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INVESTIGATIVE POWER IN PRACTICE

Summaries of contributions

-- Session IV --

29-30 November 2018

This document reproduces summaries of contributions submitted for Session IV of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at oe.cd/invpw.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

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Investigative Powers in Practice

-- Summaries of contributions --

Abstract

This document contains summaries of the various written contributions received for the discussion on "Investigative Powers in Practice" held during the 17th meeting of the Global Forum on Competition in Paris, France (29-30 November 2018, Session IV). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

Albania

Albanian Competition Authority (ACA), is a public independent institution that function based on the Law no. 9121 dated 28.07.2003 “On competition Protection”-amended. The ACA mission is “Assuring a free and effective competition in the market through the implementation of the “Competition Protection” law, to prevent, detect and prohibit anti-competitive firms’ conduct: prohibited agreement, abuse of dominant position, control on mergers and acquisitions; to promote competition through advocacy; to implement the legal framework of an independent institution in the Republic of Albania. The ACA is composed by the Competition Commission (CC) elected by the Parliament that acts as the decision making body, and the Secretariat that is the executive body.

The competition law applies to the “undertaking” and to “association of undertakings". Based on the competition law, the ACA can request for all kind of relevant data and information (RFI) from undertakings and third parties (public entities) for all its procedures.

This information can be collected in written from via an official request for information letter, through interviews, meetings, questionnaires or inspections. The ACA can request data from the undertakings under investigation or inspect through down raids and IT forensics to their premises. The ACA investigators during down raids can seizure the documents and evidences.

The data collected are administrated as foreseen to the internal regulation “On Investigative procedures” and regulation “On administration of electronic data during inspections”. The ACA should keep confidentiality and commercial secrets of the collected data.

In cases when the data provided to the authority is incorrect, incomplete or misleading, undertakings refuse to answer any questions on facts, or delay the deadline for providing the data, fines for not serious infringement may apply. The amount of fines should not exceed 1% of undertakings aggregate turnover in the preceding business year.

In the three success stories presented in the paper, for each of the investigative procedures: sector inquiry in the banking sector, preliminary investigation in the market of movie screenings in cinema chains and in depth investigation in bid-rigging procedure, it is described the RFI procedure followed by the ACA.

Some final remarks are evidenced related to the main challenges of RFI, which is the identification of the sources of the data, and collaboration with public institutions especially in submission on time for the RFI.

Australia

Breakout session 1: Unannounced Inspections in the Digital Age

This paper discusses challenges the Australian Competition and Consumer Commission faces in exercising its investigative powers, arising from the widespread digitisation of information. It also demonstrates through case study examples how the ACCC continues to adapt its approach to obtaining that information.

Electronic searches create their own challenges, some of which can be dealt with in the pre-planning stage, while others, like the handling of legally privileged documents, require different methods to physical document management.

The ACCC has found that certain preparations make unannounced inspections involving digital material more efficient and effective. The submission provides a case study of how the ACCC prepared for and conducted an unannounced inspection into an alleged cartel. The case study discusses the ACCC's use of an IT forensic service provider and challenges faced on the day of the raid.

The ACCC has the power to access historical telecommunications data about individuals held by telecommunications carriers in Australia.

The submission provides a case study of how call charge records (CCR) were obtained by the ACCC for a construction industry cartel investigation. This case study describes how the ACCC was able to use the CCR data to identify instances of potential meetings between persons of interest, providing a basis and justification for using additional investigative tools.

Breakout session 2 – Requests for Information – Limits and Effectiveness

The Australian Competition and Consumer Commission's (ACCC) submission focuses on the tools it uses in requesting information from parties, both on a voluntary and compulsory basis.

This submission examines the ACCC's approach when obtaining information for investigations and market studies, illustrated by three case studies:

ACCC v Coles Supermarkets Australia Pty Ltd

- In May 2014, the ACCC took action against Coles for engaging in unconscionable conduct by taking advantage of its superior bargaining position by demanding money from suppliers that it was not lawfully entitled to. The case study examines the challenges of obtaining information from third parties who are affected by unfair trading conduct but fear commercial retribution from coming forward with information. The case study describes how compulsory information powers were used to overcome this issue.

Dairy Inquiry

- The ACCC was directed to conduct an inquiry into the competitiveness of prices, trading practices and the supply chain in the Australian dairy industry. This case

study examines the limitations and challenges of using inquiry-specific compulsory information powers, the ACCC's approach to managing confidentiality claims in a public inquiry, and how it decided to disclose confidential information where this was deemed to be necessary in the public interest.

ACCC v Informed Sources

- In August 2014, the ACCC took action against Informed Sources for engaging in anti-competitive conduct by creating a system whereby petrol retailers could communicate with each other about their prices. The ACCC alleged this arrangement had the effect or likely effect of substantially lessening competition in markets for the retail supply of petrol in Melbourne. This case study focuses on the challenges experienced and methods used by the ACCC to manage large amounts of data to compile the evidence necessary to demonstrate the competitive effects of the conduct.

Austria

The FCA is entitled to inspect and examine any and all business documents during searches. It is entitled to inspect both physical documents (paper documents, notebooks etc.) and electronically stored documents. The search right includes all documents legally and economically connected to the suspected infringement.

The Austrian authority has invested meaningful resources in the past years in building up its forensic know-how, an expert team and the necessary technical equipment. In addition, legislative changes have helped dealing with the challenges involved. Besides, a number of legal questions were litigated and hence a broad body of **jurisprudence** developed.

As the Austrian FCA started to carry out a considerable number of dawn raids in 2011, practical problems with respect to dawn raids became evident. They were solved by changes in the Cartel and Competition Act 2013 and 2017. This was important to help the considerable amount of dawn raids and the enforcement as such to be efficient.

With regard to gathering electronic data during dawn raids also two amendments came into force in 2017: Sanctions can be imposed on undertakings, if in the course of a dawn raid, they fail to grant access to electronic data that is accessible from the premises concerned. The fines can amount to up to 5% of the average daily turnover for each day of delay. Also it was clarified that the authority can take any data which is accessible from the premises, no matter where the data is stored.

In October 2017 the FCA published a guidance paper on its dawn raid practice to increase transparency and legal security for addressees as well as to advocate compliance.[1] This guideline specifies the procedure of the dawn raids itself as well as the rights and obligations of the company, their staff and the members of the FCA. It is a summary of the legal framework and the practical handling with a special focus on securing electronic data.

[1] https://www.bwb.gv.at/fileadmin/user_upload/Englische_PDFs/Standpoints%20and%20Handbooks/Guidance_on_dawn_raids_final.pdf.

*Botswana**

RFI is one of the widely used investigative powers. In order to get relevant information for an investigation, the Authority invites the parties concerned to submit information (hard or soft copies) which may assist the determination of the investigation. This is stored in a secure strong room.

In most, if not all Unilateral conduct cases, though there are legislation challenges for collecting information from third parties, in practice this has not been felt that much as parties comply and cooperate to submit information requested for the investigation. The same cannot be said for merger transactions. For cartel cases, information is normally collected through dawn raids after securing a search warrant from the magistrate court.

The Authority uses the Act to request for information from the parties investigated. However, information from the third parties is voluntary (even with merger transactions). However when the third party is found to be distracting the investigation by refusing to submit relevant information needed, such can be reported to the Botswana Police to deal with.

Data management is also a challenge, some of the information that is received may be voluminous and needs sorting; some would not be reliable or outdated. The large volumes of data is categorised in order of importance as well as dates and processed in three stages: (1) validation or initial data analysis, (2) description, and (3) evaluation.

Sworn witness statements collected are done manual and often witnesses have to be transported to Botswana Police station for taking oath. Time and distance is a challenge.

The Authority has in place, Memoranda of Understanding with other regulatory bodies. This assists the Authority to verify information submitted by enterprises after a request.

Brazil[2]

After the enactment of the new Brazilian Competition Law, Law 12.529/2011, CADE has established a favorable environment for the development of cartel enforcement in Brazil.

This environment was the result of a coordinated effort to develop a system towards the deterrence of cartels, involving (i) the implementation of new and best practices in the leniency program; (ii) an investment in investigation techniques and information technologies tools to improve *ex officio* investigations and intelligence; (iii) the development of a settlement system focused in collaboration with the investigations; and (iv) the improvement of cooperation with domestic agents to conduct dawn raids.

These efforts are considered a "virtuous cycle" of the enforcement – the higher the risk of detection and conviction, the higher the awareness and the compliance. Notwithstanding these developments, CADE is aware that to ensure an effective deterrence of cartel, it must be as dynamic as the dynamism of the cartelists, evolving and adapting its practices to grant detection and conviction.

[2] This written contribution was prepared by Mr. Diogo Thomsom de Andrade, Deputy Superintendent of CADE, and Mr. Felipe Leitão Valadares Roquete, Head of the Inteligence Unit of CADE.

Chile (FNE)

In order to effectively investigate and prosecute anticompetitive conduct, article 39 h) of Law Decree No. 211 of 1973 ("**Chilean Competition Act**" or "**DL 211**") gives The National Economic Prosecutor's office ("**FNE**") broad powers to request information and documents. The FNE can request information from private parties and public entities; to those under investigation or to third parties; and irrespective of whether the requested information is sensitive or confidential.

To balance this broad power, our legal framework establishes a specific procedure to oppose RFIs. If requested parties the RFI as harmful to their interests, or those of third parties, this procedure allows them to request the Tribunal for the Defense of Free Competition ("**Competition Court**" or "**TDLC**") to declare the RFI -totally or partially- null and void. In our presentation, we explain cases where oppositions were filed and accepted -or partially accepted- by the Competition Court and the reach and limits set to this power on its Decisions.

Furthermore, the FNE has encountered several challenges and faced significant delays to get parties to comply fully with requests for information. The lack of specific sanctions for non-compliance to a RFI conveyed incentives for strategic behavior and negatively affect investigations. Hence, a new regulatory framework, introduced by Law No 20.945 on August of 2016, amended the Chilean Competition Act introducing several changes and establishing sanctions for whoever does not promptly respond to the request of information from the FNE or does it untruthfully. Under this new regulation, financial penalties can be imposed and a new criminal felony -with a maximum of 3 years prison sentence- can be punished. Our contribution describes a recent case in which the Competition Court imposed fines to a trade association for not complying with a RFI.

Finally, we address some practical challenges that the FNE has experienced exercising its power to request information, such as the use of information from separate and previous investigations.

*Croatia**

The CCA is empowered to request, in writing, from the parties to the proceedings or other legal or natural persons, professional associations or economic interest groups or associations of undertakings, consumers associations, public administration authorities and local regional self-government units to submit all necessary information in writing, or to make oral statements in respect of all relevant data and documentation.

The written requests sent by the CCA shall contain the legal basis, the subject and the purpose of the request, the time limit for its implementation and the penalty clause in case the request in question should be disobeyed by the parties to the proceedings or other legal or natural persons.

Where a party to the proceedings or any legal or natural person fail to act in compliance with the request of the CCA, the Agency shall in the assessment of the facts of the case take into account the significance of non-compliance with its request and shall carry out the proceedings establishing the infringement of the provisions of the Competition Act and it shall by means of a conclusion initiate a proceeding relating to establishing the grounds for the imposition of fines, it shall communicate a Statement of Objections and a notice of hearing to the party concerned, after which it shall by means of a decision establish whether an infringement of Competition Act has been committed and if so, impose a fine provided for the infringement concerned in compliance with Competition Act.

A fine not exceeding 1 % of the total turnover in the last year for which financial statements have been completed shall be imposed on an undertaking party to the proceedings where it fails to act in compliance with the request of the CCA. On an undertaking who is not a party to the proceedings a fine in the amount ranging from HRK 10 000 to 100 000 (approx. EUR 1 345 to 13 455) shall be imposed.

Where the data and documentation are covered with the obligation of secrecy, the undertakings and other legal and natural persons who submit these data and documentation to the Agency shall in their writing identify information that would be considered confidential and provide necessary argumentation. They also shall submit to the Agency a copy of business documentation which does not contain business secrets.

*Dominican Republic**

In order to determine that the actions of companies are legal, information is needed. For this reason, the regulations grant to the government agencies exercising oversight and investigation faculties, the power to request information from individuals. This power to request information is reinforced, in most cases, by imposing the companies to collaborate during the investigation procedure, through the delivery of the information at their disposal, whose non-compliance could lead to the imposition of coercive fines.

Regarding the Dominican experience in relation to the formulation of requirements for information to individuals we must say that it has been effective, because it has allowed access to first-hand information, from different sources, which has facilitated the characterization of the markets under investigation, while allowing to analyse documents and information of a factual and economic nature crucial for the instruction of the instructional procedures.

With the experience obtained by the Executive Directorate of PRO-COMPETENCIA in the investigation procedures initiated since the entry of the Competition Law, last year 2017, the information requirements they have been adapted for the purpose of making the information delivery more efficient and transparent, as well as to ensure that said delivery is made in accordance with the presentation parameters required by the Executive Directorate to facilitate the effective processing of the information received.

Considering the importance of information, before the entry into operation of the Competition Law, it was important for PRO-COMPETENCIA to make transparent to the economic agents the treatment of the confidential information that would be granted to the evidence gathered during the investigations.

Another positive aspect of the information requirements is that they allow the institution to access relevant information without having to execute other evidentiary proceedings such as inspections and raids that, as is known, are an exception to the principle of the inviolability of address, and tend to be used for the purpose of obtaining information regarding the more serious infractions, such as cartels.

The limitations faced so far by PRO-COMPETENCIA are the resistance shown by some economic agents with the delivery of confidential information and deposition of large quantities of documents and information that, even if they have not been requested, considered relevant to their defence. There are also limitations related to the refusal to deliver information by third parties. However, they have the power to collaborate with the procedure or refrain from doing so without the possibility of coercion.

European Commission

Break-out session 1: Unannounced Inspections in the Digital Age

The European Commission applies an administrative system that allows it to organise unannounced inspections at target companies' premises in the 28 Member States of the EU and, in cooperation with the EFTA Surveillance Authority, in Norway, Iceland and Liechtenstein. Unannounced inspections typically occur on the basis of a Commission decision and with the prior authorisation of the national judiciary, unannounced inspections can also take place in other premises, including the private home of managers. The Commission inspectors are entitled to examine personal electronic devices if they contain data "related to the business".

Once the data is selected, it is reviewed, typically but not exclusively by means of keywords and search queries by Commission inspectors. All possible relevant documents are submitted to the company for review. During the inspection, the company is entitled to 'shadow' the Commission inspectors, including when they are reviewing the digital documents.

In 2006, the Commission set up its internal Forensic IT ('FIT') team and started to use dedicated forensic software and performant hardware. In addition to a 'permanent FIT team', the Commission invests considerable time and effort to train an important number of its staff so that it has a sufficient number of well-trained staff that is able to perform the different IT related tasks. These efforts imply a considerable investment from the European Commission. But it provides very good value for money to the European tax payer as it has enabled the European Commission to effectively and efficiently deal with the current predominance of digital data at numerous unannounced inspections.

Break-out session 2: Investigative Powers of the Commission – RFIS

The power to send requests for information ("RFI(s)") is one of the key investigative tools of the European Commission. Almost every investigation – be it an antitrust, cartel or merger investigation – involves issuing several rounds of requests. The power to send RFIs is set out in Article 18 of Regulation 1/2003. Pursuant to this provision, the Commission may require undertakings and associations of undertakings to provide it with all necessary information.

Merger review practice. At several stages of a merger review and on a regular basis, the Commission requests information, for instance, to request information from industry participants informally prior to notification provided "the existence of the transaction is in the public domain and once the notifying parties have had the opportunity to express their views on such measures".

In drafting RFIs, the merger notification is mainly used as the basis and starting point of the investigation. The Commission identifies information missing, such as possible market segmentations and drafts RFIs to the notifying party in this respect. It then cross-checks this information with market participants such as the parties' customers and competitors during the market test.

RFIs addressed to third parties. The Commission obtains, in the course of its investigation, both quantitative and qualitative information, some of which serves as evidence underpinning the reasoning in the Commission's Statement of Objections. Data collected from third parties (e.g. cost and price data, sales data, bidding data, margins etc.) often constitute business secrets which are by nature confidential. In accordance with Article 339 of the Treaty on the Functioning of the European Union, the Commission has a general duty to protect confidential information that could seriously harm the undertaking if disclosed. Notwithstanding this, in antitrust proceedings confidential information may exceptionally be disclosed when such disclosure is necessary to prove an infringement of Articles 101 or 102 TFEU, or to safeguard the rights of defence of the parties.

Impact of large amounts of data produced as a response to RFIs. In its investigations, the Commission is more and more faced with large amounts of data. First, merging parties are encouraged to cooperate actively and in full at an early stage, notably in pre-notification, in order to better target the request and avoid a time squeeze at a later stage of the merger review procedure. To ensure the smooth and efficient processing and avoid any delays in the merger review procedure, the documents submissions must comply with certain technical instructions. For instance, documents should be virus-free, searchable (OCRed), not encrypted and structured in predefined folders. To help the Commission to process large submissions and to facilitate the document search and review process, requests for internal documents typically require the production of a "load file" containing metadata about the documents produced and accompanying the internal documents submission. In both antitrust and merger investigations, the Commission uses specific software to manage large volumes of data.

Break-out session 3: Due Process in relation to Evidence Gathering

Inspections. The inspection decision can be challenged before the European Courts, and this is indicated in the authentic copy of the decision that is notified to the undertaking. The decision can thus be appealed immediately, without the need to have to wait for a final decision. On the other hand, an appeal against specific actions that took place during the inspection has to occur in the context of an appeal of a final decision.

Over the years, an extensive body of case law of the European Courts has been developed with respect to both the requirements for an inspection decision and the conduct during the inspection such as the scope of Legal Professional Privilege, purpose and proportionality of an inspection decision. The case law has also confirmed the developing administrative practice of digital evidence gathering, the 'continued inspection' and so on.

Access to File. As a challenge to the way access to file is provided is a feature of many of the appeals against Commission decisions finding an infringement and imposing fines, the Courts have established clear case-law on the issue that is, nowadays, grounded in Article 41 of the Charter of Fundamental Rights of the EU. the European Commission does provide access to all documents, regardless of whether it has collected them in analogue (paper) or digital format, except internal documents and confidential information. In our administrative process, the parties do get the necessary time to prepare their defence and can address any concern with respect to all 'rights of defence'-issues, including the deadline for reply to a Statement of Objections, to the Hearing Officer.

Hong Kong, China

Hong Kong has a prosecutorial system with the Competition Commission (the "Commission") responsible for investigating contraventions of the Competition Ordinance (the "Ordinance"). The Commission's investigations has a range of possible outcomes one of which is the Commission bringing an action for a pecuniary penalty before Hong Kong's Competition Tribunal. If the Commission has *reasonable cause to suspect* there has been a contravention of a conduct rule in the Ordinance it will have certain powers available to it.

- To require a person to produce specified documents or information relevant to the investigation i.e. compulsory requests for information;
- To attend before the Commission and answer questions relevant to the investigation i.e. compulsory interviews; and
- Subject to the issue of a warrant by a judge of the Court of First Instance, to enter and search a premise and take possession of or make copies any document that appears to be relevant to the investigation i.e. unannounced inspections.

The Commission has experience using each of these powers and these are discussed in the paper.

Hungary

In the cartel detection and investigative work of the Hungarian Competition Authority (GVH), information and evidence gathering – considering the hidden and secret nature of cartels – is of utmost importance. Therefore, the GVH has a dedicated unit, the Cartel Detection Unit, in order – inter alia – to perform these tasks more efficiently.

Since paper-based data storage is increasingly being replaced by data storage on a variety of electronic devices, such as computers, tablets, mobile phones and servers accessed from the internet (so-called 'clouds'), there is a growing importance of making copies of data stored on electronic devices in the course of evidence gathering. As a result of the amendment of the law entered into force in 2005, the case handlers are able to make copies of not only paper-based documents, but also data stored on electronic devices. Pursuant to the respective provisions of the Hungarian Competition Act currently in force, the case handler is entitled to make a forensic copy (also known as a 'mirror copy' or a 'bit-by-bit copy') of the data storage device and to inspect its contents using that forensic copy if it is likely to contain data in connection with the conduct under investigation that cannot be retrieved in course of the proper use of the computer. Procedures that allow the creation of a 'mirror copy' / 'bit-by-bit copy' of specific digital data, identical to the original, which also ensure the authenticity and integrity of the copy are together referred to as forensic-IT procedures.

The use of forensic-IT procedures is considered as a special area of expertise of the Cartel Detection Unit, the development of which is strongly promoted by the GVH, including the development of tools, software and the training of the staff.

A number of procedural guarantees apply to electronic evidence gathering, which ensure the rights of the client, including in particular the right to due process. These rules are closely linked to the rules on unannounced inspections as digital evidence gathering carried out primarily during unannounced inspections.

Kenya

The Competition Authority of Kenya ('the Authority') has powers to carry out an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of prohibitions relating to restrictive trade practices or abuse of dominance. To ensure due process is followed in the process of gathering evidence, the Authority is guided by a raft of legislation.

The evidence gathering process entails the development of a theory of the case to determine if it warrants a full investigation. This is followed by further review of the nature of the complaint and establishing the legal theory and the theory of harm, developing a work plan that includes the evidence gathering logistics, timelines and resources required. Information sources are identified and interviews conducted. Evidence is sourced through written and signed statements, notice of investigation to produce to the Authority any document or article specified therein, the leniency program, search and seizure and summons. The evidence is then organized, analysed and a report generated, from which the violation is determined.

A decision is then proposed and shared with the undertakings offering them an opportunity to respond either in writing or an oral presentation at a place and time specified by the Authority. Upon consideration of the submissions a decision is made by the Authority's Board to either restrain the undertaking from further engaging in the prohibited behaviour, impose a financial penalty specified as a percentage of previous year's gross annual turnover, or advocate for change of behaviour. This decision is published in a Gazette, and includes the name of the undertakings, the nature of the conduct investigated and the settlement agreement. The parties may appeal the Authority's decisions in writing to the Competition Tribunal within thirty (30) days. If the decision of the Tribunal is not satisfactory, the case may be referred to the High Court, whose decision is final.

The Authority investigated restrictive trade practices into the fertilizer sector in Kenya. The due process was followed in the investigation and made decision, but the undertakings appealed against Authority's decisions. The High Court dismissed the case after the investigated undertakings sought to enter into a settlement deal with the Authority. The Court also commended the Authority for complying with Statutes guiding conduct of search and seizure, and for going out of its way to secure a Search Warrant despite this not being provided for in the Act

Korea

The Korea Fair Trade Commission (hereinafter the 'KFTC') has the power to order the parties concerned or interested parties to appear in a hearing and seek their opinions; the power to designate expert appraisers and procure their opinions; the power to order an enterprise, an association of enterprises, an executive or employee thereof to submit reports on the cost and conditions of business operation or other necessary materials or things, or retain the submitted materials or things; the power to have affiliated public officials enter the premises of enterprises or their associations in order to examine conditions of business operation, account books, documents, electronic materials, voice-recording materials, video materials and other materials or things, and hear statements from the relevant parties or interested parties at a designated place[3]; the power to order enterprises or their associations or executives and employees thereof to submit materials or things necessary for such investigation, or retain the materials or things submitted. The KFTC's investigation is an administrative and non-compulsory procedure that is basically conducted with the consent of the investigated party. Failure to comply with the KFTC's investigation may result in administrative penalty or criminal charges. The KFTC has especially made efforts to establish due process in the investigation stage. As the recent shift to the digital ages and the importance of the forensic investigation grows, KFTC has been operating the digital forensic organization since 2010.

[3] The Article 50 (2) of the MRFTA

Mexico (COFECE)

The Federal Economic Competition Law endows the Mexico's Federal Economic Competition Commission's (COFECE) Investigative Authority with effective tools to identify Law violations. Two valuable investigative tools used to identify anticompetitive conducts are requests for information (RFI) and unannounced on-site inspections (or dawn raids).

The Investigative Authority may request any individual, company or Public Authority to submit documents or information necessary to conduct an investigation, and sanctions may be imposed for non-compliance. Dawn raids are regularly held on the premises of companies, by which investigators gather documents or information deemed relevant for the investigation procedure.

The major challenges faced are: 1) the time the requested parties take to fully respond RFIs; 2) to analyze great amounts of information when RFIs are replied and, 3) whom to send RFIs to. These difficulties have been addressed by facilitating tools to the requested companies as to how to reply to RFIs, by reducing the scope of the information requested and by better selecting the targets to whom RFIs are addressed. When all these strategies fail, sanctions are imposed.

COFECE is not a criminal agency, which limits the scope of the actions that can be implemented. Also, given that dawn raids are resource-intensive, challenges are addressed by conducting effective investigation strategies, maximizing limited resources.

Moldova

The evidence collected and presented in the case file has an important role in the conduct of competitive procedures during the investigation.

Obtained information, as evidence, may be accumulated at different procedural levels of the investigation. Firstly, we consider it necessary and appropriate to structure the process of examining competitive practices, which we have developed and called **the procedural division matrix.**

We will, hereby, present the procedural division matrix of the examining anticompetitive practices, which reflect practices applied by the Competition Council of the Republic of Moldova in correlation with European practices.

The process of examining infringements of competition law is unique, but the procedures acts will vary depending on the type of infringement.

Thus, the process of examining the infringements of competition law was structured into three phases, divided into several levels.

The first phase, *the examination of the competition law infringements by the competition authority,* consists of **three levels**:

1. The preliminary examination of the case, divided into **two stages**:
   a. Preliminary examination by the specialized subdivisions of the Competition Council;
   b. Preliminary examination with the participation of the Plenum of the Competition Council.
2. Investigation of the specialized subdivisions of the Competition Council divided into **two stages**:
   a. the closed stage of the investigation conducted by the specialized subdivisions of the Competition Council;
   b. the open stage of the investigation conducted by the specialized subdivisions of the Competition Council.
3. Investigation under the aegis of the Plenum of the Competition Council:
   a. conducting hearings
   b. deliberation of the decision

The second phase, the examination process of the competition law infringement, **judging the case**, consists of **two levels**:

- Trial before the first court
- Use of legal remedies

The third phase of the process is **the enforcement of the decision**, which may be: voluntary or forced, with particularities in the case of existing extraneous elements.

In the article we will provide details on these phases and the importance of obtaining evidence at each phase and stage.

The need for a systemic approach to the investigative process is a result of the fact that the collection of evidence for each procedure and for various competitive infringements has its own specific features. Therefore, it is important to analyze the evidence collection tool in each phase and stage of the procedural division matrix.

Peru[4]

The free competition is an essential principle for the development of the market social economy in Peru. According to this principle, the Peruvian Competition Act states special powers to the Technical Secretariat for starting administrative proceedings of anti-competitive conducts. Being the conduction of a dawn raid an important tool to get information from natural or legal persons.

However, it is important to underline some steps about how to prepare dawn raids, in order to not have an objection of the companies' representative. But if the case, the amendment introduced in 2015 into the Peruvian Competition Act is more deterrent than the previous law, due to authorizes the Commission for the Defense of Free Competition to impose a sanction up to USD 1 238 805 approximately, for denying to the officials the entrance in the undertaking's offices. Before the amendment, the fines were only USD 61 940.

In that sense, the law authorizes to the Technical Secretariat to have immediate access to books, registries, documentation, among others during dawn raids in order to gather information that could reflect anticompetitive conducts. The information of anticompetitive conducts is assessed using forensic tools. Since recovering of the relevant information contained in Email about anticompetitive conduct is finished, a screenshot must be taken to guarantee the identification of the files collected and their size, and a copy is left to the undertaking's representative.

[4] The document was prepared by Jesús Espinoza, Technical Secretary and Arturo Chumbe, lawyer at the Technical Secretariat of the Commission for the Defense of Free Competition.

Portugal

Forthcoming

Russian Federation

In accordance with the legislation of the Russian Federation, the antimonopoly authority conducts scheduled and unscheduled inspections. Scheduled and unscheduled (dawn raids) inspections are carried out in the form of on-site and documentary inspections.

Before conducting an inspection, the antimonopoly authority notifies the entity being inspected: during scheduled inspections - no less than three working days prior to the inspection, during unscheduled ones - no less than twenty-four hours.

At the same time, the antimonopoly legislation provides that prior notification is not allowed in the case of dawn raids for identification of compliance with prohibitions on agreements restricting competition of economic entities and agreements restricting competition or coordinated actions of federal executive authorities, state authorities of the constituent entities of the Russian Federation, local governments, other authorities performing the functions of specified bodies or organizations, as well as state extra-budgetary funds, the Central Bank of the Russian Federation.

This is explained by the fact that violation of these prohibitions leads or may lead to the most serious, negative consequences for competition, and failure to notify the inspected person about the inspection will allow the antimonopoly authority to be more likely to detect all necessary documents and information.

As of today, unscheduled on-site inspections are one of the main tools in the fight against cartels, and each of the inspections is effective. In other words, during each of the inspections, the antimonopoly authority discovers necessary evidence (direct or indirect) sufficient to initiate a case of violation of the antimonopoly legislation.

*Serbia**

In order to carry out the duties assigned to it by the Law on the Protection of Competition, the Commission for Protection of Competition of the Republic of Serbia (hereinafter the CPC) has extensive powers to investigate suspected competition law breaches, as well as in the context of merger cases and sector inquires (market studies). The CPC has broad powers to investigate by ordering inspections (including dawn raids), hearing the parties, and requesting information.

As one of the main CPC's investigative instruments, the request for information is the most frequently used form of investigation enabling the CPC to address the undertakings and associations of undertakings, in order to obtain all information necessary to conduct its investigations. However, the CPC's power to request information is not limitless, irrespective of

The value or relevance of the information to the case under investigation. The principle is permanent: request for information must be circumscribed and limited only to information that could be relevant to the investigation, and should not extend beyond the rules on legal professional privilege and the privilege against self-incrimination.
The CPC faces one particular limitation when it comes to handling large amounts of complex information during and after competition investigations. Setting aside the issue of transparency, it should be highlighted that the CPC faces a recurring challenge that has an influence on the effective use of power to request information. This challenge concerns the issue of balancing confidentiality of information and transparency practices, in terms of the inapplicability of confidentiality rules when rules on the right of access to public information have to be applied. In fact, with regard to the treatment of confidential information, the CPC is constrained by the rules on the right of access to public information because such rules do not recognise exception stipulated by the Law on the Protection of Competition as exception to the right of access. The law governing free access to information of public importance and transparency practices are therefore significant barriers to treatment of confidential information by the CPC.

The general right of access to public information must yield whenever the refusal to disclose submitted information is supported by a supreme and justified interest of confidentiality, whether it is or not stipulated by some specific law provisions. The general right of access to public information could be disabled by the standard interpretative tool of *lex specialis derogat legi generali* in order to keep that information confidential.

The CPC also advocates that it would be a welcome clarification to the rules governing the right of access to public information to provide exceptions that protect confidential information obtained in competition law enforcement contexts from disclosure. The CPC recommends such a clarification, particularly, having in mind similar examples from the best comparative practice and increasing reliance on large amounts of complex information and internal documents obtained by using the requests for information.

Singapore

The Competition Commission of Singapore ("**CCCS**") administers and enforces Singapore's Competition Act. In this connection, it has various powers to conduct investigations where there are reasonable grounds for suspecting that one of the three prohibitions in the Competition Act has been infringed. This includes the power to issue requests for information ("**RFIs**") to any undertaking, regardless of whether the undertaking is the subject of the investigation or is a third party.

The Competition Act provides for sanctions against undertakings for failing to provide information to CCCS. Penalties are also provided for persons who provide false information or otherwise obstruct CCCS's investigations.

CCCS recognises that RFIs may impose business costs on the persons who receive such requests. As such, decisions to issue such RFIs are not taken lightly. Generally, an unannounced inspection may be preferred to an RFI if it is likely that the undertaking under investigation may conceal or destroy relevant evidence. However, both investigative tools may be used in tandem; RFIs may be used to clarify information obtained during an inspection.

CCCS also notes that there may be difficulties in formulating RFI questions if the facts of a case are complex, and that the information obtained can only be used for the matter under investigation, and not for related cases. Third parties may also be unwilling to provide proper responses to CCCS if they are of the view that the matters under investigation do not concern them.

In summary, CCCS recognises that RFIs are a useful tool in the course of investigations and will use them as appropriate to ensure that anti-competitive conduct in Singapore is detected and penalised appropriately.

Slovak Republic

Power to conduct inspections remains among the most important investigative powers in fighting against serious violations of competition law. Experience in Slovak Republic shows that almost every inspection in business premises is challenged before courts. Slovak courts review the authorisation for the inspection as well as the inspection itself while strictly observing whether the rights of the undertakings in course of inspection were not breached. Judicial review takes place after the action against the intervention- inspection is brought by the undertaking. There were some judgements of the courts which prevented the Antimonopoly Office of the Slovak Republic (AMO) from further investigation of the case. On the other hand, in many cases courts upheld powers of AMO and duties of the undertaking in the course of inspection, such as power to enter premises, power to ask for oral explanations, power to examine, search and copy digital data, duty of the undertaking to cooperate with AMO, while following the principle of proportionality. The contribution explains the legal framework as well as some examples of cases and judgements.

*South Africa**

In South Africa the unannounced inspections or search and seizure operations are regulated by section 46 and 47 of the Competition Act 89 of 1998. Section 46 provides for the authority to enter and search with a warrant while section 47 provides authority to enter and search without a warrant, if there are reasonable grounds to believe that a warrant may be issued if applied for.

The Commission can seize both hard copies and electronic data during the unannounced inspection. The hard copies are seized by Commission inspectors while the electronic data is seized by outsourced IT forensic experts.

In the past, the Commission used summons and information request letters extensively as a tool to collect evidence of collusion. For the past five years the Commission utilised unannounced inspections more frequently to collect evidence of cartel infringement.

In 2014/2015 financial year, the Commission conducted four (4) unannounced inspections, in 2015/2016 financial year five (5) unannounced inspections, In 2016/2017 financial year four (4) unannounced inspections and in 2017/2018 financial year three (3) unannounced inspections. The Commission also utilised summons and information request letters as tools to collect evidence of collusion.

During unannounced inspections, the Commission seizes electronic data contained in computers, servers, mobile phones, laptops and other electronic storage devices. When dealing with electronic data both during and after the dawn raid, the Commission faces some challenges. These are

- Large volume of data;
- Laptops not in the identified premises;
- Servers hosted in third party premises not covered in the warrant; and
- Electronic data stored in cloud.

Sweden

The contribution begins with introductory comments on the tool of requests for information (RFIs) and continues with a brief review of the legal framework for RFIs in Sweden. The main part of the submission consists of a presentation of, and reflections based on, the SCA's experiences when working with RFIs.

RFIs generally play a central role in the investigations by the SCA, as they are one of the authority's main tools for acquiring information. They are often used alongside other investigative measures such as inspections and interviews, but are in many cases more versatile and cost effective, as is elaborated on in the submission.

The role of preparatory work in order to increase the efficiency of RFIs is discussed in the submission as well as the kind of information that is best suited to be requested. The submission also presents the SCA's views on how to handle the acquired information and control for erroneous or insufficient answers.

The contributions also contains some experiences concerning how to balance the scope of the RFI in such a way that the relevant information is acquired while at the same time ensuring that the burden of the addressee is proportionate.

Chinese Taipei

In practice, the FTC decides the object (parties or third parties) from which to request information, the approaches and the content after taking into consideration the type of violation, the characteristics of the industry involved, the market structure and the level of complexity of the case.

The parties and third parties have the obligation to accept the FTC's investigations. The FTC has imposed sanctions on the parties and third parties refusing to provide information with regard to facts about the violation in question. Nonetheless, the FTC has never imposed sanctions on parties failing to provide information not associated with the confirmation of facts of violation. Furthermore, related parties are willing to cooperate and provide information in most cases after finding out that government agencies are obligated to keep information confidential. In addition, the verification of the information collected is a quite challenge. Experience and economic analysis are applied to clarify related facts and evaluate the level of impact of the unlawful act on competition and order in the relevant market.

Ukraine

Subject to current Ukrainian legislation, in order for the Antimonopoly Committee of Ukraine (hereinafter – Committee) to carry out unscheduled on-site inspections of business entities regarding their participation in a cartel, there should be formed a Commission consisting of not less than two experts of the Committee. Such Commission has unrestricted access to storage sites, documents, computers etc. during inspection. Commission tries to assemble on the very first day of the inspection all the information, important for investigating the actions of the cartel. During the inspections, the Commission members may achieve refusal in access to remote information because of "technical failure" (which is a violation of the economic competition protection legislation and entails a fine of up to 1% of the annual income of the entity). The other problem during inspection is an unauthorized interference in operation of electrical network. Business entities coordinate and agree their behavior using electronic and mobile communication tools (correspondence by e-mail, exchange of short text messages etc.) and contact (informal meetings etc.) without the conclusion of formal agreements, contracts.

Major players in the retail market of petroleum products have committed violations of the competition legislation in form of simultaneous change of retail prices for gasoline and diesel fuel. There is the Association that controls these business entities. During the inspection, members of the Commission required to be granted access to the information on the official computer of the Association's President. President deleted files despite objections of the Commission. Commission was denied in access to the official computer with no documents that could confirm the existence of technical reasons that led to the impossibility of providing access to the members of the Commission to the official computer. Committee accused Association for committing a violation stipulated by the Law of Ukraine "On Economic Competition Protection" in the form of creating obstacles for conducting inspections, seizure of property, documents, items or other information carriers. The Association was fined for the said violation.

Usually, the reasons for sending a request can be: application of the entity on committing a violation by other entities; on Committee's own initiative; on the basis of the facts presented in the submission of law enforcement agencies. In accordance with the legislation, the Committee has the right to require from business entities, associations, authorities, local authorities, bodies of administration, management and control, their officials and employees, other natural and legal persons, any information that relates to the subject of research including those with restricted access. The legislation of Ukraine provides for sanctions for non-submission of information (fine in the amount of up to one percent of the income of the entity from the sale of products (goods, works, services) for the last reporting year preceding the year in which the fine is imposed). In practice, Committee was faced with problematic issues regarding the impossibility of reviewing the information provided, because the information was provided in the software format that was owned by the entity and was developed specifically for its activities. The issue was resolved when business entity provided the Committee on a royalty-free basis with the relevant software for dealing with information for the period of the investigation.

United Kingdom

Competition authorities require a wide range of information to perform their functions effectively and make robust, evidence-based decisions. It is no surprise therefore that requests for information are one of competition authorities' most used investigative powers and tools.

The UK Competition & Markets Authority (the CMA) has formal information gathering powers in respect of all/many of its key functions, although often also relies on the cooperation of parties and voluntary requests for information to obtain as full a picture as possible and discharge its functions effectively[5]. The availability of evidence and receipt of accurate and complete information is a key factor affecting the performance of the CMA as well as the robustness of its decisions and its ability to conduct cases in a timely and efficient manner.

This paper provides an overview of the CMA's approach to the use of requests for information (RFIs) across its functions and highlights some learnings and challenges from its experiences. In this context, the CMA notes that in order to be effective and try to minimise some of the risks associated with information requests - particularly the risk of lack of response, the provision of voluminous but not necessarily all relevant material and/or the use of the request as delaying tactics by intended recipients - a request for information needs to be focused and well-prepared.

To this end, it is always important to prepare the request having an understanding of the market /industry concerned and the intended recipients and being clear of the purpose in issuing it, in light of the objectives of the investigation concerned, the evidence gathering strategy and evidence gaps and what is needed to contribute to a project or to prove whether there is an infringement. In other words, the key should be to focus on need to know rather than interesting to know when drafting an information request. A badly drafted information request will be, at best, unhelpful and cause undue delays in the project or investigation as the case may be; at worst, the information request could be found to be unenforceable and

[5] In the context of market studies, the CMA tends not to use its formal gathering powers as a matter of course but flexibly and as appropriate to the case. In the recent Care Homes market study, completed in November 2017 (https://www.gov.uk/cma-cases/care-homes-market-study), for example, the CMA decided against using its compulsory powers to collect information and relied instead on voluntary requests for information to minimise the risk that concerns about potential enforcement action could harm voluntary cooperation by the industry. However, in other cases, the CMA may decide to use its formal powers. In this regard, in its consultation in March 2018 on a draft "*Guidance on requests for internal documents in merger investigations*" (https://www.gov.uk/government/consultations/draft-guidance-on-requests-for-internal-documents-in-merger-investigations), the CMA indicated that formal s109 powers (as opposed to its voluntary powers) are likely to be used as standard in future merger investigations in both Phase 1 and Phase 2 where internal documents are requested from main parties. That said, the CMA will typically request information from third parties informally in the first instance. S109 notices will be used where third parties fail to respond to informal requests and the evidence requested is material to the CMA's investigation (see paragraphs 15 and 16 of the draft Guidance on requests for internal documents in merger investigations).

also risk the CMA taking decisions based on incomplete information. Moreover, it can result in poor cooperation as well as adversely impact on the CMA's reputation.

The paper further notes that the CMA has powers to impose administrative penalties for non-compliance with its information gathering powers where the intended recipient/s may fail to comply with the request without reasonable excuse.[6] Separately to the consequences resulting from the enforcement of these powers, it is also a criminal offence under the UK regime when a person intentionally or recklessly alters, suppresses or destroys any document which he/she has been required to produce; or knowingly or recklessly provides false or misleading information and these offences can be punishable by a fine and/or imprisonment.[7] Notwithstanding these safeguards, the CMA will still treat information obtained using its formal information gathering powers with care and will look for corroboration with other evidence wherever possible, before deciding on the weight to place on responses in terms of reliability and probative value.

The second part of the paper provides an overview of some of the legal and practical considerations relating to the adoption of the CMA's first fines for non-compliance with compulsory RFIs in an antitrust case (the *Phenytoin unfair pricing case*[8] in 2016[9]) and in a merger case (*Anticipated acquisition by JUST EAT plc of Hungryhouse Holdings Limited*[10] in 2017[11]) and highlights how these decisions have sent a clear signal to businesses that they must respond comprehensively, accurately and on time to CMA's (compulsory) information requests and that the CMA is ready to use its enforcement and fining powers when necessary/appropriate to ensure it gets the information it needs to carry out its functions.

[6] Section 40A of the Competition Act 1998 (CA98) in respect of non-compliance in competition act investigations; and sections 110 and 174A of the Enterprise Act 2002 (EA02) for non-compliance in mergers and market investigations.

[7] Sections 43 and 44 CA98 and sections 110(5) and 117 of EA02 (mergers) and section 174A (4) EA02 (markets)

[8] Case CE/9742-13 see here https://www.gov.uk/cma-cases/investigation-into-the-supply-of-pharmaceutical-products#penalty-notice.

[9] Pfizer penalty notice https://assets.publishing.service.gov.uk/media/570cbc96ed915d117a00005a/pfizer-penalty-notice.pdf

[10] Case ME/6659-16 see here https://www.gov.uk/cma-cases/just-eat-hungryhouse-merger-inquiry

[11] Hungryhouse penalty notice see here https://www.gov.uk/cma-cases/just-eat-hungryhouse-merger-inquiry#penalty-notice

United States

Break-out session 2: Requests for Information – Limits and Effectiveness

When voluntary requests for information are judged to be inadequate or inappropriate for the agencies' needs, Civil Investigative Demands (CIDs) can be used to compel production of information and documents. CIDs may be served on any natural or juridical person, including suspected violators, potentially injured persons, witnesses, and record custodians, if there is "reason to believe" that the person may have documentary material or information relevant to a civil antitrust investigation. The U.S. Agencies may issue compulsory process to third parties, too.

Agencies generally serve CIDs with a cover letter inviting the respondent, or its counsel, to telephone an antitrust investigator identified in the letter in order to attempt to resolve any avoidable problems created by the CID. Responders to this invitation almost always engage staff in a compliance negotiation, seeking to modify the scope of the request and enlarge the time for response. Agencies also balance the need to protect confidential information obtained in enforcement matters against the need to provide targets of competition enforcement proceedings with the evidence forming the basis of the case against them to allow them fairly to defend themselves.

Should a party not comply with a subpoena or CID, the Agencies would have to petition a federal district court for an order enforcing and requiring compliance with the subpoena or CID. It is a criminal offense intentionally to withhold, misrepresent, conceal, destroy, alter, or falsify any documentary material, answers to written interrogatories, or oral testimony that is the subject of a CID.

Break-out session 3: Due Process in Relation to Evidence Gathering

Successful challenges to CIDs are rare and generally have been limited to burden and relevance issues. A respondent to a CID from the FTC may not object to CID specifications by bringing an action in court without first availing itself of a potential administrative remedy. For this reason, challenges usually occur prior to any decision on the merits, but can be raised again on appeal of a final decision.

After a seizure pursuant to a search warrant, the Division and Federal Bureau of Investigation will take the seized materials and examine them back in their government offices. Seized documents are reviewed by an independent "filter team" to remove any materials protected by attorney-client privilege before being turned over to the investigative team. Attendance of lawyers or representatives of the investigated parties is not required during the actual search at the corporate premises, and so the presence (or lack thereof) of a corporate representative is not grounds upon which to suppress evidence obtained pursuant to the warrant.

If the Division or Commission initiates an enforcement proceeding in a federal district court, defendants are entitled under constitutional law and federal procedural rules to extensive discovery of the evidence that the Agency has gathered for its case.