 15 September 2004; Decision by the NMa of 18 February 2008, Case nr. 5985).

the competition authorities in the course of their investigations may be valuable for potential plaintiffs thinking in bringing a private action against the investigated undertakings[422].

Since competition authorities are public bodies, their documents and files should be subject to public consultation by natural and legal persons[423]. Thus, some jurisdictions have rules of administrative openness which govern the publicity of public documents and enable anyone to have access to public information which is in the possession of an administrative body[424], however in practice; most private plaintiffs have difficulties in gaining access to documents held by competition authorities. The fact that the documents held by competition authorities may contain sensitive information about the defendant and about the public proceedings preclude competition authorities from sharing such kind of documents with third parties and courts[425].

There are mainly two scenarios regarding the access to the competition authorities' files: one where private plaintiffs in civil proceedings do not have access to those files; and the other, where such plaintiffs may gain access to the competition authorities' files. Regardless these two scenarios, the information shared by competition authorities and public bodies is always restricted to non-confidential documents which do not contain sensitive information about the parties and the proceedings.

In the first scenario, the access to the competition authority's files will be restricted to the parties to the administrative proceedings in order to protect the interest of the parties involved[426], and also the investigation itself[427]. Consequently, since private plaintiffs in civil proceedings are not considered as parties to the administrative proceedings, they will usually not gain access to the competition authorities' files[428]. Furthermore, in some jurisdictions, third parties may gain access to the competition authority's file if the parties in the proceedings grant their permission[429], or if they can successfully claim a legitimate interest in the outcome of the administrative proceedings[430]. Finally, competition authorities will be

[422] WILS, Wouter P.J. (2009), 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages'. *World Competition.* Volume 32, No. 1, p. 21. The author states that follow-on actions for damages may be facilitated by allowing the claimants to have access to the public enforcement file. Despite the fact that the plaintiffs will not have to prove the infringement, they may find useful information regarding the extent of the harm suffered and the causal link between the infraction and the harm.

[423] In Sweden, the general public can gain access to the activities of the central government and its public documents pursuant to the *Offentlighetsprincipen* constitutional principle, to the extent that these are not classified as confidential.

[424] In Estonia, the Public Information Act; in Finland, the Act on the Openness of Government Activities; in Germany, the Law on the Freedom of Information *(Informationsfreiheitsgesetz)*; in Israel, the Freedom of Information Law; in Slovenia, the Access to Public Information Act.

[425] For instance, according to Chapter 30, Section 3 of the Swedish Publicity and Secrecy Act, the right to access public information is limited to non-confidential documents.

[426] Pursuant to Section 26(5) of the Portuguese Competition Act, the Competition Authority must safeguard the legitimate interest of the investigated undertaking by not revealing sensitive information about its businesses.

[427] For instance, in Finland the Supreme Administrative Court has determined that access to a document will be denied if its disclosure would threaten the outcome of the investigation and consequently affect the public interest (Decision of the Supreme Administrative Court 12.4.2006/883).

[428] In the Czech Republic, Section 21(a)(6) of the Competition Act establishes that those whose rights and duties are subject to the Office for the Protection of Competition dealings and decisions shall be the parties to the proceedings, leaving aside private plaintiffs in civil procedures. In Greece, Article 19 of the Hellenic Competition Commission Operation and Administration Regulation, at paragraph 5, establishes that persons or undertakings against whom an investigation by the Hellenic Competition Commission (HCC) has been initiated and also the complainant have access to the HCC's non-confidential file. Additionally, paragraph 6 of the Regulation excludes third parties from gaining access to the file. Finally, paragraph 4 allows exceptional access to confidential files if the requesting party proves absolute necessity due to reasons of defense. In Hungary, pursuant to Article 55 of the Competition Act, only the parties to the proceedings and their representatives have access to the competition authority's file, according to Article 52 of the Act, a party is a person against whom a proceeding was started or an applicant and the person who is the subject of the application.

[429] See Section 39(2) of the Austrian Cartel Act.

[430] In Spain, at least in theory, any person may request the competition authority to be accepted as an interested party in the administrative proceedings under Article 31 of Law 30/1992 of 26 November.

especially reluctant to share information gained from an application for leniency, provided that the disclosure of such information would place the applicant in a less favorable situation than the other infringers because of the information submitted to the competition authority, and additionally, it would also discourage other potential applicants from seeking lenient treatment[431].

In the second scenario, private plaintiffs may gain access to the competition authority's files by filing a request to the competition authority[432] or by making a request to the court handling the action for damages[433], in such cases, the court may have wide discretion in deciding to whether or not ask the competition authority to disclose the requested information, and to determine to what extent it will share such information with the requesting party. Furthermore, in some jurisdictions ordinary courts may even gain access to confidential documents[434]. In jurisdictions where the competition authority does not have authority to decide on the case but it is just a party to the proceedings, the other parties in the procedure may gain access to the non-confidential information gathered by the competition authority during its investigation[435]. Finally, in some competition law regimes, the competition authority's files are covered by absolute secrecy during the investigation, however, once this has concluded third parties may gain access to the file[436].

3.2. Evidential Value of Decisions Issued by the Competition Authority and Courts

The same competition law infringement may be subject, on the one hand, to administrative proceedings by a public body, such as a competition authority, which will establish the existence of an infringement of competition law, and on the other hand, to civil proceedings before ordinary courts where the victims of the infringement will sue the competition law offenders for damages. As stated before, since private plaintiffs do not have the same intrusive powers of competition authorities to gather all the relevant information to establish the infringement of the competition provisions, these may benefit from the evidence collected by competition authorities during the course of their investigations with the intention of proving the infringement. This possibility has been contemplated by some competition law regimes

[431] In Germany, the Bundeskartellamt in its *Notice on the immunity from and reduction of fine in cartel cases –Leniency Programme-* 2006, establishes that it will refuse applications by private third parties for file inspection or the supply of information, in so far as the leniency application and the evidence provided by the applicant are concerned (para 22). See also Article L 464-2 of the Commercial Code and Procedure Guidance of the French Competition Authority on the French Leniency Programme, 2 March 2009.

[432] In Croatia an interested party may request access to the competition authority's files pursuant to the Competition Act, however, access to information declared confidential is denied (Article 47 of the Competition Act).

[433] In Austria, ordinary courts may obtain access to public documents pursuant to Section 183(1)(3) of the Civil Procedure Code. At the EU level, the Commission cooperates with national courts based on the duty of loyal cooperation principle established in Article 10 EC. Additionally, Article 15(1) of Regulation 1/2003 establishes that national courts in the application of Article 81 and 82 EC may ask the Commission to share with them information in its possession. When the Commission shares information with national courts, it is precluded from disclosing any information protected by professional secrecy (Article 287 EC and 28(2) of Regulation 1/2003). Furthermore, the Commission has the obligation to protect any information containing confidential information such as business secrets, thus, when a national court cannot guarantee the confidentiality of those documents the Commission may refuse to disclose them (Case C-2/88 Zwartveld [1990] ECR I-3365, paras 10 and 11).

[434] In Estonia, courts have authority to request information to the competition authority, including confidential files. Pursuant to Section 63(3) of the Estonian Competition Act, documents containing business secrets may be summited to courts only for the preparation of the hearing of a criminal, civil, administrative or misdemeanor matter, or for the hearing or making a court decision in such matter.

[435] In Ireland the competition authority it is just an investigatory body and does not have authority to issue a decision in the relevant case, thus, in proceedings where the competition authority is a party, it is under the obligation to disclose all relevant information to the other parties in the case. Additionally, due to the characteristics of the Irish legal system, the competition authority may even be asked to share information with the requesting party even if it is not a party to the proceedings under the non-party discovery principle. Moreover, the parties in a civil proceeding in Ireland may request information from other public bodies under the provisions of the Freedom of Information Act.

[436] In Sweden, the competition authority's files are subject to absolute secrecy during the investigation.

with the purpose of facilitating private enforcement and also to avoid the relitigation of legal and factual issues that have been already decided in the administrative proceedings by competition authorities.

In this regard, it has been argued that the fact that a prior decision by a competition authority declaring the violation of the competition law rules is not binding on ordinary courts deciding in follow-on actions for damages constitutes an obstacle to private enforcement[437]. In practice, the evidential value of the decisions issued by competition authorities diverges widely among jurisdictions, ranging from being considered just as evidence, to being a binding decision declaring the infringement of the competition law provisions.

(a) Decisions by the Competition Authority as Evidence in Civil Proceedings

With regard to the evidential value of the decisions of competition authorities, most jurisdictions attribute an important or even compelling evidential value to these. In some jurisdictions, these decisions may even constitute a rebuttable presumption of the facts contained in such decision[438]. Furthermore, in some jurisdictions the decisions of competition authorities finding the infringement of the competition provisions are considered as *prima facie* evidence of those findings in civil proceedings[439]. In some countries, the competition authority's decisions are considered as admissible evidence provided that they comply with the criteria of the provisions concerning the types of evidence admissible[440]. Moreover, in some jurisdictions, the decision of a competition authority declaring the infringement of the competition provisions may lead to a reversal of the burden of proof[441].

Finally, in competition law regimes where competition authorities do not have authority to issue a decision on the matter because this is a prerogative of courts, there will not be a competition authority decision to use as evidence in follow-on actions for damages; however, follow-on plaintiffs may rely on the decisions issued by the relevant court declaring the infringement of the competition provisions[442].

(b) Decisions by the Competition Authority Binding on Civil Proceedings

The binding effect of the competition authorities' decisions may depend on the approach chosen by a determined competition law regime. Thus, in competition law regimes where both stand-alone and

[437] The Commission in its Staff Working paper, Annex to the Green Paper on Damages has identified as an obstacle to private actions the fact that decisions of national competition authorities and courts' decision of other Member States do not have binding effects on the courts in most Member States (para 36). Similarly, the Ashurst Report (*supra* note 3) has determined that it constitutes an obstacle to the extent that claimants will formally be required to prove certain elements of liability –the existence of an infringement- that would have been taken as proven by the decisions of competition authorities (page 8).

[438] Pursuant to Section 40 of the Cypriot Competition Act, a final decision by the Commission for the protection of Competition, European Commission or other competition authority asserting the infringement of the competition law provisions will constitute a rebuttable presumption of the infringement.

[439] In Australia, private plaintiffs may rely on the findings of fact in proceedings brought by the Australian Competition and Consumer Commission as *prima facie* evidence of those facts according to Section 83 of the Competition and Consumer Act. Likewise, in Japan and Korea, the Supreme Courts have determined that the findings of the national competition authorities could be considered by ordinary courts as *prima facie* evidence.

[440] In Luxembourg, since the decisions of the competition authority are in accordance with the provisions of the Civil Code of Procedure regarding the types of evidence admissible, these may be presented in civil proceedings as evidence.

[441] In Italy, the Supreme Court has determined that the decisions of Italian Competition Authority may lead to the reversal of the burden of proof in follow-on civil actions (Corte di Cassazione, judgment n. 3638 of February 13, 2009, *Certel et al. c. ENTEL*).

[442] In Canada, Section 36(2) of the Competition Act establishes that plaintiffs in civil actions may rely on the findings of criminal proceedings, as these constitute proof that the person against whom the action is brought engaged in conduct that was contrary to the Act, absent evidence to the contrary. In the US, according to 15 U.S.C. § 16(a), a final criminal judgment or civil order may constitute *prima facie* evidence of an antitrust violation in a subsequent civil procedure as to matters actually and necessarily decided against the defendant in the government's case. Similarly in Ireland, a previous criminal decision of the Irish courts will have persuasive value in subsequent civil disputes for damages.

follow-on action are allowed, and consequently, the decision of a competition authority is not a requirement to bring a civil action for damages, most courts in those jurisdictions will not be bound by the decision of a competition authority declaring the infringement of the competition law provisions[443]. Conversely, in competition law regimes where only follow-on private actions are allowed, and therefore, a prior decision of the competition authority is a requirement to enable the private plaintiff to sue for damages, such decision will be binding on ordinary courts deciding on the award of damages[444].

Despite the above, in some competition law regimes where both stand-alone and follow-on actions for damages are allowed the decision of a competition authority may be binding on ordinary courts for the purpose of facilitating private actions and to enhance the consistent application of the competition law provisions[445].

In some countries, the hierarchy of the laws determines that a court decision prevails over an administrative decision; as a consequence, the determinations of competition authorities may not be contrary to those issued by courts. However, since this principle may interfere with the functions of competition authorities, in practice ordinary courts await the decision of the competition authority before making any determination in the case[446].

The scope of the bindingness of a competition authority's decision will vary depending on the legal system. The most restrictive approach in such cases will be to declare binding only the decisions issued by national competition authorities[447]. However, there are competition law regimes that additionally recognize the binding effect of decisions issued by regional competition authorities[448] and

[443] For instance, see the Paris Court of Appeal case of 17 March 1998 establishing that the decisions of the *Autorité de la Concurrece* are not binding on national courts and *vice versa* (Paris Court of Appeal, 17 March 1998, *Syndicat des pharmaciens de Faveyron*). In Italy, the Supreme Court stated that the decisions issued by the competition authority are not binding on civil courts and that new facts and evidence which is contrary to the decision may be presented in follow-on on civil procedures (Corte di Cassazione, judgment n, 3640 of February 13, 2009, *Associazione nazionale consulenti del lavoro c. INAZ Paghe*).

[444] In South Africa, when civil courts are handling cases where the Competition Tribunal or the Competition Appeal Court have issued a decision, the court is under the obligation to apply the determination of the Tribunal or the Competition Appeal Court to the issue pursuant to Section 65(2)(a) of the Competition Act. In Singapore, an infringement decision by the Competition Commission of Singapore is a necessary pre-condition for bringing a civil action under Section 86 of the Competition Act, and the courts handling the damages award will be bound by such a decision. The situation is similar in India regarding the provisions of Section 53N of the Competition Act. In Peru, civil courts are bound by the findings of INDECOPI. Similarly in Mexico, the infringement decision of COFECO (Mexican Federal Competition Commission) enables affected parties to claim damages before courts and it is binding on those courts.

[445] This approach is follow by some Member States of the European Union where the decision of a competition authority finding the infringement of the competition rules is not a pre-condition to file an action for damages.

[446] In Brazil, court decisions prevail over administrative decisions, such as those issued by the CADE. Nevertheless, with the purpose of ensuring the consistency of the application of the competition rules, ordinary courts will stay its proceedings until the competition authority has issued a decision.

[447] Austria, Czech Republic, Greece, Hungary, Poland, Slovenia, Sweden, UK.

[448] At the European Union's level, Article 16 of Regulation 1/2003 establishes that where the European Commission has reached a decision in a particular case which is also pending before a national court, the latter cannot take a decision running counter to that of the Commission (Case C-344/98 Masterfoods [2000] ECR I-11369, para 52). If the national court doubts the legality of the European Commission's decision, it has to refer a question to the Court of Justice of the EU for a preliminary ruling. This provision in practice establishes the binding effect of the European Commission decisions on national courts of the Member States. Additionally, some Member States have adopted provisions declaring binding the decisions of their national competition authorities, see for instance: Sections 18 and 20 of the UK Enterprise Act 2002, introduced as Sections 47A and 58A into the UK Competition Act 1998; Section 33(4) of the German Competition Act; and Article 88/B of the Hungarian Competition Act. However, in most of them –except for Germany where the decision of the competition authorities and courts of other Member States are binding on German courts- the decisions of the competition authorities of other Member States are not binding on national courts and will be freely assessed by national courts which may use them as supportive evidence.

competition authorities, or courts acting as such, of other states which are part of a supranational organization[449].

Finally, in some jurisdictions where the decisions of competition authorities are not binding as a matter of law, in practice, the national courts do not deviate from the competition authority's decision[450]; or they may be required by higher courts to await the decision of the competition authority in the matter before deciding on the award of damages[451]; or the *res judicata* principle applies if there has been an appeal on the competition authority's decision before the competent administrative courts, thus, turning such decision binding on civil courts on points of both fact and law[452].

(c) Non-binding Opinions by Competition Authorities

When competition authorities do not take part in a determined civil proceeding, in some jurisdictions, they may volunteer or be asked to provide information on a point of law or some other aspect of the case to assist the court in deciding the matter before it. In such cases, the information can be submitted as a written opinion in the form of a brief (*amicus* brief), or as an oral opinion which will take the form of a testimony. Either way, the opinions and information provided by competition authorities through these mechanisms are not binding on civil courts, thus, these may be freely assessed as evidence at the court's discretion.

The involvement of competition authorities in civil proceedings varies depending on each legal system. For instance, in some competition law regimes civil courts are under the obligation to inform the competition authority of any civil proceeding concerning the application of the competition law rules[453]. As a result, the competition authorities may submit their written or oral opinion to the court in order to assist the latter in reaching a decision[454]. Conversely, in other jurisdictions, the obligation to inform the competition authority of a case concerned with the application of the competition provisions does not exist, and therefore, courts are free to decide about the involvement of competition authorities in civil

[449] The 7th amendment of the German Competition Act introduced the provisions of Section 33(4) which establishes the binding effect of the decisions issued by the Bundeskartellamt, the European Commission, and the competition authorities of other Member States or courts acting as such.
[450] Switzerland.
[451] For Instance, the Turkish Supreme Court established that a decision of the competition authority is required before initiating an action under Article 57 of the Competition Act (Supreme Court decision of 1 November 1999 (*supra* note 76).
[452] In Greece, pursuant to Article 18(1) of L. 703/1977, the decisions of the Administrative Court of Appeals and of the Council of State (Supreme Administrative Court) issued regarding an appeal against a decision of the Hellenic Competition Commission constitute *res judicata*, and therefore, are binding on civil courts.
[453] At the European Union's level, Article 15(2) of Regulation 1/2003 establishes the obligation of Member States to inform the Commission of any written judgment of national courts deciding on the application of Articles 81 or 82 EC. Some Member States have complied with the mandates of the Regulation by including such obligation in their national competition law provisions (In Estonia, Article 53(3) of the Competition Act; in Greece, Article 24(3) L. 703/1977; in Hungary, 91/H(2) of the Competition Act; in the Netherlands, Section 89(j) of the Competition Act). Furthermore, Article 15(3) of the Regulation allows national competition authorities and the Commission to submit, under its own initiative, written observations, and with the permission of the national courts, to summit oral observations on issues relating to the application of Article 81 and 82 EC. Notwithstanding, both provisions only refer to the application of the EU provisions. As a consequence, most Member States do not have similar provisions regarding the application of national law.
[454] At least in two Member States, the provisions of Article 15 of Regulation 1/2003 apply to the enforcement of the national competition rules. In Germany (Section 90 of the Act against Restraints of Competition) the court has to inform the Bundeskartellamt of any case applying national or EU law. In Hungary, according to Sections 88/B(2) and 91/H(2) of the Competition Act, the court has to inform the competition authority or the Commission when applying national or EU law respectively.

proceedings[455], or when allowed, competition authorities may submit their opinion at their own discretion.

Despite the above, the involvement of competition authorities in civil proceedings can be triggered in different ways. For instance, in some jurisdictions, competition authorities will intervene in the civil procedure under its own discretion[456]. Moreover, in other jurisdictions, the courts deciding on the civil claim have authority to request the participation of the competition authorities, in such cases; the request may be made at the petition of the parties to the proceedings[457], or at the court's motion[458]. Additionally, in some jurisdictions the competition authority may intervene as a party or as *amicus curiae* with the leave of the court[459].

Furthermore, in some jurisdictions, other institutions besides the competition authority may submit their observations related to the application of the competition law provisions[460]. Likewise, in some cases, international institutions and foreign governments have submitted their opinions to the courts of another country on issues that, they felt could affect their national interests and the application of their national law[461].

Finally, in some competition law regimes, the court deciding on the award of damages arising from the infringement of the competition law provisions may ask the opinion of the competition authority on the amount of damages[462].

4. Interaction between Leniency Programs and Private Actions for Damages

Leniency programs are investigative tools established to detect cartel activity by encouraging undertakings and individuals to report their cartel activity and cooperate in the investigation instituted by the competition authority with the purpose of receiving in exchange full or partial immunity from any

[455] In Estonia, ordinary courts may decide to include in the proceedings a body to protect the public interest in the case, such as the competition authority (Article 198(2) of the Civil Procedure Code).
[456] For instance in the US, the both the Federal Trade Commission and the Department of Justice may intervene in civil court proceedings. In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), the Department of Justice intervened in a private proceeding because it felt that the successful plaintiff's verdict could diminish the authority of the FCC to organize the pricing and interconnection obligations of the telecom industry. Similarly, the FTC has filed an *amicus* brief recommending that the court rejects a proposed class action settlement in *Chavez v. Netflix* (No. CGC-04-434884 (Cal. Sup. Ct.), available at: www.ftc.gov/os/2006/01/netflixamicusbrief.pdf. In the UK, the OFT may submit written observations to the High Court and the Court of Appeal in England and Wales on issues related to the application of the competition rules, however, it needs the court's permission to submit oral observations (OFT Guidelines, OFT 442 (Modernization), December 2004, para 10.4).
[457] In Ireland the parties in a court proceeding may request the court the participation of the competition authority in the case.
[458] In Spain, pursuant to Article 15bis of the Competition Act, courts may request the intervention of the competition authority.
[459] In Australia, the Australian Competition and Consumer Commission (ACCC) may intervene as a party or *amicus curiae* in court proceedings with the permission of the court (Section 87CA of the Competition and Consumer Act).
[460] In the US, the *American Antitrust Institute* which is an independent organization with a mission to increase the role of competition, assure that competition works in the interest of consumers, and challenge abuses of concentrated economic power in the US and world economy, has filed an *amicus curiae* brief regarding issues concerned with the standing of indirect purchaser (Brief for the American Antitrust Institute as Amicus Curiae in Support of Appellants and Reversal, *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, Appeal No. 08-16478 (9th Cir.), filed Mar. 5, 2009 ('AAI DRAM Br.')).
[461] In the *Empagran* case, the US Supreme Court established a landmark in the extraterritorial application of competition law. In the case, the Court held that where anticompetitive behavior, such as price-fixing agreements affect both customers outside the US and customers within the US, but the adverse foreign effect is independent of any adverse domestic effect, the plaintiffs that claim that they have suffered due to the foreign effect cannot invoke the jurisdictions of the US antitrust law or courts. This decision was finally in line with the *amicus curiae* briefs submitted by the International Chamber of Commerce and by the governments of the US, Belgium, Canada, Germany, Ireland, Japan, and the UK (*F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 123 S.Ct. 2359 (2004)).
[462] In Mexico, ordinary courts may ask the opinion of the *Mexican Federal Competition Commission* as to the amount of the loss and the injury (Article 38 of the Federal Competition Act).

sanctions that would have been imposed upon them for the infringement of the anti-cartel provisions. However, in order to be granted leniency, the applicants have to meet the requirements of the program[463].

Even though leniency programs are mainly concerned with the public enforcement of competition law, these interact in different extents with private antitrust enforcement. This interaction can be mainly evidenced regarding two aspects. In the first place, leniency programs interact with private enforcement with regard to the disclosure of sensitive information submitted by the applicant to the competition authority as part of its leniency application in follow-on civil proceedings. In the second place, these programs also interact with civil proceedings regarding the possibility of reducing the level of damages the applicant has to pay due to its collaboration with the competition authority.

As to the first issue, provided that leniency applications do not protect the leniency applicant from the civil law consequences of its participation in an infringement of the anti-cartel provisions[464], the discoverability of leniency applications can facilitate the bringing and the further success of follow-on private actions, however, this possibility will in turn decrease the attractiveness of leniency programs, provided that potential leniency applicants may refrain from applying to leniency under the fear of facing numerous and expensive follow-on civil actions[465]. Thus, in practice, if the fact or the content of leniency applications is discovered to cartel victims, they will be able to prove more easily the antitrust infringement by the leniency applicants. On the one hand, this possibility will encourage cartel victims to bring claims for damages against leniency applicants and, on the other hand, it will discourage cartel participants from applying for leniency in the first place. Ultimately, this would significantly impede the discovery and punishment of cartels, and as a consequence, result in a lower degree of compensation of cartel victims[466].

According to the relevant case law, the status of leniency documents in relation to disclosure requests made in the context of follow-on actions for damages is not completely clear. For instance, in some cases, the access to leniency documents by cartel victims in the context of civil damages actions has been denied by weighing and balancing the interest of the victims seeking compensation for the harm suffered against the necessity of effective cartel prosecution in which leniency programs play a leading role[467]. Alternatively, the access to leniency documents by cartel victims has been dealt with in a different manner by other courts. Thus, in some cases, the courts have granted access to certain leniency documents to cartel victims by considering that cartel members had no legitimate expectation that any leniency submissions would be protected from disclosure; that even though such disclosure would increase their exposure to liability, successful leniency applicants are offered significant amounts of reduction, or even immunity, of the sanction; and that it would be considerably difficult for cartel victims

[463] For additional information on leniency programs, please see Chapter Two, Section IV.
[464] European Commission, *Notice on immunity from fines and reduction of fines in cartel cases*, 2006.
[465] The issue about protecting leniency application from being disclosed in follow-on civil proceedings has been dealt with in the Option 28 of the Commission's Green Paper on Damages.
[466] CAUFFMAN, Caroline (2012), 'Access to Leniency Related Documents after *Pfleiderer*'. Maastricht European Private Law Institute, Working Paper N0. 2012/3.
[467] In the *Pfleiderer* case, a preliminary question referred to the European Court of Justice on whether EU law prohibits disclosure of leniency applications to cartel victims, the ECJ ruled that the disclosure of leniency documents is not prohibited under EU law. However, the Court stated that national courts should weigh and balance the interest of the aggrieved parties against the need of effective cartel prosecution (Case C-360/09, *Pfleiderer AG v Bundeskartellamt*). Based on this ruling, the Amstgericht Bonn determined that the threat to the detection and prosecution of competition law infringements justifies the refusal to access to leniency documents (Amtsgericht Bonn, Case 51 Gs 53/09, 18 January 2012).

to obtain the requested information from other sources[468]. In light of the preceding, there have been some efforts to clarify the possibility to grant access to leniency documents to cartel victims in follow-on actions for damages, however, even though these recognize the fundamental role of private antitrust enforcement as a complement of public enforcement, they also declare the necessity to protect leniency materials against disclosure to the extent necessary to ensure the effectiveness of leniency programs[469].

Leniency programs are fundamental mechanisms for the effective public enforcement of competition law provided that these programs contribute to the discovery, efficient prosecutions and sanctioning of the most serious infringement of competition law. The disclosure of leniency documents can put leniency applicants in a less favorable position in the context of follow-on actions for damages. In practice, this situation can affect the attractiveness of leniency programs and jeopardize the effectiveness of the public enforcement of competition law by the competition authorities. In this sense, to protect the effectiveness of leniency programs and anti-cartel enforcement, leniency documents should not be disclosed under any circumstances in civil actions for damages[470].

The need to protect the leniency application from disclosure in follow-on civil proceedings has been recognized mainly with the purpose of avoiding that the leniency applicant be placed in a less favorable position than the other infringers due to the fact that it has applied for leniency[471]. Additionally, the fact that the information provided by the applicant as part of its leniency application may be subject to disclosure in follow-on civil proceedings may reduce the attractiveness and efficiency of leniency programs by discouraging potential leniency applicants from seeking leniency. As a consequence, most competition law regimes have introduced regulations establishing the protection from disclosure in follow-on civil proceedings of leniency applications. For instance, in some jurisdictions, the leniency application can be made orally to protect the information provided from being disclosed later on[472]. Moreover, other jurisdictions have expressly stated its reluctance to share information provided by a leniency applicant with ordinary courts in follow-on civil proceedings[473], and also, with foreign competition authorities[474]

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[468] *National Grid Electricity Transmission Plc v ABB Ltd and Others* [2012] EWHC 869 (Ch).

[469] At the EU level, see: European Competition Network, *Protection of leniency material in the context of civil damages actions*. Resolution of the meeting of Heads of the European Competition Authorities of 23 May 2012.

[470] Article 6 of the Proposal Directive for damages actions, *supra* note 3.

[471] See page 10 of the Commission's White Paper on Damages.

[472] In Australia, the ACCC will accept oral applications but it will keep written records of the application, however, the ACCC will ensure that those records do not prejudice the applicant. In Belgium, pursuant to the 2007 Leniency Notice the competition authority will accept, under the request of the applicant, that the application be submitted orally.

[473] For instance, in the US, the Antitrust Division of the Department of Justice determined in its *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters* that the identity and information will be held under *strict confidence* by the Division, *much like the treatment afforded to confidential informants* (Question 32). In Germany, the Bundeskartellamt has stated that it will refuse applications by private third parties for file inspection or the supply of information regarding the leniency application and the evidence provided by the applicant (Paragraph 22 of the Notice of the Bundeskartellamt on the immunity from and reduction of fines in cartel case of 7 March 2006). Similarly, in the UK, the Office of Fair Trading will *firmly resist* requests for disclosure of leniency material, or the fact that leniency has been sought, where such request is made in connection with private civil proceedings (Paragraph 8.49 of the Leniency and no-action OFT's guidance note on the handling of applications, December 2008). At the European Union level, the Commission has determined that it will only share with national courts information voluntarily submitted by a leniency applicant with the latter's consent (Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ 2004 C 101/54, paragraph 26).

[474] In the US, the information and identity of the leniency applicant will not be disclosed by the Antitrust Division to foreign competition authorities even if there is a bilateral antitrust cooperation agreement, given that the Division is interested in maximizing the incentives for companies to come forward and self-report antitrust offenses (Question 33, FAQ, *supra* note 473).

As to the second issue, as a general rule, in most jurisdictions the benefits awarded to a leniency applicant for its cooperation in the leniency program are restricted to the administrative remedies applied by competition authorities and do not affect the civil liability of the benefiting applicant[475]. Thus, in most jurisdictions, the functioning of leniency programs is totally independent from further civil proceedings. However, in some competition law regimes, leniency programs and private actions for damages interact with each other. For instance, in some countries, the restitution of the affected parties by the anticompetitive conduct of the applicant is a requisite in order to be granted lenient treatment[476]. Moreover, in other jurisdictions, successful leniency applicants are rewarded for their cooperation in the public procedure by reducing the civil law consequences of their anticompetitive behavior in a certain way. For example, in certain jurisdictions where the amount recoverable as damages is multiplied by three, the successful leniency applicants will only have to pay single (rather than treble) damages if the latter has cooperated with civil plaintiffs in their lawsuit against the other cartel members. The court deciding on the award of damages will decide if the applicant has satisfactorily cooperated with the civil plaintiffs[477]. Furthermore, in other jurisdictions, the successful leniency applicant will be rewarded for its cooperation by requiring the injured party in a follow-on action to seek the recovery of the damages inflicted by the unlawful conduct from those other members of the cartel that have not been awarded immunity from fines, thus, the plaintiff will only be allowed to claim damages from the successful leniency applicant if the former was unable to recover the whole amount of its loss from the other members of the cartel[478].

IX. ARBITRATION OF COMPETITION LAW DISPUTES

1. Introduction

Arbitration is a well-established and widely used method of alternative dispute resolution. Over the years this procedure has become a common mechanism for resolving commercial disputes outside the jurisdiction of general courts. This growing preference for arbitration in commercial matters over ordinary court proceedings is due to some of the attractive characteristics that these procedures offer to the parties in a contract. In this regard, the arbitrability of a determined dispute originates from the private

[475] At the EU level, the Commission has determined that the fact that an undertaking has been granted immunity or the reduction of fines cannot protect it from the civil law consequences of its participation in an infringement of the competition provisions (Leniency Notice at para 31, *supra* note 464). In France, the 2009 Leniency Notice mentions that full or partial immunity granted by the competition authority does not protect the applicant from any civil law consequences for the infringement of Article L. 42-1 of the Commercial Code and/or Article 101 of the TFEU. In Peru, pursuant to Article 26.4 of the Antitrust Law, the immunity granted from administrative sanctions does not release the applicant from the liability for damages.

[476] In the US, the DOJ's Corporate Leniency Police, 1993, establishes as a condition to be granted leniency the restitution made by the corporation to the injured parties, where possible. Similarly in Australia, the 2003 ACCC's Leniency Policy for Cartel Conduct used to establish a requirement to make restitution to injured parties, nevertheless, this requirement has been abolished by the 2005 version of the Australian guidelines.

[477] In the US, Section 213(a) of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) establishes that the civil liability of defendants that have been granted immunity is limited to actual (rather than treble) damages only if they assist the plaintiff by providing a full accounting of relevant facts, furnishing of all relevant documents and by participating in interviews and depositions reasonably requested by the plaintiff (Section 213(b) ACPERA). The plaintiff's right to recover litigation costs and prejudgment interests as provided by the Clayton Act remains unaffected by the provision of the ACPERA (Section 213(d) ACPERA).

[478] In Hungary, pursuant to Section 88/D of the Competition Act, the injured party has to seek recovery from the cartel members that have not been awarded leniency. The party may only recover damages from the applicant if he could not recover the whole amount from the other members of the cartel. Thus, the successful applicant may refuse to pay compensation for the injuries caused by its anticompetitive conduct, until the claim is collectable from any other wrongdoer liable for the same infringement.

autonomy of the contracting parties who decide to include an arbitration clause in the contract which determines that any dispute related to the rights and obligations established in the contract will be resolved by an arbitrator[479], and as a consequence, remove the resolution of the contract from the general jurisdiction of ordinary courts. In such cases, a private judge or arbitrator chosen by the parties is given the task of settling the dispute by issuing a binding arbitration award. Furthermore, the agreement between the parties to submit any dispute to an arbitrator is an enforceable contract that binds the signing parties. Similarly, the arbitration award is an enforceable and final decision, and normally, it is subject to a limited judicial review.

In practice, there are different types of arbitration. For example, arbitration can be either national or international, in the first case, the arbitration proceedings, the subject matter of the contract and the merits of the dispute are governed by a national law, and in the second case, the arbitration involves a transaction that is either in a country other than the place of arbitration, that takes place in two or more countries, or where the parties under contract come from different countries. Additionally, arbitration can be institutional or *ad hoc,* institutional arbitration is administered and managed by an arbitral institution[480], and *ad hoc* arbitration is regulated by the agreement of the parties, thus, in such cases the procedure is customized to meet the necessities of the parties and the facts of the dispute.

As stated above, currently there is a growing number of commercial disputes being resolved through arbitration, which includes disputes concerned with the application of the competition law provisions. The especial characteristics of these procedures have driven the contracting parties to include arbitration agreements as a regular clause in most commercial contracts, and especially in those that have an international dimension. For instance, compared to lengthy ordinary court procedures that may be subject to further appeals, arbitration can be an economical solution, especially in competition law disputes that because of their complexity can demand considerable expenses (experts, witnesses, etc.). In addition, in this type of proceedings the parties can choose the arbitrator and the legal rules to be applied in the procedure; thus, on the one hand, the faculty to name the arbitrator allows the parties to designate someone who has a determined expertise in the subject matter of the dispute, and on the other hand, the ability to choose the applicable law permits the parties to establish the legal provisions to be applied in case of a dispute. Moreover, arbitration provides the parties a quick and less formal procedure than ordinary proceedings before overburdened courts; this is especially welcomed in complex competition law cases that require a fast resolution. Finally, and maybe the most important attribute of arbitration, is the relatively easy enforcement of arbitration awards both in the jurisdiction of origin and abroad, this is due to the fact that arbitration is subject to several international conventions signed by a large number of countries around the world[481].

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[479] The term "*arbitrator"* is used to make reference to the arbitral tribunal.

[480] There is a number of institutional arbitration organizations that parties can choose from: *The International Court of Arbitration of the International Chamber of Commerce* (www.iccwbo.org); *The London Court of International Arbitration* (www.lcia-arbitration.com); *The American Arbitration Association* (www.adr.org); or *The CPR Institute for Dispute Resolution* (www.cprdr.org).

[481] The most important international convention on international arbitration is the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* New York 10 June 1958 (New York Convention). By the year 2013, the convention has 148 contracting states.

Nevertheless, on the other hand, there are some drawbacks of arbitration when compared to ordinary public proceedings. For instance, arbitration does not have the same authority and rigor as public enforcement of competition law. Moreover, unlike competition authorities, arbitrators do not have special powers of investigation to acquire relevant information about the dispute, accordingly, the parties in an arbitration proceeding can be asked to produce determined information but they cannot be compelled to do so by the arbitration tribunal. In addition, the discrete and confidential nature of the arbitration proceedings can be considered as a way for concealing determined practices that the parties do not want to make public. Due to the autonomy of arbitrators there is the risk that these might issue arbitral awards that conflict with decisions by other arbitration tribunals or even with decisions by a competition authority. Finally, the confidential nature of arbitral awards produces a lack of precedents, this means that given to the fact that arbitral awards usually are not published, the previous decisions by other arbitration tribunals in similar cases cannot be taken into consideration[482].

2. Interplay and Tension between Arbitration and Competition Law

In essence, the intrinsic natures of arbitration and competition law are different. On the one hand, arbitration originates from the private will of the parties under contract to submit their disputes to an arbitral tribunal instead of ordinary courts. On the other hand, the provisions of competition law are mandatory and have a public policy character; consequently, their application has been primordially entrusted to public authorities. Accordingly, in practice, these different natures can produce certain tension in the interface between these two branches of law.

As stated above, the institution of the arbitration process is strictly related to the private autonomy of the parties under contract who decide to withdraw the resolution of their disputes from the jurisdiction of the state through the inclusion of an arbitration clause in the contract in question. Hence, this kind of extra-judicial procedure is entirely driven by the private will of the contracting parties. In this regard, the determination to submit the dispute to arbitration, the assignment of the arbitrator, and the designation of the legal provisions rest completely on the private will of the conflicting parties.

On the contrary, competition law has a public policy nature. The competition law provisions constitute a state mechanism through which the government restricts the private will of the parties in the marketplace with the purpose of preventing unlawful behavior for the welfare of the general public. As a consequence, the public policy character of competition law allows the state to restring the private autonomy of the parties for the sake of the public good.

The contradictory natures of arbitration and competition law, the former governed by the principle of the autonomy of will and the latter by the public order, can lead to the premature conclusion that these two branches of law are opposite[483]. Nonetheless, it has been suggested that arbitration and competition law are indeed complementary to each other and not contrary. For instance, arbitration is an

[482] OECD, *Arbitration and Competition*, 2010, pp. 8-9.
[483] IDOT, Laurence (2010), 'Arbitration and Competition'. Note prepared for the Competition Policy Committee of the OECD, p. 53.

institution that can only be present in a free market economy with freedom of commerce and competition[484]. Furthermore, arbitration can play a fundamental role in the overall enforcement of competition law and enhance the deterrent effect of the competition law provisions, additionally, arbitration can assist public enforcers by prosecuting competition law infringements that the latter would not pursuit for prioritization reasons[485].

3. Arbitrability of Competition Law Disputes

Traditionally, whenever a determined jurisdiction grants private law rights to natural and legal persons, the exercise of these can give rise to private law causes of action and defenses before the competent authorities of each jurisdiction, i.e. courts of civil jurisdiction. In addition to this judicial mechanism of civil dispute resolution, most jurisdictions allow the parties in conflict to seek resolution in alternative procedures that have an extra-judicial nature, such as arbitration. In this regard, to the extent that the legal provisions of a determined jurisdiction provide for the possibility to arbitrate civil law disputes, private parties under contract will be free to submit their civil disputes before the jurisdiction of arbitrators. Customarily, arbitrable disputes are those involving rights that the parties under contract are free to dispose.

Historically, competition law matters were not considered as arbitrable; this implied that arbitrators did not have the jurisdictional competence to adjudicate competition law issues. In such cases, arbitrators were precluded from applying the competition law provisions even if the parties under contract had specifically agreed to submit competition law disputes to arbitration. This determination of most jurisdictions to remove the adjudication of the competition law provisions from the jurisdictional competence of arbitrators is mainly grounded on the public policy character of competition law. In this regard, it has been argued that legislators did not intend for arbitrators to decide antitrust disputes because antitrust violations harm the general public. Moreover, the judicial system was considered to be better suited to handle the scope and complexity of competition law cases. And finally, since arbitrators were drawn from the business community, it was suggested that these could be biased towards business interests[486].

The conventional argument against the arbitrability of antitrust disputes has been that the main objective of competition law is the attainment of a competitive market for the sake of the public interest and the collectivity of consumers (public policy nature of competition law); accordingly, provided that this is a public policy objective, it should be achieved through litigation in the public courts. On the

[484] KOMNINOS, Assimakis P. (2012), 'Arbitration and EU Competition Law'. In: Basedow, Francq & Idot (ed). *International Antitrust Litigation, Conflict of Laws and Coordination.* Oxford-Portland: Hart Publishing.
[485] ROUSSOS, Antonis (2005), 'Private Antitrust Enforcement in Arbitration Proceedings: Theory and practice'. Working paper, *Workshop on Remedies and Sanctions in Competition Policy: Economic and Legal Implications of the Tendency to Criminalize Antitrust Enforcement in the EU Member States*, Faculty of Economics and Econometrics, University of Amsterdam, 17 February 2005, available at: http://acle.uva.nl
[486] *American Safety Equip. Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821, 825 (2d Cir. 1968).

contrary, international commercial arbitration is concerned with the protection of the individual commercial interest of private parties[487].

Notwithstanding the preceding, in the last few decades the international case law of the world's leading jurisdictions has recognized the competence of arbitral tribunals to address competition law issues. The reasoning of international courts to allow the arbitrability of competition law disputes has been based on the so-called "second look" doctrine. According to this doctrine, an arbitration award applying competition law can always be reviewed by national or international courts when enforcing the arbitral decision, at this stage, the courts can also verify if the competition law provisions have been properly applied and fully respected by the arbitral tribunal[488]. Furthermore, states have overcome their historic skepticism towards arbitration, which was regarded as a derogation from the natural jurisdiction of state courts, and have turned to consider arbitration as an important factor of stability and development for international commercial relations[489]. Finally, the idea that arbitrators are at the service of the parties under conflict and can do nothing without their consent has been abandoned. Thus, it is now recognized that arbitrators have a duty to the legal system that allows arbitration as a method for the resolution of commercial disputes on a par with courts and that permits the arbitrability of antitrust disputes on the assumption that competition law will be respected and applied[490].

As a consequence, over time, states and courts have moved from their previous position to consider competition law disputes as not arbitrable on the grounds of the public policy character of competition law. Accordingly, the public policy nature of mandatory rules in relation to the arbitrability of these has come to determine that mandatory rules, such as competition law, are considered as imperative provisions of law that have to be applied to an international relationship irrespective of the law chosen by the contracting parties to govern their contractual relations, provided that these are a matter of public policy[491]. This notion of the public policy of competition law has ultimately come to govern the arbitrability of antitrust disputes in both national and international arbitration procedures[492].

Currently, the public policy character of competition law is no longer sufficient grounds to restrict the arbitrability of antitrust claims in the majority of the most developed jurisdictions. In this context, the fact that legal provisions of public policy, such as competition law, are relevant for the adjudication of a certain dispute does not mean that the dispute cannot be submitted to arbitration[493]. In the course of time, the number of jurisdictions that have acknowledged the arbitrability of competition

[487] BLANKE, Gordon & NAZZINI, Renato (2008A), 'Arbitration and ADR of Global Competition Disputes: Taking Stock (Part I), *Global Competition Law Review,* Issue 1, p. 49.
[488] This approach has been recognized on both sides of the Atlantic: *Mitsubishi Motors Corp v Soler Chrysler Plymouth,* 473 U.S. 614 (1985); and *Eco Swiss China Time Ltd v Benetton International NV* (C-126/97) [1999] E.C.R. I-3055.
[489] BERNARDINI, Piero (2004), 'The Role of the International Arbitrator', *International Arbitration,* Volume 20, Nº 2, pp. 116-117.
[490] RADICATI di BROZOLO, Luca (2011A), 'Arbitration and Competition Law: The Position of the Courts and of Arbitrators', *Arbitration International,* Volume 27, No. 1, p. 23.
[491] HOCHSTRASSER, Daniel (2001), 'Choice of Law and "Foreign" Mandatory Rules in International Arbitration', 18(5) *Journal of International Arbitration*, pp. 67-68.
[492] BLANKE, Gordon (2005), 'The Role of EC Competition Law in International Arbitration: A *Plaidoyer'. European Business Law Review*, p. 172.
[493] VAN LEYENHORST, Max & VAN DEN NIEUWEENDIJK, Isabelle (2007), 'Characterization of Competition Law as public policy'. In: Zuberbühler & Oetiker (ed), *Practical Aspects of Arbitrating EC Competition Law*. Zürich: Schulthess, p. 39.

law disputes has increased[494]. Nevertheless, there are still certain cases where the arbitrability of competition law disputes has been denied by the courts on grounds of public policy[495]. However, there are also jurisdictions where the arbitrability of competition law matters has been expressly recognized by the legal provisions on arbitration[496]. In the same line, in some jurisdictions, the arbitrable disputes established by the arbitration law include the disputes related to the recovery of damages caused by the infringement of the competition law provisions[497]. Moreover, some jurisdictions have even considered the introduction of mandatory arbitration mechanisms for damages claims for the infringement of competition law[498]. In other jurisdictions, the provisions that used to impose additional burdens for the arbitrability of competition law disputes have been revoked, for example, in some competition law regimes, arbitration clauses relating to antitrust disputes were declared null and void by the provisions of the competition act unless they reserved to the parties the right to bring an action before national courts for the resolution of the case in question[499]. Recently, an international organization has published a proposal with guidelines for the institution of damages claims for the infringement of competition law, in such proposal, it has been suggested that injured parties and the perpetrators of antitrust infringements should be encouraged to agree on compensating the harm caused by a competition law violation through consensual dispute resolution mechanisms, such as out-of-court settlements, arbitration and mediation[500].

4. Arbitrator's Duty to Apply Competition Law

There is another fundamental issue regarding the arbitration of antitrust disputes that arises from the previously seen acknowledgement of the arbitrability of competition law. In particular, this issue is related to the arbitrator's duty to apply the competition rules. As seen in the previous section, arbitrators undoubtedly have a duty to apply the competition law provisions; moreover, they are expected to do so. Thus, the states' recognition of the arbitrability of competition law matters implies the expectation that arbitrators will apply competition law[501]. In this context, there are several instances in which arbitrators may be required to enforce the competition law provisions in the course of the arbitration procedure. For instance, from the obligation of arbitrators to render an enforceable award that complies with the public policy rules, arises an implicit duty of arbitrators to apply competition law. Moreover, arbitrators may be obliged to apply competition law if this is within the scope of the arbitration clause. Similarly, arbitrators

[494] For instance, in 1992, the Swiss Supreme Court held that arbitrators have jurisdiction to consider a plea that a contract is contrary to EU competition law and that their failure to do so can lead to the invalidation of the arbitral award (Tribunal Fédéral Suisse, 28 April 1992; [1992] ASA Bull 368). In 1993, the Paris Court of Appeal established that arbitrators may apply EC competition law provisions (*Société Aplix v Société Velcro,* CA Paris, 14 October 1993 [1994] *Rev. Arb.* 165). In 1997, the *Corte di Cassazione* determined that controversies concerning the freedom of private enterprises, as recognized by the Italian Constitution, which include antitrust matters, are arbitrable (Corte di Cassazione, 21.8.1996, Nº 7733, *Telecolor SpA v Technocolor SpA*, 47 Giust. Civ. I-1373 (1997). The arbitrability of antitrust disputes was also recognized in 2003 by courts in Sweden (Decision T 4366-02 of the Court of Appeal for Western Sweden of 29 December 2003, *Dirland Télécom SA v Telecom AB*), and 2005 in the UK (*ET Plus SA v Jean-Paul Welter & The Channel Tunnel Group Ltd* [2005] EW HC 2115 (Comm.)).

[495] *Alstom Power LTD v Eraring Energy* (2004) ATPR 42-009.

[496] Section 1(3) of the Swedish Arbitration Act 1999.

[497] Article 3 of the Law on Commercial Arbitration of the Republic of Lithuania.

[498] In Peru the proposal for the amendment of the competition act included this possibility in the draft; however, this was not included when the act was finally passed. BULLARD, Alfredo & FALLA, Alejandro (2010), 'Peru'. In: Foer, A. & Cuneo, J. (ed). *The International Handbook of Private Enforcement of Competition Law*. UK: Edward Elgar Publishing Limited, p. 464

[499] This was the case in Germany until 1997 when the Act against Restraints of Competition was modified (Section 91 of the old version of the Act against Restraints of Competition).

[500] Proposal Directive for damages actions (*supra* note 3), para. 37.

[501] OECD (2010), p. 12.

may have a duty to apply the competition law provisions on the basis of the *lex contractus.* And finally, arbitrators may also be required to apply *ex officio* the provisions of competition law.

Nonetheless, in some jurisdictions the duty of arbitral tribunals to apply the competition law provisions originates from the implicit obligation of arbitrators to apply the legal provisions of the jurisdiction in question. In such cases, if the parties under conflict have not submitted relevant competition law issues to the arbitral tribunal, the arbitrator will usually bring these issues to the attention of the parties in the same fashion it would do in relation to any ordinary contractual issues not submitted by the parties[502].

With regard to the implicit obligation of arbitrators to apply competition law, this is grounded on the obligation of arbitrators to render an enforceable award[503]. In order to comply with this fundamental obligation, arbitrators have to eliminate any possibility that their award will be annulled or set aside by a national or international court in the review process. Therefore, provided that any arbitral decision that is contrary to the public policy rules can be annulled or set aside, it is essential that arbitrators make sure that their awards are in conformity with the mandatory rules of public policy, such as competition law[504]. Accordingly, arbitrators face the risk of the unenforceability of their awards if they ignore relevant competition law issues in the making of the arbitral award[505], hence, this entails that arbitrators will be expected to take into consideration the competition law provisions in force at the place of enforcement of the award. Furthermore, arbitrators have an intrinsic obligation to see that justice is done, in this regard; arbitrators cannot deliberately disregard the application of the competition law provisions in order to favor the parties in conflict, given that this would turn them into accomplices of a circumvention of the applicable competition law provisions.

As abovementioned, there is a further duty of arbitrators to apply the competition law provisions if these are within the scope of the arbitration clause[506]. Overall, arbitrators have an obligation to address all matters that fall within the scope of the arbitration clause of the contract, in this sense, the application of the competition law provisions may be mandatory for arbitrators as a matter that falls within the arbitration clause[507]. In some jurisdictions, it has been found that irrespective of the exact wording of the individual arbitration clause in question, competition law matters may fall within the scope of any standard arbitration clause that calls for the submission of any dispute under the contract to arbitration, unless they are expressly excluded[508]. Normally, most arbitration clauses have a broad scope of application and will require the arbitration of disputes "arising out of" or "relating to" the contractual

[502] This is the case in the US where due to the frequency of private actions concerned with the infringement of the antitrust provisions, arbitrators and private parties are more comfortable with the application of the antitrust rules in the arbitration process, in this sense, there is not a debate in the US on the duty of arbitrators to apply the antitrust rules (BLANKE, Gordon & NAZZINI, Renato (2008B), 'Arbitration and ADR of Global Competition Disputes: Taking Stock (Part II), *Global Competition Law Review,* Issue 2, p.79).
[503] See, Art. 35 ICC Rules of Arbitration; Art. 32.2 LCIA Arbitration Rules; and Art. 31 ICDR Arbitration Rules.
[504] In the *Eco Swiss* case (*supra* note 488) the ECJ determined that the non-application of the EC Treaty and particularly its competition law provisions can amount to a violation of the public policy rules.
[505] BLANKE (2005), p. 175.
[506] The question of whether the existence of an arbitration clause can give rise to competition law matters has been discussed in the UK courts (*Provimi Limited v Aventis Animal Nutrition and SA & Ors* [2003] EWHC 961 (Comm)).
[507] STYLOPOULOS, Epameinondas (2009), 'Powers and Duties of Arbitrators in the Application of Competition Law: An EC approach in the light of recent developments', 30(3) *European Competition Law Review*, pp. 119-120.
[508] *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20; [2007] 1 All E.R. (Comm) 891.

relations of the parties[509]. In practice, courts have interpreted these general arbitration clauses broadly and determined that any doubt as to the scope of the arbitration clause should be resolved in favor of arbitration[510]. On the other hand, some courts have refused to refer competition law disputes to arbitration when the claims did not fall within the contract containing the arbitration clause in question[511]. Moreover, in some jurisdictions, the courts have determined that an arbitration agreement will be considered null and void if this implies the submission of mandatory rules to arbitration[512].

As a general practice, the contract in dispute contains a determined law clause by which the parties have designated the legal provisions applicable to their contractual relations (*lex contractus*). Thus, in cases where the competition law provisions form part of the applicable law chosen by the contracting parties, the arbitrators will be required to apply the competition law provisions in the resolution of the conflict arising from the contractual relation of the parties[513].

Arbitrators have a duty to apply the competition law provisions in any event if the applicability is raised before them by the parties in conflict[514]. Hence, if the arbitrators refuse to consider relevant matters brought before them by the parties in the proceedings, such as the applicability of the competition law provisions, they face the risk that their decisions may be set aside for the failure to address all the issues raised in the procedure or for insufficient reasoning. Nevertheless, on the other hand, there is the issue of the potential obligation of arbitrators to apply the competition law provisions at their own motion, even if none of the parties has raised the applicability of competition law in the case. This possibility brings two further issues into debate, on the one hand, there is the obligation of the arbitrators to confine themselves to the matters submitted to the process by the parties and not abandon their passive role, and on the other hand, there is the risk that the parties under contract selected a specific law with the sole purpose of circumventing the application of mandatory rules, such as competition law. The decision of arbitrators to apply the competition law provisions *ex officio*, is basically contrary to the fundamental principle of party autonomy that governs the arbitral process. However, the fact that the parties under contract can unintentionally or deliberately exclude the application mandatory rules from the arbitration process can entail the possibility that the parties go unpunished for the infringement of competition law[515]. Accordingly, given that the competition law provisions are mandatory in nature; these cannot be rendered ineffectual or be opted into at will merely through choice of law clauses[516]. Nonetheless, in some jurisdictions the courts have determined that an arbitration award is not subject to annulment merely

[509] See the *Standard Arbitration Clause* of the American Arbitration Association's Commercial Arbitration Rules & Mediation Procedures, 2009, p. 7.
[510] *AT&T Techs., Inc. v Communications Workers of Am.,* 475 U.S. 643, 650 (1986); *Louis Dreyfus Negoce, S.A. v Blystad Shipping & Trading Inc.,* 252 F.3d 218, 225 (2d Cir. 2001).
[511] *AlliedSignal, Inc. v B.F. Goodrich Co.,* 183 F.3d 568, 573 (7th Cir. 1999); *Coors Brewing Co. v Molson Breweries,* 51 F.3d 1511, 1516 (10th Cir. 1995).
[512] In 2009, the High Court of Justice of England and Wales, has determined that an arbitration agreement will be considered *"null, void and inoperative"* insofar as it purports to require the submission to arbitration of issues relating to mandatory EU law (*Accentuate Ltd v ASIGRA Inc.* [2009] EWHC 2655).
[513] In EU, arbitrators can be required to apply the EU competition law provisions on the basis of the *lex contractus*, if this coincides with the law of a Member State, provided that the EU provisions form part of the national law of the Member States and are directly applicable in their territories (*Nordsee Deutsche Hochseefischerei Gmb H v Reederei Mond Hochseefischerei Nordstern AG & Co KG* (102/81) [1982] E.C.R. 1095).
[514] LUGARD, Paul (1998), 'EC Competition Law and Arbitration: Opposing principles?', *European Competition Law Review,* 19(5), p. 297.
[515] LUGARD (1998), p. 300.
[516] DALHUISEN, Jan Hendrick (1995), 'The Arbitrability of Competition Issues', 11(2) *Arbitration International*, p. 161.

because the arbitrator has failed to raise *sua sponte* potential violation of competition law[517]. In relation to the preceding, arbitrators should take into consideration the mandatory rules of competition law even if these have been excluded by the parties in the contract: in case that the parties have selected a specific law with the sole objective of circumventing the application of certain mandatory rules; in case where the performance of the contract is affected by the invoked mandatory rules, and there is a close link between performance and the rules; and in case that the enforcement of the arbitral decision would be at risk for the non-application of the pertinent mandatory rules[518].

5. Powers of the Arbitrators

Arbitral tribunals have been vested with certain powers intended to assist them in the resolution of the disputes brought by the parties to the arbitration process. In some ways, these powers are comparable to those held by ordinary courts; however, some of these are not as extensive as those used in judicial proceedings. This occurs as a consequence of the choice of the parties to submit their controversies to the jurisdiction of arbitrators and remove them from the general jurisdiction of state courts. This decision involves an exchange between: extensive court procedures with effective review mechanisms, and expedite arbitration with simple and informal procedures[519]. Overall, arbitral tribunals may be empowered to: grant interim measures at the request of the parties; require the production of relevant evidence related to the facts of the dispute; make use of experts' reports submitted by the parties and appoint their own experts who provide their expertise for the resolution of the dispute. Nevertheless, provided that the procedure and the powers of the arbitral tribunals are shaped by the private will of the contracting parties in the arbitration clauses, in practice, the parties will ultimately determine the powers of the arbitrators and the extent of these.

5.1. Interim measures

Most arbitral tribunals can grant interim measures at the request of the parties before the arbitral award is issued. Given that the arbitration procedure is governed by the private will of the parties in conflict, the arbitrator's power to grant interim measures can be waived by the prior agreement of the parties[520]. Interim measures are provisional measures ordered by the arbitral tribunal on the exercise of the authority that the contracting parties have conferred on the latter to resolve a determined dispute. Interim measures can be granted at any time prior to the issuance of the arbitration award, moreover, the arbitral tribunal can award any interim measure it deems appropriate. Overall, interim measures can include orders to: maintain or restore the status quo pending determination of the dispute; take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral

[517] *Thalès Air Defense BV v GIE Euromissile,* CA Paris, November 18 2004.
[518] HOCHSTRASSER (2001), pp. 85-86.
[519] *In re Currency Conversion Fee Antitrust Litigation,* 265 F.Supp. 2d 385, 415 (S.D.N.Y. 2003).
[520] Article 28 of the ICC Arbitration and ADR Rules, 2011.

process itself; provide a means of preserving assets out of which a subsequent award may be satisfied; or preserve evidence that may be relevant and material to the resolution of the dispute[521].

In order for arbitral tribunals to grant interim measures, the requesting parties may have to demonstrate that a kind of harm that is not reparable by an award of damages is likely to occur if the measures are not granted, and that such harm outweighs the harm to be caused to the party against whom the measure is directed; and that there is a reasonable possibility that the requesting party will succeed on the merits of the claim[522]. Furthermore, arbitral tribunals may oblige the party requesting the grant of an interim measure to provide appropriate security in connection with the requested measure[523]. Normally, interim measures can be modified, suspended or terminated under exceptional circumstances upon the request of the parties or at the tribunal's initiative. Moreover, the interim measures by arbitrators are binding for the contracting parties and enforceable before the competent courts. Finally, the power of the arbitration tribunal to grant an interim measure in the arbitral procedure does not prejudice the right of the contracting parties to apply to any competent court for interim measures.

5.2. Powers to request information

In addition, arbitrators have certain powers to obtain relevant information from the parties in the course of the arbitration process. However, in practice, irrespective of the jurisdiction in question and the arbitration tribunal, the contracting parties will ultimately determine the disclosure mechanisms of the proceedings in the arbitration agreement. The investigative powers granted to arbitral tribunals are less extensive than the powers vested on ordinary courts. This limitation on the arbitrator's powers to request the relevant information is considered as part of the "trade off" between arbitration and litigation[524]. In this regard, in jurisdictions where the contracting parties have a wide and extensive discovery process in judicial procedures, the parties' obligation to disclose in the arbitral proceedings is somehow limited. For instance, in some cases, the courts have refused to annul arbitral awards on the grounds of incomplete discovery responses by the parties in the arbitration process[525]. Moreover, the rules of arbitration institutions also provide for limited discovery procedures where the arbitrator has the duty to decide the extent of disclosure[526]. The ultimate objective of limiting discovery in arbitration proceedings is to expedite the procedure and reduce costs[527].

On the other hand, in jurisdictions where the discovery process is not available the arbitrators are empowered to request from the conflicting parties the production of documents, exhibits or any other relevant evidence[528]. Additionally, the arbitration tribunal may have authority to order any party to make

[521] Article 17 of the UNCITRAL *Model Law on International Commercial Arbitration*, 1985: With amendments as adopted in 2006, 2008.
[522] Article 26 of the UNCITRAL Arbitration Rules (as revised in 2010), 2011.
[523] Article 25 of the LCIA Arbitration Rules, 1998.
[524] McCALLUM, Elizabeth B, & McCAREINS, R. Mark (2004), 'Arbitration Procedures: The Rules of the Road in Arbitrating Antitrust Disputes', *Antitrust*, Volume 19, Issue 1, p. 17.
[525] *Prestige Ford v Ford Dealer Computer Services, Inc.,* 324 F.3d 391 (5th Cir.2003).
[526] American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), 2010, Rule L-4; and JAMS, Comprehensive Arbitration Rules & Procedures, 2010, Rule 17.
[527] MARGOLIS, Daniel H. & VORRASI, Kenneth M. (2011), 'Arbitration in US Antitrust Enforcement'. In: Blanke, G. & Landolt, P. (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners.* Volume 2. Alphen aan den Rijn: Kluwer Law International, 2011, p. 1756.
[528] Article 27 of the UNCITRAL Arbitration Rules.

any property, site or thing under its control available for inspection by the arbitral tribunal, any other party, its expert or any expert to the arbitral tribunal[529]. Moreover, arbitrators may be allowed to summon any party to provide additional evidence that may be relevant for the resolution of the dispute[530]. Finally, the failure of a party to comply with a request by the arbitral tribunal to produce relevant evidence within the established period of time may drive the tribunal to make the award on the evidence before it. In some cases, the arbitral tribunal or a party with the approval of the tribunal may request from a competent court assistance in taking evidence, in such cases, the court will execute the request within its competence and according to the pertinent rules on taking evidence[531].

5.3. Use of experts in arbitration

Additionally, arbitral tribunals may have the power to use the experts' reports submitted by the parties to the tribunal. In such cases, the arbitral tribunal may conduct an exchange of experts' reports between the parties and be empowered to resolve disputes and compel disclosures[532]. Moreover, the arbitrators may have the faculty to decide to hear expert witnesses appointed by the parties[533]. Additionally, arbitrators may have the ability to appoint their own expert(s) who shall be and remain impartial and independent of the parties to assist them in the resolution of the controversy. Normally, the appointment of experts by the arbitral tribunal is made in consultation with the parties to the proceedings. Overall, there are certain obligations and rights that the parties have with regard to the participation of experts in the arbitration process. On the one hand, the parties in the arbitration process may be required by the arbitrators to give the experts any relevant information or to provide access to any relevant documents, goods, samples, property or site for inspection by the experts[534]. Any dispute between the parties and the experts concerned with the relevance of the required information or production will be referred to the arbitration tribunal for decision[535]. On the other hand, the parties in the arbitration procedure may have the opportunity to examine the report submitted by the experts and question their findings, additionally, the parties may request the arbitral tribunal the appearance of the experts in a hearing and have the opportunity to interrogate the experts, moreover, the parties can present their own expert witnesses in order to testify on the points at issue[536].

6. Arbitration and Competition Authorities

As with other types of competition law enforcement, the application of the competition law provisions in arbitration procedures can interact with concurrent proceedings and other types of antitrust enforcement. Particularly, arbitral tribunals can interact with competition authorities when enforcing the competition law provisions. In practice, however, the relation between arbitral tribunals and competition authorities

[529] Article 22 of the LCIA Arbitration Rules.
[530] Article 25(5) of the ICC Arbitration and ADR Rules.
[531] Article 27 of the UNCITRAL *Model Law on International Commercial Arbitration.*
[532] Rule L-3(e) of the AAA Commercial Arbitration Rules and Mediation Procedures; and Rule 17(d) of the JAMS Comprehensive Arbitration Rules & Procedures.
[533] Article 25(3) of the ICC Arbitration and ADR Rules.
[534] Article 21(1)(b) of the LCIA Arbitration Rules.
[535] Article 29(3) of the UNCITRAL Arbitration Rules.
[536] Article 29(4) and (5) of the UNCITRAL Arbitration Rules; Article 26(2) UNCITRAL *Model Law on International Commercial Arbitration.*

may raise certain questions, these are related to: the cooperation of competition authorities in arbitral proceedings where competition law matters have been raised[537]; the possibility of arbitrators to stay proceedings in case the competition authority has initiated an investigation on the same matter; the effects on the arbitral procedures of the decisions by competition authorities declaring the infringement of the competition law provisions; and the use of arbitration by the competition authority in merger remedies.

6.1. Cooperation of the competition authority in arbitration

With regard to the cooperation by the competition authority in arbitral procedures where competition law matters have been raised, this involvement of administrative authorities in court proceedings is more customary in jurisdictions where the application of competition law is mainly done by administrative entities, such as the competition authority. In this regard, in jurisdictions where the antitrust provisions are frequently applied by courts, the intervention of competition authorities in court proceedings, and in our case, arbitral procedures, is virtually inexistent[538]. Notwithstanding, in jurisdictions where the competition authorities can cooperate/intervene in other procedures dealing with the application of the competition law provisions, such as litigation or arbitration, this possibility can occur in two instances. On the one hand, competition authorities can be requested by arbitral tribunals to submit their opinion on a determined matter to assist the arbitrators in the resolution of the dispute. And on the other hand, arbitral tribunals may require the information acquired by the competition authorities in the course of an investigation for the infringement of competition law that may be relevant for the determination of the competition law matters that have been raised in the arbitration proceedings.

As stated before, the competition authority can cooperate with the arbitral tribunal by submitting an *amicus curiae* brief, in such cases, the competition authority will submit its opinion on certain competition law issues in order to ensure a proper interpretation and application of the competition law provisions, this practice is intended to avoid inconsistencies that could lead to the unenforceability or the setting aside of the arbitral award. Depending on the jurisdiction and the proceedings, the competition authority will issue the *amicus curiae* brief at its own motion or when it has been invited to do so. In arbitral procedures, the main issues related to the competition authority's possibility to submit an *amicus curiae* brief are concerned with the admissibility of the latter in the proceedings and the evidential value of such submission. As a general rule, unlike some courts[539], arbitral tribunals do not have an obligation to accept such submissions by competition authorities. Hence, provided that the arbitral procedure is ultimately determined by the private autonomy of the contracting parties, the arbitrators will be required to give effect to any agreement of the parties as to whether the submission of the competition authority's opinion should be admitted or not. However, in the case that the parties have not established such

[537] ICC Case No. 7146 (2001) XXVI Y.B. Comm. Arb. 119.

[538] The involvement of competition authorities in court proceedings is a typical European issue, conversely, in the US the competition agencies can occasionally file an *amicus curiae* brief in pending cases before courts, however, the cooperation or supervision by the competition agencies, in the EU sense, has never been an issue for US courts applying competition law (KOMNINOS, Assimakis P. (2011), 'Assistance by the European Commission and Member States Authorities in Arbitration'. In: Blanke, G. & Landolt, P. (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners.* Volume 1. Alphen aan den Rijn: Kluwer Law International, p. 728).

[539] In the EU according to Article 15(3) of Regulation 1/2003, the Commission and the competition authorities of the Member States can submit written observations to the national courts on issues relating to the application of the EU competition law provisions. However, according to the EU case law, arbitrator tribunals are not considered as courts for the purposes of Regulation 1/2003 (*Nordsee* case, *supra* note 513).

possibility in the arbitration agreement, the submission by the competition authority may be accepted by the arbitrators at their own discretion[540].

As to the possibility to require the submission of relevant information gathered by the competition authority, this can take place in two different scenarios during arbitration. In the first case, by virtue of the powers vested on arbitral tribunals to require the parties under conflict to disclose any relevant information for the resolution of the dispute[541], the arbitral tribunal could ask a party that is currently under investigation by the competition authority to submit any information that the former has provided to the latter, in such cases, appropriate arrangements must be made to protect confidentiality and business secrets. Normally, the information required by the arbitral tribunals could include: all documents produced at the request of the competition authority and the documents seized or copied by the competition authority in the course of a dawn raid[542]. On the second scenario, the arbitral tribunal may request the competition authority for information obtained in the course of an investigation, however, as seen previously[543], competition authorities are usually reluctant to disclose any information about the parties in administrative proceedings with courts and third parties, and especially if the information contains confidential documents, business secrets or information provided by the parties in leniency applications given that this possibility could diminish the attractiveness of leniency programs[544]. Oppositely, the possibility of the competition authority to request the arbitral tribunal to disclose any relevant information acquired from the parties in the arbitral procedure could deprive the confidential nature of the arbitration procedure. In those cases, the arbitral tribunal should not disclose any information to the competition authority without the express prior consent of the arbitrating parties[545].

6.2. Stays

One of the special characteristics of competition law enforcement is the possibility to apply the competition law provisions in more than one procedure at the time. In this sense, concurrent proceedings may occur, for example, when the competition authority has initiated administrative proceedings against a determined practice that may be anticompetitive, and at the same time, the same practice is the subject matter of an ongoing arbitration. In such cases, the arbitral tribunal is presented with the possibility of staying its proceedings and wait for the decision of the competition authority in the case in question. The fact that competition authorities are specialized institutions with a high level of expertise in competition law matters and special investigative powers serves as an incentive for arbitrators to stay their proceedings and benefit from the authority's findings. Moreover, due to the complex nature of some competition law disputes, the conflicting parties and the arbitrators will be relieved from having to prove or analyze complex issues, like market definition, cost structures or profitability, given that they will be able to rely on the competition authority's decision if they wait for the resolution of the administrative

[540] NISSER, C. & BLANKE, G. (2006), 'Reflections on the Role of the European Commission as Amicus Curiae in International Arbitration Proceedings', *European Competition Law Review,* Issue 4, p. 177.
[541] See section 5 '*Powers of the Arbitrators',* above.
[542] NAZZINI, Renato (2004B), 'International Arbitration and Public Enforcement of Competition Law', *European Competition Law Review,* 25(3), pp. 159-160.
[543] See Section VIII, above.
[544] MAMANE, David & MENZ, James U. (2011), 'Practical Challenges in Arbitrating Antitrust Claims', *Competition Law International,* 7, pp. 18-19.
[545] STYLOPOULOS (2009), p. 122.

procedures. In general, arbitrators do not have a duty to stay proceedings in case that the competition authority has initiated an investigation on the same matter[546]. Thus, the decision to stay proceedings rests on the private will of the contracting parties and on the discretion granted to the arbitral tribunal. Similarly, competition authorities are not obliged to stay proceedings if an arbitral tribunal has instituted proceedings on the same matter, however, there have been cases where competition authorities have decided not to initiate an investigation where there was a pending arbitration procedure[547].

The decision to stay arbitration procedures is closely related to two fundamental principles of international arbitration: the obligation of arbitrators to render an enforceable award and the principle of party autonomy[548]. As explained before, the duty of arbitrators to render an enforceable award is closely related to the public policy nature of competition law, this means, that during the review process courts will exercise a thorough scrutiny of arbitration awards in order to see if the arbitrators have applied the antitrust rules correctly and if these have been fully respected. Therefore, according to the risk that arbitrators face of having their decisions being set aside or unenforced if these are contrary to the competition law provisions and to a subsequent decision by the competition authority on the same matter, the arbitral tribunals should consider to stay their proceedings and wait for the decision of the competition authority if there is a high risk of conflict between the award and the administrative decision. As to the principle of party autonomy, it is for the parties to decide if the proceedings should be stayed or not. In this sense, the arbitrators are compelled by the agreement of the parties on the matter; however, given that the parties cannot cover any possible scenario in the arbitration agreement, the arbitrators may exercise their discretion in procedural matters to stay the proceedings if the parties have not agreed on that specific matter.

In practice, nonetheless, the decision to stay arbitral proceedings will be appropriate in cases where the nature of the dispute, the evidence before the tribunal, or the legal issues involved are such that it is likely that a decision by the competition authority on the same matter will conflict with the arbitral award and that such a conflict could cause a real risk of the arbitral decision being set aside or unenforced[549].

Additionally, arbitration may interact with other concurrent procedures such as private litigation before ordinary courts. This may occur when a party is sued in court for the resolution of a determined contract, but the latter contains a clause that requires arbitration. In such cases, the defendant may file a motion to stay litigation pending arbitration. In most jurisdictions, arbitration is favored over litigation, thus, if the court is presented with an appropriately supported motion to stay, then the court may decide to issue an order staying the litigation[550].

[546] The Swiss Federal Supreme Court recognized the jurisdiction of an arbitral tribunal to apply Article 81 and 82 EC even if the Commission had initiated an investigation on the same matter (*G SA v V SpA and Arbitration Tribunal* [1996] E.C.C. 1).
[547] ICC Case No. 7181 (1996).
[548] NAZZINI (2004B), pp. 157-159.
[549] NAZZINI, Renato (2004A), pp. 12-13.
[550] In the US, according to Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, courts are obliged to stay proceedings if presented with a supported motion to stay.

6.3. Effects of the competition authority's decision in arbitration

As stated before, the intervention of the competition authority in arbitration is more frequent in jurisdictions where the competition law provisions are mainly applied in administrative proceedings and not in jurisdictions where ordinary courts are used to handle antitrust disputes. Accordingly, if an arbitral tribunal is faced with the same or similar competition law issues that have been previously addressed by the competition authority; the decision of the latter may have different effects on the arbitration procedure depending on the jurisdiction in question.

For instance, in some competition law regimes, a final decision by the competition authority declaring the infringement of the competition law provisions constitutes *prima facie* evidence against the defendant in a subsequent action for damages[551]. Consequently, in such competition law regimes, an arbitration award that is contrary to the findings of the competition authority declaring that the defendant has violated the competition law provisions would be difficult to be subsequently enforced before the competent courts[552].

In other jurisdictions, according to the relevant case law and the pertinent provisions[553], the decisions of the competition authority declaring the infringement of the competition law provisions are binding on courts, but not on arbitral tribunals[554]. Nonetheless, in cases where the arbitrators apply the same provisions to the same facts, the decision of the competition authority can be regarded as admissible evidence in the arbitration procedure[555]. Moreover, even though arbitral tribunals are not directly bound by the decision of the competition authority, the fact that courts cannot take decisions running counter to those issued by the competition authority, in practice means that the courts cannot enforce an arbitration award that is contrary to a decision on the same matter by the competition authority. In this sense, arbitrators, even though, not directly bound by the competition authority's decision, in compliance with their obligation to render an enforceable award will consider the decision in question, provided that the failure to do so could result in the setting aside or unenforceability of the award[556].

6.4. Competition authority's use of arbitration in merger remedies

In line with the recognition of the arbitrability of competition law disputes, some competition authorities have recently began to use arbitration clauses as a mechanism to enforce third-party rights deriving from merger remedies. In this sense, the arbitration clauses are included in the commitments given by the contracting parties in order to obtain from the competition authority clearance of their proposed transactions. In such cases, arbitration has been considered to be an appropriate means to guarantee the

[551] In the US, see § 5(a) of the Clayton Act, 15 U.S.C. §§ 12-27.
[552] BLANKE, Gordon & NAZZINI, Renato (2008C), 'Arbitration and ADR of Global Competition Disputes: Taking Stock (Part III), *Global Competition Law Review,* Issue 3, p.135).
[553] In the EU, according to the *Masterfoods* case (*supra* note 448) courts cannot take decisions running counter to those issued by the Commission. In the same line, the provisions of Article 16(1) of Regulation 1/2003 states that: *"When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission…".*
[554] According to the EU case law, arbitral tribunal tribunals are not considered as courts of the Member States (*Nordsee* case, *supra* note 513).
[555] NAZZINI (2004A), p. 161.
[556] BLANKE & NAZZINI (2008C), p. 135.

parties´ compliance with the commitments offered to the competition authority[557]. Nevertheless, even though arbitration has been more used in merger control cases, there have been a few instances where the arbitration clauses have been used in other enforcement actions, for example: in some jurisdictions, arbitration clauses have been included in cases related to the unlawful restraint of competition[558]; additionally, in other jurisdictions, arbitration clauses have been included in commitments offered to obtain an individual exemption for anticompetitive agreements[559].

In practice, the use of arbitration by the competition authorities over past years has been infrequent and inconsistent; accordingly, there is little guidance on the manner and use of arbitration by competition authorities[560]. In addition, the fact that the competition authorities do not always grant the same powers and duties to arbitral tribunals has resulted in different scopes that are ultimately determined by the characteristics of each case[561]. However, some key components of the use of arbitration by the competition authorities can be identified.

For instance, with regard to the disclosure of relevant information in the course of the arbitration procedure there are different approaches depending on the case and the competition authority. In jurisdictions that provide for broad discovery process in judicial procedures, usually, the contracting parties are free to determine the scope of discovery which is normally limited in arbitration procedures when compared to judicial litigation. In such jurisdictions, the competition authorities have not addressed the issue of the scope of discovery in remedy related arbitration proceedings[562]. On other competition law regimes, the competition authorities usually determine in the arbitration clause the right of arbitrators to request all relevant information from the parties in the proceedings and the subsequent obligation of the parties to provide the arbitral tribunal with any information that may be requested[563].

A further issue is related to the determination of the participation of the competition authority in the arbitration procedure. Thus, depending on the case in question, the competition authority may be involved in the arbitration process in different extents. For instance, in some cases, the arbitration clauses determine the right of arbitral tribunals to seek the interpretation of the competition authority of the commitment decision that allows the arbitrability of the dispute[564], moreover, in other cases, the arbitrators are obliged by the arbitration clause to request the interpretation of the competition authority of the commitment decision, in such cases, the competition authority's interpretation shall be binding on the arbitration tribunal[565]. In addition, in some cases the parties in the arbitration procedure may be required by the competition authorities to notify them if an arbitration proceeding has been commenced and to

[557] NISSER & BLANKE (2006), p. 175.
[558] *United States v. El Paso Natural Gas Co.,* 1995-2 Trade Cases (CCH) para. 71, 118 (D.D.C. 1995).
[559] Decision 78/253, *Campari*, December 23, 1977, [1978] O.J. L70/69; Decision 89/467, *UIP*, July 12, 1989, [1989] L226/25; Decision 93/403, *EBU/Eurovision*, June 11, 1999, [1993] O.J. L179/23; Decision 99/329, *P&I Clubs*, April 12, 1999, [1999] O.J. L125/12; and Decision 99/781, *British Interactive Broadcasting/Open*, September 15, 1999, [1999] O.J. L312/1.
[560] MARGOLIS & VORRASI (2011), p. 1755.
[561] STYLOPOULOS (2009), pp. 123-124.
[562] In the US, the competition agencies (DOJ and FTC) have not addressed the scope of discovery in their enforcement orders/decrees issued to date (MARGOLIS & VORRASI (2011), pp. 1756-1757).
[563] COMP/M.3570-*Piaggio/Aprilia* [2005] OJ C7/5; and COMP/M.3280-*Air France/KLM* [2004] OJ C60/5.
[564] *Idem*
[565] COMP/M.3083-*GE/Instrumentarium* [2004] OJ L109/1.

serve the authorities with a final copy of the arbitration award[566]. Finally, in some cases, the competition authorities may reserve for themselves several rights to intervene in the arbitration process, these may include: the right to approve the assignation of arbitrators; the right to participate in the procedure; or the right to provide assistance and submit evidence in the arbitration proceeding[567].

Furthermore, the competition authorities may determine other aspects of the arbitration process, such as: the number of arbitrators comprising the arbitral tribunal[568]; the specific arbitration rules that shall govern the procedure[569]; the obligation of the conflicting parties to resort to other ADR procedures before arbitrating[570]; the determination of the applicable law and venue of arbitration[571]; or the time periods for the arbitration proceedings[572].

7. Review of Arbitration Awards

As a general rule, arbitral awards are subject to a quite limited review by courts, this limited review of arbitral awards is due to the parties' election to submit their disputes to arbitration instead of the jurisdiction of ordinary courts; as a consequence, they give up their right to seek redress from the courts for all but the most exceptional errors at arbitration[573]. In this line, as to the review of the award on the merits, with a few exceptions, it is considered as inappropriate to revisit the merits of the award or to disturb the arbitral tribunal's findings of fact or conclusions of law. Nonetheless, the fact that the arbitral award is related to the application of the competition law provisions can be regarded as a sufficient ground of review depending on the consideration that the law of the country where the court sits has over the public policy nature of competition law[574]. Finally, in practice, arbitral awards can be reviewed by the competent courts in two instances. On the one hand, arbitral awards can be reviewed by courts by way of an action for setting aside the arbitral decision. And on the other hand, arbitral awards can be reviewed when the successful party seeks the enforcement of the award before the relevant court.

As seen before, the arbitrability of competition law disputes is almost an entirely settled matter, however, the question of the approach that should be taken in cases where competition law is raised as a ground for setting aside the award or to resist its enforcement remains. This uncertainty on the review of arbitration decisions concerned with the application of the competition law provisions is due to the inherent tension that exists between these two branches of law that arises as a consequence of their different natures. On the side of arbitration, there is a widely accepted premise that arbitral awards are in first instance final, and as such should be regarded as court decisions not subject to review by a higher

[566] *United States v. Data Card Corp.,* 1987-1 Trade Cases (CCH) para 67,437 (D.D.C. 29 January 1987); *United States v. The Dow Chemical Co.,* 1987-2 Trade Cases (CCH) para 67,684 (N.D. 111. 12 August 1987); and *United States v. Imetal SA,* 2000-1 Trade Cases (CCH) para 72,922 (D.D.C. 25 May 2000).
[567] *Imetal* case (*supra* note 566).
[568] *In re El Paso Energy Corp.,* No. C-3915, 2000 FTC LEXIS 7 (FTC, 6 Jan. 2000).
[569] *Dow Chemical* (*supra* note 566); *United States v. Morton Plant Health System,* 1994-2 Trade Cases (CCH) para 70,759 (M.D. Fla. 28 June 1994); *Imetal* (*supra* note 566); *United States v. Cargill, Inc.,* 2002-2 Trade Cases (CCH) para 72,967 (D.D.C. 30 June 2000); and *El Paso* (*supra* note 558).
[570] *In re Evanston Northwestern Healthcare Corp.,* No. 9315, 2008 FTC LEXIS 47 (FTC, 28 Apr. 2008).
[571] *El Paso* (*supra* note 558).
[572] *Imetal* and *El Paso* (*supra* notes 566 and 558, respectively).
[573] *Generica Ltd. v. Pharm. Basics, Inc.,* 125 F.3d 1123, 1130 n.5 (7th Cir. 1997) (citing *Dean v. Sullivan,* 118 F.3d 1170, 1173 (7th Cir. 1997).
[574] BLANKE & NAZZINI (2008C), p. 142.

court, except on limited grounds, such as the violation of the public policy of the country in which the reviewing court sits[575]. With regard to competition law, its mandatory nature and public policy character entail in practice that this has to be vigorously enforced. In this regard, due to the special characteristics of these two areas of law it is uncertain whether the mandatory and public policy character of competition law demands a type of review of the arbitral award that surpasses the normally accepted limited review in order to safeguard the objectives of the arbitral decisions[576].

As abovementioned, the recognition of the arbitrability of competition law disputes has been determined in great part by the establishment of the "second look" doctrine by the courts of the leading jurisdictions. The purpose of the notion of the "second look" is to address the concern that the competition law provisions may not be adequately applied in the arbitration proceedings by permitting the competent court to review the arbitral award from the point of view of public policy in order to ensure the respect of those rules of competition law that are considered to form part of public policy[577]. In this sense, the arbitrability of competition law has been justified on the premise that courts have the opportunity at the review process to determine if the competition law provision have been applied adequately and fully respected by the arbitral tribunals[578].

In practice, there are different approaches with regard to the extent and intensity of the judicial review of arbitral awards related to the application of the competition law provisions that vary from one jurisdiction to the next, these normally depend on the interpretation of the public policy nature of competition law that the law of the country where the reviewing court sits has made. Thus, there are two doctrinal and jurisprudential positions which have been adopted, the maximalist and the minimalist approach.

Under the maximalist position, the reviewing courts are required to carry out an in depth review of the arbitral awards when these are challenged, or when their enforcement is required by the parties. This approach requires an entire review of the case and all the relevant evidence. The main purpose of this approach is to avoid the risk that arbitration will be used to circumvent competition law. As to the minimalist approach, there are no special considerations for arbitral awards raising competition law issues, the intention is to completely resolve the dispute via arbitration and not involve courts. The explanation for the minimalist approach is that if a full review of the arbitral award is carried out by courts, this arguably defeats the purpose of going into arbitration in the first place and diminishes the trust afforded to arbitrators and the institution of arbitration. In this sense, reviewing courts should only refuse the recognition and the enforcement of arbitral awards where there is a fundamental breach of public policy[579].

The rationale for the maximalist approach is the need to effectively enforce competition law in light of its mandatory and public policy nature. In this regard, proponents of the maximalist approach

[575] According to Article V(2)(b) of the New York Convention, the recognition and enforcement of an arbitral award may be refused when *"The recognition or enforcement of the award would be contrary to the public policy of that country"*.
[576] RADICATI di BROZOLO (2011), pp. 3-4.
[577] POUDRET, Jean Francois & BESSON, Sebastien (2007), 'Comparative Law of International Arbitration'. 2nd Edition. London: Sweet & Maxwell, para. 352.
[578] *Mitsubishi* case (*supra* note 488).
[579] OECD (2010), p. 13.

suggest than only a very strict standard of review of arbitral awards raising competition law issues can avoid the infringement of competition law and an interference with the enforcement of competition policy[580].

On the other hand, the foundation for the minimalist approach rests on the premise that even though competition law forms part of the public policy, it will be in extreme cases where an arbitral award will have to be annulled or refused recognition or enforcement. For instance, when arbitral awards have as their sole purpose the creation of hard core horizontal restrictions of competition that are *"repugnantly anti-competitive"*, or when the arbitrators have ignored competition law although it was raised by the parties. In all other cases, there will not be a violation of the public policy, particularly if arbitrators have addressed the competition law issues, although their decision was erroneous. Thus, reviewing arbitral awards for errors would amount to a *révision au fond*, which is contrary to the principles of arbitration itself[581].

Irrespective of the existence of these two contrary positions, over the years there has been a reconciliation between the apparently opposite policy objectives of minimal review of arbitral awards and effective enforcement of competition law[582]. This has led both courts and scholars to position themselves in favor of the minimalist approach.

Notwithstanding the preceding, there are certain cases where the reviewing courts did not recognize the arbitral awards and have refused to enforce them on grounds of violation of the public policy. As seen before, the arbitrability of competition law disputes parted from the recognition that the courts in the reviewing process can reexamine the arbitral award and verify if the competition law provisions have been adequately applied and fully respected by the arbitral tribunal, the so-called "second look" doctrine[583]. The strict application of this doctrine has allowed some courts to deny the recognition and enforcement of arbitral awards on grounds of public policy violations, in such cases, the courts determined that arbitral awards that are contrary to the competition law provisions cannot be enforced[584], and that an infringement of the competition law provisions does not have to be flagrant to constitute a violation of public policy[585].

Despite these few cases where reviewing courts have applied the maximalist approach, most courts have adopted a minimalist approach when reviewing competition law arbitral awards. Under this position, courts review the arbitral award for the purpose of establishing that the competition law matters have been addressed and decided, this review is mainly focused on the compatibility of the operative part

[580] RADICATI di BROZOLO (2011), p. 4.
[581] KOMNINOS (2012), p. 214.
[582] RADICATI di BROZOLO (2011), p. 4.
[583] "Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the enforcement stage to ensure that the legitimate interest in the enforcement of antitrust laws has been addressed" (*Mitsubishi* case, *supra* note 488).
[584] Press Rechtbank The Hague, 27 May 2004, *Marketing Displays International Inc v VR Van Raalte Reclame BV*, KG/RK 2002-979 and 2002-1617 (2006) 2 SIAR 201.
[585] Tribunal de première instance Bruxelles (Civ Bruxelles), 8 March 2007, *SNF SAS v Cytec Industrie BV* (2007) 127 GP No 112-114, 53. However, the court of appeal determined that the court of first instance cannot reexamine the merits of the case and substitute the arbitrators' opinion with its own or examine legal errors possibly made by the tribunal (Cour d'appel de Bruxelles 22 June 2009, *SNF SAS v Cytec Industrie BV* (2009)).

of the award with the competition law provisions[586]. In practice, the request to set aside the arbitral award is usually filed by one of the parties arguing that the disputed contract was contrary to the competition law provisions in order to avoid complying with the determinations of the award. The decisions of the reviewing courts to recognize and enforce the contested arbitral awards on grounds of violation of the public policy include: the establishment that the violation of public policy in an arbitral award has to be flagrant, effective and concrete in order to lead to the setting aside of the award[587]; the refusal to reexamine the merits of the dispute[588]; the deference to the arbitral tribunal applying the competition law provisions[589]; and the consideration of violations of public policy only in obvious cases[590].

[586] BLANKE & NAZZINI (2008C), p. 144.
[587] CA Paris, *Thalès v Euromissile* (2005) Rev Arb 750.
[588] CA Paris, *SNF SAS v Cytec Industries BV* (2007) XXXII YCA 282. This case was confirmed on appeal by the French Supreme Court (Cass Civ, 4 June 2008, *SNF SAS v Cytec Industries BV* (2008) 135 JDI Clunet 1107).
[589] Court of Appeal of Thessaloniki, judgment 1207/2007 (Greece); Court of Appeal of Florence, 21 March 2006, *Soc Nuovo Pignone v Schlumberger SA*; and Court of Appeal of Milan, 5 July 2006, *Terra Armata Srl v Tensacciai SpA* (2007) 25 Bull ASA 618 (this award was also challenged in Switzerland where the reviewing court recognized its enforceability (*Tensacciai v Terra Armata* (2006) Rev Arb 763, 8 March 2006 (Tribunal Fédéral)).
[590] Court of Appeal of Svea, Case T 6730-03, 4 May 2005, *Republic of Latvia v Latvijas Gaze* (Sweden).

CHAPTER FOUR
Self-Enforcement & Antitrust Compliance

This part of the study is concerned with the voluntary compliance of the competition law provisions by undertakings and individuals, and with the analysis of the antitrust compliance programs that have been put into place across jurisdictions for this matter. Antitrust compliance programs have the greatest potential to prevent and uncover hard-core cartels, provided that other anticompetitive practices, such as abuse of dominance or monopolization, usually require more complex legal and economic analysis, consequently, most of these are designed to control anticompetitive activity that is related to this type of conduct[1]. In this regard, this part of the study will be mainly focused on compliance programs and their ability to prevent, detect, remedy, and report hard-core cartels. The first part will present the case for the need of voluntary compliance and the establishment of antitrust compliance programs to increase the overall enforcement of competition law. The second part will address the self-enforcement and antitrust compliance topics. The third part will deal with the current need of robust antitrust compliance programs to enhance the overall enforcement of competition law. The fourth part will study the factors or drivers that encourage individuals and undertakings to comply or non-comply with the antitrust provisions. The fifth part will provide guidance on the essential features that a compliance program should have in order to guarantee its credibility and effectiveness. The sixth part will make a comparative analysis of the guidelines and best practices available across jurisdictions. The seventh part will review the most relevant literature with regard to the relationship between compliance programs and the enforcement of competition law. And finally, the last part will make a comparative study of how competition law enforcers deal with the implementation of compliance programs when imposing antitrust sanctions for the infringement of competition law and the interaction of compliance programs and settlement mechanisms and leniency programs.

[1] OECD, *Promoting Compliance with Competition Law*, 2011, p. 13.

I. INTRODUCTION

Besides the objectives of competition law enforcement, a fundamental function of competition law, as happens with any other public law, is to guarantee the compliance of its legal provisions in order to accomplish the desired goals of the law. In this regard, the ultimate purpose of competition law policy is not to sanction antitrust offenders with the imposition of fines or imprisonment, but to ensure effective compliance of the competition law provisions[2].

In the case of competition law, traditionally, the governments have assured its compliance mainly via the public enforcement of the competition rules by public authorities, such as competition agencies, sector regulators, judicial courts, and others. While enforcing the provisions of competition law, public enforcers have been empowered with the ability to sanction undertakings and individuals – depending on the jurisdiction- for the breach of the competition law provisions. As seen in the *Public Enforcement* chapter, there is a variety of sanctions that competition law enforcers can apply for the infringement of the antitrust rules, which range from the imposition of financial penalties on the concerned undertakings, to the imprisonment of the individuals involved in anticompetitive practices[3].

Significant efforts have been made across jurisdictions with the purpose of strengthening competition law enforcement and compliance in the last decades. In particular, these measures are intended to prevent or detect the infringement of the antitrust provisions and to sanction the offenders for their illegal behavior. In most jurisdictions with strong competition law systems, there has been a proliferation of leniency programs, coupled with a substantial increase of the financial penalties, and the implementation of sanctions against individuals involved in anticompetitive practices, such as financial penalties, director disqualification or even imprisonment; all these measures are intended to achieve higher levels of compliance and deterrence. However, and despite these efforts, the current enforcement policy is not sufficient given that there are still many competition law infringements being discovered across jurisdictions[4]. Thus, these approaches have partly failed in encouraging full compliance with the competition law provisions.

With regard to leniency programs and its ability to deter market participants from engaging in anticompetitive practices, it has been argued that leniency programs have not led to optimal deterrence levels, that leniency may actually strengthen certain cartels, and that these programs may not be uncovering the most harmful cartels but might be only discovering the cartels that are easy to find[5], as a consequence, leniency programs should be coupled with additional enforcement policies in order to assure higher levels of compliance of the competition law provisions.

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[2] RILEY, Anne & BLOOM, Margaret (2011), 'Antitrust Compliance Programmes – Can companies and antitrust agencies do more?' *Competition Law Journal,* Volume 10, Issue 1.

[3] See Section VI of Chapter Two.

[4] CONNOR, John & HELMERS, Gustav (2007), 'Statistics on Modern Private International Cartels, 1990-2005', at 38 (Working Paper, January 2007).

[5] SOKOL, Daniel (2011), 'Detection and Compliance in Cartel Policy'. *CPI Antitrust Chronicle*, Volume 2; LELIEFELD, Daniel & MOTCHENKOVA, Evgenia (2010), 'Adverse Effects of Corporate Leniency Programs In View Of Industry Asymmetry', 2 *J. APPLIED ECON. SCI.* 114; HARRINGTON, Joseph E. & CHANG, Myong-Hun (2009), 'Modeling the Birth and Death of Cartels with an Application to Evaluating Antitrust Policy', 7 *J. EURO. ECON. ASSOC.* 1; and LANDE, Robert H. & CONNOR, John M. (2011), 'Optimal Cartel Deterrence: An Empirical Comparison of Sanctions to Overcharges'. AAI Working Paper, No. 11-08.

Moreover, the fact that the current level of financial penalties has proved to be insufficient to reach the desired levels of deterrence and compliance, has inspired academics to suggest the further increase of the levels of fines imposed for the infringement of competition law[6]. Nevertheless, there are certain limits above which financial penalties cannot be raised. For instance, corporate fines for the infringement of competition law cannot be raised above the ability to pay of undertakings, provided that this would lead them to bankruptcy. This possibility to force undertakings to exit the market is contrary to the primordial objectives of competition law and policy provided that the market place would turn less competitive, consumers would have to pay higher prices, receive poorer services and benefit from less innovation[7]. In addition, impossibly high financial penalties would inevitably carry other undesired side effects, like: (i) the over-enforcement of the antitrust provisions, this means that undertakings may fear to enter into lawful agreements that would have reported benefits for consumers under the fear of being severely fined; and (ii) other social and economic costs, such as the reduction of the dividends of shareholders, or the cut of expenses by undertakings, which will ultimately harm end consumers[8]. Moreover, fines imposed on corporations do not have a deterrent effect on individuals who are ultimately the responsible for the business decisions of the infringing undertakings. Thus, some competition regimes allow the possibility to impose financial penalties on both undertakings and individuals; however, the deterrent effects of fines imposed on individuals are lost when undertakings assume these penalties on behalf of their employees[9].

If according to the abovementioned, corporate fines would need to be impossibly high in order to reach the desired levels of deterrence and compliance and the fines on individuals are not effective sanctions due to the possibility of undertakings assuming the fines imposed on their employees, then imprisonment seems to be an adequate sanction for the infringement of competition law that sends a strong message to market participants to comply with the provisions of the law and provides for high levels of deterrence. Thus, unlike financial penalties, imprisonment presents a significant deterrent effect and compliance duty for individuals who are ultimately the responsible for the infringement of competition law[10]. However, due to the fact that except for a few jurisdictions the imposition of imprisonment as a sanction for the infringement of competition law is relatively scarce or even inexistent in most competition law systems that allow this possibility, accordingly, this type of sanction does not provide sufficient incentives for individuals to comply with the mandates of the law.

As stated before, the amount of financial penalties for the infringement of competition law has increased significantly in the last decades, as well as the length of jail sentences imposed in jurisdictions where this type of sanction is available, and the implementation of leniency programs has also proliferated across jurisdictions. Nevertheless, this increase in the severity of the sanctions imposed and

[6] CONNOR & HELMERS (2007); CONNOR, John & LANDE, Robert (2007), 'Cartel Overcharges: Implications for U.S. and EU Fining Policies', 51 *Antitrust Bulletin* 983; WILS, Wouter P.J. (2005A), 'Is Criminalization of EU Competition Law the Answer?', *World Competition,* Volume 28, No. 2.
[7] WERDEN, Gregory (2009), 'Sanctioning Cartel Activity: Let the Punishment Fit the Crime', 5 *European Competition Journal* 1, 30-31.
[8] WILS, Wouter P.J. (2006A), 'Optimal Antitrust Fines: Theory and Practice'. *World Competition.* Volume 29, No. 2, p. 20.
[9] According to the OECD, financial penalties on individuals alone are not effective because of the ability of undertakings to reimburse their employees (OECD, *Cartel Sanctions against Individuals*, 2004).
[10] GINSBURG, Douglas & WRIGHT, Joshua (2010), 'Antitrust Sanctions', *Competition Policy International*, Volume 6, 3, 4.

in the enforcement policies used to deter future violations of competition law has not resulted in an exponential decline of anticompetitive behavior[11].

Accordingly, even though governments and competition law enforcers have made tremendous efforts to deter potential antitrust offenders and to enhance the compliance levels of the competition law provisions; these have not been entirely successful in accomplishing these desired objectives. Hence, given that the sanctions available and other enforcement policies are not sufficient to reach the desired levels of deterrence and compliance, undertakings, competition authorities, practitioners and academics need to question what other strategies might enhance deterrence and compliance[12]. In this regard, the voluntary compliance of market participants of the competition law provisions can play a fundamental role in enhancing the levels of deterrence and compliance, provided that without the latter, there is no rule of law, no matter how well the institutions and regulations are designed[13].

II. SELF-ENFORCEMENT & ANTITRUST COMPLIANCE

As seen in previous chapters, the legal provisions of competition law can be enforced in different procedures and by different persons or authorities, this application of the law is ultimately intended to assure the compliance of the antitrust provisions and the accomplishment of the objectives of the law. This type of enforcement is based on the formal and supervisory public control of the State for the compliance of laws that have a public nature. However, the compliance of the law is not only achieved due to the legal authority of the State to demand the obedience of the law. In this sense, and on their behalf, the recipients of the law can also achieve compliance by voluntarily obeying and respecting the mandates of the law. This self-enforcement of the law by market participants does not require the intervention of competition authorities and courts in order to assure compliance of the legal mandates. Hence, it is thanks to the voluntary willingness of market participants to abide by the law that the compliance of the competition law provisions is assured. It goes without saying, however, that voluntary antitrust compliance is complementary to the State's application of the competition law provisions, given that self-enforcement on its own cannot achieve the objectives of competition law enforcement.

Generally speaking, the people's voluntary compliance of law can be driven by different factors, such as: (i) the legal obligation of the members of a determinate State to obey the law; (ii) the perception of internal factors like what people regard as just and moral, and of external factors such as the gains and losses resulting from different behaviors; and (iii) the sense of social responsibility of enterprises.

(i) Legal obligation to comply with the law

Every business and individual has the obligation to act according to the established laws of a determined territory. In Plato's *Crito*, according to Socrates, all citizens belonging to a State have an obligation to

[11] GINSBURG & WRIGHT (2010), p. 13.
[12] OECD (2011), p. 25.
[13] LEVI, Margaret, TYLER, Tom & SACKS, Audrey (2009), 'The Reasons for Compliance with the Law'. The United States Studies Centre at the University of Sydney, Working paper.

obey the laws of the State. This obligation to obey the law derives from the notion of the *Social Contract*, by virtue of which, the citizens of a society give up their rights to the State and in return receive peace and security[14]. In this regard, the State is empowered to create laws that govern the relations of the citizens, which these are obliged to comply for the sake of society.

For the purpose of this study, this duty to comply with public laws is also concerned with the obligation of companies and individuals to obey the State's provisions on competition law. The aim of the government in enacting public laws that protect free competition in the market is intended to provide the benefits of free markets to the general population of the State. A fundamental feature of this relationship between the State and its inhabitants and their obligation to comply with the law is the coercive nature of public laws[15]. This means that the government and its institutions are allowed to demand compliance from the recipients of a determined law, such as the competition law provisions. In practice, this possibility of competition law enforcers to demand compliance and the people's sense of obligation to comply with the law constitute strong incentives for individuals and undertakings to abide by the law.

(ii) Perception of internal and external factors to comply with the law

In addition to the compliance of the law due to the sense of obligation of citizens to obey the mandates of the law, which is derived from the *Social Contract*, people also obey the law through the perception of internal and external factors.

The perception of internal factors, or normative perspective, explains compliance with the law from the angle of what people regard as just and moral. In normative commitment people feel personally committed to obey the law irrespective of whether they risk punishment for breaking the law. Normative commitment implicates personal morality or legitimacy. Personal morality entails complying with the law because citizens feel that the law is just. Alternatively, legitimacy means obeying the law because citizens feel that the authority enforcing the law has the right to dictate behavior. Accordingly, the normative perspective explores people's internalized norms of justice and obligation.

On the other hand, according to the perception of external factors, or instrumental perspective, the citizens accommodate their behavior to respond to changes in the tangible, immediate incentives and penalties associated with following the law. Under this explanation of why people obey the law, citizens comply with the mandates of the law because of the fear of being punished for conducts contrary to the law. In this case, compliance is assured by shaping the public behavior through the increase of the severity and certainty of punishment for breaking the law[16].

(iii) Corporate social responsibility

Particularly, in the case of competition law, undertakings voluntarily comply with the antitrust provisions in the framework of corporate social responsibility. Corporate social responsibility (CSR) is a concept

[14] HOBBES, Thomas (1996), 'Leviathan', Richard Tuck (ed). 1st Edition. Cambridge: Cambridge University Press; LOCKE, John (1986), 'The Second Treatise on Civil Government'. New York: Prometheus Books; ROUSSEAU, Jean-Jacques (1997), 'The Social Contract and other later political writings', Victor Gourevitch (ed). Cambridge: Cambridge University Press.
[15] HART, H.L.A. (1994), 'The Concept of Law'. Second Edition. Oxford: Oxford University Press, p. 20.
[16] TYLER Tom R. (1990), 'Why People Obey the Law'. New Haven and London: Yale University Press.

whereby companies integrate social and environmental concerns in their business operations and in their integration with their stakeholders on a voluntary basis[17].

In this regard, and in relation to competition law, under the precepts of CSR the undertakings carry out their commercial activities in a manner consistent with all applicable competition laws and regulations, taking into account the competition law provisions of all the jurisdictions in which their activities may have anti-competitive effects.

In addition, by virtue of CSR the undertakings also abstain from entering or carrying out anti-competitive agreements among competitors, including agreement to fix prices; make rigged bids; establish output restrictions or quotas; or share or divide markets by allocating customers, suppliers, territories or lines of commerce.

Furthermore, a socially responsible behavior on behalf of undertakings with regard to the competition law provisions also requires undertakings to cooperate with the investigations carried out by competition authorities. This means that the undertakings have to provide responses as promptly and completely as practicable when requested by the competition agencies. The assistance of the undertakings in the investigation can also include the use of available instruments, like waivers of confidentiality to promote effective and efficient cooperation among investigating authorities.

Finally, socially responsible undertakings habitually promote employees awareness of the importance of compliance with all applicable competition laws and regulations. For this purpose, it is fundamental to train and educate senior management of the undertakings in relation to competition law matters[18].

In this regard, given that the provisions of competition law contribute to the efficient operation of markets, the overall welfare and economic growth; undertakings with a sense of social responsibility are expected to comply fully with the fundamental mandates of competition law. Accordingly, in order to fulfill all the above mentioned objectives, socially responsible undertakings build genuine antitrust compliance programs to ensure compliance with the important antitrust provisions. Antitrust compliance programs are part of CSR and are intended to provide the undertakings and their employees with awareness about the developments concerning the scope, remedies and sanctions of competition law. In addition, compliance programs create channels of cooperation between the competition authority and the undertakings with the purpose of obtaining valuable information in the curse of an investigation. Ultimately, the creation of genuine compliance programs is envisioned to promote and assure the compliance of the antitrust provisions and to prevent violations of the law, and as a consequence, to accomplish the benefits and goals of competition law.

[17] European Commission, *Green Paper, Promoting a European framework for Corporate Social Responsibility*, 2001.
[18] OECD, *Guidelines for Multinational Enterprises*, 2011 Edition, p. 57.

III. ANTITRUST COMPLIANCE PROGRAMS

Antitrust compliance programs are programs whereby undertakings commit themselves to obey the provisions of competition law and the values or objectives on which these are based. These programs usually include a set of actions aimed to assist undertakings in building a genuine culture of compliance with the antitrust rules; prevent potential violations of the law; detect infringements that have been committed; and eventually, remedy them. In practice, compliance programs are not exclusive for the field of competition law, given that in most undertakings that have some kind of corporate compliance program this programs will usually deal with other issues, such as anti-bribery and corruption, securities and tax law, consumer health and safety, or environmental protection, among others. The main objective of an antitrust compliance program in any undertaking is to reduce the likelihood that antitrust violations will occur in the future[19].

Antitrust compliance programs constitute the policies, procedures, guidelines and mechanisms established by a determined undertaking in order to be allowed to comply with the mandates of competition law. These programs are usually tailor made for each undertaking by regarding different factors, such as the size of the undertakings, the sector where it develops its main economic activity, the market place, and the potential risks of infringing competition law, among others. Summarizing, compliance programs involve the management commitment to do the right thing and effective management measures and steps to make that happen[20].

Effective antitrust compliance programs shall fulfill a variety of objectives both for undertakings and competition law enforcers. For instance, with regard to undertakings, antitrust compliance programs basically allow undertakings to prevent, detect, remedy and report infringements of the competition law provisions, in addition, compliance programs may allow undertakings to take advantage of leniency programs, similarly, companies that have taken adequate steps to achieve compliance, but have nonetheless committed a violation, may receive a reduction in financial penalties imposed for such infringement, moreover, early detection of anticompetitive practices can enable undertakings to take early corrective measure, allowing them to reduce the burden of costs related to fines, penalties and litigation, finally, a credible an effective antitrust compliance program can enhance the public perception on undertakings as a consumer friendly company committed to business ethics and social responsibility[21]. As to the competition law enforcers, compliance programs will allow undertakings to assist competition authorities to detect anticompetitive practices and to punish those responsible for the infringement of competition law, in this way, competition authorities and courts will save resources that otherwise would have been destined to the detection of the reported anticompetitive practices[22].

Furthermore, from the perspective of the undertakings, the adoption of antitrust compliance programs is a protective measure that is intended to provide them with the necessary guidance that they

[19] HANNAY, William M. (2003), 'Designing an Effective Antitrust Compliance Program'. New York: Thomson /West, p. 5.
[20] MURPHY, Joseph (2011), 'Promoting Compliance with Competition Law: Do compliance and ethics programs have a role to play?'. Paper prepared for the OECD Roundtable on Promoting Compliance with Competition Law.
[21] Competition Commission of Pakistan, Voluntary Competition Compliance Code: Statement of Principles and Policy, 2010.
[22] See the Korean report in: OECD (2011), p. 122.

need to comply with their legal obligations and to minimize the risk of infringing the law[23]. On the one hand, antitrust compliance programs report benefits to undertakings by creating an effective culture of competition law compliance, enhancing the company's reputation, raising job satisfaction and pride of the staff, and avoiding the potentially high cost of non-compliance. On the other hand, non-compliance presents undertakings considerable costs, such as high corporate fines, sanctions on individuals, invalidity of agreements that may infringe the competition law provisions, lawsuits from those damaged by the infringement, and bad press for the infringing undertakings[24].

However, the mere establishment of antitrust compliance programs by undertakings is not sufficient to assure the required levels of compliance, in this regard, depending on the competition law regimes, compliance programs will have to comply with certain requirements in order to be considered as effective programs. Moreover, there is not a one-size-fits-all model that undertakings can adopt with regard to the design of effective antitrust compliance programs. Accordingly, undertakings should then find an effective means of assessing and addressing their competition law risk. Additionally, provided that, at least at first instance, the establishment of antitrust compliance programs is voluntary; consequently undertakings are free to adopt a compliance program depending on their competition law risk exposure.

Despite the preceding, irrespective of the competition law regime in question or the size or sector of the concerned undertaking and its risk exposure to commit and infringement of the competition law provisions, most antitrust compliance programs share certain basic features. For instance, at the core of any effective antitrust compliance program there should be a sound culture of competition law compliance, this means a public commitment on the part of the undertaking to fully comply with the mandates of competition law[25]. Such commitment has to involve all the lairs of the organizational structure of the undertaking; thus, it would have to include from senior managers to sales representatives. In addition, most antitrust compliance programs include compliance manuals that provide a statement of policy and ethical conduct expected and endorsed by the undertaking, employees whose activities may raise competition law issues are supposed to be familiar with these manuals. These manuals may contain lists of common practices that employees may need to avoid, such as discussing pricing strategies with competitors, or which products the undertaking is going to sell and where. Moreover, the employees will be required to attend mandatory training seminars as part of the compliance program, in addition, these may be required to sign that they have completed this training[26] or may be regularly evaluated[27]. Furthermore, risk assessment is a fundamental tool of most antitrust compliance programs; this is intended to determine the key competition law compliance risks faced by the undertaking and assessing

[23] Autorité de la Concurrence, *Antitrust Compliance and Compliance Programmes: Corporate Tools for Competing Safely in the Marketplace*, 2012.
[24] For more on the benefits and drawbacks of compliance and non-compliance of competition law, see: European Commission, *Compliance Matters: What companies can do better to respect EU competition rules*, 2012; and OFT (2010B), *How Your Business Can Achieve Compliance: Guidance*, October 2010.
[25] Autorité de la Concurrence (2012), p. 8-9; Fiscalía Nacional Económica (Chile), *Programas de Cumplimiento de la Normativa de Libre Competencia*, Junio 2012; OFT (2010B), p. 14.
[26] ABA Section of Antitrust Law (2005), 'Antitrust Compliance: Perspectives and Resources for Corporate Counselors'. Chicago: ABA Publishing, p. 64-69.
[27] Competition Bureau Canada, *Bulletin – Corporate Compliance Programs,* 2010.

the level of risk identified[28]. Most antitrust compliance programs also include monitoring, auditing and reporting systems that allow undertakings to observe if the program is successful in preventing infringements of the law, to audit if a violation of the competition provisions has occurred, and to report conduct that may be contrary to the antitrust rules. Finally, another feature of most compliance programs is the adoption of disciplinary procedures and incentives. The disciplinary procedure will explicitly provide for disciplinary actions against employees who infringe the competition law provisions, like suspension, demotion, dismissal, or legal actions. On the other hand, the availability of incentives, such as promotions and bonuses for employees that behave in accordance with the antitrust compliance program is a feature that some undertakings include in their corporate compliance programs.

IV. DRIVERS OF COMPLIANCE & NON-COMPLIANCE

The drivers of compliance and non-compliance constitute a variety of factors that influence undertakings and individuals to obey or disobey the provisions of competition law. In this regard, the drivers of compliance will encourage undertakings and individuals to comply with the provisions of competition law, on the contrary, the drivers of non-compliance will encourage undertakings and individuals to infringe the antitrust provisions.

1. Drivers that encourage compliance

a) Fear of monetary sanctions imposed on corporations and individuals

The fear of undertakings and individuals of being sanctioned with financial penalties constitutes a strong driver of competition law compliance. This driver is further exacerbated by the current high levels of financial penalties of most developed competition law regimes. The deterrent effect of financial penalties creates a credible threat of penalties which weighs sufficiently in the balance of expected costs and benefits to deter potential offenders from committing competition law infringements[29]. However, in order for potential antitrust offenders to be driven into complying with the competition law provisions, the amount of the financial penalty must exceed the expected gain from the violation. Consequently, this requires the imposition of high financial penalties that serve as a sufficient deterrence against potential competition law infringements[30]. Moreover, given that corporate financial penalties do not always guarantee adequate incentives for responsible individuals within the undertaking to comply with the competition law provisions[31], some competition law systems allow the possibility of fining individuals for their participation in the violation of the antitrust rules[32]. This possibility to sanction individuals, if implemented correctly, may enhance the incentives of individuals, who are ultimately the responsible for the business decisions of companies, to comply with the mandates of competition law. Nevertheless, there are certain issues that may diminish the deterrent effect of financial penalties for individuals, for instance,

[28] ABA Section of Antitrust Law (2010), 'Antitrust Compliance: Perspectives and Resources for Corporate Counselors'. Second Edition. Chicago: ABA Publishing.
[29] WILS (2006), p. 12.
[30] BECKER, Gary S. (1968), 'Crime and Punishment: An Economic Approach'. 76 *Journal of Political Economy*, p. 169; and LANDES, William M. (1983), 'Optimal Sanctions for Antitrust Violations'. 50 *The University of Chicago Law Review*, p. 652.
[31] WILS, Wouter, P. J. (2008A), 'Efficiency and Justice in European Antitrust Enforcement'. Oxford: Hart Publishing, p. 181.
[32] See Section VII of Chapter Two.

the difficulty of determining the optimal levels of fines that effectively deter individuals from participating in anticompetitive activities can take away the deterrent effects of this type of sanction, additionally, the possibility of individuals being reimbursed by their undertakings can also reduce significantly the deterrent effects of fines on individuals[33]. Finally, corporate sanctions and individual sanctions complement each other as incentives for undertakings and individuals to comply with the legal mandates of the law, thus, legal sanctions applied to undertakings can effectively deter those who act on their behalf, similarly, threats of criminal and civil sanctions directed against individuals inhibit the intention to commit corporate crime[34].

b) Fear of imprisonment

Criminal sanctions against individuals are the most effective deterrence mechanisms available for competition authorities in their fight against hard-core cartels[35]. For businessman, '*prison is the inferno*', consequently, the threat of being sentenced to spend time in jail still constitutes the most meaningful deterrent for the infringement of competition law[36]. In jurisdictions where this type of sanction has been properly implemented, this represents the difference between considering cartels on a cost/benefit basis as a reasonable risk-taking exercise and serious deterrence that prevents anticompetitive activities related with hard-core cartels[37]. There is evidence that international cartels do not extend their anticompetitive conducts into jurisdictions that have effective mechanisms to detect cartel activity and provide for severe sanctions –imprisonment- for the violation of the antitrust provisions[38]. Moreover, the fear of being sentenced to jail increases the incentives of individuals to comply with the antitrust provisions and to resist to corporate pressure from overly ambitious profit targets or performance goals or overly strong incentives set for them by the company that might have driven them to violate the antitrust provisions. In this regard, the fear of being sentenced to prison maybe the strongest driver of competition law compliance for individuals if compared to other types of sanctions available for the infringement of the competition law provisions[39]. In addition to the evident inconvenient of having to spend time in jail, imprisonment also presents a strong reputational factor that enhances its deterrent effects, given that criminal convictions represent a condemnation by society of certain conduct in a way that the imposition of a civil penalty cannot[40].

c) Fear of damage to individual or corporate reputation

Another factor that can motivate undertakings and individuals to comply with the competition law provisions is the fear of reputational damage. Moreover, for most undertakings and individuals

[33] OECD (2003), p.17.
[34] PATERNOSTER, Raymond and SIMPSON, Sally (2006), 'Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime'. *Law & Society Review,* Volume 30, No. 3,p. 579.
[35] BAKER, Donald I. (2001), 'The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging', 69 *Geo. Wash. L. Rev*. 693, p. 713.
[36] LIMAN, A.L. (1977), 'The Paper Label Sentences: Critique'. 86 *Yale Law Journal* 619, 1977, pp. 630-31.
[37] OECD, *Cartel Sanctions against Individuals*, 2003, p. 16.
[38] HAMMOND, Scott D. (2004), 'Cornerstones of an Effective Leniency Program', paper presented at the ICN Workshop on Leniency Programs (Sidney, 22-23 November 2004). The author states that the US Department of Justice has uncovered cartels that operated in Europe, Asia and other parts of the world, but did not expand their cartel activity to the US due to the fear of the executives of the infringing undertakings of having to spend time in jail in the US.
[39] OFT, *The Deterrent Effect of Competition Enforcement by the OFT: A report prepared for the OFT by Deloitte*, November 2007.
[40] OECD (2003), p. 18; OFT (2010A), *Drivers of Compliance and Non-compliance with Competition Law: An OFT Report*, May 2010, p. 30.

reputational damage is a greater driver for antitrust compliance when compared to the imposition of financial penalties[41]. For undertakings, being sanctioned for infringing the law can produce certain undesired consequences that are usually related to the concept of reputational damage[42]. The reputational damage that arises from being convicted for having violated the law mainly affects the trustworthiness of undertakings. The damage to the reputation of a company can result in the loss of revenue, customers, consumers, partners, employees, and the destruction of shareholder value. Moreover, reputational damage does not only occur as a consequence of being actually convicted for having infringed the law, but the mere accusation can also tarnish the public image of undertakings. With regard to individuals, the stigma and reputational damage associated with being sanctioned for the infringement of the law, also increases their incentives to obey the provisions of the law. Furthermore, in the case of individuals, the reputational damage for breaking the law is further enhanced in the case of a criminal conviction, given that the imposition of criminal sanctions carries, and is design to carry, a stigma effect[43]. Finally, the possibility for individuals of having a criminal record raises further reputational issues, like the affectation of a future career life.

d) Morality

The decision-making process to comply or not with the provisions of competition law, or any other law, definitively contains a moral dimension. Accordingly, businessmen have a moral responsibility to obey the law whether or not they are likely to be caught[44]. The choice to commit a corporate crime, such as the infringement of the competition law provisions, has both rational and moral aspects. The rational aspect involves the assessment by the decision-maker of the costs and benefits of the unlawful behavior. On the other hand, the moral aspect involves the moral considerations of the decision-maker. In this regard, the moral considerations of decision-makers can be an especially powerful source of corporate social control; accordingly, strengthening the business ethics of managers may constitute an effective crime-control strategy given that moral inhibitions seem to be an effective tool against corporate crime[45].

e) Effective compliance training programs

Another key driver of competition law compliance is the adoption of effective compliance training programs for employees that face an actual risk of infringing the competition law provisions. The main purpose of training employees in antitrust compliance is to create awareness of the risks of infringing the competition law provisions. In this regard, a well-informed employee is less likely to infringe the mandates of competition law, at least willfully, than an employee who is not familiar with the antitrust rules. Hence, raising awareness helps minimize the risk of violations occurring[46]. Nonetheless, it has been argued that employees inclined to engage in anticompetitive practices can learn from compliance training

[41] OFT (2010A), p. 30.
[42] The threat of reputational damage works as an incentive for undertakings and individuals to obey the legal provisions irrespective of the branch of law.
[43] WILS (2005).
[44] WILS (2008), p. 185.
[45] PATERNOSTER & SIMPSON (1996), pp. 579-580.
[46] OECD (2011), p. 333.

programs how to engage more effectively in anticompetitive practices or how to avoid being detected and punished for the infringement of the competition law provisions[47].

f) Disciplinary measures and positive incentives

Both disciplinary measures and positive incentives are essential parts of effective antitrust compliance programs; these demonstrate the seriousness with which the undertaking views conduct that is contrary to the competition law provisions. In addition, these measures serve as important drivers of competition law compliance. State-of-the-art antitrust compliance programs should have clear rules and procedures for the eventual violation of the competition law provisions[48]. In this sense, compliance programs shall determine what consequences the non-compliance of the antitrust rules will trigger. Depending on the specific compliance program, these disciplinary measures may include: suspension, demotion, dismissal, or even legal actions. In practice, just like the actual threat of being sanctioned by public authorities for the infringement of competition law, disciplinary measures within the undertaking should encourage employees to comply with the provisions of competition law. Regarding positive incentives, these should constitute an essential part of any antitrust compliance program due to their ability to foster competition law compliance[49]. Positive incentives for employees usually involve linking employee evaluations, bonuses and promotions to the compliance of the competition law provisions.

g) Impact of competition investigations and litigation cause on compliance

Undertakings' fear of costly competition investigations and follow-on litigation is a strong driver of competition law compliance. The possibility of being investigated by the competition authority for the alleged infringement of competition encourages undertakings to comply with the antitrust rules. Hence, the costs involved in competition investigations, such as the expenses faced by undertakings during the investigation and the reputational damage to the public image of investigated undertakings, deter undertakings from engaging in anticompetitive behavior that may lead to a posterior investigation. In addition, the threat of private litigation may also encourage competition law compliance. For instance, in competition law regimes where every injured party in the market can bring a private action for the infringement of competition law, the likelihood of observed transgressions being prosecuted grows. Moreover, private antitrust litigation increases the likelihood of prosecution of competition law violations, given that private parties can fully internalize the benefits of their antitrust enforcement. Finally, if the remedies available for private parties are sufficient enough to encourage potential claimants to bring private claims, these can also enhance competition law compliance[50].

[47] WILS, Wouter P.J. (2013), 'Antitrust Compliance Programmes & Optimal Antitrust Enforcement'. *Journal of Antitrust Enforcement*, Volume 1, No. 1. Against Wils's position, see: GERADIN, Damien (2013), 'Antitrust Compliance Programmes & Optimal Antitrust Enforcement: A Reply to Wouter Wils'. *Journal of Antitrust* Enforcement, Vol. 1, Issue 2.
[48] OFT (2010B), p. 28.
[49] MURPHY, Joseph and KOLASKY, William (2012), 'The Role of Anti-Cartel Compliance Programs In Preventing Cartel Behavior'. *Antitrust*, Volume 26, No. 2, p. 62.
[50] See William Kovacic describing the characteristics of U.S. private antitrust litigation and how this promotes better compliance of the antitrust rules: KOVACIC, William E. (2003), 'Private Participation in the Enforcement of Public Competition Laws'. British Institution of International & Comparative Law. Third Annual Conference on International and Comparative Competition Law: The Transatlantic Antitrust Dialogue. London, May 15, 2003.

h) A genuine and credible culture of compliance

Moreover, a fundamental driver of competition law compliance is the availability of a genuine and credible corporate culture of law compliance. Corporate culture is the set of enduring and underlying assumptions and norms that determine how things are done in an organization. Hence, a genuine corporate culture is based on shared beliefs, values and understandings that shape the behavior across the organization[51]. In this regard, undertakings and individuals that operate in environments where the value of competition is widely understood and appreciated, and in which the competition law provisions are respected, are more likely to comply with the mandates of the law[52].

g) Influence of compliance programs on the sanctions

As will be seen bellow, the existence of compliance programs may affect the amount of the sanction to be imposed for the infringement of the competition law provisions[53]. Thus, the competition authority may reduce the level of the penalty if it considers that despite of having violated the antitrust provisions the undertaking has adopted a true compliance program, or alternatively, the authority may increase the sanction if it considers that the compliance program is just a façade. In cases where the sanctions can be increased for the existence of a compliance program the individuals and undertakings may further incentive to comply with the antitrust provisions as they can be sanctioned more heavily because of the compliance program.

2. Drivers that encourage non-compliance

a) A corporate culture of non-compliance

As previously seen, a certain corporate culture of competition law compliance will ultimately determine how an undertaking behaves in the marketplace. In this sense, if the undertakings and the individuals within them are driven by a strong corporate culture that encourages them to comply with the provisions of the law, then these will most likely avoid engaging in unlawful conducts. On the other hand, if within the company, industry, or even country, there is not a genuine culture of competition law compliance, or even worse, there is a latent corporate culture of non-compliance; then the risk of competition law infringements occurring is even greater[54]. Moreover, as it will be seen below, the commitment of undertakings and their employees to comply with the provisions of competition law has to cover all the layers of the structural organization of the company, in practice this means, that this commitment to obey the law has to begin at the senior management level and go all the way down to lower levels of the structure where there are employees that face the risk of committing violations of the law.

[51] KILLINGSWORTH, Scott. 'Modeling the Message: Communicating Compliance Through Organizational Values and Culture', *Georgetown Journal of Legal Ethics,* Volume 25, No. 4, 2012, pp. 964-965.
[52] OECD (2011), p. 24.
[53] Section VII and VIII below.
[54] *Idem.*

b) Lack of or ambiguity in senior management's commitment to compliance

A solid and true commitment by senior management to comply with the antitrust provisions is a fundamental driver of competition law compliance. By demonstrating its commitment to competition law compliance, senior management is sending a strong message to other employees that behavior contrary to the provisions of competition law is not acceptable[55]. The commitment of senior management needs to be evident in all aspects related to the antitrust compliance policy of the undertaking. In this regard, senior management has to encourage a corporate culture of competition law obedience by playing an active and visible role in promoting the antitrust compliance program. Accordingly, senior management has to show its support to the program by ensuring sufficient resources to compliance, and demonstrating that violations of the company policy on competition law compliance will be dealt with effectively.

On the contrary, the fact that senior management does not care for competition law compliance or sees competition law as something to be evaded will inevitably lead to the non-compliance of the antitrust provisions within the company[56]. Given to the nature of most anticompetitive practices, competition law infringements usually involve the participation of employees that have been given substantial authority by their company[57]. In practice this means that most competition law infringements, especially hard-core cartels, are committed at the senior level within the organizational structure of undertakings[58]. This situation clearly represents an important problem for competition law compliance programs, provided that the support of those who are usually involved in anticompetitive practices –senior management- is considered as fundamental for the effectiveness of a compliance program[59]. Accordingly, the involvement of senior management in the infringement of the competition law provisions constitutes a strong driver of non-compliance of competition law for employees at a lower level in the organizational structure of the company. In addition, it provides for a series of difficulties for the success of antitrust compliance programs and could make these control mechanisms unsuitable for combating hard-core cartels. For instance, in order to avoid detection, top management may underfund antitrust compliance programs, or create a façade of compliance without effective means to prevent and detect anticompetitive behavior. Moreover, the involvement of senior management in anticompetitive practices makes it less probably that employees at lower levels in the organizational structure of the company come forward and report their employers[60].

Another serious factor of non-compliance of competition law is the ambiguity in the senior management's commitment to antitrust compliance[61]. The ambiguity in senior management's commitment to competition law compliance occurs when top management executives send mixed signals to their employees with regard to their actual position on competition law compliance. For instance, on the one hand, top management executives may express support for competition law compliance, and on

[55] Competition Bureau Canada (2010), p. 7.
[56] OFT (2010A), p. 36.
[57] WILS (2013), p. 8.
[58] KLAWITER, D.C. and DRISCOLL, J.M. (2009), 'Antitrust Compliance in the Age of Multi-jurisdictional Leniency: New ideas and new challenges'. GCR Supp (The Antitrust Review of the Americas).
[59] STEPHAN, A. (2009), 'Hear No Evil, See No Evil: Why Antitrust Compliance Programmes May Be Ineffective at Preventing Cartels', CCP Working Paper 09-09, July 2009. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1965733
[60] STEPHAN (2009), p. 10.
[61] OECD (2011), p. 24; OFT (2010A), p. 36-37.

the other hand, they may also set ambitious profit targets and pressure their employees to meet them, even if this means that employees have to overlook the compliance policy of the company. Consequently, employees usually feel motivated to infringe the provisions of the law by the expectations that the company has set for them and by the pressure of profits targets, performance goals, or strong incentives of the company[62].

c) Market conditions that facilitate the infringement of competition law

Another possible factor that could lead to the non-compliance of competition law is related to the market conditions that facilitate the commission of antitrust infringements. Accordingly, undertakings that operate in markets or industries that because of their characteristics facilitate the commission of competition law infringements are more prone to engage in anticompetitive behavior[63]. For instance, markets where there is a small number of players, price transparency, a homogenous product, continuous exchanges of information among competitors, or public signals about planned price or output level, tend to facilitate the formation of cartels. In this regard, in order to avoid the infringement of the competition law provisions, the undertakings that find themselves in these kinds of markets have to identify in time these characteristics and devote their antitrust compliance programs to reduce the risk of infringement. Accordingly, risk identification constitutes a fundamental part of effective antitrust compliance programs that allows undertakings to prevent the violation of the competition law provisions.

d) Ignorance of the legal consequences of non-compliance

Even though, the ignorance of the antitrust rules does not justify anticompetitive behavior, when employees are not sure about the legal consequences of certain practices, this lack of clear knowledge of the competition law provisions may constitute a factor for non-compliance. With regard to the infringement of the cartel prohibition this premise does not seem to be applicable. As seen before, the infringement of the cartel prohibition usually involves the top management of the concerned undertakings. In practice, most businesspeople know that price-fixing or market sharing are illegal activities and that depending on the competition law regimes in question, these can be severely sanctioned. What this means is that the individuals who usually engage in cartel activities are fully aware of the unlawfulness of their behavior. Proof of this is the fact that individuals involved in cartel activities take exceptional measures intended to conceal the existence of the cartel[64]. If this is the case, then antitrust compliance programs would be useless for combating cartels[65]. However, if competition law infringements could be committed by employees at a lower level of the organizational structure of the company, then the possibility of untrained and uniformed staff infringing the provisions of competition law could result. In such cases, antitrust compliance training programs would reduce the risks of non-compliance by making sure that employees are well informed about the legal consequences of their actions. Similarly to the ignorance of the legal consequences of anticompetitive conducts, the perception of employees that the likely gains for not complying outweigh the likely costs constitutes a further factor

[62] WILS (2013), pp. 9-10.
[63] OECD (2011), p. 24.
[64] STEPHAN (2009), pp. 7-8.
[65] *Idem.*

of non-compliance. Thus, the potential violator, in deciding whether to commit a violation, will consider the cost to him (the punishment cost), and if the cost is lower than the prospected benefits, then the potential violator will commit an infringement of the law[66].

e) The rogue employee as a driver of non-compliance

In otherwise compliant undertakings, rogue employees are another driver of non-compliance of competition law[67]. The rogue employee defense in corporate crime cases argues that a certain employee within the structure of the company has committed a violation of the law despite the fact that the company has a rigorous corporate compliance program and an effective compliance culture. According to this defense, there was nothing that the undertaking could have reasonably done to detect or stop the infringement. In the case of competition law compliance, this would mean that irrespective of the fact that a determined undertaking has established a state-of-the-art antitrust compliance program there still exists the possibility of rogue employees committing antitrust violations while acting on behalf of the undertaking. Against the rogue employee defense it has been argued that this cannot be applicable to most hard-core cartel cases where the top management of the undertaking is usually involved[68]. Moreover, an infringement of the competition law provisions is difficult to be committed by a single perpetrator, especially if this is not at the senior management level. Accordingly, single perpetrators would not be able to commit a violation of the competition law provisions if these are not helped by someone else, or if the compliance programs and internal control mechanisms that are intended to prevent these illegal activities are not suitable for these purposes[69].

An additional driver of non-compliance of competition law is the arrogant attitude of antitrust offenders. When employees in an undertaking believe they are above the law or that they are so smart that they will not get caught or convicted, they are more likely to violate the law[70].

f) Influence of the compliance programs on the sanctions

As competition authorities can reduce the level of penalty for the existence of compliance programs[71], individuals and undertakings could be induced to violate the antitrust provisions if they believe that for the mere fact of having a compliance program any sanction imposed will be reduced. In this sense, it is fundamental that competition authorities effectively determine the truthfulness of compliance programs before reducing any penalty to be imposed.

V. ESSENTIAL FEATURES OF EFFECTIVE COMPLIANCE PROGRAMS

As stated in the introduction of this chapter, anticompetitive practices, especially cartels, are still being discovered around the world in spite of the efforts of competition authorities and courts to eradicate these

[66] POSNER, Richard A. (2001), 'Antitrust Law'. Second Edition. Chicago; London: The University of Chicago Press. pp. 266-267.
[67] OFT (2010A), p. 38.
[68] WILS (2013), p. 8.
[69] OFT (2010A), p. 39; and SILBEY, Susan S. (2009), 'Rotten Apples or a Rotting Barrel' *MIT Faculty Newsletter,* Volume XXI, No. 5, Summer 2009.
[70] OECD (2011), p. 25.
[71] See Section VIII (1), below.

unlawful conducts. As a consequence, new approaches to fight anticompetitive practices, such as the adoption of antitrust compliance programs, have emerged lately. In this regard, a strong antitrust compliance program can constitute a fundamental tool for the prevention and detection of cartel activities within undertakings if such programs are designed and implemented accordingly. In practice, unfortunately only a few undertakings take seriously the labor of adopting a credible and effective antitrust compliance program given that most competition law authorities do not incentivize undertakings to adopt compliance programs and do not give any credit to those that already have[72]. As a consequence, this position of competition authorities has reduced the incentives of most undertakings to create effective antitrust compliance programs. Despite the preceding, if competition authorities would unquestionably grant credit to undertakings just for having established antitrust compliance programs without having considered if these are real and creditworthy, then the possibility of undertakings creating sham antitrust compliance programs with the sole purpose of receiving certain indulgence from the competition authority arises[73].

In this regard, there are certain fundamental features that have been identified which may enhance the credibility and effectiveness of competition law compliance programs, these are the following[74].

i) Risk Assessment

An elemental part of any corporate compliance program is to provide for mechanisms that allow undertakings to timely identify and assess the key competition law compliance risks that they face while conducting their business activities. Thus, once the company is aware of these areas of risk within its organization, it should then assess the level of those risks. This labor has to be conducted periodically and should include the assessment of risky practices and risky personnel. The main objective of risks assessment is to allow the undertaking to focus all the resources it has available to control these areas of risk so that competition law infringements do not occur.

ii) Integrated Approach

Most competition law compliance programs form part of a wider corporate policy of law compliance. Thus, antitrust compliance programs should be fully integrated into the compliance and ethics infrastructure of the company so that it is not isolated. Nonetheless, if antitrust compliance programs have to share scarce resources with other compliance areas that may have priority over antitrust, then there is the risk that competition law compliance gets left behind.

[72] See the speech of Joaquín Almunia –Vice President of the European Commission responsible for Competition- where he states that the European Commission should not reward companies that have antitrust compliance programs if these have failed to prevent anticompetitive behavior. 'Compliance and Competition Policy' Speech before Businesseurope and the US Chamber of Commerce (Brussels, 25 October 2010), available at: http://europa.eu/rapid/press-release_SPEECH-10-586_en.htm
[73] MURPHY (2011), p 4.
[74] MURPHY & KOLASKY (2012).

iii) Standards

Effective competition law compliance programs have to clearly determine standards, procedures and policies designed to prevent and detect unlawful cartel activities. These standards include codes of conduct, procedures and organizational policies that incorporate values, such as the commitment to free-market competition.

iv) Controls

In order to successfully establish an effective competition law compliance program, interested undertakings have to implement control mechanisms designed to create effective barriers that prevent cartel activities, or at least make the commission of this type of anticompetitive conducts more difficult, for example, to require prior approval to attend trade association functions.

v) Empowered Compliance Officer

Along with the active participation of top management executives and the board of directors, a further welcomed feature of effective competition law compliance programs is the availability of an empowered compliance officer. In this regard, the management bodies of the undertaking should designate a compliance officer responsible for the correct implementation and application of the compliance and ethics program. The effectives and credibility of antitrust compliance programs can be enhanced if these compliance officers are independent in their functions, are sufficiently empowered, and participate in senior management decision-making; in this sense, it is better if the designated compliance officer belongs to the senior management and has direct access to the supervisory bodies of the undertaking.

vi) Resources and Infrastructure

Taking into consideration, the size and resources of the undertakings, these should provide sufficient funds and infrastructures to the person or group of persons responsible for the implementation of the compliance policy. These funds and infrastructures should be sufficient enough so that compliance official and other employees are in a position to act effectively, moreover, the assignment of sufficient resources empowers compliance officials and allows them to act in a more independent and professional way. As compliance programs have to be tailored to the needs and situation of the concerned undertakings, small companies cannot spend as much as big corporations in the establishment of antitrust compliance programs. In such cases, small businesses that cannot adopt elaborated compliance programs due to their limited resources, could promote a corporate culture of competition law compliance through less expensive actions, such as training their employees about the mandates of the law and the legal consequences for infringing the law.

vii) Board Oversight

A good practice to ensure an effective competition law compliance program is to delegate the appointment of the compliance officer to the management bodies and the board of directors of the undertaking. Moreover, the management bodies of the undertaking shall oversee the correct

implementation of the compliance program, and require the compliance officer to report directly to the board of directors. On the other hand, the compliance officer shall also have the ability to directly access the company's supervisory bodies (board of directors, others), when required by a question or issue relating to the undertaking's antitrust compliance program or policy.

viii) Senior Management Support

The establishment of an effective antitrust compliance program and the promotion of a culture of compliance must start at the top of the company. In this sense, the support of senior management is essential for the design and further development of the competition law compliance program. A clear and genuine commitment from the top management executives encourages the entire staff and motivates the company to commit effectively to the compliance policy of the undertaking.

ix) Personnel Practices

The level of commitment to competition law compliance can be influenced by the personal characteristic of the undertaking's employees and their tendency to infringe the mandates of the law. Accordingly, effective competition law compliance programs should implement diligent personnel practices that include effective measures to prevent delegation of authority to those who may engage in cartel activities based on prior anticompetitive conduct or conduct inconsistent with the undertaking's compliance and ethics program.

x) Training and Communication

Another fundamental feature of effective competition law compliance programs is that concerned with the training of employees that are exposed to the risk of infringing the provisions of competition law. There are different approaches in relation to the compliance training programs, however, most of them involve: the distribution of informational documents, mandatory training sessions, and regular evaluation of the knowledge of the competition law compliance program. The main purpose of establishing compliance training programs is to inform employees about the scope of competition law and the importance of complying with these provisions. Compliance training program shall include all the layers of the organization where employees may be exposed to the risk of violating competition law.

xi) Third Parties

Another fundamental point that an effective antitrust compliance program needs to cover is concerned with the establishment of systems that address cartel risks from third parties, such as trade associations and those acting on behalf of the undertaking. In addition, these systems should also provide for effective mechanisms to monitor these third parties. Finally, undertakings should require third parties that act on their behalf to implement effective competition law compliance and ethics programs.

xii) Audit and Monitor

Furthermore, the availability of effective mechanisms of monitoring and auditing allow undertakings to prevent and detect anticompetitive behavior and flaws of the antitrust compliance programs. Accordingly,

in practice these types of mechanisms are essential for the adoption of an effective antitrust compliance program. Moreover, these mechanisms can enable undertakings to identify other potential areas of risk, and in this way, allow them to devote part of their resources and attention to create new competition law compliance policies in those areas.

xiii) Measure Effectiveness

The success of a determined competition law compliance program depends on the undertaking's capacity to monitor and evaluate its correct and effective implementation. In this regard, undertakings should adopt mechanisms that enable them to regularly measure the effectiveness and performance of the competition law compliance program with the purpose of allowing them to review and if necessary modify their antitrust compliance policies.

xiv) Reporting System

In order to accomplish their main objectives, to prevent and detect anticompetitive behavior within the undertaking, competition law compliance programs have to establish an efficient reporting procedure through which individuals can provide reliable information about a proven or possible infringement of competition law. For employees to be encouraged to report these actual or potential violations, it is necessary that these reporting systems provide certain confidentiality and protection against possible retaliatory measures. Moreover, undertakings should also consider the implementation of systems through which the employees can obtain advice about any competition law concern they might have.

xv) Protection from Retaliation

As seen before, in order for competition law compliance programs and their reporting systems to succeed, it is important that these reporting procedures include mechanisms that provide the reporting employee with effective protection from any retaliatory actions. If there is an actual threat of retaliation, employees that have gained information about an actual or potential infringement of the competition law provisions, most likely, would not report it under the fear of retaliation. In this regard, reporting systems should be coupled with especial mechanisms that allow confidentiality and anonymity.

xvi) Discipline

As above mentioned, the implementation of consistent disciplinary procedures for the violation of the antitrust compliance policy demonstrates the seriousness of the undertaking's commitment to comply with the provisions of competition law. Accordingly, the establishment of appropriate and consistent disciplinary measures against the infringement of the antitrust compliance policy is fundamental to ensure the credibility and effectiveness of the latter. These disciplinary procedures shall include all levels of the organizational structure of the undertaking, thus, senior management should also be subject to disciplinary sanctions in case of violation of the antitrust compliance program.

xvii) Incentives

Moreover, in order to make antitrust compliance programs more effective, the abovementioned disciplinary procedures should be coupled with appropriate incentives that promote the employees' commitment with the competition law compliance program. In this regard, linking employee evaluations, rewards, promotions and bonuses with the compliance of competition law, serves as an incentive for employees to obey the mandates of the antitrust rules.

xviii) Response to Violations

An effective competition law compliance program should be able to efficiently respond to any actual or potential violation of the competition law provisions by conducting a timely investigation and if necessary to impose any appropriate disciplinary sanctions upon the individuals that have violated the compliance policy of the undertaking. Moreover, the antitrust compliance program should provide opportune responses to any consultation made by an employee in relation to competition law issues. This opportune response of the compliance program enhances its effectiveness and its ability to prevent recurring violations.

xix) Diligence and Industry Practice

A further important feature for the adoption of an effective competition law compliance program is its ability to continuously assess compliance policies and procedures that maintain its compliance policy diligent and at least as good as industry practice. This includes the assessment of new policies and procedures based on changes in the industry, changes in the law, changes in the competition authority's enforcement policies, lessons learned, results of new competition law investigations, or complaints, among others.

xx) Documentation

Finally, the documentation of compliance policies is critical for the success of the antitrust compliance program. Documented evidence of antitrust compliance may assist an undertaking in advancing a due diligence defense, where available. The mere existence of a competition law compliance program is not a defense to allegations of having violated the antitrust provisions. Hence, a credible and effective compliance program may enable an undertaking to prove that it took reasonable steps to avoid contravening the law. In this regard, the documentation of all compliance efforts (training sessions, disciplinary actions, incentives provided, and others) is advisable.

VI. GUIDANCE & BEST PRACTICES FOR ANTITRUST COMPLIANCE PROGRAMS

As expected, governments are interested in promoting the obedience of public laws, such as the competition law provisions. The voluntary compliance of the law offers important benefits for the enforcement authorities, for instance, by being relieved from having to compel the public to obey the law

by threatening or using force due to the voluntary compliance of the recipients of the law, the enforcement authorities save the resources that would have been needed to impose compliance[75]. In this regard, a number of competition authorities around the world have issued detailed guidelines and best practices for the establishment of credible and effective competition law compliance programs as a way to encourage undertakings and individuals to obey the antitrust rules. Most of these guidelines do not prescribe a generic regime with respect to these programs, on the contrary, they acknowledge that each undertaking is different, and as a consequence, the issues that their antitrust compliance programs have to address and their eventual design will be determined by certain factors, such as the size and complexity of the organizational structure of the company, and its risk exposure. Accordingly, some competition law regimes also provide guidelines on how to implement antitrust compliance programs for small undertakings and undertakings with scarce resources[76].

Moreover, given that, at least in first instance[77], in most competition law regimes the adoption of an antitrust compliance program is not mandatory, these guidelines normally are not binding on undertakings at the time of designing these programs. Nonetheless, in some jurisdictions the undertakings have to comply with the requirements established in these guidelines in order to receive a certificate that acknowledges the credibility and effectiveness of their antitrust compliance programs[78]. Similarly, in other competition law regimes, undertakings that want to demonstrate its commitment to compliance and want to avail the benefits of the latter have to register the programs with the competition authority[79]. Finally, in some competition law regimes, even though undertakings are not required to submit their compliance programs for prior approval, these are required to submit annual reports on the implementation of their antitrust compliance programs to the competition authority[80].

In practice, besides a few differences, most guidelines available for the effective implementation of competition law compliance programs have included, in different extents, most of the elements mentioned in the previous section. For instance, most guidelines available depart from the premise that any compliance program shall demonstrate the true and unequivocal commitment of the undertaking to comply with the provisions of competition law[81]. Moreover, in most cases it is required that this commitment has to start at the top of the organization and spread throughout the layers of the company,

[75] TYLER (1990), p. 4.
[76] For instance, the ACCC's website includes four compliance program templates to assist companies that do not have the resources to develop a tailored antitrust compliance programs. Similarly, the Competition Commission of Singapore in its compliance guidelines encourages SMEs to adopt compliance programs adapted to their size and economic resources.
[77] In some cases undertakings that have been involved in anticompetitive practices are required to implement antitrust compliance programs.
[78] In Brazil, Ordinance No. 14 of 19 March 2004 issued by the Secretariat of Economic Law (SDE) establishes the guidelines of prevention programs on economic order offences. According to the Ordinance, the companies that have complied with the requirements of the Ordinance in the adoption of their compliance programs can request the SDE a certificate valid for two years that recognizes that the company has a credible and effective compliance program. On the other hand, undertakings can also adopt their compliance programs independently of the provisions of the Ordinance, in such cases they cannot request a certificate from the SDE. The advantage of implementing a program in accordance with the Ordinance was that according to Article 9 (revoked by Ordinance 48 of 2009), undertakings that had a certificate could ask for a reduction in the penalties imposed for the infringement of competition law. However, given that since the adoption of the new antitrust act in May 2012 (Law No. 12.529/20011) the SDE has been concentrated into CADE, it is not clear how the existing regulation on compliance programs will be applied. In Korea, the Korean Fair Trade Mediation Agency is the entity responsible for testing and qualifying compliance programs for the KFTC, in this sense, the companies are required to apply for the qualification of their compliance programs to this agency.
[79] Competition Commission of Pakistan (2010), p. 18.
[80] Israel Antitrust Authority, *Model Internal Compliance Program,* 1998.
[81] The OFT guidelines (OFT (2010B)), determine that at the core of any compliance program there has to be a true commitment to comply with the antitrust rules.

i.e. it should include the board of directors, the senior management and any other employees in lower levels of the organizational structure that face an actual risk of infringing the competition law provisions[82]. It is suggested that the commitment of high-level personnel can be demonstrated by a message of the senior management to the rest of employees declaring the importance of competition law compliance and/or by making reference to the compliance program in the business's mission statement[83]. Also, most guidelines require the appointment of an individual with authority to coordinate and monitor the implementation of the antitrust compliance program[84]. Usually, this individual is part of the top management of the company and is required to report directly to the governing authority of the organization (e.g. the board of directors, where available)[85].

In addition, according to the majority of these guidelines, an effective antitrust compliance program shall contain effective mechanisms to identify the areas of risk that the company faces with regard to the possibility of infringing competition law, thus, this identification should mainly determine: the overall risk of the company and the individual exposure of the employees[86]. In this sense, it is recommended that the undertaking should conduct an initial audit on the past of the company and its commitment to competition law in order to identify risky areas within the company[87]. Once these potential risks have been identified, then the compliance programs should provide for specific measures to assess the likelihood of violating the law, this could be accomplished by defining certain factors, like the position of the company in the market, the characteristics of the industry and the market, the frequency and level on the company's interaction with competitors; and then determine how these factors can lead to an eventual infringement of competition law[88].

Moreover with the purpose of adopting an effective antitrust compliance program, most guidelines require undertakings to establish clear standards and procedures within their programs[89]. These standards and procedures shall be tailor made to address the specific characteristics of each undertaking[90], and shall be contained along with other fundamental issues of the program in a compliance manual that the undertaking has to develop and which employees have to become familiar with[91]. Another fundamental requirement for the success of these compliance programs is that undertakings have to assign sufficient resources to provide the individuals responsible for their implementation with the necessary means to accomplish the objectives of these programs[92].

With regard to the employees, undertakings are required to implement antitrust compliance training programs for the individuals who are most exposed to commit antitrust violations. These training programs are intended to provide individuals with the necessary knowledge about the competition law provisions and the legal consequences for the infringement of these. In order to ensure the correct training

[82] Competition Bureau Canada (2010).
[83] Competition Commission of Singapore, *Better Business with Competition Compliance Programme: How competition compliance can help your business*, 2011.
[84] In Brazil, see Ordinance No. 14, issued by the Secretariat of Economic Law on 19 March 2004 (Ordinance No. 14).
[85] United States Sentencing Commission, *Guidelines Manual*,2012.
[86] Japan Fair Trade Commission, *Survey on Compliance Efforts with the Antimonopoly Act* (Summary), November 28, 2012.
[87] Competition Commission of Pakistan, *Voluntary Competition Compliance Code: Statement of Principles and Policy*, 2010.
[88] OFT (2010B).
[89] Competition Bureau Canada (2010).
[90] Israel Antitrust Authority (1998).
[91] Turkish Competition Authority, *Competition Compliance Program*, 2011.
[92] ACCC, *Corporate Trade Practices and Compliance Programmes*, 2005.

of employees, these training programs shall be mandatory and undertakings shall constantly evaluate the familiarization of employees with these[93].

Moreover, the undertakings, within the design of their antitrust compliance programs may establish further burdens on employees. For instance, employees who are exposed to an actual risk of infringing the competition law provisions may be required to state and confirm that they acknowledge the contents of the corporate compliance program[94], or to provide a written statement to conduct their business activities in accordance with the company's competition compliance policy[95]. Also, employees can be required on a periodic basis to confirm in written that they are not part to or aware of any violation of the competition law provisions[96]. Similarly, employees who are in constant contact with competitors may be subject to special supervisions[97]. Finally, compliance programs shall have procedures to control that individuals who have been engaged in illegal activities or conduct that is contrary to the compliance policy, do not be included in areas where there are potential compliance risks[98].

An essential element usually established in most of the guidelines is the implementation of effective channels though which employees can report the actual or potential infringement of the competition law provisions. It is highly recommended by most of these guides that undertakings provide reporting procedures that guarantee the anonymity of the employee and the confidentiality of the information[99]. The purpose of this is to ensure employees that they will not suffer any retaliatory measures as a consequence of the report. Moreover, in some jurisdictions these guidelines recommend the use of incentives to encourage employees to report anticompetitive behavior, such as the implementation of in-house leniency programs[100]. In addition, it is also recommended that undertakings establish consultation mechanisms so that employees can submit any doubt they may have with relation to the competition law provisions and the company's compliance policy[101]. Furthermore, some of these guidelines recommend undertakings the adoption of internal review mechanisms for the previous evaluation of the legal consequences of certain business agreements, usually those signed with competitors[102]. In relation to these two procedures, it is critical for their proper implementation that the undertakings enable mechanisms that ensure a timely and appropriate response to reports and consultations[103].

Additionally, the establishment of effective antitrust compliance programs requires the implementation of mechanisms to ensure that the program is followed. In this sense, the guidelines recommend undertakings to adopt monitoring and auditing procedures to detect any violation of the undertaking's antitrust compliance policy[104]. Moreover, antitrust compliance programs should also

[93] Office for the Protection of Competition of the Czech Republic, Information Bulletin 2/2004.
[94] European Commission (2012).
[95] Competition Commission of India, *Competition Compliance Programme for Enterprises: A Suggested Framework for Compliance of the Competition Act, 2002 by Enterprises* , 2011.
[96] Competition Commission of Pakistan (2010).
[97] Ordinance No. 14.
[98] United States Sentencing Commission (2012).
[99] Fiscalía Nacional Económica (2012).
[100] Japan Fair Trade Commission (2012).
[101] Competition Commission of Singapore (2011).
[102] Competition Commission of India (2011).
[103] Fiscalía Nacional Económica (2012).
[104] United States Sentencing Commission (2012).

establish mechanisms that enable the undertakings to evaluate the effectiveness and diligence of their programs[105]. This requires an ongoing evaluation of the antitrust compliance policy in relation to the development and change of competition law and business practices[106].

Finally, as seen before the availability of proper incentives and disciplinary measures reflect the seriousness and commitment of undertakings with regard to competition law compliance. In this sense, most of the guidelines available recommend undertakings to implement appropriate incentives and disciplinary measures within their compliance programs with the objective of, on the one hand, encourage the true commitment of employees with the antitrust compliance policy, and on the other hand, to sanction those who have acted against the compliance program[107].

VII. COMPLIANCE PROGRAMS & COMPETITION LAW ENFORCEMENT

Depending on the jurisdiction in question, the adoption of antitrust compliance programs may have different effects on the enforcement of the competition law provisions. In particular, these effects on the enforcement of competition law triggered by the infringement committed by the adopting undertakings are related to the imposition of financial penalties, the acceptance of commitments or settlements and the application of leniency programs.

Currently, there is an intense debate on the value that competition law enforcers should grant to the fact that an undertakings has implemented, or not, an antitrust compliance program. As stated before, the scope of this debate covers the interaction of competition law compliance programs in the case of an infringement of the competition law provisions with the imposition of antitrust financial penalties, the acceptance of commitments or settlements and the application of leniency programs.

In relation to the imposition of financial penalties for the infringement of competition law, there are mainly two positions with regard to the value that competition law enforcers should grant to the implementation of corporate antitrust compliance programs. On the one hand, there are those who argue that competition law enforcers should take into account the fact that undertakings have implemented antitrust compliance programs when determining the imposition of financial penalties. On the other hand, there are those who consider that the adoption of antitrust compliance programs should not be considered by competition law enforcers in setting financial penalties.

With regard to the position that considers that competition law enforcers should take into account the implementation of antitrust compliance programs in relation to the imposition of a financial penalty, most of the literature is grounded on the premise that only genuine antitrust compliance programs that have established a true compliance culture within the structure of the company should be considered as a factor in the determination of financial penalties. In this sense, companies that implement symbolic or cosmetic compliance programs shall not receive any credit, given that this recognition by competition

[105] Office for the Protection of Competition of the Czech Republic (2004).
[106] Competition Commission of Singapore (2011).
[107] Turkish Competition Authority (2011).

law enforcers can encourage the adoption of sham compliance programs that have as sole purpose the reduction of any potential penalty for the infringement of the competition law provisions[108].

Moreover, there is a further debate among those who argue in favor of the recognition by competition law enforcers of genuine and robust antitrust compliance programs. This is related to the value that the enforcers should grant to the implementation of these programs, hence, on one side, there are those who suggest that undertakings should be relieved from any financial penalty, and on the other side, there are those who think that a reduction in the amount of the penalty should be sufficient to encourage companies to adopt genuine antitrust compliance programs. In this sense, on the one hand, the immunity from financial penalties departs from the idea that undertakings that have been reasonably diligent in complying with the competition law provisions should not be fined for the infractions committed by their employees while acting on their behalf[109]. And on the other hand, those who advocate in favor of a reduction in the fine over total immunity argue that even though an undertaking has infringed the antitrust rules despite its best efforts, the latter will still have to pay a reduced fine, this ensures that companies do not adopt sham programs with the intention of being relieved from having to pay a fine. Moreover, it has been stated that it is unfair and does not make sense to treat a company that has made extensive and genuine efforts to prevent competition law infringements from occurring in the same fashion as a company that has not make such efforts or whose top management deliberately and systematically planned its anticompetitive practices[110].

Furthermore, in addition to those who recommend that the implementation of corporate antitrust compliance programs should be considered by competition law enforcers as a mitigating factor in setting financial penalties, there are some who suggest that as a way to encourage undertakings to adopt antitrust compliance programs, competition law enforcers should consider the fact that an undertaking has not implemented a corporate compliance program as an aggravating factor when setting the amount of the financial penalty[111].

As stated at the beginning of this section, there is a contrary position to the one reviewed above, which is in favor of considering the adoption of antitrust compliance programs as a mitigating or aggravating factor in setting financial penalties for the infringement of competition law. This argument, suggests that the fact that undertakings have invested time and resources in implementing a determined corporate compliance program, irrespective of its credibility and effectiveness, should in no way be considered by competition law enforcers when fining undertakings that have violated the antitrust rules.

The foundation of this proposition is that if competition law enforcers promise an indulgent treatment (reduction or immunity of fines) to those undertakings with compliance programs, there is a high risk that undertakings will implement sham corporate antitrust compliance programs with the hope of benefiting from a reduction in the fines imposed for the violation of competition law, or even

[108] GERADIN (2013), p. 3; MURPHY & KOLASKY (2012), p. 61.
[109] GINSBURG & WRIGHT (2010), p. 18; HOFSTETTER, Karl & LUDESCHER, Melanie (2010), 'Fines against Parent Companies in EU Antitrust Law: Setting Incentives for "Best Practice Compliance". *World Competition,* Volume 33, No. 1, p. 8.
[110] FORRESTER, Ian S. (2009), 'Due process in EC competition cases: A distinguished institution with flawed procedures'. 871 *European Law Review*; GERADIN (2013).
[111] RILEY & BLOOM (2011).

immunity. Moreover, the literature against the reduction of fines due to the implementation of genuine and robust compliance programs argues that it is not possible for competition law enforcers, as outside observers, to accurately determine at a reasonable cost which antitrust compliance programs are genuine and effective and which are just symbolic programs[112].

Finally, against the reduction of fines for the prior adoption of compliance programs is has been stated that competition law enforcers already offer sufficient incentives to undertakings to come forward and cooperate with the authority for the detection and elimination of anticompetitive practices, such as reduction in the amount of the fines for cooperating in the discovery of cartels, for the cooperation during the proceedings before the competition authority, or for the limited participation of the undertaking in the cartel. In this sense, these incentives should be sufficient for undertakings to cooperate with competition authorities. Moreover, if the imposition of a financial penalty is being discussed is because the undertaking has been involved in anticompetitive practices, accordingly, competition authorities should not grant any credit to undertakings for compliance programs that have failed[113].

As to the relationship between antitrust compliance programs and the acceptance of commitments and the application of leniency programs, this is concerned with the potential requirement by competition law enforcers to demand that undertakings willing to benefit from the preferential treatment that these mechanisms provide, implement genuine antitrust compliance programs in addition to the further requirements that these procedures normally establish. In practice, the requirement by competition law enforcers for the implementation of robust compliance and ethics programs before commitment or settlement agreements are signed, or to be admitted to a leniency program, is intended to provide effective incentives for undertakings to adopt a compliance program with the ultimate intention of preventing new cartels from forming[114]. Accordingly, it has been suggested that competition law enforcers could require the adoption of compliance programs as part of commitment agreements[115], or leniency applications[116].

VIII. DIFFERENT APPROACHES BY COMPETITION LAW ENFORCERS

In practice, there are various approaches by the competition law enforcers, competition authorities and courts, with regard to the antitrust compliance policy across jurisdictions. These approaches are concerned with the different positions adopted by the competition law enforcers when dealing with the implementation, or lack of implementation, of competition law compliance programs in case of an infringement of the antitrust provisions. Particularly, these different approaches are related to the suggestions reviewed in the previous section: the value granted to the implementation of compliance programs when setting antitrust sanctions, and the interaction of compliance programs with the acceptance of commitments and the application for leniency.

[112] HARRINGTON, Joseph (2010), 'Comment on Antitrust Sanctions'. *Competition Policy International,* Volume 6, No. 2, pp. 48-49; WILS (2013), pp. 19-20.
[113] See the speech of Joaquín Almunia, footnote 64 above.
[114] OECD (2011), p. 15.
[115] RILEY & BLOOM (2011).
[116] For instance, the World Bank in its leniency program for corruption requires that the admitted applicants shall adopt effective compliance and ethics programs (World Bank, *Voluntary Disclosure Program: Guidelines for participants,* 2011).

1. Compliance programs as a mitigating factor

In some competition law regimes, competition authorities and courts consider the prior adoption of antitrust compliance programs by infringing undertakings when setting the amount of the corresponding financial penalty. In most jurisdictions where this possibility is available, competition law enforcers take the implementation of corporate compliance programs as a mitigating circumstance to favor undertakings that have instituted this kind of programs over others that have not. As seen before, the fundamental requirement that competition law enforcers have established in order to consider compliance programs as a mitigating factor is the adoption of a genuine and effective competition law compliance program that has created an actual antitrust compliance culture within the undertaking, this requires the obedience of the antitrust rules by all member of the organization, i.e. board of directors, senior management, and other employees. Thus, in determining the credibility and effectiveness of antitrust compliance programs, competition law enforcers considerer certain factors, such as: the availability and effective distribution of compliance manuals among the employees; the effectiveness of the measures taken by the undertaking; the regular training of employees; and the acknowledgement of the compliance program by senior management; among others. Accordingly, in practice, the main objective of offering undertakings that have successfully implemented compliance programs a reduction in the amount of the financial penalties is to encourage market participants to adopt antitrust compliance programs with the ultimate purpose of increasing the obedience of the competition law provisions.

The possibility to reduce the amount of the fines in the case that the infringing undertaking has implemented a compliance program is recognized in a few jurisdictions. This recognition has been established in the guidelines for the design of compliance programs[117], or the guidelines for the imposition of financial penalties[118]. Nevertheless, in practice, there are only a few actual cases where competition authorities and courts have considered the reduction of financial penalties[119].

According to the research performed in the elaboration of this study, there is not one jurisdiction that provides for an automatic reduction in the amount of the financial penalties due to the existence of a prior antitrust compliance program on the part of the infringing undertaking. In this sense, most jurisdictions that allow this possibility require a prior analysis of the circumstances of the infringement and the compliance program in question. This analysis varies from jurisdiction to jurisdiction, but it is mainly concerned with establishing if the compliance program is genuine and not just a façade. In this regard, competition law enforcers will assess the truthfulness of the program by determining if this includes the requirements provided in the guidelines elaborated for this purpose[120].

[117] In India, among the benefits of implementing a compliance program, the guidelines suggest the possibility to reduce fines (Competition Commission of India (2011), p. 4). In Singapore an effective compliance program can be considered as a mitigating factor for the impositions of fines (Competition Commission of Singapore (2011), p. 6).

[118] In Pakistan, according to the Guidelines on Imposition of Financial Penalties, the prior adoption of a compliance program is considered as a mitigating factor (Section 8.1 of the Guidelines). In the UK, the amount of financial penalties can be reduced where the infringing party can prove that adequate steps had been taken ensure compliance with the competition law provisions (OFT, *Guidance as to the Appropriate Amount of the Penalty,* at para. 2.16).

[119] For instance, in Australia see cases: *ACCC v Australian Safeway Stores Pty Ltd* [1997] FCA 450; *ACCC v George Weston Foods Ltd* [2000] FCA 690; *ACCC v Visy Industries Holdings Pty Limited* (No. 3) [2007] FCA 1617.

[120] In Australia, about the determination of the credibility of compliance programs see case: *ACCC v George Weston Foods Ltd* [1999] FCA 858.

In some competition law regimes, with the purpose of providing a certain degree of certainty to undertakings; the competition authorities have designed mechanisms though which undertakings can submit their compliance programs for evaluation and certification. In such cases, the undertakings have to present a draft of their compliance programs to the competition authority, and the latter will determine if the programs comply with the requirements established to be considered credible and effective. Ultimately, the competition authority will issue a certificate or qualification declaring that the program is creditworthy. Thus, in these regimes the availability of a certificate[121] or qualification[122] will allow the concerned undertakings to request a reduction in the amount of the financial penalty in case of infringement of the competition law provisions.

Furthermore, the reduction of the financial penalties due to the existence of a compliance program can be restricted in some jurisdiction with regard to the type of anticompetitive infringement committed by the undertaking in question. Accordingly, in such cases the possibility to require the reduction of the fine will only apply to infringements that are not related to hard-core cartels. The basis for this restriction is that undertakings involved in hard-core activities have the possibility to make an application for leniency and obtain full immunity, or settlement and obtain a reduction of the financial penalty[123].

Finally, in competition law regimes where there are criminal sanctions for the infringement of the antitrust provisions, the implementation of an antitrust compliance program can relief individuals from criminal liability. For instance, in jurisdictions where senior management executives are held criminally responsible for the infringement of competition law committed by their undertakings, the fact that at the time of the infringement there was a genuine antitrust compliance program can be used by senior management as a defense against criminal prosecution[124].

2. Compliance programs as an aggravating factor

As a general rule, most competition law enforcers are neutral with regard to the recognition of antitrust compliance programs. Thus, they do not consider their existence or inexistence as a mitigating or aggravating factor for the imposition of antitrust sanctions for the infringement of the competition law provisions. The main purpose of the adoption of antitrust compliance programs is to allow the adopting undertakings to prevent antitrust violations from taking place, in this sense, these programs are not intended to provide infringing undertakings reductions on the sanctions imposed, or to allow competition

[121] In Brazil according to the Ordinance No. 14, before its modification in 2009, the availability of a certificate issued by SDE was considered for a reduction in the amount of the fine (Article 9 of SDE Ordinance No. 14/2004 (revoked by Ordinance No. 48 of March 4 2009)).

[122] In South Korea, the amount of the financial penalties imposed can be reduced in cases where the undertaking has submitted its compliance program for qualification to the KOFAIR (Korean Fair Trade Mediation Agency) and has obtained a qualification superior to A (qualifications range from AAA to D).

[123] In France, the Autorité will consider the implementation of a genuine compliance program as a mitigating circumstance in cases not related to cartel activity (horizontal or vertical agreements, abuse of dominance). In cartel cases, the undertaking can apply to the leniency program or settlement in order to receive a reduction or immunity from fine (Autorité de la Concurrence (2012), p. 8).

[124] In Israel, the provisions of the Antitrust Law impose direct criminal liability on individuals who participated in the violation of the antitrust provisions. Moreover, section 48 of the Antitrust Law determines that if the infringement was committed by the company, anyone who was an active director or senior management executive at the time of the offence will be prosecuted. Nevertheless, senior executives can defend themselves from indirect liability by proving that they were not aware of the antitrust infringement and that they adopted all reasonable measures to guarantee compliance with antitrust provisions, such as the adoption of an effective antitrust compliance program.

law enforcer the possibility of increase the sanctions in the case of flawed compliance programs. Nevertheless, there are jurisdictions where the implementation of compliance programs can act as an aggravating factor in the setting of financial penalties under certain circumstances.

Even though most competition law regimes, as a way to encourage the implementation of antitrust compliance programs, have declared that the fact that a genuine compliance program has failed to prevent a determined infringement shall not be considered by competition law enforcers as an aggravating circumstance when setting financial penalties[125], there are, however, a few cases where competition law enforcers can consider flawed or sham antitrust compliance programs as aggravating factors. For instance, in some jurisdictions, the competition law enforcers can consider the existence of compliance programs as an aggravating factor when setting financial penalties where such programs have been used to facilitate the infringement of the competition law provisions, to mislead the competition authority as to the existence or nature of the infringement, or have been used in an attempt to conceal the infringement[126]. Moreover, there have been cases where the competition authority has increased the amount of the financial penalties due to the existence of sham compliance programs[127].

The existence of a compliance program and its use as an aggravating factor is more usual in relation to the sanctions imposed on the individuals involved in anticompetitive behavior. For instance, in some competition law systems, the fact that a senior executive has participated in conduct contrary to the competition law provisions will lead the competition authority to believe that the senior management's commitment to compliance was not genuine and that the program was neither credible nor effective. Moreover, the fact that the senior executive has knowingly violated the law can be considered as an aggravating factor for the individuals involved in the offense[128].

Finally, in jurisdictions where the individuals involved in anticompetitive behavior can be criminally prosecuted, the prior existence of an antitrust compliance program may facilitate criminal conviction, given that the fact that a compliance program was in place can lead the courts to consider this as evidence of criminal intention. Moreover, the adoption of a compliance program can also serve as an aggravating factor in criminal procedures against senior executives, provided that its availability can indicate that the individuals violated the competition law provisions willfully and deliberately[129]. Moreover, in some competition law regimes, even though, the guidelines on compliance programs available establish that compliance programs that have failed to prevent the infringement of competition law will not be considered as an aggravating circumstance, even if the senior executives participated in

[125] "[t]he existence of a compliance programme will not be considered an aggravating circumstance if an infringement is found by the enforcement authorities…" (European Commission (2012), p. 21).
[126] Competition Bureau Canada (2010), p. 17; OFT (2010B), p. 32.
[127] In the EU, the Commission has considered the existence and violation of a compliance program as an aggravating factor in the imposition of the financial penalties. In this case, the infringing undertakings previously received a reduction in the fine in exchange of a commitment agreement that included the implementation of the compliance program in question. The Commission found that the fact that the undertaking had not complied with the commitment and the provisions of the compliance program, was sufficient to increase the financial penalty by 75%, and that the existence of the compliance program may facilitate the evidence that the company entered into a prohibited behavior intently. (Commission Decision of 14 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty Case IV/F-3/33.708 - British Sugar plc, Case IV/F-3/33.709 - Tate & Lyle plc, Case IV/F-3/33.710 - Napier Brown & Company Ltd, Case IV/F-3/33.711 - James Budgett Sugars Ltd).
[128] Competition Bureau Canada (2010), p. 17.
[129] BANKS, Theodore & JALABERT-DOURY, Nathalie (2012), 'Competition Law Compliance Programs and Government Support or Indifference. Best practices for compliance programs: Results of an international survey'. *Concurrences, No. 2-2012.*

the infringement despite their commitment to the compliance policy, there is the possibility that the competition authority may institute criminal proceedings against these individuals if the required conditions to do so are met[130].

3. Compliance programs and settlement agreements and leniency programs

Depending on the competition law regime in question, commitment/settlement agreements and leniency programs may interact with the implementation of antitrust compliance programs and the overall enforcement of competition law. In practice, commitment/settlement agreements and leniency programs relate to antitrust compliance programs in that the application of the former may require the implementation of the latter. As a general rule, the prior implementation of an antitrust compliance program is not a requisite to sign a settlement agreement or to apply for leniency. However, in some cases infringing undertakings may be required by competition law enforcers to adopt compliance programs if they want to benefit from the preferential treatment that settlement and leniency provide.

In most jurisdictions, there is no condition requiring that an undertaking must already have adopted an antitrust compliance program before entering into settlement discussions with the competition authority in relation to any potential competition infringement under consideration, nonetheless, in some cases the willingness of infringing undertakings to adopt compliance programs can be considered as an attenuating circumstance when imposing a fine[131]. However, in some cases, the infringing undertaking can propose the adoption of a compliance programs as part of a settlement agreement with the competition authority in exchange of a reduction in the amount of the financial penalty[132]. Moreover, in other cases, the adoption of an antitrust compliance program can be ordered by the competition law enforcer in order to accept the commitments proposed by the undertaking[133]. In addition, in some cases, the competition authority can recommend the infringing undertaking the implementation of an antitrust compliance program as a measure to avoid new antitrust offences[134].

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[130] Autorité de la Concurrence (2012), p. 8.

[131] In France, according to the procedure of non *costestation des griefs* of Article L. 464-2 III of the Code de Commerce, companies that receive a statement of objections and not discuss or challenge these objections can reduce the fine imposed up to 10%. Additionally, if the undertakings commit to adopt a genuine antitrust compliance program an additional reduction of up to 10% may be granted by the enforcer.

[132] In the EU, the Commission accepted commitments from British Sugar on 7 August 1986; these included the implementation of a comprehensive competition compliance program. In 1988, the Commission adopted an infringement decision recognizing the exemplary efforts of British Sugar to comply with the mandates of competition law. In this sense, the implementation of the compliance program worked as a mitigating factor and the financial penalty imposed was reduced (Commission Decision of 18 July 1988 relating to a proceeding under Article 86 of the EEC Treaty (Case No IV/30.178 Napier Brown - British Sugar)). However, later on the Commission discovered that British Sugar participated in collusive agreements with some of its competitors between 1986 and 1990. As a consequence, the Commission considered that the existence of a compliance program should be regarded as an aggravating circumstance and increased the financial penalty by 75 % (Commission Decision of 14 October 1998, footnote 118 above. In France the Autorité may choose to close proceedings on the basis of the commitments proposed by the infringing undertaking (Article L 464-2 of the code de Commerce), in practice, there have been some cases where such commitments have included the adoption of antitrust compliance programs (Autorité de concurrence - Décision n° 10-D-29 of the 27 September 2010).

[133] In Australia, according to section 87B of the Competition and Consumer Act, the ACCC can accept court-enforceable undertakings from companies committing themselves to implement compliance programs. However, courts are empowered to order undertakings to establish education and training program for employees or other persons involved in the infringement of competition law (section 86C of the CCA). In Brazil, CADE requested an undertaking the adoption of a compliance program during the negotiations for settlement, this included measures like: the appointment of a compliance officer; periodic reports; training; hotline to report; and mechanisms to identified violations and the individuals that are more likely to commit them (Administrative Proceeding No. 08012.005328/2009-31).

[134] In Brazil, after imposing financial penalties on the competition law offenders, CADE recommended these the adoption of corporate compliance programs in order to avoid further infractions of the Law (Administrative Proceeding No. 08012.009088/1999-48).

In most cases, the competition authority is responsible for monitoring that the undertakings are complying with the commitments agreed during the settlement negotiations, this control would include the supervision of the implementation of the compliance programs. In most jurisdictions, the violation of the commitments can result in the imposition of financial penalties and even the initiation of new proceedings[135].

With regard to the requirement to implement a competition compliance program as part of an application for leniency, during the research for this study not one jurisdiction that provided for this requirement has been found. However, the requisite to adopt a compliance program in order to receive lenient treatment exists in other fields of law and is being discussed as an alternative for competition law[136]. In some competition law systems there are cooperation programs, which are additional to leniency programs that provide for a lower level of enforcement action, or no action at all, against an individual or undertaking in exchange for information and full continuing and complete cooperation. These programs are related to infringements of the competition law provisions that are not related to hard-core cartels and may require the implementation of a compliance program[137].

[135] In France, in the case the undertaking violates the commitments proposed, the Autorité can impose a fine for the violation of the commitment (Autorité de la Concurrence (2012), p. 8; and Article L. 464-3 of the Code de Commerce).
[136] World Bank (2011).
[137] See the *Cooperation Policy* of the Commerce Commission of New Zealand, available at: http://www.comcom.govt.nz/the-commission/commission-policies/cooperation-policy/

CHAPTER FIVE
Conclusions

I. GENERAL CONCLUSIONS

It is a well-known fact that over a hundred jurisdictions have implemented some kind of competition law provisions in their national legislations. The current trend of trade liberalization, privatization and deregulation taking place at a fast global pace has inspired this worldwide proliferation of competition law regimes. The implementation of competition law provisions has occurred in different contexts and circumstances across the globe, in this sense; there is a great variety of countries with different traditions and levels of economic development that have adopted competition law provisions, which in addition, may be aimed at the accomplishment of different objectives. Accordingly, the spectrum of countries that have put in place competition law regimes includes both jurisdictions with a long tradition on market oriented economies and competition law policy, and countries that have recently moved from central planned economies and have recently adopted competition law provisions in their legislations. Moreover, there is a great deal of divergence on the levels of economic development of these countries provided that there are countries that have large and well developed economies, and on the other hand, there are some countries with small and underdeveloped economies. As mentioned above, the objectives sought by these countries through the implementation of competition law regimes differs from one country to the next, hence, countries with large and developed economies may usually seek to avoid anticompetitive conducts within their large markets, instead, competition law in developing countries may be intended to eliminate entry barriers to attract foreign capitals and competitors with the ultimate purpose of economic growth.

From the abovementioned, it is evident that competition law has increasingly gained worldwide acceptance and that there is a great diversity among competition law systems due to the different backgrounds of the countries that have enacted antitrust provisions in their legislations. Nevertheless, despite this wide expansion of competition law and the different contexts and circumstances of most countries, this global proliferation of competition law has not brought along a proportional increase in the enforcement of competition law. Consequently, in practice, a considerable amount of countries that have established competition law regimes have not just yet accomplished decent levels of competition law enforcement.

On the one hand, the lack of effective competition law enforcement can be related to the economic, legal, cultural and religious traditions of some countries and regions. For instance, in the Middle East, none of the existing competition law regimes in the Arab World is remarkably or particularly advanced in terms of having a competition law understanding or culture, or in terms of competition law enforcement[138].

On the other hand, this lack of competition law enforcement, however, is not particularly related to the levels of economic development or the history of competition law and policy of most countries, given that there are jurisdictions with well developed economies and a long tradition of competition law and policy that have not matched the enforcement levels of other similar countries that have stronger competition law regimes. Alternatively, there are countries with a shorter history of market based economies and competition law and policy that have been more successful in implementing a solid competition law system with considerable rates of enforcement.

For instance, until before the 2008 financial crisis Ireland had a high level of economic development thanks to its significant increase during the 90's. In addition, Ireland has a long tradition of competition law and policy with a history of over sixty years, some of the first European merger regulations, and four competition acts. Furthermore, the Irish competition law system has appealing characteristics that theoretically should ensure fair levels of enforcement, these include: strong sanctions for antitrust offenders, such as the imprisonment of individuals involved in hard-core cartels; or the possibility for private parties to bring civil claims for the recovery of damages. In spite of the level of economic development, the long competition law and policy tradition and the appealing characteristic of its competition law system, Ireland has not reached a considerable level of competition law enforcement, especially in regard to criminal prosecutions[139].

Conversely, other countries with different circumstances and backgrounds have been more successful in the implementation of strong competition law regimes and have attained decent rates of competition law enforcement. Such is the case of the Republic of Korea, once a colonial country, which began developing its economy after WWII and implemented its first competition act at the beginnings of the 80's. In just over thirty years, the Korean competition law system is now considered Asia's best antitrust enforcer and a reference for the international competition enforcement community. Until 2011, the Korean Fair Trade Commission had issued remedies to over 43,000 cases and has imposed financial penalties amounted to KRW 3 trillion[140]. In this regard, Korean antitrust enforcement can be considered as a success story if one takes into account the Korean history of decade-long growth-oriented industrial policy[141].

Thus, it could be argued that the success in the enforcement the antitrust provisions and the implementation of a sound competition law regime is not merely related to the backgrounds of the

[138] DABBAH, Maher M. (2007), 'Competition Law and Policy in the Middle East'. Cambridge, New York, et al: Cambridge University Press, p. 4.
[139] LYONS, P., MASSEY, P., & McDOWELL, M. (2012), 'Boston v. Berlin: A half century of Irish antitrust'. In: Mehta, P. (ed). *Evolution of Competition Laws and their Enforcement*. London and New York: Routledge, p. 111-130.
[140] Fair Trade Commission of the Republic of Korea, 2012 Annual Report.
[141] YANG, Meong-Cho (2009), 'Competition Law and Policy of the Republic of Korea'. *The Antitrust Bulletin.* Volume 54, No.3, p. 621-650.

countries, the substantial commands of the antitrust legislations, or the institutional arrangements of most competition law regimes. There are other important issues related to the success of competition law systems. Most countries that have recently implemented competition law systems in their national legislations face a variety of difficulties in the execution of their antitrust provisions. These difficulties are normally related to the lack of resources for the implementation of fully functioning competition law institutions. In addition, most new competition law regimes do not have enough specialists with academic training or practical experience in competition law matters to successfully enforce the antitrust provisions. This absence of sufficient specialists is related to the lack of academic infrastructures that provide formation to students in the competition law area. Moreover, new competition law regimes may also encounter the obstacle of deficient judicial systems that have little or no experience in the adjudication of competition law matters. A further difficulty faced by some competition law regimes is the interference of political forces in the enforcement of the competition law provisions; this is more frequent in countries with state-owned enterprises and policies favoring domestic producers over foreign enterprises. Finally, new competition law regimes face great difficulties in the recollection of relevant information from investigated undertakings for proving the infringement of the antitrust provisions, additionally; competition law institutions encounter difficulties in relation to the standards of proof required by ordinary courts in order to demonstrate the anticompetitive conduct of the defendants[142].

Despite the preceding, even though there are studies that rate the effectiveness of competition regimes, the appropriate levels of enforcement and the overall efficiency of competition regimes are difficult to measure effectively[143]. Currently, there is not an effective measurement mechanism to determine the strengths and weaknesses of competition law and its institutions[144]. Traditionally, the rates of enforcement have been related with the good performance of antitrust agencies, hence, the initiation of new cases by the competition authorities have been used as the main criteria to grade competition law enforcement[145]. However, to rely entirely on this standard to measure good performance would be incorrect provided that the amount of enforcement activity may respond to different aspects. For instance, the competition authorities face different challenges in different jurisdictions, hence, in some jurisdictions, the high rates of public enforcement may be caused by the lack of private enforcement, and similarly, the scarce enforcement of competition law may be caused by high levels of voluntary compliance. Accordingly, the good performance of competition authorities should be analyzed by considering substantive results, such as antitrust agencies improving economic performance and social welfare by stimulating improvements in quality, reductions in cost, and increases in innovation. Moreover, good agency performance should be measured by evaluating the effectiveness of the enforcement process of competition authorities, i.e. transparency, accountability and internal controls[146].

[142] KOVACIC, William E. (1998), 'Getting Started: Creating New Competition Policy Institutions in Transition Economies'. *Brooklyn Journal of International Law*, vol. XXIII, No 1, p. 403-454.
[143] For instance, every year, *Global Competition Review* evaluates the performance of the world's leading competition authorities in its 'Rating Enforcement' publication.
[144] SOKOL, Daniel D. (2010), 'Designing Antitrust Agencies for More Effective Outcomes: What Antitrust Can Learn from Restaurant Guides'. 41 *Loyola University Chicago Law Journal*, p. 578.
[145] KOVACIC, William E. (2009), 'Rating the Competition Agencies: What Constitutes Good Performance?'. *George Mason Law Review*, Volume 12, Number 4, p. 908.
[146] *Idem* at p. 907.

In addition to the abovementioned difficulties that competition law regimes have to overcome in order to obtain decent levels of enforcement, there is the fundamental issue of creating a solid competition law culture among the institutions responsible for the enforcement of the antitrust provisions, the stakeholders and the general public. In this regard, a sound competition culture refers to the awareness of the business community, public authorities, non-governmental agencies, the media, the judiciary, and the general public, of the substantive commands of competition law, and their overall responsibility to ensure that such commands are observed in the interest of competition and overall economic development[147].

As to the overall application of competition law, the competition law institutions have to be competent when enforcing the competition law provisions in order to acquire the credibility of market participants and the general public. For this purpose, competition law institutions have to be concerned in recruiting, training and retaining qualified professionals in the fields of law and economics that provide the antitrust agencies with the necessary human resources needed to build strong public institutions in which the recipients of the law and the general public can rely. Furthermore, competition law institutions have to spend wisely their limited resources in the prosecution of emblematic cases that have an importance to the general population in order to demonstrate the benefits of competition law for society. Additionally, as stated before, the general public has to be convinced of the benefits of competition law, provided that the majority of the population does not have a clear idea or an idea at all, about competition law and its benefits.

Furthermore, competition law is not static, which means that it is constantly evolving as trade practices change over time. In this regard, in order to build strong competition law systems with considerable levels of enforcement, competition law institutions, legislators and academics have to be updated on the most recent developments of competition law and policy. For this purpose, institutions, legislators and academics have to be constantly studying and analyzing the work of foreign competition law institutions and international organizations that work on the development of competition law best practices guidelines (International Competition Network (ICN), the Organization for Economic Co-operation and Development (OECD), or the United Nations Conference on Trade and Development (UNCTAD)). Hence, the constant reformulation of competition law and policy is fundamental for attaining decent levels of enforcement. For example, in a broad sense, competition law in the UK can be traced many centuries back in the UK legislation. Since those times, competition law and policy have been constantly evolving in the UK. After WWII the first modern competition law provisions emerged in the UK, however, those provisions were badly conceived, and as a consequence, under-enforced. It was only in the beginnings of the 21st Century with the adoption of the Competition Act, 1998, and the Enterprise Act, 2002, that the UK has finally introduced a coherent competition law regime. Nonetheless, this process of evolution of the UK competition law system has not reached a final impasse, given that still today UK competition law is looking for ways to improve. For instance, private antitrust enforcement is the least effective part of competition law in the UK, in this regard, the UK government has proposed certain measures intended to foster private claims for the infringement of the competition law provisions,

[147] ICN, Competition Policy Implementation Working Group (Sub-Group 2). *Lessons to Be Learnt From the Experiences of Young Competition Agencies.* Cape town, South Africa, 2006, p. 38.

these include, the broaden of the competence of the CAT to handle private claims; the introduction of opt-out collective actions; and the promotion of ADRs as a way to resolve competition law disputes[148]. Accordingly, the enactment of clear and flexible competition law provisions is fundamental for the foundation of strong competition law regimes, nevertheless, the mere adoption of antitrust provisions does not guarantee on its own the accomplishment of the competition law objectives, given that jurisdictions have to overcome the abovementioned difficulties, and at the same time, be able to adapt their antitrust rules to the constant change of trading.

A further issue that has been considered to have affected the levels of competition law enforcement in some jurisdictions, is that related to the transposition of foreign antitrust provisions into the national legislations of some countries, especially those of developing economies. In great part, the proliferation of competition law regimes across the world that has taken place in the last few decades has been promoted by different instances that have ultimately resulted in the indiscriminate transplantation of foreign competition law commands into the legislations of the adopting countries.

In most cases, the institution of competition law regimes has been promoted by international organizations in developing countries in exchange of credits or funds, in this regard, it has been argued that the antitrust provisions of developed nations have been *forced down the throat* of developing countries with the aid of international organizations[149]. Moreover, the willingness of developing countries to participate in bilateral and multilateral agreements has driven these nations to incorporate antitrust provisions in their national legislations. For example, Chile was required to reform its competition law regime in order to sign a free trade agreement with the U.S. back in 2004. Moreover, in the ASEAN region, the members of ASEAN have committed themselves to all have competition laws by 2015. Similarly, in the EU aspiring countries to EU membership are required to implement competition law provisions that resemble those of the EU. Finally, in some countries the institution of competition law regimes has been forced by the occupation forces of winning countries after bellicose conflicts, such is the case of Japan that has modeled its Antimonopoly Act and its antitrust institution (Japanese Fair Trade Commission) on the U.S. model, provided that this process was promoted by and under the supervision of the U.S. Occupation Forces in 1947 after WWII[150].

In practice, this indiscriminate process to transpose foreign competition law models from jurisdictions that have been successful in implementing strong competition law regimes with considerable rates of enforcement, mainly those of the EU and the U.S., has resulted in the establishment of under-enforced competition law regimes in most of the receiving countries. This recent trend to inspire new antitrust provisions in those of successful competition law regimes has prevented these countries from converting their competition law provisions into effective enforcement tools in practice, provided that most of these countries have experienced considerable difficulties in creating strong competition law institutions and executing effective enforcement programs. This ambitious endeavor of legislators and foreign forces to implement complex antitrust provisions in countries that have competition law

[148] See, Department for Business Innovation and Skills, *Private Actions in Competition Law: a consultation on options for reform*. April 2012.
[149] DABBAH, 2010, p. 4.
[150] TAKIGAWA, Toshiaki (2009), 'Competition Law and Policy of Japan'. *The Antitrust Bulletin*. Vol. 54, No 3, p. 435-515.

institutions with scares economic and human resources, strong opposition from political and economic forces, and judicial systems with little to no experience in competition law matters, has ultimately resulted in badly conceived competition law regimes. In addition, this implementation of competition law regimes that are designed to fail from their inception presents some drawbacks on its own. For instance, on the one hand, this implementation of useless sets of laws is a waste of the limited resources of most developing countries where such provisions have been established. Moreover, on the other hand, the implementation of unclear and ineffective competition law commands affects the interests of market participants and the general public in economies with already precarious conditions.

Therefore, it can be safely argued that there is not a single recipe that legislators should consider when adopting or reforming their competition law systems, provided that the characteristics of each country are unique and these should be contemplated in enacting the antitrust provisions. This *one size fits all* exercise has brought along the creation of competition law regimes where the antitrust rules are under-enforced. The fact that some jurisdictions have been successful in implementing strong competition law systems does not mean that the adoption of similar provisions in other countries will entail the creation of effective competition law systems elsewhere. The implementation of a successful competition law system requires the tailoring of the competition law provisions to the needs of each particular economy, therefore, the EU and U.S. models may be used as a reference, however, these cannot be successfully duplicated in countries with different initial conditions[151].

Notwithstanding the preceding, the reader must not be mistaken. The formulation of new competition law systems or the reform of existing ones should always be assisted by the study and analysis of several foreign competition law regimes. This practice will allow legislators to be well advised on the recent developments of competition law and how these could be transposed into their legislation. Moreover, this study and analysis of foreign competition law regimes should be coupled with the analysis of the recommendations on competition law and policy of international organizations, such as the ICN, OECD, or UNCTAD. Particularly, this need to study and analyze foreign competition law regimes and the recommendations of international organizations has inspired the present comparative study, which is intended to enlighten competition law officials, policymakers, practitioners and academics on the approaches chosen by some jurisdictions on the main features of their competition law regimes and the subsequent enforcement of the antitrust provisions.

Overall, even though the enforcement of competition law has increased in the last few decades, mainly because of the proliferation of competition law regimes across the world, the reformulation of old competition law regimes and the interest of international organizations in the field of competition law, the increase in the enforcement of competition law has not been exponential to this process of competition law globalization. On the one hand, in most jurisdictions where new competition law regimes have been instituted, these regimes have faced considerable obstacles that have impeded the successful application of competition law, in such cases, the mere passing of the competition law statutes has not been enough to build around it a solid competition law regime. On the other hand, in some jurisdictions that already had

[151] WALLER, Spencer, MUENTE, Rafael (1989), 'Competition Law for Developing Countries: A Proposal for and Antitrust Regime in Peru'. 21 *Case Western Reserve Journal of International Law*, p. 159-184.

competition law provisions, the improvement in the competition law commands has not brought along corresponding improvements in the outcomes of the application of competition law. Nevertheless, this asymmetry between implementation of competition law provisions and the subsequent lack of enforcement is not so surprising if one takes into account the complexity of competition law and the ambitious objectives of the law, especially in relation to the precarious conditions of some of the countries that have enacted antitrust provisions. This complexity of competition law has made its application difficult in countries with scarce resources and little experience in market processes. The obstacles faced by competition law agencies related to the lack of human and economic resources, pressure of political and economic forces, deficient judicial systems, and the inability to gather relevant information to prove the competition law infringement, among others, has ultimately made almost impossible for new and inexperienced competition law agencies to efficiently apply the antitrust commands. In addition, jurisdictions that have certain experience with markets processes and competition law policy, still find somehow difficult to obtain considerable rates of competition law enforcement, given that the process of establishing strong competition law regimes does not happen overnight and , as stated before, the mere adoption of competition law provisions, irrespective of the level of economic development of the country in question, does not guarantee on its own the implementation of a successful competition law regime. Moreover, in some countries the application of the competition law commands has been uneven, given that these jurisdictions have been more successful in the application of certain competition law provisions. For instance, it is well-know that the private enforcement of competition law is considerably low compared to the public enforcement in most jurisdictions. Similarly, the criminal prosecution of individuals involved in anticompetitive practices, in countries that allow this possibility, is considered in some jurisdictions the weak link of the competition law chain. It could be stated that this has occurred due to the inability of the competition law authorities to convince the judicial system and the general public of the unlawfulness of the anticompetitive practices of the defendants. In great part of the countries that have competition law commands, the courts have not felt compelled to award considerable amounts of damages to antitrust victims for the anticompetitive conduct of the defendants, to second the decisions of the competition authority imposing sanctions or penalties, or to sentence an individual to imprisonment for the infringement of the competition law provisions. Furthermore, the diversity of competition law regimes across the world and the multiplicity of enforcers have, in practice, increased the level of punishment of anticompetitive practices, however, such increase has occurred in an unpredictable, erratic and random fashion, given that depending on the competition regime in question and on the antitrust infringement, the punishment and remedies imposed for certain violations exceed the enforcement efforts and sanctions available for other anticompetitive practices[152].

Ultimately, the diversity of competition law systems, institutions and proceedings should not be resolved by a utopian process of harmonization of competition law and policy. Provided that this latent diversity can be surpassed by the commonalities found on the application of the antitrust provisions and

[152] WALLER, Spencer W. (2003), 'The Incoherence of Punishment in Antitrust'. 78 *Chicago Kent Law Review*, 207, pp. 220-221.

the goals and objectives of competition law. Thus, in order to provide for some harmony in the laws that govern global transactions, these commonalities shall be maximized.

In sum, even though the current state of competition law enforcement is not the most desirable in the majority of jurisdictions, there has been a considerable increase in the last few decades. A couple of decades ago, competition law and policy were considered proper for developed countries with complex economies and large markets, nevertheless, today, the professed benefits of competition law have spread to all countries despite their level of economic development. Notwithstanding, the mere passing of competition law acts is not sufficient for the development of strong competition law regimes and the accomplishment of the competition law objectives. There are several obstacles that most competition law regimes have to overcome before they are able to obtain decent levels of enforcement. The work of competition law institutions, international organizations and academics is fundamental to assist in the development of strong competition law regimes. In that sense, this is the aim of the present comparative study, to provide competition law officials, practitioners and academics with a clear and comprehensive perspective of the approaches chosen in a fair sample of competition law regimes that includes countries with different levels of economic development, traditions and competition law history, in order to allow them to analyze the consequences and potentialities of these legislative approaches and to suggest the possibilities available for the formulation or reformulation of the fundamental commands of competition law.

II. CONCLUSIONS TO THE PUBLIC ENFORCEMENT CHAPTER

Due to the fact that the competition law provisions are not self-executing and to the secretive nature of most competition law infringements, the substantial provisions of competition law have to be enforced by someone that has the expertise and the powers to uncover and sanction the infringement of the competition law provisions. In this regard, most competition law regimes have opted for the public approach, which is, the enforcement of the competition law provisions by a public entity vested with wide powers of investigation and the ability to impose sanctions and remedies upon those who have breached the competition law commands.

In practice, in most jurisdictions the public enforcement of competition law has been more prosperous than other types of enforcement, provided that only in one country, the U.S., the number of antitrust cases handled in private proceedings is superior to the number of cases adjudicated in public procedures. The public nature of this branch of law and the wide faculties provided to the public enforcers of competition law has made the public application more effective in the majority of jurisdictions. As a result, the wide powers of investigation granted to the public enforcers to uncover anticompetitive practices and the ability to unilaterally impose their decisions on the addressees of the competition law provisions has allowed tipping the scales in favor of the public enforcement of competition law.

Notwithstanding the preceding, some competition law systems, especially young ones and those established in developing countries, have encountered serious difficulties for the effective enforcement of competition law. This are mainly concerned with the implementation of inadequate competition law

provisions, conflicting policies, week competition law institutions that lack financial and human resources, ineffective sanctioning systems and review mechanisms.

1. Inadequate Competition Law Commands

The enactment of clear and sound competition laws is fundamental for the successful implementation of strong competition law regimes in every jurisdiction. Overall, the substantive commands of competition law shall include clear and sufficient prohibitions against the most common and harmful anticompetitive practices in order to establish the scope of the antitrust provisions and to prevent these anticompetitive practices from happening. Moreover, the establishment of the prohibitions against the anticompetitive practices has to be coupled with an effective sanctioning system that allows competition law enforcers to impose suitable sanctions and remedies on those who have infringed the competition law provisions. Additionally, the substantive commands of competition law shall also include the enforcement procedures and the investigative powers granted to uncover the prohibited anticompetitive practices in order to provide competition law enforcers with efficient mechanisms to detect and sanction any conduct that is prohibited by the substantive commands of competition law.

In addition to the abovementioned substantive commands of competition law there are other provisions included in some competition laws that may ease the enforcement of competition law. For instance, the inclusion of the objectives sought by the competition law provisions allows clarifying the intention of the legislators at the time of the enactment of the competition law. However, in some cases, the inclusion of conflicting objectives may affect the effective enforcement of competition law in practice. Moreover, the addition of definitions in the competition law provisions is especially welcomed in new competition law regimes that lack sufficient case law on competition law matters, in such cases; the existence of clear definitions facilitates the enforcement of the competition law commands. Similarly, the incorporation of thresholds and legal presumptions may ease the enforcement of competition law; nonetheless, these should be periodically revised in order to maintain them updated.

As to the anticompetitive practices controlled by the competition law provisions, most competition law regimes are designed to police three typical anticompetitive conducts: restrictive agreements, abuse of a dominant position and mergers that create or strengthen a dominant position. In practice, the implementation of such complex provisions, especially in competition law regimes with scares resources and little experience on market processes has led to the enactment of hollow legal commands, which are erratically enforced or not enforced at all. The ambitious endeavor of legislators in new competition law regimes to include the full range of prohibitions found in successful competition law systems has resulted in excessively broad and complex competition law provisions. The fact that the enforcement of these ambitious legal commands has been delegated to inexperienced competition law agencies with scares human and economic resources that face strong opposition of political and economic forces and are subject to the review of deficient judicial systems has wrecked the unrealistic expectations of the drafters of these competition law commands. Additionally, the fact that in some jurisdictions the competition law provisions also deal with other matters, like, intellectual property, price control, deceptive advertising or fraudulent market practices has brought additional obstacles for the effective

enforcement of competition law. In this regard, it would be wise for legislators drafting competition law provisions for new antitrust regimes to limit the scope of these provisions and the responsibilities of the inexperienced enforcers, provided that, once competition authorities have implemented successful enforcement processes and advocacy programs, there is always room for improvement through legislative reforms, however, public opinion is a fundamental component of any movement for legislative reform. In addition, in competition law regimes that have not yet reached considerable rates of enforcement, the legislative enhancement of the competition law provisions is also a possibility to improve the current state of competition law enforcement. Thus, in new competition law regimes, the competition law provisions can be limited to the prohibition of the most harmful anticompetitive practices, those that do not have redeeming social value, mainly hard-core cartels and other equally harmful practices like the abuse of dominance and resale price maintenance. Moreover, new competition law institutions should focus their efforts and limited resources in competition advocacy and the prosecution of the most harmful anticompetitive practices and emblematic cases that have a significant value for the general public.

Jurisdictions contemplating the implementation of competition law commands; these would be well advised to limit the scope of the substantive commands of competition law and the responsibilities of the competition law institutions in order to facilitate the codification of competition law and the subsequent enforcement of these provisions. In this sense, broad and general antitrust provisions that are supposed to be clarified by judicial interpretation like those found in the U.S. model may be inadequate for most civil law countries that relay in the precepts of the provisions, thus, in such cases, clear and sufficiently defined provisions are better suited for being applied by new competition law agencies and inexperienced judicial systems.

Summarizing, jurisdictions designing competition laws should focus on implementing adequate provisions that address the particular realities of their jurisdictions and should avoid relying so heavily on the provisions of experienced competition law regimes. In this way the competition law provisions will address the most harmful anticompetitive conducts that affect their national markets. Moreover, these fundamental provisions should include supporting provisions that effectively allow the enforcers to detect and eliminate these anticompetitive practices. Ultimately, in jurisdictions where inadequate competition law provisions that do not allow competition law authorities to effectively eliminate antitrust infringements and to sanction the offenders have been implemented, these can be amended through legislative reform.

2. Weak Competition Law Institutions

In relation to the institutional arrangements of competition law regimes, there is a great deal of diversity mainly with regard to the number of competition law institutions and the enforcement functions delegated to these institutions. As seen in the *Public Enforcement Chapter*, different approaches have been chosen in the design of the competition law institutions. In practice, however, the effectiveness of these different institutional arrangements also varies depending on the jurisdiction, which means, that there is not a particular institutional arrangement that has proven to be effective irrespective of the conditions of the competition law regime in which it is implemented.

With respect to the number of competition law institutions responsible for the enforcement of the antitrust provisions, there are jurisdictions where competition law is enforced by a single institution, and alternatively, there are regimes where the enforcement of competition law is delegated to multiple institutions. In practice, even though there are successful competition law systems with both single and multiple agencies models that have established strong enforcement processes, there appears to be an inclination towards the implementation of single institution models. For instance, in the U.S., there are two antitrust agencies responsible for the enforcement of competition law at the federal level, the Federal Trade Commission and the Antitrust Division of the Department of Justice. The multiple agency model of the U.S. is one of the top rated competition law regimes in the world; however, there are serious drawbacks present in this type of institutional arrangement, such as rivalry and inconsistency between multiple agencies and the duplicative costs of having more than one agency with overlapping functions[153]. In this regard, in 2007, the Antitrust Modernization Commission addressed the viability of changing this dual model and concluded that due to practical and political difficulties of reallocating authority and the fact that the coexistence of the two institutions has not produced significant negative consequences it was not recommendable to change the current institutional model[154]. There are, however, other competition law regimes with multiple institutions that have moved to the single agency model, such is the case of Brazil that has recently concentrated the three previously existing competition law institutions in a single one[155]. Similarly, in the UK, the Competition Commission and the competition functions of the OFT will merge into a single competition authority, the Competition and Markets Authority, in the first half of 2014[156]. Moreover, other competition law regimes are evaluating the possibility to reform their multiple institutional models and adopt a single agency model, for example, the UK, which has one of the strongest competition law systems in the world is planning to redesign its competition law system and to dissolve both the Office of Fair Trading and the Competition Commission and create a single institution, the Competition and Markets Authority, responsible for the enforcement of competition law[157]. These examples show the current trend to move from multiple competition law institutions to a single institution in regimes with more than one agency, and the reluctance of new competition law regimes that are designing competition law institutions from scratch to implement multiple institution models[158].

As seen before, there is a current trend among new competition law regimes to implement single institution models. In such regimes, the enforcement functions are delegated to a single competition law agency with strong powers of investigation and with authority to impose sanctions and penalties, which are reviewed by a separate appellate body. This institutional approach is the one suggested by UNCTAD

[153] CRANE, Daniel A. (2011), 'Enforcing Competition Law with Multiple Agencies and Private Enforcers'. *Hokkaido Journal of New Global Law and Policy*, vol 10, p. 45-70, at p. 58-64.
[154] See Antitrust Modernization Commission, Report and Recommendations, 2007, p. 129-32.
[155] Under the provisions of the former competition act (Law 8.884/94), the Brazilian competition law regimes had three different institutions responsible for the enforcement of competition law: CADE (*Conselho Administrativo de Defesa Econômica*), the Economic Law Office (*Secretaria de Direito Econômico*), and the Economic Policy Bureau (*Secretaria de Acompanhamento Econômico*). The current Antitrust Law (Law 12.529/2011) has concentrated all three agencies within CADE.
[156] Competition Commission, *A Competition Regime for Growth: A Consultation on Options for Reform (Response by the Competition Commission)*, 2011; and OFT, *A competition Regime for Growth: a consultation on options for reform (The OFT's response to the Government's consultation)*, 2011.
[157] In 2010, the Ministry of Business, Innovation, and Skills has begun an inquiry to redesign the UK's competition law regime.
[158] FOX, Eleanor M. (2010), 'Antitrust and Institutions: Design and Change'. *Loyola University Chicago Law Journal.* Volume 41, No. 3, p. 473-488.

in its *Model Law on Competition*[159] and has been followed by several jurisdictions. The most representative and probably the most successful jurisdiction that has implemented this type of institutional arrangement is the EU. At the EU level the Competition Directorate of the European Commission is the institution responsible for the enforcement of the EU competition law provisions; this single institution has broad powers of investigation and consolidates the executive and adjudicatory enforcement functions, in addition, its decisions are reviewed, in first instance, by the General Court[160] and, in last instance, by the Court of Justice of the EU. Despite this tendency to delegate the competition law enforcement to a single institution, some competition law regimes, especially those with scares resources, little experience with market processes, and deficient judicial systems, have not been able to duplicate the results of the EU or other successful competition law regimes.

In relation to the design of the competition law institutions and the assignment of the enforcement functions, there are jurisdictions that conglomerate the enforcement functions within a single agency, and conversely, there are other jurisdictions where there is a separation of these functions among different institutions. In practice, both of these institutional models have been successfully implemented in some competition law regimes. Nevertheless, the conglomeration and the separation of the enforcement functions present certain benefits and drawbacks that legislators should consider when designing or reforming their competition law institutions. In a broad sense, in relation to the structure of the competition law institutions and the allocation of the enforcement functions, most competition law institutions fall within one of the following three institutional models[161]. First, the *bifurcated judicial model*, in which the competition law institution has been attributed the investigative functions, but has to bring enforcement actions before courts of general jurisdiction given that the former does not have adjudicative powers[162]. Second, the *bifurcated agency model*, in which the competition law institution has authority to investigate possible antitrust infringements, but must bring enforcement actions before adjudicative authorities specialized in competition law matters[163]. And third, the *integrated agency model*, in which the competition law institution has been awarded both investigative and adjudicative functions[164].

As stated before, the implementation of each one of these models involves certain trade-offs. For instance, the institution of the bifurcated judicial model, on the one hand, provides for high levels accountability, detachment, transparency and protection of due process, however, this model scores poorly in relation to the expertise of general courts in competition law matters, timeliness and process costs. As to the, bifurcated agency model, this allows a high level of independence, expertise and detachment in the composition of the specialized tribunal, moreover, it provides decent levels of administrative efficiency and protection of due process, however, the creation of specialized competition

[159] United Nations Conference on Trade and Development, *Model Law on Competition: Substantive Possible Elements for a Competition law, Commentaries and Alternative approaches in Existing Legislation.* New York and Geneva, 2010, p. 66.
[160] Formally known as Court of First Instance.
[161] TREBILCOCK, M. & IACOBUCCI, E.M. (2010), 'Designing Competition Law Institutions: Values, Structure and Mandate'. *Loyola University Chicago Law Journal,* vol. 41, p. 459-464.
[162] In the U.S., the Antitrust Division of the Department of Justice has authority to investigate the infringement of the antitrust provisions but has to bring civil or criminal proceedings before federal courts in order to obtain criminal sanctions or civil relief.
[163] In Canada, in non-criminal cases, the Commissioner of Competition has investigative functions; however, the adjudicative functions have been delegated to the Competition Tribunal.
[164] In the EU, the Competition Directorate of the European Commission has both investigative and adjudicative functions.

law tribunals represents a substantial expense for most jurisdictions. Finally, with regard to the implementation of the integrated agency model, the latter provides for high levels of expertise in competition law matters and administrative efficiency, on the other hand, the main drawback of this model is the risk of prosecutorial bias due to the combination of the investigative and the adjudicative functions in one institution.

Irrespective of the institutional design of the competition law institutions, there are certain issues that are strictly related to the optimal functioning of antitrust agencies, these are related to the insufficient capital and human resources of most competition law agencies. With regard to the capital resources, virtually all competition law agencies have limited budgets that impede the desired performance of some of these institutions. Thus, in order to overcome this obstacle, antitrust institutions have to spend their limited resources wisely in the prosecution of cases that immediate attention and try to obtain additional funds while retaining their independence and transparency. In relation to the human resources, competition law agencies, especially young ones, normally encounter difficulties in finding and retaining trained professionals in the competition law area. This problem is usually related to the lack of sufficient qualified professionals and the lack of financial resources to hire and retain skilled professionals. This limited human resource capacity, challenges the ability of competition authorities to timely address competition concerns and the effective enforcement of the law. In this regard, some competition authorities have established successful training programs on their own and in collaboration with foreign competition authorities and international organizations.

3. Ineffective Sanctioning Systems

A further issue that is strictly related with the effective enforcement of competition law and the attainment of the desired effects of competition is the availability of an appropriate sanctioning system that provides public enforcers with effective mechanisms to prevent and sanction any anticompetitive practice that is contrary to the competition law provisions. Competition law has a regulatory and compulsory nature, which require market participants a certain business behavior for the accomplishment of the competition law objectives. In this sense, an appropriate sanctioning system is fundamental for the effective implementation of competition law, given that punishment is a critical component for the enforcement of any compulsory legislation, such as competition law. Thus, market participants will only comply with the provisions of the law if they are threatened by being punished for non-compliance. Accordingly, deterrence plays a fundamental role in the enforcement of competition law, due to the fact that the threat of being sanctioned for the breach competition law is crucial, given that it is virtually impossible for competition authorities to control the activities of every single market participant[165].

A remedial system like competition law seeks to deter people from violating the provisions of the law. In order to accomplish this objective, the sanctions provided in such systems have to make the engagement in unlawful practices costly for the recipients of the law. In this regard, an appropriate

[165] ROSOCHOWICZ, P.H. (2004), 'The Appropriateness of Criminal Sanctions in the Enforcement of Competition Law'. *European Competition Law Review,* 25, No 12.

sanctioning system will have to impose a cost on the violator, whether this is pecuniary or not, equal to the cost the violation imposed on the society[166].

Competition law regimes across the world have relied on a diverse set of sanctions to deter undertakings from engaging in anticompetitive practices, however, the establishment of the appropriate sanctioning system depends on the specific characteristics of each competition law regime. There is a variety of sanctions that can be imposed for the infringement of competition law, which include: the imposition of financial penalties, administrative sanctions, and the imprisonment of the individuals responsible for the competition law infringement.

The imposition of financial penalties is the most common type of sanction used for the infringement of competition law. The versatility of this type of sanction and the relatively low costs of its imposition and administration, compared to other types of sanctions, have been determinant in the adoption of this type of sanction in most competition law regimes. However, there is a great deal of diversity with regard to the main characteristics of this type of sanction that are mainly concerned with the nature of the sanction and the persons subject to this sanction.

The nature of financial penalties varies depending on the competition law regime in question and the administrative system of these. Thus, there are jurisdictions where financial penalties have an administrative nature and others where fines have a civil or criminal nature. In practice, the nature of fines has some implications in the enforcement of competition law and the imposition of the fines. For instance, in competition law regimes that provide for the imposition of financial penalties of an administrative nature, the latter are imposed in administrative procedures by administrative authorities, normally the competition authority. This possibility for the competition authority to impose administrative fines ease the imposition of these, and as a consequence, reduces the costs of administration given that the authority does not have to file an action before the competent authority to request the imposition of the fine. On the one hand, this faculty of administrative authorities may benefit competition law enforcement by allowing the enforcers to sanction antitrust offenders expeditiously and without excessive administrative costs. On the other hand, this faculty allows the possibility of imposing abusive and inadequate sanctions if there are no effective mechanisms to review the decisions imposing these fines. In the case of financial penalties of civil or criminal nature, the imposition of these is competence of civil or criminal courts, respectively. The imposition of financial penalties by courts prevents the imposition of abusive penalties by biased competition authorities and protects due process, however, the fact that competition authorities have to bring an action before general courts provides for additional obstacles in the enforcement of competition law. This is especially burdensome for young competition authorities that lack experience in litigation.

With regard to the persons subject to being sanctioned with the imposition of financial penalties for the infringement of competition law, there are two approaches chosen in most competition law regimes. On the one hand, some jurisdictions restrict the imposition of financial penalties to undertakings only. On the other hand, other competition law regimes allow the imposition of financial penalties on

[166] POSNER, Richard A. (2001), 'Antitrust Law'. Second Edition. Chicago; London: The University of Chicago Press, p. 266-267.

undertakings and individuals acting on behalf of infringing undertakings. In jurisdictions where individuals can be fined the competition law liability of an undertaking derives from the establishment of a violation of the competition law provisions by its management or employees. Hence, the purpose of allowing individuals to be fined is to punish those who decide on the undertaking's business strategy. The fact that financial penalties imposed on undertakings only can be ultimately passed on to consumers rests the deterrent effects of this type of sanction in practice. However, the deterrence level of financial penalties imposed on individuals can also be reduced if these sanctions are assumed by the undertakings on behalf of their employees. In this regard, there are jurisdictions that have established specific provisions that prohibit undertakings to assume the fines imposed on their employees, thus, protecting the deterrent effect of financial penalties and punishing individuals for their participation in anticompetitive practices. Accordingly, the imposition of financial penalties on individuals will reduce the willingness of business people to commit violations, given that the public punishment of antitrust offenders has deterrent effects, due to the fact that it creates a credible threat of punishment to others, and in addition, it has moral effects, by sending message to the spontaneously law-abiding, reinforcing their moral commitment to the rules[167].

In practice there are certain issues regarding the imposition of financial penalties and their effectiveness to deter market participants from engaging in anticompetitive behavior. For instance, determining the appropriate level of financial penalties has proven to be a demanding exercise. The fact that most competition law provisions do not establish a fixed amount of fines and that the circumstances of each case are different require from public enforcers a heavy analysis of complex evidence, which can be sometimes an overwhelming exercise, especially for young competition authorities. This situation is exacerbated in jurisdictions where the competition authority does not have effective mechanisms to gather relevant information about the challenged practice in order to determine an appropriate level of the fine that effectively sanctions and deters market participants.

A further issue related to the imposition of financial penalties is the inability of some competition authorities, especially young competition authorities with scarce resources, to effectively enforce their decisions imposing fines for the infringement of the competition law provisions. In order for the sanctioning system to provide its desired deterrent effects, the sanctions imposed have to be effectively enforced to present market participants with a credible threat of being punished. Nevertheless, there are jurisdictions where the competition authorities face serious difficulties in ordering the sanctioned party to comply with the sanctions imposed due to the fact that these authorities lack the legal powers to enforce compliance on their own. In such cases, competition authorities have to request the intervention of the competent courts to order the infringing undertakings to pay the fines imposed. Moreover, in some of these jurisdictions the problem is further exacerbated by deficient judicial systems that provide for lengthy procedures and little experience in market processes, which ultimately affect the effective enforcement of competition law. Furthermore, even competition authorities that have enforcement powers may face certain difficulties when trying to order the compliance of their fining decisions. For instance, young competition authorities with few resources and little experience in

[167] WILS, Wouter P.J. (2006A), 'Optimal Antitrust Fines: Theory and Practice'. *World Competition.* Volume 29, No. 2,p. 7-8.

litigation will encounter difficulties in enforcing their decisions even if they have the legal powers to do so. Additionally, in jurisdictions where the legal status of competition authorities and their competences are not clearly established, the legitimacy to impose sanctions and their competence to do so will be frequently challenged, thus, adding further obstacles for the effective enforcement of competition law. Moreover, competition authorities in developing countries may encounter strong political and economic opposition when trying to enforce fines imposed on large transnational undertakings, large national undertakings or state owned enterprises. Finally, needless is to say that young competition authorities in developing countries; that face strong opposition; rely on a deficient judicial system; and lack authority to impose sanctions on their own; will face almost insurmountable obstacles in trying to impose a fine and effectively enforce it.

In addition, it has been argued that the current level of financial penalties is too low to deter market participants from engaging in anticompetitive conducts, consequently, in order for financial penalties to effectively deter market participants from violating the antitrust provisions, these would have to be impossibly high and would exceed the statutory ceilings of most legislations and the ability of undertakings to pay without being forced in to bankruptcy[168]. Imposing a fine that exceeds the ability to pay of an undertaking and forces the latter to bankruptcy and to exit the market would be against the primary objective of competition law to protect the competitive process. Accordingly, competition law regimes should not rely exclusively in financial penalties, especially those imposed on undertakings only, to accomplish the desired deterrent effects to avoid violations of competition law. These financial penalties may have to be coupled with additional sanctions that present individuals with a credible threaten to being punished for non-compliance with the commands of competition law. In this regard, the use of financial penalties on individuals, and especially the possibility to imprison managers and employees are usually suggested to enhance the level of deterrence of competition law[169].

In this regard, some competition law regimes have established in their sanctioning systems the possibility to impose the imprisonment of individuals involved in anticompetitive practices. There are jurisdictions that provide for this possibility since the inception of their competition law regimes; such is the case of the U.S. that allows the imprisonment of the individuals who violate the antitrust provisions since the adoption of the Sherman Act back in 1890. In addition, there has been a trend in the last few decades to criminalize certain anticompetitive practices with the hope that the deterrent effect of this type of sanction will prevent the most harmful anticompetitive violations, i.e. hard-core cartels[170]. Nevertheless, other competition law regimes that used to provide for the possibility to impose

[168] WILS, Wouter P.J. (2001), 'Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings But Also Individual Penalties, In Particular Imprisonment?'. Paper presented at the 6th Competition Law and Policy Workshop at the European University Institute (Florence, 1-2 June 2001), at p. 11-18.
[169] WILS (2001), p. 22.
[170] For instance, in the UK, the Enterprise Act 2002 has added a criminal cartel offence, limited to hard-core cartels, punishable with imprisonment and/or fines for individuals only, as well as a sanction of director disqualification for individuals. Other jurisdictions such as: Canada, Cyprus, Estonia, Germany, Hungary, Ireland, Israel, Japan, and Malta have introduced criminal sanctions for the breach of the substantial provisions of competition law.

imprisonment have decided to decriminalize their provisions due to the fact that these where almost never enforced and were effective on paper only[171].

The criminalization of the competition law provisions –imprisonment in particular- is intended to enhance the deterrence levels of the antitrust provisions, and as a consequence, to increase the compliance of the law. Even though, the amount of the financial penalties imposed in the last decades has increased considerably, to rely solely on the imposition of financial penalties has proven to be insufficient to comply with the desired levels of deterrence[172]. As a consequence, there are those who argue that the threat to individuals of being imprisoned for participating in anticompetitive practices will bring about the desired levels of deterrence and compliance with the law. On the other hand, there are those who believe that imprisonment should be regarded as a last instance sanction given that this type of sanction represents a cost to society and that the professed high levels of deterrence attributed to imprisonment are not that high provided that this kind of sanction is imposed so rarely in competition law cases[173].

On the one hand, imprisonment can be more efficient than other types of sanctions due to its level of deterrence. In addition, given that the amount of the financial penalties imposed currently cannot be raised to a level that exceeds the ability of undertakings to pay, and that there is the possibility that these fines could ultimately be passed on to consumers, deterrence by other means would be required. Hence, it seems that effective deterrence will be best accomplished if both the undertaking and the individuals acting on its behalf are punished. With regard to the imposition of financial penalties on individuals, these would not reach the desired level of deterrence, especially if there is the possibility that undertakings assume the fines imposed on behalf of their employees. On the other hand, imprisonment may not be an appropriate sanction in some jurisdictions for a number of reasons. For instance, the adoption of criminal penalties –especially imprisonment- for the infringement of competition law may not be in line with the social and legal norms of a particular country. In this regard, the general public will have to be convinced that antitrust offenders deserve imprisonment as punishment, moreover, in most jurisdictions; the introduction of criminal penalties for antitrust breaches will require difficult legislative amendments. Therefore, jurisdictions that are implementing competition law provisions from the scratch would be well advised to avoid the introduction of criminal provisions in its first attempt to develop their competition law regimes. Moreover, jurisdictions that have already competition law provisions that provide for administrative or civil penalties should not switch to criminal sanctions without the acceptance of the relevant constituencies[174]. Additionally, the costs of imprisonment are higher if compared to other sanctions such as financial penalties, and the costs of the offender being imprisoned constitute a deadweight loss to society. Likewise, the higher procedural requirements of criminal

[171] In Austria, a long tradition of individual criminal sanctions for cartel agreements was abolished in 2002; nevertheless, imprisonment for bid-rigging is still available. In France, antitrust enforcement was exclusively criminal under the provisions of the competition acts of 1953 and 1958. After the reforms of 1977 and 1978, the enforcement of the competition provisions relies essentially on administrative fines on undertakings, imposed by the Competition Council. Similarly, in the Netherlands, after the reform of 1997, the sanctions for the infringement of the competition provisions are purely administrative.
[172] WILS, Wouter, P. J. (2008A), '*Efficiency and Justice in European Antitrust Enforcement'*. Oxford: Hart Publishing, p. 177-185.
[173] POSNER (2001), p. 270-271.
[174] KOVACIC, William E. (2006), 'Competition Policy and Cartels: the design of remedies'. In: Cseres, K.J., Schinkel, M.P., & Vogelaar, F.O.W. (eds). *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States.* Cheltenham (UK); Northampton (USA): Edward Elgar, p. 41-59.

procedures represent a further obstacle for the effective enforcement of competition law, given that these difficult the prosecution of competition law violations in practice.

In most competition law regimes the sanctioning system is usually coupled with certain remedies aimed at maintaining or restoring the competitive process. Unlike sanctions, remedies do not have a punitive nature and serve additional purposes, like, the termination of an anticompetitive conduct, or the restoration of the competitive process. As seen in the Public Enforcement Chapter, there is a variety of remedies available depending on the competition law regime in question. These can broadly be grouped in: behavioral remedies, which require a person either to do something or to stop doing something; and structural remedies, which require undertakings to divest assets they hold in order to restore the competitive structure of a determined market. Consequently, an effective set of remedies would include both structural and behavioral remedies.

In particular, the main issue related to the imposition of remedies and the effective enforcement of competition law is concerned with the correct determination of the appropriate remedy for the anticompetitive conduct in question. Overall, when determining the appropriate remedy, competition authorities should consider the imposition of remedies only if a real threat to competition has been identified. The competition law issue that a determined remedy is intended to address should be clearly identified in order to impose the optimal remedy for each case. Moreover, remedies should be the least restrictive means to effectively eliminate the relevant competition concerns. Also, the remedies imposed by competition authorities should only address competition law issues, given that remedies are not tools for industrial planning and usually are not suited to accomplish wider purposes.

In addition to the preceding principles considered when determining the appropriateness of a certain remedy, there are some antitrust remedies that are better suited to address specific anticompetitive practices. For instance, structural remedies, such as divestiture, are usually preferred for mergers cases over behavioral remedies. In merger cases, the imposition of remedies is intended to restore or maintain the competitive process while at the same time to allow the realization of relevant merger efficiencies and other additional benefits. Even though, this type of remedy is considered as the most drastic, it also provides for some benefits, for instance, divestiture does not require ongoing monitoring like other remedies do; it also allows the rapid elimination of market power; it allows the concerned parties to take part in the design of the remedy; and finally, it involves less intervention of courts and other institutions in its implementation.

On the other hand, in cases involving restrictive agreements or the abuse of a dominant position, behavioral remedies are usually more suitable for addressing the anticompetitive effects of these types of practices. This type of remedies may require the concerned undertakings to stop engaging in certain activities that are contrary to competition, or alternatively, they may impose an affirmative obligation to do something in order to restore the competitive process. In the first case, the remedies are intended to terminate the infringement of competition law, and in the second, to restore the competitive process. This kind of remedies is advantageous in that they can be formulated to address the particular competition law concerns raised by each case. Additionally, in some jurisdictions the imposition of these remedies can be

agreed by the competition authority and the concerned undertakings, this possibility eases the implementation of these remedies and enhances its ability to restore the competitive process. On the other hand, even though behavioral remedies can be modeled to address a specific competition law concern, this type of remedies may require an ongoing supervision, which can suppose significant costs both for the competition authority and the concerned undertakings.

Consequently, the implementation of an effective sanctioning system requires the availability of both structural and behavioral remedies in order to accomplish all the enforcement objectives of competition law. However, there are some matters that jurisdictions have to consider in order to allow the competition law enforcers to effectively impose optimal remedies that address the specific competition concerns of most anticompetitive practices. For instance, competition law regimes should provide for a clear statutory basis that allows public enforcers to impose any type of remedy available for the infringement of competition law. Moreover, there are certain obstacles that can affect the effective imposition of these antitrust remedies. For example, young competition authorities may find the formulation of remedies as an overwhelming exercise in cases where complex analyses are required. In this way, the lack of resources and experience of new competition law authorities can affect the effective imposition of the antitrust remedies. In addition, some remedies used in large and developed markets may not be appropriate for the market conditions of some developing countries, e.g. divestiture may not be suitable in small markets with few market participants, due to the difficulty of finding an appropriate acquirer. Similarly, in jurisdictions where the competition authority cannot impose remedies on its own, a deficient judicial system may impose further burdens for the enforcement of competition law, such as lengthy procedures and adverse decisions. A further obstacle encountered in the imposition of antitrust remedies is related to the unwillingness of the concerned undertakings to comply with the mandates of the remedies imposed by the competition authority. In new competition law regimes with no competition law culture, the addressees of remedies may be reluctant to comply with the provisions of these, in such cases, on the one hand, the competition authority should have effective means to enforce its decisions imposing remedies, and on the other hand, the competition authority must implement advocacy programs in order to promote the benefits of competition law and the obligation of market participants to comply with the commands of the law.

4. Deficient Judicial Review Mechanisms

Finally, another fundamental issue that is related to the effective enforcement of competition law by public authorities is the availability of an adequate mechanism to review the decisions of the public enforcers. Thus, the independent and effective judicial review of the decisions issued by competition authorities is fundamental for the establishment of a well-functioning competition law regime, given that flawed decisions can affect the interests of the concerned undertakings, third parties and the general public. In particular, the function of the judicial review of competition law cases is to ensure that the decisions issued by public authorities are fair and lawful. Additionally, the availability of an optimal review mechanism enhances the quality of the decisions issued by the competition authorities and the trust in the system.

As with other features of competition law, the judicial review of the decisions by public authorities varies from one country to another. In this regard, depending on the jurisdiction an appeal against a competition law decision can be made to general administrative courts, administrative courts specialized in competition law matters, judicial courts of general jurisdiction, or even to the Supreme Court. Moreover, as seen in the *Public Enforcement Chapter*, the judicial review of competition law cases also varies from jurisdiction to jurisdiction in relation to the standard of review, the suspensory effects and the decisions issued by the appellate bodies.

Despite the abovementioned differences, competition law regimes, especially new ones, have encountered a series of challenges in the implementation of effective judicial review mechanisms. For instance, in jurisdictions that have deficient judicial systems, the judicial review of competition law cases may be affected by the deficiencies of the system if competition decisions are reviewed by courts of general jurisdiction. Moreover, competition cases are often very complex and require profound legal knowledge and a sound economic understanding of market processes. Accordingly, in most young competition law systems, there is a shortage of sufficiently trained judges with enough experience in the competition law field. Given that a judiciary that is familiarized with the substantive commands of competition law and its economic aspects is fundamental for the development of a sound competition law system, most competition law regimes that face this lack of sufficiently trained judges have to address this issue in order to provide for an effective review mechanism. In this sense, some countries have developed training programs for the judiciary that provide the latter with the essential knowledge in competition law concepts, goals and its economic aspects. In addition, other competition law regimes have dealt with this issue by establishing specialized entities responsible for the review of competition law cases, e.g. the creation of a specific chamber in the court responsible for the judicial review of competition cases, or the creation of specialized tribunals in competition law matters. A further difficulty encountered by public enforcers with regard to the judicial review of competition cases is related to the length of the appeal procedures. In most jurisdictions, the judicial review of competition decisions involves lengthy procedures that impose further obstacles to the effective enforcement of competition law. Thus, in some competition law regimes there have been established expedites procedures that reduce the formalities and length of appeal cases. Finally, the fact that the decisions by the competition authority or courts responsible for the enforcement of competition law can be quashed in the appeal process presents a further obstacle for the effective enforcement of competition law. This possibility may occur in two instances; on the one hand, untrained judiciary that do not have a clear understanding of competition law may strike down correct decisions by the competition authority, on the other hand, flawed decisions by the competition authority may be quashed in the appeal process.

III. CONCLUSIONS TO THE PRIVATE ENFORCEMENT CHAPTER

In a number of competition law regimes, the enforcement of the competition law provision is not limited to the public application of the law by administrative or judicial authorities, additionally, the antitrust rules in these jurisdictions can be enforced by private parties that have been harmed by the anticompetitive conduct of the defendant and seek the award of civil remedies before the competent

courts. On the one hand, there are those who argue in favor of the private enforcement of competition law and consider that the overall enforcement of competition law can benefit from the civil actions brought by private parties, given that these serve as an important complement to public enforcement. An enforcement system that allows the possibility of private parties to tackle down violations of the antitrust provisions provides additional enforcers who are closer to the relevant problems[175]. Moreover, private enforcement can save the taxpayer a significant amount by shifting the costs and risks of public antitrust litigation[176]; in addition, the private enforcement of public laws, such as competition law, allows breaking the government's monopoly in the enforcement of public laws. Finally, private parties that have suffered harm as a consequence of the infringement of competition law may be better suited and better informed than public officials to prove the infringement of the competition law provisions[177]. On the other hand, there are those who argue that public enforcement of competition is superior to private enforcement in that public officials benefit from more effective investigative and sanctioning powers. Moreover, as private enforcement is driven by the private profit motive, it systematically diverges from the general interest, which is normally the main purpose of public laws. Finally, private enforcement is more expensive than public enforcement given that private actors may lack the desire, resources, or expertise to enforce public laws[178].

Nevertheless, despite the postulated benefits and drawbacks of private antitrust enforcement, many competition law regimes have established provisions that allow private parties to enforce competition law. However, in spite of this possibility to privately enforce competition law, the current state of private antitrust enforcement is one of almost total underdevelopment in most competition law regimes that allow this possibility. There is only one competition law regime, the U.S., where private enforcement outnumbers public enforcement. In the U.S. there is a 10 to 1 rate between private actions and public procedures for the infringement of the competition law provisions. The fact that the U.S. competition law system provides this possibility for private parties to enforce the competition law provisions since its inception, back in 1890, has allowed this competition law regime to acquire far more experience with private antitrust enforcement than any other jurisdiction. In addition, some of the features of U.S. civil litigation have made the private enforcement of competition law so prevalent in this regime, these include a combination of: treble damages remedies, class action procedures, one-way cost rules, contingency fees, and civil jury trials. Nonetheless, most jurisdictions reject many of the U.S. features of civil litigation and consider that the adoption of the U.S. model in their jurisdictions may lead to private antitrust litigation abuses and excesses[179]. In this sense, most competition law regimes seek to accomplish an optimal level of private enforcement, in order to ensure that private antitrust enforcement encourages

[175] CRANE, Daniel A. (2010), 'Optimizing Private Antitrust Enforcement'. 63,3 *Vanderbilt Law Review*, p. 677.
[176] LANDE, Robert H. and DAVIS, Joshua P. (2008), 'Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases'. *University of San Francisco Law Review*. Vol. 42, p. 879-918.
[177] ROACH, Kent & TREBILCOCK, Michael J. (1996), 'Private Enforcement of Competition Laws'. *Osgoode Hall Law Journal*. Vol. 34, No. 3, p. 462-508.
[178] WILS, Wouter P. J. (2005B), 'Principles of European Antitrust Enforcement'. Oxford [etc.]: Hart Publishing, p. 118
[179] CRANE, Daniel (2009), 'Private Enforcement Against International Cartels in Latin America: A U.S. Perspective'. In: Fox M.E and Sokol D.D. (eds), *Competition Law and Policy in Latin America*. Portland and Oxford: Hart Publishing, p. 325-350.

compliance with the law, but at the same time avoiding litigation that is wasteful and could discourage socially beneficial conduct[180].

This state of underdevelopment of private antitrust enforcement is due, in part, to the fact that in most jurisdictions this branch of law has been traditionally enforced by public authorities, thus, in practice, this institutionalized enforcement of competition law has excluded private parties from the actual application of competition law, and as a consequence, it has provoked a scarce and erratic private antitrust enforcement[181]. Moreover, the lack of private antitrust enforcement may be further aggravated by the serious difficulties that private enforcers have faced when bringing civil actions for the infringement of competition law in most jurisdictions where this possibility is available. In practice, private enforcers have encountered different obstacles that vary from one jurisdiction to the next, however, these are mainly related to the jurisdiction and applicable law, the legal standing, the access to evidence, the standard of proof, the calculation of the amount of damages, the costs of private litigation, and the interaction between public and private enforcement. In order to overcome these obstacles faced by private enforcers and to increase the current state of private enforcement, some jurisdictions, especially those of well-established competition law regimes, have promoted different initiatives to encourage the private enforcement of competition law. For instance, in 2008, the European Commission issued its White Paper that suggests specific policy options and measures intended to assist the victims of EU antitrust infringements to get access to effective redress mechanisms so that they can be fully compensated for the harm they suffered[182]. Similarly, in the UK, the Department for Business, Innovation and Skills (BIS) has made a consultation in which it proposes some measures intended at enhancing the effectiveness of the private antitrust enforcement in the UK[183].

1. Unclear Legal Basis for the Private Enforcement of Competition Law

As previously seen in the *Private Enforcement Chapter,* there is a great deal of diversity with regard to the statutory basis for privately enforcing the provisions of competition law. In general, two approaches have been chosen by most competition law regimes, on the one hand, some regimes have introduced specific provisions in their antitrust rules that allow private parties to enforce these provisions before the relevant courts; on the other hand, other competition law regimes have not established specific provisions in their competition laws, but rely on the general provisions of civil or commercial law. In practice, the availability or not, of specific provisions that allow the private application of the competition law provisions may affect in some extents the optimal enforcement of competition law by private parties. The introduction of specific provisions in the competition law allowing private parties to enforce this branch of law may ease the private enforcement in civil procedures; moreover, this approach has been suggested by UNCTAD in its *Model Law on Competition (2010)*, which encourages competition law regimes to introduce a specific provision that gives injured parties the right to bring a claim in order to recover the

[180] OECD, *Private Remedies,* 2007.
[181] MARCOS, Francisco (2011). '¿Es verdaderamente necesaria una iniciativa Comunitaria destinada a incentivar las acciones de daños por cártel? Una mirada a la experiencia Española'. Paper presented at the *III Convegno di Studio, I Remedi Civilistici agli illeciti anticoncurrenziali. Private Enforcement of Antitrust,* Facoltà di Giurisprudenza de la Università degli Studi di Trento, April 2011, p. 6.
[182] White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, 2.4.2008.
[183] UK's Department for Business, Innovation & Skills. *Private Actions in Competition Law: A consultation on options for reform-government response*, January 2013.

damages suffered[184]. Despite the preceding, the mere establishment of a provision that grants private parties the right to file a claim for the infringement of competition law does not in itself guarantees the attainment of optimal levels of private enforcement, given that, in different extents, most competition law regimes rely on the general provisions of civil/commercial law for procedural issues and the conditions of liability, thus, if the interaction between the specific provisions and the general provisions is not clear, this will create obstacles for the effective private enforcement of competition law. Consequently, even though the inexistence of specific competition law provisions allowing private enforcement does not create obstacles for the effective enforcement, the availability of these specific provisions may serve as an incentive for private parties to file civil claims for the infringement of competition law, moreover, if the right of private parties to file claims is coupled with other specific provisions, such as the presumption or removal of the fault requirement, this would effectively ease the private enforcement of the competition law provisions.

2. Inexperienced Competent Courts to handle Competition Law Cases

One of the major difficulties found by private parties when filing civil claims for the infringement of the competition law provisions is that related to the lack of experience of the relevant courts of general jurisdiction in competition law matters[185]. As stated before, untrained judiciary in competition law matters supposes an important obstacle for the enforcement, both public and private, of competition law. Due to the complexity of most competition law cases, the competent courts responsible for handling private claims must be familiarized with the substantial provisions of competition law and have a sufficient understanding of its economic implications in order to effectively address the competition law concerns of every case. Thus, exercises such as the calculation and allocation of damages can be an overwhelming endeavor for courts of general jurisdiction with little to no experience in competition law matters and market processes. In order to overcome this obstacle to private actions for the infringement of competition law, different jurisdictions have addressed this issue in different ways. For instance, in some jurisdictions, the handling of private claims for the infringement of the competition law provisions has been delegated to specific chambers of existing courts. Alternatively, other jurisdictions have addressed this issue by creating specialized competition law courts that are exclusively responsible for hearing private claims; moreover, other regimes have opted for allowing the existing competition courts, usually responsible for the judicial review of the competition authority's decisions, to handle private claims. Finally, in competition law systems where these possibilities are not viable, an alternative could be the establishment of training programs for the competent courts imparted by the competition authorities.

3. Limited Legal Standing

Furthermore, in some competition law systems, private enforcers may additionally face obstacles with regard to the legal standing required to file a civil claim for the infringement of the competition law provisions. For instance, in some jurisdictions, the legal standing to bring private claims for the breach of competition law is limited to direct purchasers only. In these jurisdictions, only the parties that have been

[184] UNCTAD's Model Law on Competition (2010)-Chapter XIII.
[185] OECD, Competition Law and Policy in Latin America: Peer reviews of Argentina, Brazil, Chile, Mexico and Peru, 2006.

directly affected by the anticompetitive conduct of the defendant will be allowed to sue the latter before the relevant courts in order to obtain compensation for the harm suffered. In such cases, in direct purchasers that have not been directly injured by the anticompetitive conduct of the defendant are not allowed to bring civil claims to recover damages. In this regard, the limitation of standing to direct purchasers only prevents corrective justice because it precludes ultimate consumers from seeking compensation for the harm they have suffered; in addition, it also affects the deterrence levels given that these regimes rely exclusively on direct purchasers, even though these may be reluctant to sue their suppliers[186]. On the other hand, the limitation of standing to direct purchasers only is intended to avoid that the defendant is ordered to pay multiple damages as both the indirect and direct purchasers can file a claim for damages. In addition, in other competition law regimes there are other restrictions on the legal standing for bringing a claim for the infringement of the competition law provisions, for example, in some jurisdiction the standing to bring a civil claim for the breach of competition law is restricted to undertakings only, in such cases natural persons cannot recover damages, in other jurisdictions, a contractual relationship between the potential plaintiff and the defendant is required to give the former legal standing to bring a claim. In practice, these limitation to the legal standing to bring damages constitute important obstacles for private parties injured by the anticompetitive conduct of the defendant, hence, the removal of these limitations on standing could facilitate and encourage private claims and the overall enforcement of competition law.

4. Unavailability of Effective Collective Redress Mechanisms

Most competition law regimes provide for some kind of collective redress mechanism for private parties that have been injured by the anticompetitive conduct of the defendant. The purpose of establishing collective redress mechanisms is to provide consumers and purchasers with small claims with effective means to collectively sue for the harm suffered as a consequence of the infringement of the competition law provisions, given that it is unlikely for practical reasons, that consumer and indirect purchasers with small claims will bring individual actions to recover the small amount of damages suffered as a consequence of the anticompetitive behavior of the defendant. However, in a variety of competition law regimes, collective action in competition law cases are restricted for injunctive relief actions and cease and desist orders, moreover, in some jurisdictions, these collective claims are used in matters of unfair competition more that competition law[187]. In this sense, the availability of effective collective redress mechanisms allow the small claims of indirect purchasers and final consumers to be cost-effective, in addition, it enhances the levels of deterrence and obedience of the law, and accomplishes the compensatory function of competition law. Accordingly, effective collective redress mechanisms have to available for private parties in order encourage the latter to file a claim for damages and to enhance the levels of development of private antitrust enforcement.

5. Impossibility to Access Relevant Information and High Standards of Proof

[186] ROACH & TREBILCOCK (1996), p. 502.
[187] ICN, *Interaction of Public and Private Enforcement in Cartel Cases.* Report to the ICN annual conference, Moscow, May 2007, at p. 24.

In most competition law regimes the burden of proving the infringement of competition law and the harm suffered as a consequence rest on the plaintiff, in this sense, an important obstacle to private antitrust enforcement in most competition law systems is that private plaintiffs often lack the procedural tools necessary to gather all the relevant information to prove the infringement of the competition law provisions and the subsequent harm suffered as a consequence. Due to the secretive nature of most anticompetitive practices, the collection of necessary information that proves the violation of competition law and the harm suffered as a consequence of the latter may turn out to be an overwhelming exercise for most private plaintiffs most of the times, and especially for those with limited resources. However, there are jurisdictions that have established broad discovery rules that allow private parties to gather all necessary information to successfully file a civil claim for the infringement of the competition law provisions. For example, in the U.S. private plaintiffs can demand that the defendants to produce any documents that are relevant to the plaintiff's claims. This is one of the most important features of the U.S. civil litigation system that has allow private antitrust enforcement to be so widespread in this jurisdiction when compared to others. Nonetheless, detractors to the U.S. model argue that the broadness of this type of discovery procedure may produce the unwanted excesses of the U.S. litigation, and as a consequence, allow the proliferation of fishing expeditions and unmeritorious claims. Notwithstanding the preceding, in jurisdictions that lack effective procedural rules that allow private plaintiffs to obtain the necessary evidence to sustain their claims, some kind of discover is required for the success of the private enforcement of competition law. In the current situation of some competition law regimes, the parties suspected to have breach competition law are not under the obligation to produce relevant information and can only be required to do so by the relevant court when the private plaintiff has sufficiently identified the individual document sought, which in most cases cannot be done because the plaintiff may not be even aware of the existence of such document. Accordingly, it has been proposed to provide private plaintiffs in competition law cases with some limited discovery rights, which would allow private plaintiffs to get access to documents and other relevant evidence from the defendant if they can assert facts –with a reasonable degree of particularity- evidencing the existence of the conspiracy[188].

In addition to the struggle of private plaintiffs to get access to the necessary information required to successfully bring a private claim for the infringement of competition law; these also face further impediments related with the high standards of proof required in most competition law regimes. The fact that most jurisdictions require private plaintiffs to proof various elements of liability, such as the causal link between the anticompetitive conduct of the defendant and the alleged harm suffered by the plaintiff, or the fault requirement and the existence of an infringement of the competition law provisions, represent in most cases insurmountable obstacles to successfully bring a private claim for the infringement of the competition law provisions. Some competition law regimes have addressed these issues by lowering the standard of proof or by reversing the burden of proof in order to facilitate and encourage private actions.

[188] CRANE, Daniel (2009), pp. 325-350.

6. Excessive Cost of Private Litigation

A further impediment for the success of private antitrust enforcement is related to the excessive costs involved in this type of procedures. Moreover, the fact that these litigation expenses can be considerably higher in comparison to other civil disputes due to complexity of most competition law cases and to the amounts involved in these disputes, disincentives private plaintiffs, especially those with limited resources and/or small claims, from filing civil claims for the infringement of competition law. Normally, competition law litigation involves two types of expenses, on the one hand, there are the court cost, which are the expenses generated by the court in the course of the procedure, these include, court fees, the appointment of experts, or the expenses of witnesses, on the other hand, the parties to the proceeding have to bear with their own litigation costs, which include, the attorney's fees, cost for retrieving evidence, or costs for retaining an expert, among others. As stated before, due to the complexity of competition law litigation, the abovementioned expenses are usually significantly high, moreover, the fact that most competition law regimes require the plaintiff to pay the court fees upfront, which normally tend to be high given that the amounts of the claim have to be high in order to make the action cost-effective, and that most jurisdictions apply the loser pays principle, which requires the unsuccessful party to pay the litigation expenses of the prevailing party, constitute a huge financial impediment for most private plaintiffs, except of course for plaintiffs with deep pockets.

This threat for private plaintiffs of having to pay its litigation expenses plus the defendant's in case the latter prevails, disincentives private plaintiffs for bringing an action for the infringement of the competition law provisions and impedes private parties an effective access to courts for civil claims. Accordingly, in order to incentive private plaintiffs to file civil claims for the infringement of the competition law provisions and to provide them effective access to courts, it has been proposed the establishment of a rule that unsuccessful plaintiffs will only have to pay the litigation expenses if they acted in a manifestly unreasonable manner by bringing the case. Additionally, courts may be given a discretionary power to order at the beginning of the proceedings that the plaintiff not be exposes to any costs recovery even if the latter is unsuccessful in its claims[189]. Moreover, the obstacle imposed by the financial costs of private antitrust litigation can be diminished by reducing or waving the obligation of private plaintiffs to pay court or other state fees. Similarly, the use of contingency or conditional fees could also ease private antitrust enforcement[190].

7. Rough Interaction between Private and Public Proceedings

It has been argued that private enforcement of competition law is a complement to public enforcement given that private antitrust litigation can deal with cases which the public authorities will not deal with due to resource constraints and other prioritization needs[191]. In this regard, the interaction between these two types of proceedings is fundamental for the accomplishment of the competition law goals and objectives, as well as the attainment of the enforcement objectives of competition law.

[189] See Option 27 of the Green Paper on Damages actions for breach of the EC antitrust rules, COM(2005) 672, 19.12.2005.
[190] See page 12 of the *Study on the conditions of claims for damages in case of the violation of EC competition rules* (Ashurst Report).
[191] See page 8 of the Commission Staff Working Paper, Annex to the Green Paper on Damages actions for breach of the EC antitrust rules SEC(2005) 1732.

In jurisdictions where the competition law provisions can be applied both in public and private proceedings, these interact with each other in different levels. For instance, public and private proceedings interact with each other with regard to the requirement of a previous decision by the competition authority declaring the infringement of competition law in order to be allowed to bring a private claim against the antitrust offender. Similarly, public and private enforcement interact in relation the possibility of staying one of these proceedings while waiting for the resolution of the other. Moreover, public and private proceedings also interact with each other in relation to the evidential value of the findings of one proceeding over the other. In addition, public and private enforcement interact with regard to the access of evidence collected in these proceedings.

As seen in the *Private Enforcement Chapter*, in some competition law regimes, the existence of a prior decision by the competition law authority declaring that the competition law provisions have been infringed by the anticompetitive behavior of the defendant is a prerequisite for private parties that have been injured by the anticompetitive conduct of the defendant in order to bring a civil claim for the recovery of damages. In practice, this requirement can be considered as an important obstacle for the success of private antitrust litigation.

The fact that the same anticompetitive conduct may provoke the initiation of public proceedings by the relevant public authorities and private claims by the private parties affected by such behavior may lead to the establishment of concurrent proceedings. In such cases, given that the same legal or factual issues are simultaneously contested in more than one procedure, one of these can be stay until the other is resolved.

One of the major obstacles identified for the success of private antitrust enforcement is the lack effective means for private plaintiffs in order to collect the necessary information to prove their claims. In this regard, given that competition authorities have strong investigative powers that allow them to uncover most anticompetitive practices, normally, the files of the competition authority contain valuable information proving the infringement of the competition law provisions that may be valuable for private plaintiffs in subsequent civil claims for the same infringement. However, the fact that most competition authorities are reluctant to share the information gathered in the course of an investigation constitutes an obstacle for private plaintiffs. Moreover, the information provided by the antitrust offenders to the competition authority via leniency applications is not shared by competition authorities. This impossibility of private plaintiffs to get access to information gathered by the competition authority constitutes a further obstacle to private antitrust enforcement, nevertheless, this unwillingness of competition authorities to share information, especially the one gathered via leniency applications, with private plaintiffs is intended to protect the attractiveness of leniency programs and not to put the persons that have granted this information in a disadvantaged position.

With regard to the evidential value of the prior decisions of the competition authority, the fact that in some competition law regimes civil courts handling competition law cases brought by private plaintiffs are not bound by the decisions of the competition authority declaring the infringement of the

competition law provisions has been considered as an obstacles for the private antitrust enforcement[192]. In this regard, there are different approaches as to the evidential value of the decisions by the competition authority across jurisdictions, which range from considering the competition authority's decision as evidence to declaring the findings of the competition authority as binding in follow-on actions by private plaintiffs.

[192] See page 8 of the *Study on the conditions of claims for damages in case of the violation of EC competition rules* (Ashurst Report).

BIBLIOGRAPHY

Books and Articles

- ABA Section of Antitrust Law (2005), 'Antitrust Compliance: Perspectives and Resources for Corporate Counselors'. Chicago: ABA Publishing.

- ABA Section of Antitrust Law (2011), 'Competition Laws Outside the United States', 2D ED.

- ABA Section of Antitrust Law (2010), 'Antitrust Compliance: Perspectives and Resources for Corporate Counselors'. Second Edition. Chicago: ABA Publishing.

- ALMUNIA, Joaquín (2010), 'Compliance and Competition Policy'. *Businesseurope & US Chamber Of Commerce.* Competition Conference, Brussels, 25 October 2010 (SPEECH/10/586).

- AUBERT, C., REY, P., KOVACIC, W.E. (2006), 'The impact of leniency and whistle-blowing programs on cartels'. 24 *Int. J. Ind. Organ*.

- BAKER, Donald I. (2001), 'The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging'. 69 *Geo. Wash. L. Rev*. 693, 713.

- BAKER Jonathan B. (2003), 'The Case for Antitrust Enforcement'. 17 *Journal of Economic Perspectives*.

- BANKS, Theodore & JALABERT-DOURY, Nathalie (2012), 'Competition Law Compliance Programs and Government Support or Indifference. Best practices for compliance programs: Results of an international survey'. *Concurrences, No. 2-2012.*

- BARNES, Stanley N. (1954), 'Settlement by Consent Judgment'. Section of Antitrust Law, ABA Publishing.

- BASEDOW, J., FRANCQ, S., & IDOT. L. (eds) (2012), 'International Antitrust Litigation: Conflict of Laws and Coordination'. Oxford-Portland: Hart Publishing.

- BAXTER, William F. & KESSLER, Daniel P. (1995), 'Toward a Consistent Theory of the Welfare Analysis of Agreements'. 47 *Stanford Law Review*.

- BECKER, Gary S. (1968), 'Crime and Punishment: An Economic Approach'. 76 *Journal of Political Economy*.

- BECKER, Gary S. & STIGLER, George J. (1974), 'Law Enforcement, Malfeasance, and Compensation of Enforcers'. 3 *Journal of Legal Studies*, 1.

- BENTHAM, Jeremy (1789), 'An Introduction to the Principles of Moral and Legislation'. In: *The Utilitarians,* New York: Anchor Books, 1973.

- BERNARDINI, Piero (2004), 'The Role of the International Arbitrator', *International Arbitration*, Volume 20, Nº 2.

- BLANKE, Gordon (2005), 'The Role of EC Competition Law in International Arbitration: A *Plaidoyer*'. *European Business Law Review*.

- BLANKE, Gordon (2007), 'The use of arbitration in EC merger control: latest developments'. 28(12) *European Competition Law Review*, 2007.

- BLANKE, Gordon & NAZZINI, Renato (2008A), 'Arbitration and ADR of Global Competition Disputes: Taking Stock (Part I)'. *Global Competition Law Review*, Issue 1.

- BLANKE, Gordon & NAZZINI, Renato (2008B), 'Arbitration and ADR of Global Competition Disputes: Taking Stock (Part II)'. *Global Competition Law Review*, Issue 2.

- BLANKE, Gordon & NAZZINI, Renato (2008C), 'Arbitration and ADR of Global Competition Disputes: Taking Stock (Part III). *Global Competition Law Review*, Issue 3.

- BLANKE, Gordon & NAZZINI, Renato (eds) (2012), 'International Competition Litigation: A Multi-Jurisdictional Handbook'. Alphen aan den Rijn: Kluwer Law International.

- BLOMQUIST, Robert F. (1988), 'Rethinking the Citizen As Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values'. 22 *Georgia Law Review*, 337.

- BORK, Robert. (1966), 'Legislative Intent and the Policy of the Sherman Act'. 7 *Journal of Law & Economics*.

- BORK, Robert H. (1993), 'The Antitrust Paradox: A Policy at War with Itself'. New York: The Free Press.

- BULLARD, Alfredo & FALLA, Alejandro (2010), 'Peru'. In: Foer, A. & Cuneo, J. (ed). *The International Handbook of Private Enforcement of Competition Law*. UK: Edward Elgar Publishing Limited.

- BUXBAUM, Hannah L. (2005), 'German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement'. *Berkeley Journal of International Law,* Vol. 23:2.

- BUXBAUM, Hannah L. & MICHAELS Ralf (2012), 'Jurisdiction and Choice of Law in International Antitrust Law – A US Perspective'. In: Basedow, Francq & Idot (eds), *International Antitrust Litigation: Conflict of Laws and Coordination*. Oxford-Portland: Hart Publishing.

- CAMPBELL, Thomas, BUSEY, Roxane, & KOCH, Peter (2004), 'Arbitrating Antitrust Claims: The Road Less Traveled'. *Antitrust*, Volume 19, Issue 1.

- CANENBLEY, Cornelis & STEINVORTH Till (2011), 'Effective Enforcement of Competition Law: Is There a Solution to the Conflict Between Leniency Programmes and Private Damages Actions?'. *Journal of European Competition Law & Practice*, Vol. 2, No. 4.

- CAUFFMAN, Caroline (2012), 'Access to Leniency Related Documents after *Pfleiderer*'. Maastricht European Private Law Institute, Working Paper N0. 2012/3.

- CENGIZ, Firat (2012), 'Antitrust Federalism in the EU and the US'. London and New York: Routledge.

- CHADWELL, John T. (1995), 'Antitrust Administration and Enforcement'. 53 *Michigan Law Review*.

- CHAO, Y., SAN, G., LO, C., & HO, J. (eds) (2001), 'International and Comparative Competition Laws and Policies'. The Hague: Kluwer Law International.

- CONNOR, John & HELMERS, Gustav (2007), 'Statistics on Modern Private International Cartels, 1990-2005'. Working Paper, January 2007.

- CONNOR, John & LANDE, Robert (2007), 'Cartel Overcharges: Implications for U.S. and EU Fining Policies'. 51 *Antitrust Bulletin* 983.

- CSERES, K.J., SCHINKEL, M.P., & VOGELAAR, F.O.W. (2006), 'Law and Economics of Criminal Antitrust Enforcement: An Introduction'. In: Cseres, K.J., Schinkel, M.P., and Vogelaar, F.O.W. (eds). *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States*. Cheltenham (UK); Northampton (USA): Edward Elgar.

- CSERES, K.J., SCHINKEL, M.P., & VOGELAAR, F.O.W. (eds) (2006), '*Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States'*. Cheltenham (UK); Northampton (USA): Edward Elgar.

- CRANE, Daniel A. (2009), 'Private Enforcement Against International Cartels in Latin America: A U.S. Perspective'. In: Fox M.E and Sokol D.D. (eds), *Competition Law and Policy in Latin America*. Portland and Oxford: Hart Publishing.

- CRANE, Daniel A. (2010), 'Optimizing Private Antitrust Enforcement'. 63,3 *Vanderbilt Law Review*.

- CRANE, Daniel A. (2011A), 'Enforcing Competition Law with Multiple Agencies and Private Enforcers'. *Hokkaido Journal of New Global Law and Policy*, vol. 10.

- CRANE, Daniel A. (2011B), 'The Institutional Structure of Antitrust Enforcement'. New York: Oxford University Press.

- DABBAH, Maher M. (2007), 'Competition Law and Policy in the Middle East'. Cambridge, New York, et all: Cambridge University Press.

- DABBAH, Maher M. & HAWK, Barry E. (eds) (2009), 'Anti-Cartel Enforcement Worldwide'. Volume I, II and III. Cambridge; New York: Cambridge University Press.

- DABBAH, Maher M. (2010), 'International and Comparative Competition Law'. Cambridge; New York: Cambridge University Press.

- DABBAH, Maher, & LASOK QC, Paul (eds) (2012), 'Merger Control Worldwide'. Second Edition. Volume I and II. Cambridge; New York: Cambridge University Press.

- DALHUISEN, Jan Hendrick (1995), 'The Arbitrability of Competition Issues'. 11(2) *Arbitration International*.

- DECKER, Christopher & GRAY, Harriet (2011), 'Antitrust and Arbitration in Regulated Sectors'. *Competition Law International*, 7.

- DEKEYSER Kris & ROQUES Christian (2010), 'The European Commission's settlement procedure in cartel cases'. *The Antitrust Bulletin,* Vol. 55, No. 4.

- DE LEÓN, Ignacio (2001), 'Latin American Competition Law and Policy: A Policy in Search of Identity'. The Hague (The Netherlands): Kluwer Law International.

- DEPOORTER, Ben & PARISI, Francesco (2005), 'The Modernization of European Antitrust Enforcement: The Economics of Regulatory Competition'. *George Manson Law Review*, Vol. 13:2.

- DILORENZO, Thomas J. (1985), 'The Origins of Antitrust: An Interest-Group Perspective'. 5 *International Review of Law and Economics*, p. 87.

- DILORENZO, Thomas J. (1990), 'The Origins of Antitrust: Rhetoric vs. Reality'. *Regulation*, Vol. 13, No. 3.

- DON, Henk, KEMP, Ron & VAN SINDEREN, Jarig (2008), 'Measuring the Economic Effects of Competition Law Enforcement'. 156 *De Economist*.

- EASTERBROOK, Frank H. (1987), 'Allocating Antitrust Decisionmaking Tasks'. *The Georgetown Law Journal*, Vol. 76:305.

- EASTERBROOK, Frank H. (1984), 'The Limits of Antitrust'. *Texas Law Review*, Volume 63, Number 1.

- EDWARDS, Corwin D. (1974), 'The Future of Competition Policy: A World View', 14 *California Management Review.*

- FIEBIG, André R. (1993), 'The German Cartel Office and the Application of Competition Law in Reunified Germany'. *University of Pennsylvania Journal of International Business Law*, Vol. 14: 3.

- FOER, Albert A. & CUNEO, J. W. (eds) (2010), 'The International Handbook on Private Enforcement of Competition Law'. Cheltenham: Edward Elgar Publishing Limited.

- FOER, Albert A. & SCHULTZ, Evan P. (2011), 'Will Two Roads Still Diverge? Private Enforcement of Antitrust Law is Getting Harder in the United States. But Europe May be Making it Easier'. *Global Competition Litigation Review*, Issue 3.

- FORRESTER, Ian S. (2009), 'Due process in EC competition cases: A distinguished institution with flawed procedures'. *European Law Review,* 817.

- FOX, Eleanor M. (1997), 'US and EU Competition Law: A Comparison'. In: Graham E.M. & Richardson J.D. (eds) *Global Competition Policy*. Washington: Institute for International Economics.

- FOX, Eleanor M. (2003), 'We Protect Competition, You Protect Competitors'. *World Competition*, Vol. 12:2.

- FOX, Eleanor M. (2010), 'Antitrust and Institutions: Design and Change'. *Loyola University Chicago Law Journal.* Volume 41, No. 3.

- FOX, Eleanor M. (2011), 'Economic Development, Poverty and Antitrust: The Other Path'. In: Fox, Eleanor M. & Mateus Abel M. (eds), *Economic Development: The Critical Role of Competition Law and Policy. Volume II: Competition Law and Its Architecture*. Cheltenham: Edward Elgar Pub.

- GAL, Michal S. (2010), 'Regional Competition Law Agreements: An Important Step for Antitrust Enforcement'. *University of Toronto Law Journal*, 60.

- GAROUPA, Nuno (1997), 'The Theory of Optimal Law Enforcement'. *Journal of Economic Surveys,* Vol. 11, No. 3.

- GERADIN, Damien (2013), 'Antitrust Compliance Programmes & Optimal Antitrust Enforcement: A Reply to Wouter Wils'. *Journal of Antitrust Enforcement*, Volume 1, Issue 2.

- GINSBURG, Douglas & WRIGHT, Joshua (2010), 'Antitrust Sanctions'. *Competition Policy International*, Volume 6, 3, 4.

- GIRARDET, Philipp (2010), 'What if Uncle Sam wants you?: Principles and Recent Practice Concerning US Extradition Requests in Cartel Cases'. *Journal of European Competition Law & Practice*, Vol. 1, No. 4.

- GOODMAN, Shaun (ed) (2009), 'The Public Competition Enforcement Review'. Fourth Edition. London: Law Business Research Ltd.

- GOTTS, Ilene K. (ed) (2011), 'The Private Competition Enforcement Review'. Fourth Edition. London: Law Business Research Ltd.

- HAMMOND, Scott D. (2004), 'Cornerstones of an Effective Leniency Program'. Paper presented at the ICN Workshop on Leniency Programs (Sidney, 22-23 November 2004).

- HAMMOND Scott D. (2006), 'The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All'. *OECD Competition Committee, Working Party No. 3*.

- HAMMOND, Scott D. & BARNETT, Belinda A. (2008), 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters'. US Department of Justice.

- HAMMOND, Scott D. (2010), 'The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades', Department of Justice Antitrust Division, Miami.

- HANNAY, William M. (2003), 'Designing an Effective Antitrust Compliance Program'. New York: Thomson /West.

- HARRINGTON, Joseph E. (2008), 'Optimal Corporate Leniency Programs'. *The Journal of Industrial Economics*, Volume LVI, No. 2.

- HARRINGTON, Joseph E. & CHANG, Myong-Hun (2009), 'Modeling the Birth and Death of Cartels with an Application to Evaluating Antitrust Policy'. 7 *J. EURO. ECON. ASSOC.* 1.

- HARRINGTON, Joseph (2010), 'Comment on Antitrust Sanctions'. *Competition Policy International,* Volume 6, No. 2.

- HART, H.L.A. (1994), 'The Concept of Law'. Second Edition. Oxford: Oxford University Press.

- HAWK, Barry E. & VELTROP, James D. (1993), 'Dual Antitrust Enforcement in the United States: Positive or Negative Lessons for the European Community'. In: Slot & McDonnell (eds), *Procedure and Enforcement in E.C. and U.S. Competition Law.* London: Sweet & Maxwell.

- HAWK, Barry & LAUDATI, Laraine (1996), 'Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A comparison'. *Fordham International Law Journal*, Volume 20, Issue 1.

- HOBBES, Thomas (1996), 'Leviathan', Richard Tuck (ed). 1st Edition. Cambridge: Cambridge University Press.

- HOFSTETTER, Karl & LUDESCHER, Melanie (2010), 'Fines against Parent Companies in EU Antitrust Law: Setting Incentives for "Best Practice Compliance". *World Competition,* Volume 33, No. 1.

- HOCHSTRASSER, Daniel (2001), 'Choice of Law and "Foreign" Mandatory Rules in International Arbitration'. 18(5) *Journal of International Arbitration*.

- HOVENKAMP, Herbert (2005), 'The Antitrust Enterprise: Principle and Execution'. Cambridge; London: Harvard University Press.

- HOLMES, Marjorie, & DAVEY, Lesley (eds) (2007), 'A Practical Guide to National Competition Rules across Europe'. Second Edition. Alphen aan den Rijn: Kluwer Law International.

- HOLMES, Simon & GIRARDET, Philipp (2011), 'The International Comparative Legal Guide to: Cartels & Leniency 2011: A practical cross-border insight into cartels and leniency'. London: Global Legal Group.

- HUR, Joseph Seon (2004), 'Cartel Detection Techniques of the KFTC'. Presented at the Cracking Cartels Conference: International and Australian Developments.

- HÜSCHELRATH, Kai & PEYER, Sebastian (2013), 'Public and Private Enforcement of Competition Law: A Differentiated Approach'. Centre for European Economic Research, Discussion Paper No. 13-029.

- HUANG, Yong & JIANG, Shan (2010), 'Thirty Years of PRC Anti-Monopoly Law under 'State-Market' Yardstick: From Retrospective and Prospective Viewpoints'. In: Zäch, Heiemann, and Kellerhals, *The Development Of Competition Law: Global Perspectives.* Cheltenham: Edward Elgar Pub.

- HWANG, Tzong-Leh, & CHEN, Chiyuan (eds) (2004), 'The Future Development of Competition Framework'. The Hague: Kluwer Law International.

- IDOT, Laurence (2010), 'Arbitration and Competition'. Note prepared for the Competition Policy Committee of the OECD (OECD, *Arbitration and Competition*, 2010).

- INNES, Robert (1999), 'Remediation and Self-Reporting in Optimal Law Enforcement'. *Journal of Public Economics*.

- ITALIANER, Alexander (2011), *'Zero Tolerance for International Cartels'*. ICN Cartel Workshop, Bruges-Belgium.

- JACOBS, Francis G. & DEISENHOFER, Thomas (2003), 'Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective'.

In: Ehlermann and Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*. Oxford and Portland: Hart Publishing.

- JUNG, Youngjin & HAO Qian (2003), 'The New Economic Constitution in China: A Third Way for Competition Regime?'. 24 *Northwestern Journal of International Law & Business.*

- KAPLOW, Louis & SHAVELL, Steven (1994), 'Optimal Enforcement with Self-Reporting of Behavior'. *Journal of Political Economy*.

- KAPLOW, Louis & SHAVELL, Steven (2002), 'Economic Analysis of Law'. In: Auerbach A.J. & Feldstein M. (eds) *Handbook of Public Economics*, Volume 3. Amsterdam: Elsevier.

- KILLINGSWORTH, Scott (2012), 'Modeling the Message: Communicating Compliance Through Organizational Values and Culture'. *Georgetown Journal of Legal Ethics,* Volume 25, No. 4.

- KIRKWOOD, John, & LANDE, Robert (2008), 'The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency'. *Notre Dame Law Review*, Vol. 84:1.

- KOMNINOS, Assimakis, P. (2008), 'EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts'. Oxford [etc.]: Hart Publishing.

- KOMNINOS, Assimakis P. (2011), 'Assistance by the European Commission and Member States Authorities in Arbitration'. In: Blanke, G. & Landolt, P. (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Volume 1. Alphen aan den Rijn: Kluwer Law International.

- KOMNINOS, Assimakis P. (2012), 'Arbitration and EU Competition Law'. In: Basedow, Francq & Idot (ed). *International Antitrust Litigation, Conflict of Laws and Coordination*. Oxford-Portland: Hart Publishing.

- KOTSIRIS, Lambros E. (1988), 'An Antitrust Case in Ancient Greek Law'. *The International Lawyer*, vol. 22, Nº 1.

- KOVACIC, William E. (1996A), 'Creating Competition Policy: Betty Bock and the Development of Antitrust Institutions'. *Antitrust Law Journal*, Vol. 66.

- KOVACIC, William E. (1996B), 'The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist'. *American University International Law Review*, Vol. 11, Issue 3.

- KOVACIC, William E. (1998A), 'Getting Started: Creating New Competition Policy Institutions in Transition Economies'. *Brooklyn Journal of International Law,* Vol. XXIII, No 1.

- KOVACIC, William E. (1998B), 'Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies', 66 *U. Cin. L. Rev*.

- KOVACIC, William E. (2000), 'Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy'. *St. John's Law Review,* Volume 74, Issue 2.

- KOVACIC, William E. (2001), 'Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement'. *Chicago-Kent Law Review*, Vol. 77:265.

- KOVACIC, William E. (2003A), 'Private Participation in the Enforcement of Public Competition Laws'. British Institution of International & Comparative Law. Third Annual Conference on International and Comparative Competition Law: The Transatlantic Antitrust Dialogue. London, May 15, 2003.

- KOVACIC, William E. (2003B), 'The Modern Evolution of U.S. Competition Policy Enforcement Norms'. *Antitrust Law Journal*. Vol. 71.

- KOVACIC, William E. (2006), 'Competition Policy and Cartels: the design of remedies'. In: Cseres, K.J., Schinkel, M.P., and Vogelaar, F.O.W. (ed). *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States.* Cheltenham (UK); Northampton (USA): Edward Elgar.

- KOVACIC, William E. & EVERSLEY, DeCourcey (2007), 'An Assessment of Institutional Machinery: Methods Used in Competition Agencies and What Worked for Them'. *International Competition Network, Competition Policy Implementation Working Group, Subgroup 2 on Experiences of Younger Agencies.* May 23, 2007.

- KOVACIC, William E. (2009), 'Rating the Competition Agencies: What Constitutes Good Performance?'. *George Mason Law Review*, Volume 12, Number 4.

- KOVACIC, William E., & HYMAN, David A. (2012), 'Competition Agency Design: What's on the Menu?'. *Illinois Public Law and Legal Theory,* Research Papers Series No. 13-26.

- KLAWITER, D.C. & DRISCOLL, J.M. (2009), 'Antitrust Compliance in the Age of Multi-jurisdictional Leniency: New ideas and new challenges'. GCR Supp (The Antitrust Review of the Americas).

- LANDE, Robert H. (2006), 'Five Myths about Antitrust Damages'. *University of San Francisco Law Review*, Vol. 40.

- LANDE, Robert H. & DAVIS, Joshua P. (2008), 'Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases'. *University of San Francisco Law Review*. Vol. 42.

- LANDE, Robert H. & DAVIS, Joshua P. (2010), 'Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws'. *University of San Francisco Law Research Paper No. 2010-17.*

- LANDE, Robert H. & CONNOR, John M. (2011), 'Optimal Cartel Deterrence: An Empirical Comparison of Sanctions to Overcharges'. AAI Working Paper, No. 11-08.

- LANDES, William M. & POSNER, Richard A. (1975), 'The Private Enforcement of Law'. 4 *Journal of Legal Studies*, 1.

- LANDES, William M. (1983), 'Optimal Sanctions for Antitrust Violations'. 50 *The University of Chicago Law Review*.

- LANDOLT, Phillip (2012), 'Arbitration and Antitrust: An overview of EU and national case law'. *e-Competitions*, 13 April 2012.

- LELIEFELD, Daniel & MOTCHENKOVA, Evgenia (2010), 'Adverse Effects of Corporate Leniency Programs In View Of Industry Asymmetry'. 2 *J. APPLIED ECON. SCI*. 114.

- LEMOS, Margaret H. (2011), 'State Enforcement of Federal Law'. *New York University Law Review*, Vol. 86:698.

- LESLIE, Christopher R. (2004), 'Trust, Distrust, and Antitrust'. 82, 3 *Texas Law Review.*

- LESLIE, Christopher R. (2006), 'Antitrust Amnesty, Game Theory, and Cartel Stability'. 31 *Journal of Competition Law*.

- LETWIN, William L. (1954), 'The English Common Law Concerning Monopolies'. *The University of Chicago Law Review*, Vol. 21.

- LEVENSTEIN, Margaret C. & SUSLOW, Valerie Y. (2006), 'What Determines Cartel Success?'. 44 *Journal of Economic Literature*.

- LEVI, Margaret, TYLER, Tom & SACKS, Audrey (2009), 'The Reasons for Compliance with the Law'. The United States Studies Centre at the University of Sydney, Working paper, August 2009.

- LIMAN, A.L. (1977), 'The Paper Label Sentences: Critique'. 86 *Yale Law Journal* 619.

- LOCKE, John (1986), 'The Second Treatise on Civil Government'. New York: Prometheus Books.

- LOWE, Philip (2008), 'The Design of Competition Policy Institutions for the 21st Century: The experience of the European Commission and DG Competition'. *Competition Policy Newsletter*, Number 3.

- LUGARD, Paul (1998), 'EC Competition Law and Arbitration: Opposing principles?'. *European Competition Law Review*, 19(5).

- LYONS, P., MASSEY, P., & McDOWELL, M. (2012), 'Boston v. Berlin: A half century of Irish antitrust'. In: MEHTA, P. (Ed). *Evolution of Competition Laws and their Enforcement*. London and New York: Routledge.

- MAMANE, David & MENZ, James U. (2011), 'Practical Challenges in Arbitrating Antitrust Claims'. *Competition Law International*, 7.

- MALIK, Arun (1993), 'Self-Reporting and the Design of Policies for Regulating Stochastic Pollution'. *Journal of Environmental Economics and Management*.

- MARCOS, Francisco (2011), '¿Es verdaderamente necesaria una iniciativa Comunitaria destinada a incentivar las acciones de daños por cártel? Una mirada a la experiencia Española'. Paper presented at the *III Convegno di Studio, I Remedi Civilistici agli illeciti anticoncurrenziali. Private Enforcement of Antitrust*, Facoltà di Giurisprudenza de la Università degli Studi di Trento, April 2011.

- MARCOS, Francisco (2012), 'Diminishing Enforcement: Negative Effects for Deterrence of Mistaken Settlements and Misguided Competition Promotion and Advocacy'. *Working Paper IE Law School AJ8-187-I*.

- MARGOLIS, Daniel H. & VORRASI, Kenneth M. (2011), 'Arbitration in US Antitrust Enforcement'. In: Blanke, G. & Landolt, P. (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Volume 2. Alphen aan den Rijn: Kluwer Law International.

- MASTALIR, Roger W. (1993), 'Regulation of Competition in the "New" Free Markets of Eastern Europe: A Comparative Study of Antitrust Laws in Poland, Hungary, Czech and Slovak Republic, and their Models', 19 *N.C. J. Int'l L. & Com. Reg*.

- MATEUS, Abel M., & MOREIRA, Teresa (eds) (2010), 'Competition Law and Economics: Advances in Competition Policy Enforcement in the EU and North America'. Cheltenham: Edward Elgar Publishing Limited.

- McAFEE, Preston R., MIALON, Hugo M., & MIALON, Sue H. (2008), 'Private v. Public Antitrust Enforcement: A Strategic Analysis'. 92 *Journal of Public Economics*.

- McCALLUM, Elizabeth B, & McCAREINS, R. Mark (2004), 'Arbitration Procedures: The Rules of the Road in Arbitrating Antitrust Disputes'. *Antitrust*, Volume 19, Issue 1.

- MEHTA Kirtimumar & TIERNO CENTELLA María Luisa (2010), 'EU Settlement Procedure: Public Enforcement Policy Perspective'. In Ehlermann & Marquis (eds), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law*. Oxford and Portland: Hart Publishing.

- MEHTA, Pradeep S. & EVENETT, Simon J. (2006), 'Promoting Competition Around the World: A Diversity of Rationales and Approaches'. In Mehta, Pradeep S, 'Competition Regimes in the World-A Civil Society Report, Book, LVIII + 683, CUTS International, Jaipur.

- MEHTA, Pradeep S. (ed) (2012), 'Evolution of Competition Laws and their Enforcement: A political economy perspective'. London; New York: Routledge.

- MILLER, Frederic P. (2011), 'History of Competition Law'. Mauritius: Alphascript Publishing, p. 2.
- MIYAKAWA, Hiromitsu (2010), 'Japan'. In: Foer, A., Cuneo, J. (ed.). *The International Handbook on Private Enforcement of Competition Law.* UK: Edward Elgar Publishing Limited.

- MOBLEY, Samantha J & DENTON Ross (eds) (2010), 'Global Leniency Manual 2010' Oxford University Press.

- MOBLEY, Samantha J & DENTON Ross (eds) (2011), 'Global Cartels Handbook: Leniency: Policy and Procedure'. Oxford: Oxford University Press.

- MONTI, M., 'Cartels Why and How? Why should we be concerned with cartels and collusive behavior?' Speech delivered to 3rd Nordic Competition Policy Conference, Stockholm, September 2000.

- MOTTA, Massimo & POLO, Michele (2003), 'Leniency Programs and Cartel Prosecution', 21 International Journal of Industrial Organization.

- MOTTA, Massimo (2004), 'Competition Policy: Theory and Practice'. Cambridge: Cambridge University Press.

- MURPHY, Joseph (2011), 'Promoting Compliance with Competition Law: Do compliance and ethics programs have a role to play?'. Paper prepared for the OECD Roundtable on Promoting Compliance with Competition Law.

- MURPHY, Joseph & KOLASKY, William (2012), 'The Role of Anti-Cartel Compliance Programs In Preventing Cartel Behavior'. *Antitrust*, Volume 26, No. 2.

- NAZZINI, Renato (2004A) 'Concurrent Proceedings in Competition Law: Procedure, Evidence and Remedies'. Oxford; New York: Oxford University Press.

- NAZZINI, Renato (2004B), 'International Arbitration and Public Enforcement of Competition Law'. 25(3) *European Competition Law Review*.

- NAZZINI, Renato (2011), 'The Foundations of European Union Competition Law: The Objective and Principles of Article 102'. Oxford; New York: Oxford University Press.

- NISSER, C. & BLANKE, G. (2006), 'Reflections on the Role of the European Commission as Amicus Curiae in International Arbitration Proceedings'. *European Competition Law Review*, Issue 4.

- O'BRIEN Ann (2008), 'Cartel Settlements in the U.S and EU: Similarities, Differences & Remaining Questions'. 13th Annual EU Competition Law and Policy Workshop 5-6 (June 6, 2008).

- O'CONNOR, John T. (1985), 'Copperweld Corporation v. Independence Tube Corporation: The Death of a Doctrine'. 5 *Pace Law Review*.

- ODUDU, Okeoghene (2010), 'The Wider Concerns of Competition Law'. *Oxford Journal of Legal Studies*, Vol. 30, No. 3.

- PAGE, William H. (1980), 'Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury'. 47 *University of Chicago Law Review,* 467.

- PAPADOPOULOS, Anestis S. (2010), 'The International Dimension of EU Competition Law and Policy'. New York: Cambridge University Press.

- PALIM, Mark R.A. (1998), 'The Worldwide Growth of Competition Law: An Empirical Analysis'. *The Antitrust Bulletin*, Vol. XLIII, Nº 1.

- PATERNOSTER, Raymond & SIMPSON, Sally (1996), 'Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime'. *Law & Society Review,* Volume 30, No. 3.

- POLINSKY, Mitchell A. (1980), 'Private versus Public Enforcement of Fines'. 9 *Journal of Legal Studies.* 105.

- POLINSKY, A. Mitchell & SHAVELL, Steven (1984), 'The Optimal Use of Fines and Imprisonment', 24 *Journal of Public Economics*.

- POLINSKY, A. Mitchell & SHAVELL, Steven (2007), 'The Theory of Public Enforcement of the Law'. In: Polinsky & Shavell (eds) *Handbook of Law and Economics*, Volume 1. Amsterdam: Esevier.

- POSNER, Richard A. (2001), 'Antitrust Law'. Second Edition. Chicago; London: The University of Chicago Press.

- POSNER, Richard A. (2004), 'Federalism and the Enforcement of Antitrust Laws by State Attorneys General'. *The Georgetown Journal of Law & Public Policy*, Vol. 2:5.

- POUDRET, Jean Francois & BESSON, Sebastien (2007), 'Comparative Law of International Arbitration'. 2nd Edition. London: Sweet & Maxwell.

- PRICHARD, J. Robert, S. & TREBILCOCK, Michael, J. (1978), 'Class Action and Private Law Enforcement'. *University of New Brunswick Law Journal.* Volume 27.

- RADICATI di BROZOLO, Luca (2004), 'Antitrust: A Paradigm of the Relations between Mandatory Rules and Arbitration: A Fresh Look at the 'Second Look'. *International Arbitration Law Review,* 23.

- RADICATI di BROZOLO, Luca (2011A), 'Arbitration and Competition Law: The Position of the Courts and of Arbitrators'. *Arbitration International*, Volume 27, No. 1.

- RADICATI di BROZOLO, Luca (2011B), 'Competition Law and Arbitration'. *Competition Law International*, 7.

- REES, Martin (ed) (2011), 'Cartel Enforcement Worldwide'. London: CMP Publishing.

- RILEY, Anne & BLOOM, Margaret (2011), 'Antitrust Compliance Programmes – Can companies and antitrust agencies do more?'. *Competition Law Journal,* Volume 10, Issue 1.

- ROACH, Kent & TREBILCOCK, Michael J. (1996), 'Private Enforcement of Competition Laws'. *Osgoode Hall Law Journal*. Vol. 34, No. 3.

- RODRÍGUEZ IGLESIAS, G. C., & ORTIZ BLANCO, L. (eds) (2010), 'The judicial Application of Competition Law'. Proceedings of the FIDE XXIV Congress Madrid 2010 Vol. 2. Madrid: Servicio de Publicaciones de la Facultad de Derecho de la Universidad Complutense de Madrid.

- ROSOCHOWICZ, P.H. (2004), 'The Appropriateness of Criminal Sanctions in the Enforcement of Competition Law'. *European Competition Law Review,* 25, No 12.

- ROUSSEAU, Jean-Jacques (1997), 'The Social Contract and other later political writings'. Victor Gourevitch (ed). Cambridge: Cambridge University Press.

- ROUSSOS, Antonis (2005), 'Private Antitrust Enforcement in Arbitration Proceedings: Theory and practice'. Working paper, *Workshop on Remedies and Sanctions in Competition Policy: Economic and Legal Implications of the Tendency to Criminalize Antitrust Enforcement in the EU Member States,* Faculty of Economics and Econometrics, University of Amsterdam, 17 February 2005.

- RUBINFELD, Daniel L. (2001), 'Antitrust Policy'. *International Encyclopedia of the Social and Behavioral Sciences*, Vol. 1: 553-60.

- RUBINFELD, Daniel (2006), 'An Empirical Perspective on Legal Process: Should Europe Introduce Private Antitrust Enforcement?'. In: NOBEL & GETS (eds), *New Frontiers of Law and Economics.* Zurich: Schulthess.

- RÜGGEBERG, Jacob & SCHINKEL, Maarten Pieter (2006), 'Consolidating Antitrust Damages in Europe: A Proposal for Standing in line with Efficient Private Enforcement'. Amsterdam Center for Law & Economics, Working Paper No. 2006-04.

- SAMÀ, Danilo (2008), 'Competition Law, Cartel Enforcement & Leniency Program'. MPRA Paper No. 14104.

- SEGAL, Ilya R. & WHINSTON, Michael D. (2007), 'Public vs Private Enforcement of Antitrust Law: A survey'. 28 *European Competition Law Review*.

- SCHWARTZ, Louis B. (1979), 'Justice and other non-economic goals of antitrust'. 127 *University of Pennsylvania Law Review*.

- SHAVELL, Steven (2003), 'Economic Analysis of the General Structure of the Law'. National Bureau of Economic Research, Working Paper 9699.

- SHAVELL, Steven (2004), 'Foundations of Economic Analysis of Law'. Cambridge: Harvard University Press.

- SHUGHART II, William F. (1990), 'Private Antitrust Enforcement: Compensation, Deterrence, or Extortion?'. *Regulation,* Vol. 13, No. 3.

- SILBEY, Susan S. (2009), 'Rotten Apples or a Rotting Barrel'. *MIT Faculty Newsletter,* Volume XXI, No. 5.

- SOKOL, Daniel D. (2010), 'Designing Antitrust Agencies for More Effective Outcomes: What Antitrust Can Learn from Restaurant Guides'. 41 *Loyola University Chicago Law Journal*.

- SOKOL, Daniel D. (2011), 'Detection and Compliance in Cartel Policy'. *CPI Antitrust Chronicle*, Volume 2.

- SMITH, V., MATON, A., CAMPBELL, S. (2010), "England and Wales". In: Foer A. & Cuneo J. (eds) *The International Handbook on Private Enforcement of Competition Law*.

- SPAGNOLO, Giancarlo (2004), 'Divide et Impera: Optimal Leniency Programmes'. C.E.P.R. Discussion Paper No. 4840.

- STEPHAN, Andreas (2009A), 'Hear No Evil, See No Evil: Why Antitrust Compliance Programmes May Be Ineffective at Preventing Cartels'. CCP Working Paper 09-09, July 2009.

- STEPHAN, Andreas (2009B) 'The Direct Settlement of EC Cartel Cases'. *International and Comparative Law Quarterly,* Vol. 58.

- STEUER, Richard M. (2012), 'The Simplicity of Antitrust Law'. *U. of Pennsylvania Journal of Business Law*, Vol. 14:2.

- STIGLER, George T. (1970), 'The Optimum Enforcement of Laws'. *Journal of Political Economy*, Vol. 78, No. 3.

- STIGLER, George J. (1985), 'The Origin of the Sherman Act'. 14 *Journal of Legal Studies*.

- STYLOPOULOS, Epameinondas (2009), 'Powers and Duties of Arbitrators in the Application of Competition Law: An EC approach in the light of recent developments'. 30(3) *European Competition Law Review*.

- TAKIGAWA, Toshiaki (2009), 'Competition Law and Policy of Japan'. *The Antitrust Bulletin*. Vol. 54, No 3.

- TREBILCOCK Michael J. & IACOBUCCI Edward M. (2002), 'Designing Competition Law Institutions'. *World Competition*, Vol. 25.

- TREBILCOCK Michael J. & IACOBUCCI Edward M. (2010), 'Designing Competition Law Institutions: Values, Structure and Mandate'. 41 *Loyola University Chicago Law Journal* 455.

- TYLER, Tom R. (1990), 'Why People Obey the Law'. New Haven and London: Yale University Press.

- VAN DE GRONDEN, Johan W. & DE VRIES, Sybe A. (2006), 'Independent competition authorities in the EU'. *Ultrecht Law Review,* Volume 2, Issue 1.

- VAN GERVEN, Walter (2005), 'Private Enforcement of EC Competition Rules'. Paper presented at the Joint IBA and European Commission Conference on Antitrust Reform in Europe: A Year in Practice (Brussels, 9-11 March 2005).

- VAN LEYENHORST, Max & VAN DEN NIEUWEENDIJK, Isabelle (2007), 'Characterization of Competition Law as public policy'. In: Zuberbühler & Oetiker (eds), *Practical Aspects of Arbitrating EC Competition Law*. Zürich: Schulthess.

- VELJANOVSKI, C. (2009), 'European Cartel Prosecution and Fines, 1998-2009: A Statistical Analysis of Fines Under the 1998 Penalty Guidelines' [online]. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016014

- WALLER, Spencer W., & MUENTE, Rafael (1989), 'Competition Law for Developing Countries: A Proposal for an Antitrust Regime in Peru'. *Case W. RES. J. INT'L L.* Vol. 21:159.

- WALLER, Spencer W. (2003), 'The Incoherence of Punishment in Antitrust'. 78 *Chicago Kent Law Review*, 207.

- WALLER, Spencer W. (2010), 'Designing Better Institutions to Enforce Competition Law: A Symposium Introduction'. *Loyola University Chicago Law Journal*, Vol. 41.

- WANG, Xiaoye (2009), 'The New Chinese Anti-Monopoly Law: A Survey of a Work in Progress'. *The Antitrust Bulletin*, Vol. 54, No. 3.

- WERDEN, Gregory (2009), 'Sanctioning Cartel Activity: Let the Punishment Fit the Crime'. 5 *European Competition Journal* 1.

- WHEELER, Malcom E. (1973), 'Antitrust Treble-Damage Actions: Do They Work?'. 61 *California Law Review*.

- WHISH Richard & BAILEY David (2012), 'Competition Law'. Seventh Edition. Oxford: Oxford University Press.

- WILBERFORCE, Richard Orme (1966), 'The Law of Restrictive Trade Practices and Monopolies'. 2nd Edition. London: Sweet and Maxwell.

- WILS, Wouter P.J. (2001), 'Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings But Also Individual Penalties, In Particular Imprisonment?'. Paper presented at the 6th Competition Law and Policy Workshop at the European University Institute, Florence, 1-2 June 2001.

- WILS, Wouter P.J. (2002), 'The Optimal Enforcement of EC Antitrust Law: Essays in law & economics'. The Hague: Kluwer Law International.

- WILS, Wouter P.J. (2003), 'Should Private Antitrust Enforcement Be Encouraged in Europe?' *World Competition,* Vol. 26, Issue 3, p. 483.

- WILS, Wouter, P.J. (2004A), 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis'. *World Competition.* Volume 27, No. 2.

- WILS, Wouter P.J. (2004B), 'The Reform of Competition Law Enforcement: Will it Work?'. In: Cahill (ed), *The Modernisation of EU Competition Law Enforcement in the European Union-FIDE 2004 National Reports*. Cambridge: Cambridge University Press.

- WILS, Wouter P.J. (2005A), 'Is Criminalization of EU Competition Law the Answer?'. *World Competition,* Volume 28, No. 2.

- WILS, Wouter, P. J. (2005B), 'Principles of European Antitrust Enforcement'. Oxford: Hart Publishing, 2005.

- WILS, Wouter P.J. (2006A), 'Optimal Antitrust Fines: Theory and Practice'. *World Competition.* Volume 29, No. 2.

- WILS, Wouter P.J. (2006B), 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003'. *World Competition*, Volume 29, No. 3.

- WILS, Wouter P.J. (2007), 'Leniency in Antitrust Enforcement: Theory and Practice'. 30 *World Competition*.

- WILS, Wouter, P. J. (2008A), 'Efficiency and Justice in European Antitrust Enforcement'. Oxford: Hart Publishing.

- WILS, Wouter P.J. (2008B), 'The Use of Settlement in Public Antitrust Enforcement: Objectives and Principles'. *World Competition,* Vol. 3, No. 3.

- WILS, Wouter P.J. (2009), 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages'. *World Competition.* Volume 32, No. 1.

- WILS Wouter P.J. (2011), 'Discretion and Prioritisation in Public Antitrust Enforcement, in particular EU antitrust enforcement', World Competition, Volume 34, No. 3.

- WILS, Wouter P.J. (2013), 'Antitrust Compliance Programmes & Optimal Antitrust Enforcement'. *Journal of Antitrust Enforcement*, Volume 1, No. 1.

- WITHROW, J.R. & LARM, R.P. (1976), 'The "Big" Antitrust Case: 25 Years of Sisyphean Labor'. 62 *Cornell Law Review,* 1.

- YANG, Meong-Cho (2009), 'Competition Law and Policy of the Republic of Korea'. *The Antitrust Bulletin.* Volume 54, No.3.

- ZINGALES, Nicolo (2008), 'European and American Leniency Programmes: Two Models Towards Convergence?'. *Competition Law Review*, Volume 5, Issue 1.

Reports, Guidelines and Studies

AUSTRALIA

- ACCC, *Merger Guidelines*, 2008
- ACCC, *Leniency Policy for Cartel Conduct*, 2003.
- ACCC, *Leniency Policy for Cartel Conduct*, 2005.
- ACCC, *Corporate Trade Practices and Compliance Programmes*, 2005.

BELGIUM

- Belgian Competition Authority, *Leniency Notice,* 2007.

BULGARIA

- Commission for the Protection of Competition, *Methodology on Investigation and Definition of the Market Position of undertaking in the Relevant Market*, 1998.

BRAZIL

- Conselho Administrativo de Defesa Econômica, Regulation 01/2012.

CANADA

- Competition Bureau Canada, *Bulletin-Leniency Program*, 2010.
- Competition Bureau Canada, *Bulletin–Corporate Compliance Programs*, 2010.
- Competition Bureau Canada, *Leniency Program: Frequently Asked Questions*, 2010.

CHILE

- Fiscalía Nacional Económica, *Programas de Cumplimiento de la Normativa de Libre Competencia*, Junio 2012.

CZECH REPUBLIC

- Office for the Protection of Competition of the Czech Republic, *Information Bulletin* 2/2004.
- Czech Office for the Protection of Competition, *Leniency Programme,* 2012.
- Czech Office for the Protection of Competition, *Leniency Programme*, 2013.

EGYPT

- The Executive Regulations for the Law concerning the Protection of Competition and Prohibition of Monopolistic Practices, Prime Ministerial Decree No. 1316 of 2005.

EUROPEAN COMPETITION NETWORK

- ECN, *Model Leniency Programme: Report on Assessment of the State of Convergence,* 2010

- ECN, *Explanatory Notes of the ECN Model Leniency Programme*, 2012.
- ECN, *Model Leniency Programme,* 2012.
- ECN, *Protection of leniency material in the context of civil damages actions*. Resolution of the meeting of Heads of the European Competition Authorities of 23 May 2012.

EUROPEAN UNION

- European Commission, *Notice on immunity from fines and reduction of fines in cartel cases*, 2002.
- European Commission, *Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC,* 2004.
- European Commission, *Notice on Cooperation within the Network of Competition Authorities,* 2004.
- European Commission, *Notice on the handling of complaints by the Commission under Article 81 and 82 of the EC Treaty,* 2004.
- European Commission, *Green Paper, Promoting a European Framework for Corporate Social Responsibility*, 2001.
- European Commission, *Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, 2005.
- European Commission, *Staff Working Paper, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, 2005.
- European Commission, *Finning Guidelines*, 2006.
- European Commission, *Notice on Immunity from fines and reduction of fines in cartel cases*, 2006.
- European Commission, *Antitrust: Commission introduces settlement procedure for cartels-frequently asked questions*. Brussels, 30th June 2008.
- European Commission, *White Paper on Damages Actions for Breach of the EC antitrust rules*, 2008.
- European Commission, *Staff Working Paper, Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules,* 2008.
- European Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Firms*, 2009.
- European Commission, *Compliance Matters: What companies can do better to respect EU competition rules*, 2012.
- European Commission, *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, 2013.
- Ashurst, *Study on the Conditions of Claims for Damages in Case of the Violation of EC Competition Rules*, 2004.
- Ashurst, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: Analysis of Economic Models for the Calculation of Damages*, 2004.
- Oxera Consulting Ltd., *Quantifying Antitrust Damages: Towards Non-binding Guidance for Courts. Study Prepared for the European Commission*, 2009.

FRANCE

- National Bar Rules, 2007.
- Autorité de la Concurrence, *Leniency Notice,* 2009.
- Autorité de la Concurrence, *Procedure Guidance of the French Competition Authority on the French Leniency Programme,* 2009.
- Autorité de la Concurrence, *Antitrust Compliance and Compliance Programmes: Corporate Tools for Competing Safely in the Marketplace*, 2012.

GERMANY

- Bundeskartellamt, *Notice No. 9/2006 on the Immunity from and Reduction of Fines in Cartel Cases –Leniency Programme*, 7 March 2006.

GREECE

- Hellenic Competition Commission, *Operation and Administration Regulation.*
- Hellenic Competition Commission, *Powers & Operation of the Hellenic Competition Commission*, 2006.
- Hellenic Competition Commission, *Leniency Programme,* 2011.

INDIA

- Competition Commission of India*, Lesser Penalty Regulations of the Competition Commission of India,* 2009.
- Competition Commission of India, *Competition Compliance Programme for Enterprises: A Suggested Framework for Compliance of the Competition Act, 2002 by Enterprises*, 2011.
- Bar Council of India Rules, 2009.
- Lesser Penalty Regulations of the Competition Commission of India, 2009.

INTERNATIONAL COMPETITION NETWORK

- ICN, *The Challenges Facing Competition Authorities in Developing Countries: A Business Perspective*, 2003.
- ICN, *Enforcement Experience in Regulated Sectors*, 2004.
- ICN, *Interrelations between Antitrust and Regulatory Authorities*, 2004.
- ICN, *Competition and the Judiciary: A report on a survey on the relationship between Competition Authorities and the Judiciary*, 2006.
- ICN, *Lessons to Be Learnt From the Experiences of Young Competition Agencies*, 2006.
- ICN, *Competition and the Judiciary*, 2007.
- ICN, *Interaction of Public and Private Enforcement in Cartel Cases*, 2007.
- ICN, *Agency Effectiveness Project*, Kyoto, Japan, 2008.
- ICN*, Cartel Settlements*, 2008.
- ICN, *Anti-Cartel Enforcement Manual, Chapter 2: Drafting and implementing an effective leniency policy*, May 2009.
- ICN, *Report on the Agency Effectiveness Project*, Zurich, 2009.
- ICN, *Report on the Agency Effectiveness Project: Second Phase-Effectiveness of Decisions*, 2009.
- ICN, *Trends and Developments in Cartel Enforcement,* Turkey, 2010.

IRELAND

- Competition Authority*, Cartel Immunity Programme*, 2001.
- Competition Authority, *Notice in respect of the review of non-notifiable mergers and acquisition*, 2003.
- Competition Authority, *Project Selection and Prioritization Principles*, 2011.

ITALY

- Autorità Garante della Concorrenza e del Mercato, *Comunicazione sulla non imposizione e sulla riduzione delle sanzioni ai sensi dell'articolo 1 della legge 10 ottobre, N. 287*, March 2013.

JAPAN

- Japan Fair Trade Commission, *Rules on Administrative Investigations by the Fair Trade Commission*, 2005.
- Japan Fair Trade Commission, *Rules on Compulsory Investigation of Criminal Cases by the Fair Trade Commission*, 2005.
- Japan Fair Trade Commission, *Rules on Applications for Approval, Reporting, Notification, etc. Pursuant to the Provisions of Article 9 to 16 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade*, 2011.
- Japan Fair Trade Commission, *Survey on Compliance Efforts with the Antimonopoly Act (Summary)*, November 28, 2012.

KOREA

- Korea Fair Commission, *Cartel Leniency Program in Korea*, 2009.
- Korea Fair Trade Commission, *Notification on Implementation of Cartel Leniency Program*, 2009.
- Korea Fair Trade Commission, *Guidelines of Reviewing Undue Exercise of Intellectual Property Rights,* 2010.
- Korea Fair Trade Commission, *Guidelines for the Abuse of Market Dominant Position*, 2013.

NEW ZEALAND

- Commerce Commission, *Cartel Leniency Policy Immunity Agreement Conditional Grant of Immunity for an Individual*, June 2010.
- Commerce Commission, *Cartel Leniency Policy Immunity Agreement Conditional Grant of Immunity for a Company*, June 2010.
- Commerce Commission, *Cartel Leniency Policy and Process Guidelines*, 12 April 2011
- Commerce Commission, *Merger and Acquisitions Guidelines*, July 2013.
- Commerce Commission, *Enforcement Response Guidelines*, October 2013.

OECD

- OECD, *Glossary of Industrial Organization Economics and Competition Law,* 1993
- OECD, *Judicial Enforcement of Competition Law*, 1996.
- OECD, *Recommendation of the Council concerning Effective Action Against Hard Core Cartels*, 1998.

- OECD, *Relationship between regulators and Competition Authorities*, 1998.
- OECD, *Using Leniency to Fight Hard Core Cartels, September,* 2001.
- OECD, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes,* 2002.
- OECD, *Capacity Building for Effective Competition Policy in Developing and Transitioning Economies*, 2003.
- OECD, *Cartel Sanctions against Individuals*, 2003.
- OECD, *Merger Remedies*, 2003.
- OECD, *The objectives of Competition Law and Policy and the Optimal Design of a Competition Agency*, 2003.
- OECD, *Cartel Sanctions against Individuals*, 2004.
- OECD, *Merger Remedies*, 2005.
- OECD, *Competition Law and Policy in Latin America: Peer reviews of Argentina, Brazil, Chile, Mexico and Peru*, 2006.
- OECD, *Plea Bargaining*, 2006.
- OECD, *Private Remedies*, 2007.
- OECD, *Experience with Direct Settlement in Cartel Cases*, 2008.
- OECD, *Arbitration and Competition*, 2010.
- OECD, *Excessive Prices,* 2011.
- OECD, *Guidelines for Multinational Enterprise*, 2011 Edition.
- OECD, *Promoting Compliance with Competition Law*, 2011.

LITHUANIA

- Minister of Justice Recommendations on the Maximum Amounts of Attorney Fees, 2004.

PAKISTAN

- Competition Commission of Pakistan, *Guidelines on Imposition of Financial Penalties*, 2009.
- Competition Commission of Pakistan, *Voluntary Competition Compliance Code: Statement of Principles and Policy*, 2010.

PERU

- INDECOPI, *Directiva Nº 001-2003-INDECOPI/DIR sobre Normas para la Intervención de Asociaciones de Consumidores en Procedimientos Administrativos ante la Comisión de Protección al Consumidor y demás Organismos Funcionales del Indecopi,* 2003.

SINGAPORE

- Competition Commission of Singapore, *Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases*, 2009.
- Competition Commission of Singapore, *Better Business with Competition Compliance Programme: How competition compliance can help your business*, 2011.

SPAIN

- Comisión Nacional de la Competencia, *Comunicación sobre el Programa de Clemencia*, 2013

TURKEY

- Minimum Tariff Schedule of the Act on Attorneyship, 2001.
- Turkish Competition Authority, *Competition Compliance Program,* 2011.

UNITED KINGDOM

- Civil Procedure Rules, 1998.
- Competition Appeal Tribunal Rules, 2003.
- Competition Commission, *A Competition Regime for Growth: A Consultation on Options for Reform (Response by the Competition Commission)*, 2011.
- OFT, *Enforcement Guideline,* 2004
- OFT, *Guidelines,* OFT 442 (Modernization), December 2004.
- OFT, *Guidelines on the Abuse of a dominant position*, 2004.
- OFT, *Competition Prioritisation Framework,* 2006
- OFT, *The Deterrent Effect of Competition Enforcement by the OFT: A report prepared for the OFT by Deloitte*, November 2007.
- OFT, *Leniency and no-action: OFT's guidance note on the handling of applications*, 2008
- OFT, *Prioritisation Principles*, 2008.
- OFT, *Drivers of Compliance and Non-compliance with Competition Law: An OFT Report,* May 2010.
- OFT, *How Your Business Can Achieve Compliance: Guidance*, October 2010.
- OFT, *Guidance as to the Appropriate Amount of the Penalty*, 2012.
- OFT, *A competition Regime for Growth: a consultation on options for reform (The OFT's response to the Government's consultation)*, 2011.
- OFT, *Applications for leniency and no-action in cartel cases: OFT's detailed guidance on the principles and process*, 2013.

UNITED NATIONS

- UNCTAD, *The United Nations Set of Principles and Rules on Competition*, Geneva, 2000.
- UNCTAD, *Best Practices for defining respective competences and settling of cases, which involve joint action of competition authorities and regulatory bodies*, Geneva, 19 August 2004.
- UNCTAD, *Guidebook on Competition Systems*, 2007.
- UNCTAD, *Appropriate Sanctions and Remedies*, 2010.
- UNCTAD, *Model Law on Competition*, 2010.
- UNCTAD, *Model Law on Competition: Substantive Possible Elements for a Competition law, Commentaries and Alternative approaches in Existing Legislation*, 2010.
- UNCTAD, *The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries*, 2010.

UNITED STATES

- U.S. Department of Justice*, Antitrust Division Manual*, Fourth Edition.
- U.S. Department of Justice, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters.*
- U.S. Department of Justice, *Corporate Leniency Policy*, 1978
- U.S. Department of Justice, *Corporate Leniency Policy,* 1993
- U.S. Department of Justice, *Individual Leniency Policy,* 1994.
- U.S. Department of Justice, *Antitrust Division Grand Jury Practice Manual,* 2011.
- U.S. Department of Justice and Federal Trade Commission*, Revised Merger Guidelines,* 1992.
- U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations,* 1995.
- U.S Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, 2010.
- ABA Model Rules of Professional Conduct, 2013.
- American Arbitration Association's Commercial Arbitration Rules & Mediation Procedures, 2009,
- Federal Rules of Criminal Procedure, 2010.
- Federal Rules of Civil Procedure, 2010.
- Federal Rules of Evidence, 2010.
- The Hoover Commission Report on Organization of the Executive Branch of the Government, 'Legal Services and Procedure', 1955.
- United States Sentencing Commission, *Guidelines Manual*, 2012.

WORLD BANK

- World Bank, *Voluntary Disclosure Program: Guidelines for participants*, 2011.