ICN AGENCY EFFECTIVENESS PROJECT ON INVESTIGATIVE PROCESS

INVESTIGATIVE TOOLS REPORT

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List of Abbreviations

EU (EC): European Union (European Commission), but to be understood in this context as referencing to "enforcement actions by the European Commission under Articles 101/102 Treaty on the Functioning of the European Union (TFEU)and its review by the EU Courts".

ICN: International Competition Network

SO: Statement of Objections

UK CC: United Kingdom, Competition Commission

UK OFT: United Kingdom, Office of Fair Trading

US DOJ: United States Department of Justice, Antitrust Division

US FTC: United States Federal Trade Commission

1. INTRODUCTION

The quality of a competition agency's enforcement depends heavily on its ability to conduct effective investigations.

The ICN Steering Group therefore launched an initiative to explore the processes that ensure that competition agencies obtain all relevant information and views and the mechanisms that ensure that they are given adequate consideration before a final decision is reached.

The United States Federal Trade Commission (US FTC) and the European Commission's Directorate General for Competition (EC DG Competition) volunteered as project leaders to bring forward the initiative on behalf of the Steering Group.

The confines of the project's mandate were defined during the 2012 ICN Annual Conference in Rio, where it was agreed that the Agency Effectiveness Working Group would seek to enhance ICN members' understanding of how different investigative processes and practices can contribute to enhancing the effectiveness of competition agencies' decision-making and ensuring effective protection of procedural rights.

The project consists of two main parts: (i) a first part aims at identifying the *tools* at the competition agencies' disposal and those they need to conduct effective investigations, and (ii) a second part will look into competition agencies' *procedures* for conducting investigations that provide the desired quantity and quality of information while protecting parties' legitimate interests and avoiding unnecessary burdens. (This includes issues such as how to ensure transparency and predictability; how to ensure that competition agencies have the full benefit of the parties' evidence and views; how competition agencies have organized internal checks and balances; the role of third parties, and the protection of confidentiality and legal privileges).

The present Report addresses the first part of the project, namely taking stock of the powers and tools competition agencies need to conduct effective and efficient investigations.

Recognizing that ICN members are organized in various ways both internally and within their governments and that they operate under different legal systems, competition agencies may benefit from sharing information and experience as to <u>*what tools*</u> are available to competition agencies globally to collect all information and views relevant to their proceedings and *what the processes and practices are* to make use of these tools in the most effective and efficient manner.

The methodology applied for taking stock of the available tools, processes and practices has been (i) to carry out a preliminary research of pre-existing ICN work products (such as on the Anti-Cartel Enforcement Manual on searches, raids and inspections (Chapter 1), Anti-Cartel Enforcement Templates and information from the survey conducted for the Merger Investigative Techniques Handbook), (ii) to research publicly available information regarding investigative tools (including from the EU and a representative sample of competition agencies), and (iii) to issue a detailed survey to ICN members of the Agency Effectiveness Working Group asking them to complement, and where necessary, correct the preliminary data.

The results of this exercise have been subsequently analysed and put into this Report which has been submitted for verification, discussion and completion to the members of the Agency Effectiveness Working Group.

The present Report aims to give a representative overview of the most recurrent investigative tools and to provide insight into how different jurisdictions have developed processes and procedures to effectively and efficiently collect the information and views necessary to enforce competition rules. The Report is by no means an exhaustive presentation of the investigative tools and processes available in all ICN member jurisdictions, or for that matter those available in the 31 jurisdictions (32 competition agencies) that have contributed to the survey. ICN members from the following jurisdictions contributed to the survey: Australia, Barbados, Botswana, Bulgaria, Canada, Chile, Columbia, Croatia, Czech Republic, European Commission, France, Hungary, Israel, Italy, Japan, Jersey, Germany, Kenya, Mexico, New Zealand, Norway, Poland, Russian Federation, Slovakia, Spain, Sweden, Switzerland, Taiwan, UK (Competition Commission & Office of Fair Trading), the United States (Federal Trade Commission & Department of Justice, Antitrust Division), Vietnam.

The most recurrent investigative tools identified in the Report are (i) on-site inspections in business premises; (ii) inspections in non-business premises; (iii) compulsory requests for information; (iv) voluntary interviews; (v) compulsory interviews; (vi) voluntary submission of information; and (vii) wiretaps or recording of conversations. A final category ("Other") includes a number of additional and more specific investigative tools that may be available to some jurisdictions.

The Report addresses investigative tools available to competition agencies across jurisdictions and across enforcement systems (i.e. administrative or criminal). Where necessary, the report has identified the specific context in which a statement is applicable.

It is hoped that the present stock taking exercise may provide a basis for members to discuss the costs and benefits of using the investigative tools identified in the Report. Members may consider whether to develop the work further in view of providing guidance to ICN members looking to enhance the effectiveness and efficiency of investigative tools available to them.

2. INSPECTIONS IN BUSINESS PREMISES

2.1. Legal basis

In the jurisdictions covered by the survey[1], competition agencies have the power to inspect[2] business premises[3], although some jurisdictions distinguish between different types of proceedings.

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[1] Please refer to "Introduction" for the overview of which jurisdictions are covered.

[2] Definition of **inspection** for the purposes of this Report: Any form of on-the-spot investigation, including in particular (i) the power to enter premises of undertakings or individuals, (ii) the power to verify or check for records that may be kept there, and (iii) the power to copy or seize any records, with a view to allow the competition agencies to collect evidence of competition law infringements.

- In Chile, the power to conduct an unannounced inspection is limited to cartel cases. The consent of the inspected parties is required in abuse of dominance and merger cases.

- In Japan, the legal basis and the extent of the competition authority's powers during the inspection vary depending on the type of procedure. Under the administrative procedure, the competition agency has the power to enter and inspect business premises, whereas under the criminal procedure it may also conduct searches.

- In Norway, the power to inspect is subject to an additional condition in merger cases: there must be an indication of a violation of the competition law.

- In some jurisdictions, the power to inspect premises is limited to antitrust cases, e.g. Sweden.

- In Switzerland and Taiwan, investigatory powers such as the power to inspect business premises are limited to administrative procedures.

- In the United States, the US DOJ may inspect business premises, but only in the context of criminal investigations[4].

Most competition agencies foresee a single legal basis for such inspections, while some competition agencies carry out inspections on the basis of different sets of powers.

- Australia makes a distinction between inspections which require a court warrant or a formal decision and those that do not ("voluntary" searches).

- In Germany, a distinction is made between "administrative fines procedures" and "administrative procedures"[5]. Inspections can be conducted in both types of proceedings, but they present different legal safeguards for the parties concerned and different limitations to the competition agency's powers. Inspections in administrative proceedings remain exceptional; therefore, with regard to inspections, this Report will refer mainly to administrative fines proceedings. When the competition authority envisages imposing a fine, it will always conduct the inspection under the administrative fines procedure.

- In France**,** the investigatory system provides for two different sets of powers, which rest on different legal bases: "simple powers" (inspections without a court warrant, rarely used to perform unannounced inspections) and "enhanced powers"

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[3] Definition of **business premises** for the purposes of this Report: premises of undertakings or individuals. On the other hand, the definition on **non-business premises** refers to premises other than business premises, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned.

[4] The US DOJ shares jurisdiction over civil antitrust enforcement matters with the US FTC. The US DOJ also has jurisdiction over criminal enforcement matters.

[5] Article 59 of the Act against Restraints of Competition ("ARC").

(inspections with a court warrant, referred to as "dawn raids")[6]. Unless otherwise specified, subsequent references are to the latter type.

- In the EU (EC), a distinction exists between inspections ordered by a formal decision (undertakings required to submit) and those that are not[7].

- In Poland**,** there are two types of inspections of business premises: "plain inspections" and "inspections with search"[8]. Plain inspections may be conducted at any time during explanatory[9] or antimonopoly proceedings before the President of the competition authority and within the scope of these proceedings. As a general rule, inspections with a search shall take place after initiation of antimonopoly proceedings. However, in the event of any justifiable suspicion of serious breach of the provisions of the Act, particularly whenever obliteration of evidence may occur, the President of the competition authority may file a request to the court for a search warrant prior to the antimonopoly proceedings being instituted (i.e. within explanatory proceedings). The Polish competition authority is not required to announce the inspection to the undertaking before its initiation. Unless otherwise specified, subsequent references are to "inspections with search".

- In the UK, if the OFT has reasonable grounds for suspecting that an agreement falls within one or both of Article 101 TFEU and the Chapter I prohibition, and/or that one or both of Article 102 TFEU and the Chapter II prohibitions have been infringed, it may conduct an investigation and has the power to enter premises to carry out inspections, either with or without a warrant. These powers enable the authority to enter premises and to gain access to documents relevant to an investigation[10]. It is noted however that the power to carry out inspections without a warrant is limited to business premises.

The Report typically focuses on unannounced inspections unless otherwise specified[11].

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[6] Book IV of the French Code of commerce: Article L. 450-3 refers to simple powers and Article L. 450-4 refers to inspections with a court order.

[7] Article 20 (4) of Regulation 1/2003 for inspections ordered by decision of the Commission; Article 20(3) of Regulation 1/2003 for inspection without decision; OJ (2003) L1.

[8] Articles 105a-105l of the Polish Act of 16 February 2007 on Competition and Consumer Protection.

[9] Before instituting antimonopoly proceedings the Polish competition authority may initiate explanatory proceedings, the aim of which is to evaluate whether there is a likelihood of a breach of the competition law. Such proceedings are conducted "in a case" and not against a particular undertaking, therefore no formal objections are formulated at this stage. The explanatory proceedings should be completed within 30 days, or in complicated cases, within 60 days. This time limit is of an instructive character and it may be legally extended.

[10] Article 27 and 28 of the CA98.

[11] "**Unannounced**" inspections are carried out without advance notice; for "**announced**" inspections prior notice is given to the object of the inspection. Some jurisdictions, e.g. the EU (EC) and Hungary**,** have the power to conduct announced inspections.

2.2. Requirements for conducting inspections

2.2.1. Substantive requirements

An inspection of business premises will typically be conducted when there are reasonable grounds to suspect an infringement, or to suspect that evidence is held on the premises, or that evidence may be concealed or destroyed, or when the inspection is deemed "necessary" to establish an infringement (e.g. Australia, Barbados, Botswana, Canada, Croatia, the Czech Republic, France, the EU (EC), Germany, Hungary, Israel, Italy, Jersey, Kenya, Mexico, New Zealand, Norway, Spain, Portugal, Russia, Sweden, Japan, the UK OFT, the United States[12]).

2.2.2. Procedural requirements relating to the stage of the procedure

Some jurisdictions require that an investigation has been opened in order to undertake inspections of business premises (e.g. Chile, Hungary, Poland[13] and Vietnam); others have adopted such a requirement in practice (e.g. the Czech Republic, France).

Generally, an inspection of a business premise can be carried out at any time during the proceedings.

2.3. Procedural requirements

2.3.1. Authorisation by decision / court warrant

In almost all of the jurisdictions, either a court warrant or an inspection decision[14] granted by the competition agency is required in order to conduct an inspection in business premises (see chart below).

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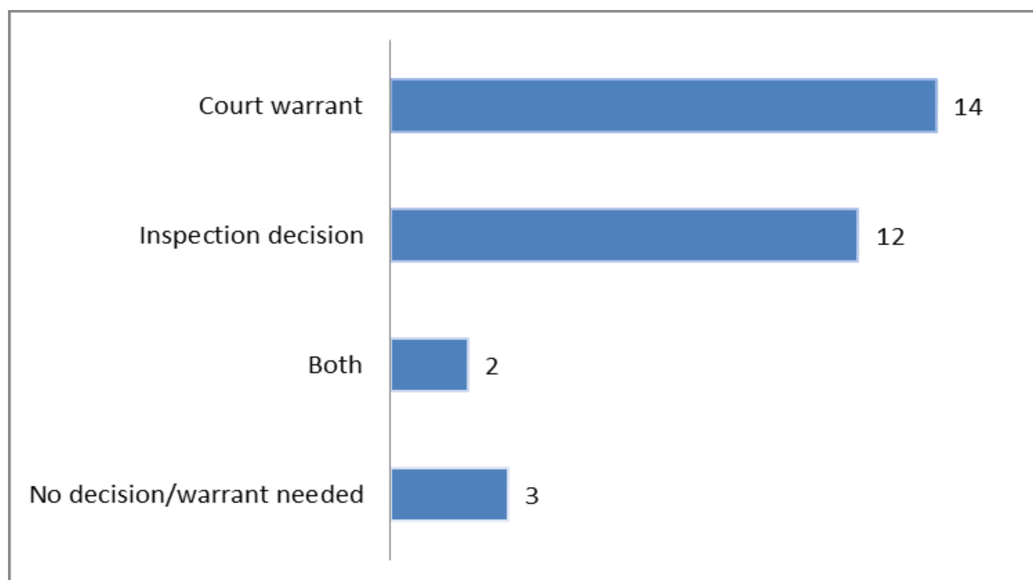
[12] As provided by applicable case law in the United States, search warrants (including warrants to inspect business premises) may be issued when there is a "probable cause" to believe that a crime has been committed, that documents or other items evidencing a crime exist, and that such items to be seized are at the premises to be searched. It is not necessary to have probable cause to believe that evidence of the crime may be destroyed or withheld if not seized by search warrant. See US DOJ Manual at Chapter III.F.5. (Search Warrants).

[13] See exception below.

[14] For the purposes of this report, the term "**inspection decision**" will refer to all decisions, administrative acts or other measures of any kind which the competent organization or person in the competition authority issues with the purpose of ordering or authorizing an inspection. The term "**court warrant**" is used for a decision by a court authorizing inspections.



The following aspects can be highlighted:

- In Botswana, a search warrant needs to be obtained at the Magistrate court prior to conducting an inspection. The Competition Act also allows the authority to conduct searches without search warrants, but that is subject to the undertaking being inspected giving its consent.
- In Chile, a "double warrant" is required, that is to say that the inspection must be approved by the Competition Tribunal and authorized by the Minister of the Court of Appeals.
- Likewise, in Croatia a court warrant is required, in addition to an order from the Council of the competition authority.
- In Colombia, no court warrant or specific decision is required, but the inspection team must carry credentials indicating the legal basis for the inspection, the name of the inspected party, the object of the inspection and sanctions for non-cooperation.
- In the Czech Republic and Slovakia, no formal decision of the authority is issued for an inspection: the head of the competition authority authorizes certain officials to carry out the inspection.
- Likewise, in Israel the authority does not issue a formal decision: the search will take place once the head of the investigations department is convinced that an inspection is necessary.
- In Italy, although no court warrant is required to carry out inspections, a court warrant can be needed in case the Authority wants the Guardia di Finanza (Italian Customs and Excise Police, regularly assisting the Competition Authority in

conducting an inspection) to overcome opposition by the parties against opening closed letters/ drawers or conducting physical searches[15].

- In Germany, in exigent circumstances (i.e. a court order cannot be obtained in due time without diminishing the chances for success) the inspection may be carried out without a court warrant (for instance, if the warrant is limited to one premise and the case team sees the need to search other premises and a judge cannot be reached by phone). If the competition agency seizes evidence and the undertaking objects to this, the competition agency has to apply for the required court order immediately (usually up to three days) after the inspection.

- In France, no formal decision is required for inspections without a court warrant (which, as mentioned previously, are rarely used for unannounced inspections) while a court warrant is required to perform a search (or "dawn-raid")).

- In Japan, prior authorization by a judge is needed only under the criminal procedure. Under the administrative procedure, the agency will issue identification cards to the inspectors specifying the name of the case, the legal basis for the inspection and eventual penalties for non-compliance.

- In Kenya and Spain, the competition authorities need a court warrant if they face opposition.

- In Poland, as indicated in *Section 2.1*, the inspectors act upon the authorisation issued by the President of the competition authority in "plain inspections", while "inspections with search" additionally require a prior authorisation from the court of competition and consumer protection, which is issued, within 48 hours, upon the request of the President of the competition authority.

- In Switzerland, inspections in business premises typically require an Order of the Presidency of the Swiss competition authority. However, if the success of the investigation risks being jeopardized by delays in obtaining this Order, the investigating officer may proceed without it.

- In Taiwan, the competition authority issues a notification to the concerned agencies, organisations, enterprises and individuals asking them to submit books, records, documents and any other necessary materials or exhibits.

- In the UK, a warrant is usually sought if the OFT suspects that information relevant to the investigation may be destroyed or otherwise interfered with if the OFT were to issue a written request for the material.

- In the United States, the US DOJ requires a search warrant to inspect business premises. The application for a search warrant must be made to a federal magistrate judge in the judicial district where the property is located.

[15] See Section 52 of Presidential Decree n. 633/1972.

2.3.2. *Contents of the inspection decision or court warrant*

The contents of inspection decisions by competition authorities or court warrants may vary considerably. Nevertheless, the main elements can be identified as follows:

2.3.2.1. *Authority*

The inspecting competition agency, and in some cases (e.g. Australia, Chile, Mexico, Poland, the Russian Federation, Switzerland, the UK OFT in criminal investigations) the persons empowered to conduct the inspections, are designated in the decision or court warrant.

2.3.2.2. *Legal basis*

Generally the decisions or warrants include a reference to the legal basis empowering competition authorities to conduct them.

2.3.2.3. *Addressee*

Requirements regarding the addressee may vary. The addressees are normally specified in the inspection decision or court warrant.

2.3.2.4. *Subject matter/ suspected infringement / conduct / affected market*

In most jurisdictions, the subject matter or reason for the inspection or search is mentioned in the decision or court warrant. Differences arise in the level of detail provided in such document and in the aspects of the infringement included.

In some jurisdictions, the suspected infringement or facts of the case are described. Reference may also be made to the subject matter and purpose of the inspection, as well as to the complaint initiating the investigation. In some jurisdictions, the market affected or the economic sector or products concerned is mentioned.

2.3.2.5. *Rights and obligations (sanctions if applicable)*

In some jurisdictions, e.g. the EU (EC), Hungary, Italy, Poland, the Russian Federation, Spain, Switzerland, the UK OFT, the inspection decision (or court warrant as the case may be) includes the potential penalties or legal consequences that may be imposed in case the undertaking or association of undertakings refuses to comply.

2.3.2.6. *Temporary scope of the inspection*

The exact date or temporary scope of the inspection or search of the business premise is indicated in the decision or warrant (for instance, Australia, Spain, Mexico, New Zealand, Poland, Sweden, Spain). In some jurisdictions, the decision must mention the date on which the inspection is to begin (e.g. the EU (EC), Sweden). In others (e.g. Australia), the warrant also specifies the day on which it ceases to have effect (not more than one week after the date of issue).

- In Germany, according to the case law, the competition authority has to conduct inspections within six months after the issuance of the court warrant (or otherwise apply for a new court warrant after this period has expired).

- In Hungary, the competition authority may carry out inspections within three months of the issuance of the court authorisation. Within this period, the warrant can be used several times.

- In New Zealand, the warrant indicates the period within which it may be executed; this period cannot normally exceed 14 days, unless a longer period is considered necessary (it may not, however, exceed 30 days from the date of issue).The warrant also specifies whether it may be executed more than once.

- In the UK, the OFT's warrant remains in force for one month from the date of issue.

- In the United States, the search warrant affidavit must note the period of time within which the search will be executed, which is no greater than within fourteen days.

In addition, in certain jurisdictions the warrant must specify whether the inspection of the business premise has to be carried out at a particular time of the day, or whether it may be carried out at any time (e.g. Australia, the United States[16]).

2.4. Extent of inspection powers

2.4.1. Possibility to make copies and seize original documents

Almost all competition agencies have the possibility to make copies of documents during inspections of business premises. However, not all of them can seize original documents during inspections (e.g. the EU (EC), the Czech Republic, Italy[17], Kenya, Mexico, Sweden). In certain jurisdictions, evidence may only be seized if it is impossible to make copies on the premises (e.g. Croatia, Slovakia), or if an additional permit is obtained (in Poland, the President of the competition authority issues a decision to seize). Moreover, the power to retain documents may be limited in time (e.g. in Spain, evidence may be retained for maximum 10 days, in Poland, the maximum period is seven days, for the UK OFT the maximum period is three months, whereas in Jersey, documents may be retained for up to one year, or until the conclusion of the proceedings if they are started within that year).

2.4.2. Possibility to collect digital/forensic evidence

Most competition agencies have the power to collect digital/forensic evidence during inspections of business premises. Their powers in this regard may differ, according to the respective legal requirements.

Several competition agencies have the power to take digital copies/forensic images of the evidence found at the premises investigated (e.g. Botswana, Chile, Colombia, France,

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[16] The search warrant must note whether the search will be conducted in the daytime (6:00 a.m. to 10:00 p.m.) or whether it may be executed at any time. The US DOJ will rarely seek permission to conduct a night time search, which must be based on a showing of "good cause." ; See US DOJ Manual at Chapter III.F.5 (Search Warrants).

[17] In certain circumstances, the Guardia di Finanza (when assisting the Competition Authority to conduct a search) may be empowered to seize original documents in case where it is not possible to take a copy of the original documents.

Germany, Hungary, Israel, Italy, Jersey, Mexico, Norway, New Zealand, the Russian Federation, Sweden, Switzerland, the UK OFT, the United States[18]), whereas others have the possibility to copy all the digital data to which they have access from the location of the investigation (e.g. Bulgaria, Kenya).

2.4.3. Possibility to seal premises

Most jurisdictions foresee the power to seal premises, with the exception of Colombia, Israel, Japan, Kenya, New Zealand and the United States. In most cases, seals are normally only used over night when the inspection continues for more than one day.

Regarding time limits for the sealing of premises, in many jurisdictions including e.g. Croatia, the Czech Republic, Germany, Poland, Spain, the EU (EC), and Slovakia, premises can remain sealed for the period necessary to carry out the inspection of the business premise. In some jurisdictions, e.g. Hungary there is no strict time limit. In Australia, it is possible to secure evidence pending the award of a search warrant to seize it (in context of voluntary searches).

In the UK, the OFT is entitled to seal the relevant business premises (and documentation if applicable) for a maximum of three working days. This time period may be extended where an undertaking consents to a longer time or where access to documents is unduly delayed, such as by the unavailability of a person who can provide access. In Sweden, the assistance of the Swedish Enforcement Authority is required to open locked doors or seal premises).

Regarding the implications of breaching the seals, in e.g. Germany, the breach of seals is considered a criminal offence, punishable by up to one year's imprisonment. In the EU (EC), fines may be imposed not exceeding 1% of the total turnover in the preceding business year where, intentionally or negligently, seals have been broken[19].

2.4.4. Power to ask questions during inspections

Most competition agencies have the possibility to ask questions related to the inspection and to the investigation during inspections of business premises[20]. This must be distinguished from the power of competition agencies to conduct interviews or question witnesses on a separate legal basis. See *Section 5.*

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[18] During the course of a search of business premises, the US DOJ has the authority to seize any item, including original paper documents, electronic documents and computer hardware and software. Because examining a computer for evidence of a crime is so time consuming, it will be infeasible in almost every case to do an on-site search of a computer or other storage media. Although courts have approved removal of computers to an off-site location for review in many cases, law enforcement agents can instead create a digital copy of the hard drive that is identical to the original in every relevant aspect rather than seize an entire computer for off-site review. See US DOJ Manual at Chapter III.F.5 (Search Warrants).

[19] Article 23 of Regulation 1/2003, OJ (2003) L1

[20] Germany cannot compel the inspected parties to answer questions during inspections, but this does not prevent the parties from giving voluntary explanations. However, leniency applicants may be interviewed by the competition agency during the inspection. In Switzerland the inspected party may give explanations but cannot be obliged to do so.

The power to ask questions is typically limited by the privilege against self-incrimination. See *Section 4.2*.

2.4.5. Law enforcement assistance

Most competition authorities have the possibility to ask for police or other law enforcement assistance during inspections. In most of these jurisdictions, law enforcement assistance is requested at the discretion of the competition agency only for entering the business premises. In Italy, the Guardia di Finanza (Italian Customs and Excise Police) can assist to overcome opposition during the inspection or to seal premises.

2.5. Limitations

The power of competition agencies to inspect business premises is limited or circumscribed for various reasons.

First of all, in a majority of jurisdictions (e.g. Australia, Botswana, Canada, Chile, Colombia, Croatia, France, the EU (EC), Germany, Hungary, Israel, Italy, Jersey, Kenya, Norway, New Zealand, Poland, Sweden, Slovakia, Spain, Switzerland, the UK, the United States), the competition authorities respect well-founded claims for the protection of Legal Professional Privilege (LPP) (or attorney-client privilege), subject to certain conditions.

In most of these jurisdictions LPP relates only to external legal counsel, however, in the UK and the United States it covers all lawyers independently of their capacity as in-house or external legal counsel[21].

In most cases, documents for which LPP is invoked, may be transferred either to a judge in a sealed container, in order for him/her to decide whether or not the privilege applies (e.g. New Zealand, Poland), or to another designated person or persons not involved in the investigation (e.g. officer of the court, sheriff or person agreed upon by the competition authority and the person invoking LPP in Canada, a team of law enforcement agents and attorneys not otherwise involved in the investigation in the United States[22] or a Hearing Officer in the EU (EC)).

In the vast majority of jurisdictions, well-founded claims invoking the privilege against self-incrimination will be respected. See *Section 4.2*.

2.6. Binding nature of inspections

Inspections are binding on the targeted undertakings in almost all jurisdictions, without prejudice to the right of undertakings to legally oppose an inspection if this is beyond the scope of the investigation as described in the inspection decision.

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[21] Though beyond the scope of this report, there are other aspects in which the LPP (or attorney-client privilege) differs across jurisdictions

[22] In the United States, the ultimate determination of whether a document is privileged is determined by the court.

There is generally an obligation on undertakings to cooperate.

2.7. Judicial review

In some jurisdictions (e.g. Australia, Botswana, Barbados, Bulgaria, Canada, the Czech Republic, the EU (EC), Germany, France, Mexico, New Zealand, Sweden, Spain, Taiwan) parties can appeal the competition agency's decision/court warrant authorising the inspection separately, although the appeal does not always have a suspensive effect. In the UK it is possible to appeal (and suspend) the OFT's inspection decision/warrant. In other jurisdictions (e.g. Croatia, France, Hungary, Israel, Italy[23], the Russian Federation, Slovakia), the legality of the inspection may be assessed in an appeal brought against the final prohibition decision.

In addition, the inspected parties may have the possibility to challenge the conduct of the inspection separately or in the context of the final decision (e.g. Chile, Colombia, Hungary, Japan, Kenya, Norway, New Zealand, Poland), and obtain the annulment of the inspection or compensation (e.g. Australia). In some jurisdictions parties may demand the return of items seized or to prevent their use as evidence (e.g. Switzerland, the United States).

2.8. Enforcement measures and sanctions for non-compliance and/or interference with an investigation

Non-compliance and/ or interference with the investigation of a business premise are prohibited in almost all jurisdictions. It covers a range of practices, including assaulting or preventing an official from the competition agency from carrying out his/her tasks, altering or destroying records, knowingly submitting false information, breaking seals or unduly delaying the proceedings.

Some competition agencies (e.g. Barbados, Canada, France, Jersey, Kenya, New Zealand, Switzerland, the UK, the United States) underlined that non-compliance and/or interference with an investigation by the undertakings which are the subject of an investigation can constitute a criminal offence and, in some cases, lead to custodial sentences.

In jurisdictions where competition enforcement measures can also be taken against individuals, a distinction is typically made between fines that may be imposed on individuals and those that may be imposed on undertakings. In certain jurisdictions sanctions for non-compliance are limited to individuals (Chile) or to undertakings (Bulgaria**,** the EU (EC)).

Based on the responses to the survey, there is a large degree of divergence on the level of sanctions, both pecuniary and custodial:

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[23] In a recent decision, the Administrative Tribunal of First Instance (TAR Lazio) has accepted however the admissibility of the appeal against the Authority's decision to open an investigation and authorize an inspection (decisions nrs. 864 and 865 of January 26th, 2012); the appeal against this decision is however still pending.

- In Australia, a penalty of AUD 3300 [24] can apply to individuals or corporations who refuse to provide all reasonable facilities and assistance to the competition authority officials. In addition, any individual on the premises faces AUD 3300 and/or imprisonment for 12 months if he/she fails to answer questions or produce evidential material.

- In Barbados, individuals face up to six months imprisonment for assaulting or preventing a member of the competition authority from carrying out his tasks, impeding an investigation under the competition law, altering or destroying a document, failing to produce information or documents requested by the competition authority or knowingly giving false information.

- In Botswana, there are no sanctions against the undertakings being investigated during the course of the investigation, but failure by the party relevant to the investigation to provide the information requested or refusal is a criminal offence with a penalty or imprisonment up to two years or a fine up to BWP 30 000[25]

- In Chile, individuals face up to 15 days imprisonment for obstructing an investigation.

- In Slovakia, a fine of up to EUR165[26] can be imposed on natural persons who impede proceedings (in addition to the fine imposed on the undertaking).

- In France, anyone who objects to the fulfilment of the investigating agents' duties is liable to a fine of EUR7500[27] and/or up to six months imprisonment.

- In Israel, destruction of evidence is sanctioned by up to three years imprisonment.

- In Japan, in context of the administrative procedure, individuals who fail to cooperate may be sanctioned by a fine of up to three million yen[28] or up to one year's imprisonment. The company or the association to which the individual belongs will also receive a fine, the amount of which is determined by the law[29].

- In Jersey, supplying false information can be sanctioned by up to five years imprisonment.

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[24] Approx. USD 3427 or EUR2510 (based on the exchange rate on Feb. 1st , 2013)

[25] Approx. USD 3657 or EUR 2792 (based on the exchange rate on March 7th, 2013).

[26] Approx. USD 225 (based on the exchange rate on Feb. 1st , 2013).

[27] Approx. USD 10.239 (based on the exchange rate on Feb. 1st , 2013).

[28] Approx. USD 32.554 or EUR23.851 (based on the exchange rate on Feb. 1st, 2013).

[29] See Sections 94 and 95 of the Antimonopoly Act.

- In Kenya, any person who contravenes or fails to comply with a lawful order of the competition authority is liable for a fine of up to 500 000 shillings[30] and/or up to three years imprisonment.

- In the United States, individuals may under certain circumstances be charged with certain criminal, non-antitrust offenses involving the integrity of the antitrust investigative process (for instance, perjury, false statements, obstruction of criminal investigations, and destruction, alteration, or falsification of records[31]).

- In a number of European jurisdictions (e.g. Bulgaria, the Czech Republic, the EU (EC), France, Hungary, Slovakia, Spain), the fine prescribed for non-compliance can be up to 1% of the undertaking's annual turnover in the preceding year.

In several jurisdictions (e.g. Barbados, Bulgaria, the EU (EC), France, Poland, Spain, Taiwan, the UK OFT) penalty payments or periodic penalty payments are equally foreseen to compel compliance.

In some jurisdictions (e.g. Spain), non-cooperation might be taken into account as aggravating circumstances in the final decision.

In Germany, Sweden and Switzerland there is no fine for non-compliance, but the authority can gain access to the premises - with the help of law enforcement (Swedish Enforcement Agency (SEA) in Sweden) - in a case of non-compliance. Resisting law enforcement or the SEA can constitute a criminal offence. In some jurisdictions, only the courts can impose sanctions for non-compliance (e.g. Australia, the Russian Federation).

3. INSPECTIONS IN NON-BUSINESS PREMISES

This Section describes the powers of inspection of the competition agencies regarding non-business premises. It typically focuses on the relevant differences identified in comparison to inspections in business premises.

3.1. Legal basis and substantive requirements

The possibility of inspecting non-business premises is envisaged in most jurisdictions, although it has not yet been put in practice in certain jurisdictions (e.g. Bulgaria, Taiwan). In some jurisdictions it is limited to criminal investigations (e.g. Germany, the United States). In many cases, competition laws include a specific provision granting such power and defining its scope (e.g. Hungary, the EU (EC), Poland, Sweden, Slovakia, Spain, Switzerland, Taiwan).

Where inspections in non-business premises are available, the decision to launch an inspection in non-business premises is commonly subject to the existence of a degree of

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[30] Approx. USD 5.702 or EUR 4.177 (based on the exchange rate on Feb. 1st , 2013).

[31] Perjury (Title 18 United States Code §1621 *et seq.*), false statements (Title 18 United States Code §1001), obstruction of criminal investigations (Title 18 United States Code §1510), and destruction, alteration or falsification of records (Title 18 United States Code §1519)); See also US DOJ Manual at Chapter II.B.2 (Offenses Involving the Integrity of the Investigative Process).

suspicion that records related to the business and to the subject-matter of the inspections are being kept in other premises than those of the undertaking.

The jurisdictions empowered to inspect non-business premises have pointed to (i) either applying the same standard as for business premises (e.g. Australia, Botswana, Canada, Chile, Colombia, France, Germany[32], Japan, Kenya, Mexico, New Zealand, Taiwan, the UK OFT, the United States), or (ii) refer explicitly to elements pointing towards "reasonable grounds", or "reasonable suspicion" that evidence will be found on the non-business premises (e.g. the Czech Republic, France, the EU (EC), Hungary, Israel, Jersey, Norway, Poland, the Russian Federation, Slovakia). However, in certain jurisdictions there are no specific requirements to inspect non-business premises in the law (e.g. Barbados, Bulgaria, Kenya, Vietnam).

Examples of non-business premises under national law include:

- In Botswana, the concept relates to any other premises where information or documents are kept by the undertaking.
- In Croatia, the term is understood to cover any other premises, land and means of transport of the parties against whom proceedings have been initiated, along with the homes of directors, managers and other members of staff of the undertakings under investigation or other persons.
- In the Czech Republic, the concept of non-business premises includes the homes of natural persons who are statutory bodies of the undertaking or their members, or who are in an employment or similar relation with the undertaking.
- In the EU (EC), the term covers "any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned".
- In Hungary, the term covers rooms used for private purposes or privately used, including vehicles and other land, can be searched, when they are in the use of any executive official or former executive official, employee or former employee, agent or former agent of the undertaking under investigation, or of any other person who exercises or exercised control as a matter of fact.
- In Poland, the concept of non-business premises refers to any housing apartment or in any other room, real estate or means of transportation.
- In Sweden, the possibility to search non-business premises is limited to those belonging to the board and employees of undertakings being suspected of an alleged infringement. A specific reason must exist to believe that the evidence of the infringement can be found at the non-business premises and inspections of such premises are only allowed in cases of serious infringements.
- In Slovakia, the term covers buildings, premises or means of transport of an undertaking which are not listed in the provision concerning inspections in business

[32] Although special requirements for inspections at private homes may appear in terms of practical implementation, i.e. missing IT infrastructure etc.

premises, and private buildings, private premises or private means of transport of an undertaking's employees.

- In Spain, the term refers to "the private homes of the entrepreneurs, managers and other members of staff of the undertakings".
- In the UK, "domestic premises" are defined as premises used in connection with the affairs of the undertaking or association of undertakings, and premises where documents relating to the affairs of an undertaking or association of undertakings are kept.

3.2. Procedural requirements

3.2.1. Authorisation by decision / court warrant

In most jurisdictions where inspections of non-business premises can be undertaken[33], a court warrant is required. In several jurisdictions where a decision by the competition authority is sufficient to conduct inspections in business premises, a court warrant for the inspections in non-business premises is required. That is the case in e.g. the Czech Republic, Israel, Poland, Slovakia, the EU (EC)[34], the UK OFT. In Botswana, a court warrant is always obtained since inspections without a court warrant at non-business premises would otherwise require the consent of the person in control of the premises.

In addition, in Slovakia, the competition authority shall invite a custodian appointed by the court to attend the inspection. In Croatia, the inspection must be conducted in presence of two witnesses.

3.2.2. Prior notice

In Jersey, the competition authority must send prior written notice of the inspection in non-business premises at least two days before the start of the inspection if the person occupying the premises is not suspected of being a party to the breach or the intended breach, or whose behaviour is not the subject of the investigation. The notice will indicate the purpose of entry and the nature of the suspected offence(s).

3.3. Extent of inspection powers

3.3.1. Possibility to make copies and seize original copies

In most jurisdictions, the competition agency has the same power to copy and to seize documents during inspections in non-business premises as during inspections of business premises (see *Section 2.4.1*). The following exceptions may be highlighted:

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[33] E.g. in Germany a court warrant is required for business as well as non-business premises (with the exception that in cases of imminent danger of removal and/or destruction of the documents, the German competition authority is entitled to inspect all kinds of premises without court warrant).

[34] In the EU, the national judicial authority of the Member State(s) concerned needs to give its prior authorisation, Article 21(3) of Regulation 1/2003.

- In the UK, in context of a civil investigation, the OFT has no power to "seize and sift" during searches of domestic premises.

3.3.2. Sealing of premises

In several jurisdictions it is possible to seal non-business premises during inspections (e.g. Bulgaria, Chile, Croatia, Germany, Hungary, Norway, the Russian Federation, Sweden, Spain, Switzerland, the UK OFT, Vietnam), while in others it is not possible to use this power (e.g. Australia, Barbados, Colombia, the Czech Republic, France, the EU (EC)**,** Israel, Jersey, Slovakia). In Spain, sealing non-business premises requires the express prior consent of the affected party, or failing this, judicial authorization to do so.

3.3.3. Power to ask questions during inspections

Almost all competition agencies have the possibility to ask questions related to the subject matter of the inspection during inspections in business premises, and this power extends to inspections in non-business premises. In the EU (EC), the power to ask explanations on facts or documents relating to the subject-matter and purpose of the inspection (and to record the answers) is not available in the case of inspections in non-business premises.

3.3.4. Law enforcement assistance

In most jurisdictions the competition authority may request the assistance of law enforcement or a similar authority during an inspection in non-business premises.

In Poland, inspections in non-business premises are performed by the police, whereas inspections in business premises are performed by the competition authority officials. Authorised employees of the competition authority or other authorised persons participate in the inspection.

3.4. Limitations

There are generally no differences regarding limitations in the case of inspections in non-business premises as compared to inspections of business premises.

3.5. Judicial review

Almost all jurisdictions offer the possibility for the inspected persons to challenge either the inspection decision/court warrant, or the conduct of the inspection. Legal remedies are largely identical for inspections in non-business premises and inspections in business premises, although the following exceptions have been indicated:

- In Barbados, a party may obtain the restitution of a book, document or thing that has been seized if the court is satisfied that it will not be needed for the purposes of the investigation.

- In Slovakia, the inspected party may lodge an appeal against an inspection decision before the Council of the Office (an appellate body in administrative proceedings). The decision of the Council may subsequently appealed before a court.

3.6. Enforcement measures and sanctions for non-compliance and/or interference with an investigation

The following specificity in terms of enforcement measures and sanctions for non-compliance with and/or interference with an investigation of inspections of non-business premises, in comparison with inspections of business premises, can be highlighted:

- In Poland, the owner of whatever is being searched may refuse to provide information or co-operate in the course of an inspection only if this would expose him or her, or his or her relatives, to criminal liability.

4. REQUESTS FOR INFORMATION (RFIs)[35]

4.1. Legal basis and scope of the relevant provisions

All competition agencies have the power to request information in the context of investigations of competition law infringements, although in some jurisdictions it is limited to a specific type of procedure (e.g. the Czech Republic, Germany, and Japan are limited to administrative procedures).

In addition, a number of jurisdictions have reported using premerger notification forms, which require merging undertakings to submit information about the planned operation (e.g. Canada, Colombia, the Czech Republic, Germany, Hungary, Japan, Kenya, Taiwan, the EU (EC), the UK, the United States). Botswana reported they publish a merger notification and seek any information from any person/entity that may wish to comment.

Whereas in several jurisdictions (France, the EU (EC), Poland, the UK) RFIs may be addressed only to undertakings and/or associations of undertakings, in the majority of jurisdictions (e.g. Czech Republic, Germany[36], Hungary, Italy, Sweden, Slovakia, Spain, the United States) requests may also be addressed to natural persons (mostly representatives of the undertaking concerned).

The scope of the relevant provisions is generally comprehensive (e.g. "*necessary information*" or *"relevant information"* for the purposes of the investigation, *"all data and information which may be useful for the application of the law"*). The information which can be requested includes all kinds of documents and computer files, including in written/digital/electronic form, and data, including reports, trade books, business records, etc.

In many jurisdictions RFIs must respect the principle of proportionality, meaning that the recipients must not be unduly burdened, as evidenced by the following examples:

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[35] **Requests for information** for the purposes of this Report are any form of request addressed by a competition authority to an undertaking and/or association of undertakings and/or natural person to provide information in the context of an investigation (normally in writing, but may be also in oral form: e.g. in Ireland a witness summons hearing. Such witnesses may be compelled to produce documents within their power).

[36] Administrative proceedings only.

- In Australia, the competition authority must weigh the burden represented by the RFI against its benefits for the investigation, in order to justify that the RFI is reasonable given the circumstances. The RFI must incorporate a sufficient description of the matter alleged to show the necessary relationship between the information sought and the matter in respect of which it is sought.

- In Canada, the competition authority's subpoena powers are subject to judicial authorisation, which will only be obtained if the judge is satisfied that a bona fide inquiry is being conducted and that the recipient of the RFI has, or is likely to have, information that is relevant to the inquiry.

- In the EU, the EC is equally bound by the EU law principle of proportionality and the RFI must state the legal basis and purpose[37], although it is up to the EC to define the scope and the format of the RFI.

- In Japan, the competition authority will adopt an approach to lighten the burden of the companies (e.g., when the competition authority requests the undertaking to submit reports, the purpose of it will be clearly described in each request)[38].

- In Mexico, the RFI must indicate, *inter alia*, the connection between the recipient and the investigated conducts and the relevance of the requested information for the proceedings.

- In New Zealand, the courts have stated that the competition authority does not have unlimited power to request information. The information must be relevant to the investigation which itself must be authorised by the competition law.

- In Sweden, information can only be requested in relation to specific suspected infringements. Persons or undertakings subject to an RFI cannot be requested to provide information which is not in their possession.

- In the UK, the OFT does not apply a set timescale for responses to RFIs: the deadline will depend on the nature and amount of information requested. The recipient of an RFI may justify his/her failure to comply by proving that the document required was not in his/her possession or under his/her control, and that it was not reasonably practical for him/her to comply.

- In the United States, in criminal proceedings, certain federal district courts require that the subpoena seek "relevant information"[39]. Thus, a subpoena must be "reasonable" in scope and a subpoena recipient may claim that the subpoena is "overly burdensome", especially in connection with data stored on the company's computer systems. Subpoena recipients may request the deferral of certain categories

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[37] See also paragraph 34 of the Antitrust Best Practices.

[38] See paragraph 6(1) of "Policies Concerning Procedures of Review of Business Combination", available at http://www.jftc.go.jp/en/pressreleases/uploads/110620attach2.pdf.

[39] Unlike a search warrant, in the United States there is no "probable cause" requirement for the issuance of a subpoena. See US DOJ Manual at Chapter III.F.4.a (Subpoenas *duces tecum*).

of the subpoena, or file a motion in federal district court to quash the subpoena. In civil proceedings, a Civil Investigative Demand (CID) may be served if there is a "reason to believe" that the recipient may have documentary material or information relevant to a civil antitrust investigation[40]. Recipients of compulsory RFIs may raise initial objections to the request with staff and subsequently via internal appeal processes provided at the US FTC and US DOJ. Based on discussions with the parties, staff may agree to modify the compulsory RFIs.

Information is typically provided in a written form, but several jurisdictions also accept oral statements (e.g. Bulgaria, Croatia, Italy, Norway, the Russian Federation, Slovakia).

The following specificities can be indicated:

- Some jurisdictions limit the use of RFIs to administrative/civil procedures (e.g. the Czech Republic, Germany, Switzerland). Germany reports that it is considered that compulsory RFIs addressed to persons suspected of an administrative fines procedure would violate the right not to incriminate oneself.

- In Botswana, the RFI can only be served on "parties relevant to the investigation," but not the actual parties under investigation.

- In Australia and Israel, the competition authority has the power to issue compulsory RFIs in both civil and criminal investigations.

- In the EU (EC), a distinction is made between "compulsory" RFIs on the basis of a decision and "non-compulsory" RFIs on the basis of a simple request.

- In the United States, the US DOJ and US FTC have the power to issue compulsory RFIs, including subpoenas, second requests for additional information following the filing of a merger notification, as well as Civil Investigative Demands (CIDs).

The competition agencies usually state the legal basis and the purpose of the RFI, specify what information is required and within which time-limit.

4.2. Limitations

The power of the competition agencies to ask for information is limited for various reasons:

4.2.1. Legal Professional Privilege (LPP)

Certain jurisdictions foresee specific procedures in order to determine whether documents are covered by LPP (or attorney-client privilege) or not:

- In New Zealand, in case of dispute, the matter shall be resolved by reference to a court for a ruling.

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[40] See US DOJ Manual at Chapter III.E. (Issuing Civil Investigative Demands); Federal Trade Commission Act, 15 United States Code § 57b-1(c)(1).

- In the United States, when parties receive a second request, a CID or subpoena, they can decline to provide documents that they claim are protected by the attorney-client privilege or work product privilege. In these instances, the parties must provide a written list and description of the withheld documents, and seek additional relief from federal district court, if necessary.

4.2.2. Privilege against self-incrimination

In the vast majority of jurisdictions, well-founded claims invoking the privilege against self-incrimination will be respected. The scope of this right may vary. For example:

- In Australia, the competition authority's power to issue an RFI is limited after it has commenced court proceedings, to the extent that it should not interfere with the right against self-incrimination.

- In Barbados and Canada individuals cannot refuse to comply with an RFI on the grounds that they would incriminate themselves, but self-incriminating evidence cannot be used against them in criminal proceedings.

- In the EU (EC), the scope of the privilege against self-incrimination is set out in case law[41]. The addressees of a compulsory RFI decision (which can only be issued to undertakings or associations of undertakings) may be required to provide pre-existing documents, such as minutes of cartel meetings, even if those documents may incriminate the party providing them. In the case of simple non-compulsory RFIs, the addressee may refuse to reply to a question in such a request invoking the privilege against self-incrimination and the matter may be referred to the Hearing Officer, after having raised the matter with the Directorate-General for Competition[42].
- In Hungary, parties are not obliged to make statements admitting an infringement of the law, but they may not refuse to supply self-incriminating evidence if requested.
- In Italy, although not explicitly foreseen by the law, the competition authority cannot ask for information which would violate the privilege against self-incrimination pursuant to the case law of the national and European courts.
- In Mexico, the privilege against self-incrimination applies only in criminal proceedings (i.e. cartel cases).
- In Switzerland, individuals can refuse to comply with an RFI if their answer could have severe consequences for themselves, their spouses or partners, any person related to them by birth or marriage in a direct line or collaterally up to the second degree. An undertaking may refuse to comply to the extent that its answers might involve an admission of the existence of an infringement.
- In the United States, the privilege against self-incrimination is available to individuals, not corporations. With respect to applying the privilege to individuals, the contents of voluntarily created, pre-existing documents are not protected, but an individual's act of producing such documents may be incriminating by implicitly

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41 Case C-301/04 P *Commission* v *SGL*, [2006] ECR I-5915

42 Article 4(2)(2b) of the Terms of Reference of the Hearing Officer, OJ L 275, 20.10.2011, p.29.

conceding the existence of the documents, the individual's possession of the documents, or the authenticity of the documents.

4.2.3. Others

Other limitations may also play a role in certain very limited circumstances, such as privacy, data protection and banking secrecy.

4.3. Judicial review

In most jurisdictions an application can be made for the RFI to be reviewed by a court (e.g. Australia, Canada, Barbados, Chile, the Czech Republic, the EU (EC), Germany, Japan, Kenya, Mexico[43], New Zealand, Sweden, Spain, Switzerland, Taiwan, the United States, Vietnam).

In other jurisdictions, there are no separate legal remedies against RFIs. Nonetheless, an appeal can be brought in the context of an appeal against the final decision (e.g. Bulgaria, Colombia, France, Italy, Slovakia, the UK).

In certain jurisdictions, the parties have the possibility to seek review of a compulsory RFI or complain before a non-judicial body:

- In France, RFI recipients can raise their concerns before the Board of the competition authority before it issues a decision on the merits.
- In Norway, the recipient may complain to the Ministry.
- In Spain, if the RFI causes irreparable damage to rights or legitimate interests it may be appealed before the Council of the competition authority within 10 days.
- In the UK, where a recipient has a complaint (e.g. about the deadline set for a response) he/she can raise this with the Senior Reporting Officer. If it is not possible to resolve the dispute with the latter, the recipient may refer the matter to the Procedural Adjudicator.
- In the United States, as stated in *Section 4.1*, subpoena recipients may request the deferral of certain categories of the subpoena, or file a motion in federal district court to quash the subpoena. In civil proceedings, recipients of compulsory RFIs may raise initial objections to the request with staff at the US DOJ and US FTC and subsequently via internal appeal processes provided at each agency. Based on discussions with the parties, staff may agree to modify the compulsory RFIs. If staff and a recipient fail to reach agreement on a modification or deferral of the compulsory RFI, the US FTC and US DOJ have the authority to petition a federal district court to enforce it if the recipient fails to comply.

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[43] In Mexico, recipients of an RFI have the possibility to challenge the constitutionality of the RFI before a federal judge, e.g. if it breaches their due process rights.

4.4. Enforcement measures and sanctions for non-compliance and/or interference with an investigation

In almost all jurisdictions, fines or penalty payments may be imposed in case of non-compliance or refusal by an undertaking to submit a reply to an RFI. Many jurisdictions equally provide for periodic-penalty payments as a means to enforce RFIs (e.g. Barbados, Bulgaria, Colombia, the Czech Republic, France, Germany, Hungary, Mexico, Poland, Spain, Taiwan, the EU (EC)).

In several jurisdictions the fine may amount up to 1% of the annual turnover in the preceding business year if an undertaking submits incomplete, misleading or untrue information, or fails to reply within the relevant time limit (e.g. Bulgaria, the Czech Republic[44], France[45], Hungary[46], Spain[47], Slovakia, the EU (EC)). In Israel, undertakings may be fined up to 8% of their annual turnover.

In addition, in those jurisdictions that have enforcement powers against individuals, sanctions of a different nature (administrative and/or criminal), of a different form (fines and/or imprisonment), of varying extent (rather low to very high) and subject to different statutory limitation periods (from one to five years), may also be imposed on individuals.

The following particularities have been mentioned:

- In Chile, the competition authority may request up to 15 days imprisonment against individuals who obstruct an investigation.
- In France, penalty payments up to 5% of the average daily turnover[48], per day, may be imposed on an undertaking if it does not comply with a summons or does not answer within the time limit or answers inaccurately. In addition to fines amounting to 1% of the annual turnover in the preceding business year, criminal sanctions (fine of EUR 7 500[49] and/or imprisonment of up to 6 months) are foreseen for anyone who objects, in any way whatsoever, to the fulfilment of the duties with which the investigating agents are entrusted.
- In Japan, in the context of the administrative procedure, undertakings and associations will be fined if their employees or members make false statements or submit false reports, in addition to the individual sanctions that apply (up to one year's imprisonment or a fine of up to three million yen[50]). In addition, in case of

[44] For an administrative offence a fine can be imposed up to CZK 300 000 or up to 1% of the net turnover achieved in the preceding business year.

[45] In case of undue delay (e.g. erroneous or incomplete information).

[46] In case of behaviour which is aimed at protracting the proceeding or preventing the disclosure of facts or which has such an effect (Article 61(1) and (3) of the Competition Act).

[47] Fines up to 1% of the turnover may be imposed if the information supplied is incorrect or misleading.

[48] Article L 464-2 V.

[49] Approx. USD 10.239 (based on the exchange rate on Feb. 1st, 2013).

[50] Approx. USD 32.554 or EUR 23.851 (based on the exchange rate on Feb. 1st, 2013).

merger review, any person who has failed to submit a notification or submitted a false notification shall be punished by a fine of not more than two million yen.

- In Mexico, the refusal to comply with an RFI may be sanctioned by daily penalty payments of up to 1,500 times the minimum daily wage. Supplying false information may lead to fines of up to 175,000 times the minimum daily wage, independently from any criminal liability which might apply.

- In New Zealand, criminal fines of up to NZD10,000[51] for individuals and NZD 30,000[52] for corporate bodies shall be imposed for refusal or failure to comply with an RFI, without reasonable excuse, or to knowingly submit false or misleading information or documents[53].

- In Poland, administrative fines amounting to EUR 50 000 000[54] can be imposed upon an undertaking, if it, *even unintentionally*, (i) has not provided information as demanded by the President of the competition authority, or provided untrue or misleading information, or if it (ii) has not co-operated in the course of the inspection. Moreover, a financial penalty of up to fifty times the average salary can be imposed on a natural person[55].

- In Sweden, RFIs may be imposed, subject to penalty payments[56]. No additional sanctions are provided for, even for providing incorrect or misleading information. Penalties may only be enforced by a court upon application by the competition authority.

- In Slovakia, fines on undertakings not exceeding 1% of the annual turnover in the preceding business year can be imposed. In addition, a fine of up to EUR 165 may be imposed on natural persons[57] who impede the proceedings. A sanction of up to EUR 99 can be imposed on natural persons for failure to provide correct or complete information or explanation to the competition authority.

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[51] Approx. USD 8.436 or EUR 6.177 (based on the exchange rate on Feb. 1st, 2013).

[52] Approx. USD 25.301 or EUR18.522 (based on the exchange rate on Feb. 1st, 2013).

[53] A bill currently before the New Zealand parliament proposes raising these fines to NZD 100,000 for individuals and NZD 300,000 for corporate bodies.

[54] Approx. USD 68.323.801 (based on the exchange rate on Feb. 1st, 2013).

[55] A natural person holding a managerial post or being a member of a managing authority of the undertaking, should such a person, intentionally or unintentionally, have failed to provide information or provided unreliable or misleading information, requested by the President of the competition authority.

[56] Chapter 6 Article 1 of the Swedish Competition Act and Article 6 of the Act on the duty to provide information (2010:1350).

[57] Pursuant to general Code of Administrative Procedure, "A person who impedes the proceedings, mainly if he/she does not arrive to the authority without serious reasons, breaches the order in spite of previous reprimand, unreasonably refuses witness evidence, submission of document or the realization of an inspection ."

- In Spain, penalty payments up to EUR 12 000[58] a day may be imposed on natural and legal persons in case of non-compliance with an RFI from the competition authority. Fines up to 1% of the turnover of the preceding business year may be imposed if the information supplied is incorrect or misleading.

- In Switzerland, undertakings which does not, or does not fully, comply with an RFI shall face an administrative fine of up to 100 000 Swiss francs[59]. Individuals who do not, or do not fully, comply with an RFI shall be liable to a criminal fine of up to 20 000 Swiss francs[60]. Moreover, the competition authority may conduct an on the spot investigation and seize the documents mentioned in the RFI.

- In the UK, fines can be imposed by the competition authority for failure to cooperate and comply when the powers of investigation are exercised. Criminal penalties are imposed by the criminal courts[61]. Fines (on summary conviction) can be up to a statutory maximum (currently approx. GBP 5 000[62]) for offences in relation to providing information/documents; intentionally obstructing investigations; and knowingly or recklessly provide information that is false or misleading in a material particular.

- In the United States, the US DOJ and the US FTC may seek enforcement of a subpoena or a CID in federal district court. Refusal to comply with a court enforcement order is subject to penalties for contempt of court. Likewise, failure to comply with a subpoena or CID (including intentionally withholding information or falsifying information) can amount, in certain circumstances, to a criminal obstruction of justice charge.

5. VOLUNTARY INTERVIEWS[63]

5.1. Legal basis

Many competition agencies have the legal authority to conduct voluntary interviews (e.g. Botswana, Bulgaria, Canada, Germany, the EU (EC), France, Hungary, Poland, Slovakia, Sweden, Spain, the UK, the United States).

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[58] Approx. USD 16.410 (based on the exchange rate on Feb. 1st, 2013).

[59] Approx. USD 110.645 or EUR 80.933 (based on the exchange rate on Feb. 1st, 2013).

[60] Approx. USD 22.132 or EUR 16.186 (based on the exchange rate on Feb. 1st, 2013).

[61] For instance, in the UK, it is a criminal offence to intentionally or recklessly destroy or otherwise dispose of or cause or permit the falsification, concealment destruction or disposal of documents which he/she knows or suspects to be relevant to an investigation, which – if tried summarily – can be sanctioned by fines up to the statutory maximum or by up to six months imprisonment.

[62] Approx. USD 7.877 or EUR 5755 (based on the exchange rate on Feb. 1st, 2013).

[63] **"Interviews"** are defined, for the purposes of this Report, as the power of a competition agency to ask natural or legal person oral questions and to take statements for the purpose of collecting information in the context of an investigation.

Specific rules typically are provided for in the respective competition laws (with the exception of e.g. Jersey, Kenya, Sweden, Slovakia). In some jurisdictions, other specific rules are foreseen in general administrative law (e.g. Taiwan[64], Vietnam[65]) or criminal law (e.g. Australia[66]).

The following specificities may be highlighted:

- In the EU (EC)[67], interviews are always voluntary. The EC does not have the power to carry out compulsory interviews[68].

- In Germany, interviews conducted with parties under investigation in the course of administrative fines proceedings will always be voluntary, because a person suspected of committing an administrative offence has a right to silence and cannot be compelled to give any information or make any comment on the subject matter of the investigation.

- In Italy, voluntary interviews are conducted as part of the general framework of its investigative powers which allows for the competition authority to receive voluntary statements from legal or natural persons.

- In the UK, interviews are always conducted on a voluntary basis in civil procedures. In criminal procedures, the OFT may, however, compel a person to answer questions or provide information.

In a majority of jurisdictions, the voluntary interview process is the same for parties to the proceedings and third parties. Other jurisdictions provide additional safeguards for certain categories of persons:

- Special rules, such as in the EU (EC), may apply to leniency applicants in order to protect their identity in the context of voluntary interviews.

- In Australia, voluntary interviews with individuals under investigation must be conducted in accordance with the principles in Part IC of the Crimes Act 1914 and the Evidence Act for admissions to be admissible against them. Specific requirements apply for criminal matters.

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[64] Art. 40 of the Administrative Procedure Act.

[65] Interviews are regulated by general administrative law and Art. 79, Section 5, Chapter III, of Decree No. 116/2005/ND-CP of 15 Sept. 2005 detailing the implementation of a number of articles of the Competition Law.

[66] For a voluntary interview to be admissible in court proceedings, it must be conducted in accordance with the principles in Part IC of the Crimes Act 1914 and the Evidence Act 1995.

[67] Article 19 of Regulation 1/2003.

[68] This need to be distinguished from the compulsory power the authority has, during inspections, to ask any representative or member of staff of the undertaking, or association of undertakings, for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

- Sweden reports that if the interviewee is a representative of the undertaking under investigation, he/she must be informed before the start of the interview about the Competition Act and the possibility of a trading prohibition (depending on the type of investigation and the interviewed person's position).

5.2. Procedural requirements

The format of voluntary interviews is broadly the same across most jurisdictions.

The voluntary interviews are normally conducted by the case-handlers of the investigation team or other staff of the competition agency.

- In the Russian Federation, in criminal cases, the staff of the competition authority may be assisted by staff members of the Prosecutor General's Office.

- In the United States, in both civil and criminal proceedings, voluntary interviews are typically conducted by the investigative team: an attorney and/or law enforcement agent(s) in criminal matters, and an attorney(s) and economist(s) in civil matters.

The voluntary interviews may take place in-person at the premises of the competition agency, at the premises of the undertakings, or over the telephone.

In many jurisdictions, written minutes/protocols are established during/after the voluntary interview, which are signed by the interviewer and the interviewee. A copy is handed over to the interviewee. The interviewee normally has the possibility to comment. If a comment/objection does not result in an amendment, it should be noted.

In many jurisdictions, the voluntary interview is recorded on tape or by other electronic means and/or a summary is prepared. In other jurisdictions, there are few formal substantive and procedural requirements for voluntary interviews. For instance, the agency may produce its own notes for its internal assessment only.

Normally, an interviewee is informed about his or her rights of defence (in particular, the right not to incriminate oneself) and, in some jurisdictions, his/her right to terminate the voluntary interview at any point (e.g. Australia, the EU (EC), the UK in criminal procedures). The following specificities can be mentioned:

- In New Zealand, the interviewee has the right not to answer questions, but he/she will be reminded that assumptions may be drawn from the refusal to answer certain questions.

- In the UK (OFT), suspects in a criminal investigation will be given the standard criminal caution that his/her answers, or failure/refusal to answer, may be used as evidence in court.

In addition, in some jurisdictions the interviewee may be reminded, as appropriate, that it is a criminal offence to attempt to deceive or knowingly mislead the competition authority (e.g. New Zealand, the United States[69]).

Legal counsel is admitted to voluntary interviews in almost all jurisdictions (Bulgaria, Canada, Germany[70], the EU (EC), France[71], Hungary, Jersey, Norway, New Zealand, Poland, Sweden, Slovakia, Spain, the UK, the United States[72], Vietnam). In Japan, legal counsel may be present during the interview in merger procedures. In addition, in many jurisdictions, the competition agency directly conducts interviews with legal counsel who has been designated by the undertakings.

5.3. Limitations

The power of the competition agencies to ask for information in the context of voluntary interviews may be limited or circumscribed for various reasons. For instance in Vietnam the case team will only be able to take statements from the complainant or a person with related interests or obligations, if such a person has not yet submitted a written explanation, or if the written explanation is incomplete or unclear.

The vast majority of authorities notably recognise the privilege against self-incrimination during voluntary interviews. Specificities from individual jurisdictions include:

- In the Czech Republic, the party to the proceeding can refuse to comply with the authority in accordance with the principle of self-incrimination. Other individuals as well as employees of the undertaking, who are not acting on behalf of the party to the proceeding, have to answer questions. However, a witness cannot be asked questions about confidential information protected by a special law or cannot be interviewed if his testimony results in the breach of non-disclosure imposed or recognized by the state. A person who may by his or her testimony cause himself or a person close to him to be subject to prosecution for a crime or an administrative offence may refuse to testify.

- In Germany, in administrative proceedings refusal to participate in the interview as such is possible, notwithstanding the right to refuse to testify. In the administrative fines procedure there is a general right not to incriminate oneself (nemo-tenetur principle), so the parties have the right not to answer questions on the subject-matter. An exception applies to the leniency programme (the reasons for this are that the leniency applicant has the duty to cooperate to the fullest extent and that some

[69] For example, in the United States, false statements made by individuals during voluntary interviews in either the civil or criminal context are punishable under Title 18, United States Code § 1001.

[70] There is no legal provision allowing legal counsel to be present during an interview in administrative fines procedures. Nonetheless, the interviewee ("suspect") may declare that he will only reply to questions in the presence of his legal counsel.

[71] Legal counsel is admitted to assist their clients during interviews pursuant to a summons.

[72] Counsel are frequently present at voluntary interviews of their clients conducted by US FTC and US DOJ, with the exception of voluntary interviews that occur when US DOJ attorneys or law enforcement agents conduct unannounced "drop-in" interviews in criminal investigations.

leniency applicants are reluctant to submit written documents, e.g. due to discovery procedures in the United States). External witnesses on the other hand are generally obliged to answer questions and would therefore be questioned in compulsory interviews (see *Section 6*).

- In Hungary, parties are not obliged to make statements admitting an infringement of the law. They may however not refuse to supply self-incriminating evidence if requested. Regarding witnesses, a person may not be required to testify if he or she is unlikely to produce any admissible evidence; or if he or she was not released from the obligation of confidentiality concerning any protected data or privileged information (nevertheless, the Competition Act contains special rules, pursuant to which witnesses may be interviewed about the business secrets of parties even if the witnesses have not been released from their obligation of secrecy by the parties). Testimony may be refused if the witness is a relative of any of the parties or it would implicate the witness himself or his relative in some criminal activity. Neither the party nor the witness may be required to make statements/testimony concerning classified data (unless he was released from the obligation of confidentiality).

- In Jersey, the competition authority cannot require the provision of answers that might involve an admission of the existence of an infringement, which it has a duty to prove. It can, however, request documents or information concerning facts, such as whether a person attended a particular meeting, or whether a particular communication took place.

- In the United States, in certain circumstances during criminal cartel investigations, the staff of US DOJ may provide witnesses with "informal immunity", which is conferred by a letter from the Antitrust Division setting forth the terms under which a witness's statements may or may not be used against that witness[73].

5.4. Sanctions for non-compliance and/or interference with the investigation

In most jurisdictions fines, penalty payments and/or, in some cases, criminal charges, may be imposed if interviewees provide false or misleading information and/or if evidence is withheld in the context of voluntary interviews (e.g. Australia, Barbados, Bulgaria, Chile, Jersey, Kenya, Norway, New Zealand, the Russian Federation, Sweden, Slovakia, Spain, the UK, the United States, Vietnam).

In the EU (EC), no fines may be imposed for failure to answer questions correctly or in a manner which is not misleading[74]. However, the EC is reflecting on the possibility to introduce sanctions in this regard[75]. Likewise, in Hungary and Japan, neither procedural fines nor coercive measures can be applied against persons who refuse to cooperate during voluntary interviews. In Germany, no sanctions can be imposed on a suspect in

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[73] See US DOJ Manual Chapter III.F.8 (Informal Immunity).

[74] To be distinguished though from oral questions asked during inspections. In the latter context fines may be imposed on the basis of Article 23(d) of Regulation 1/2003.

[75] See the Report on the functioning of Regulation 1/2003 SEC(2009) 574 final of 29.4.2009 and the accompanying Staff Working Paper, para 84.

administrative fines proceedings for false or misleading statements, since the suspect is not legally required to tell the truth.

In addition, in several jurisdictions sanctions may also be imposed on individuals:

- In Australia, the courts can impose up to 12 months in prison if a person has knowingly given false or misleading information[76] (or documents) and up to 24 months in prison if a person has obstructed, hindered, intimidated or resisted a Commonwealth official in the performance of their functions[77].
- In Botswana, giving false information to the Authority is a criminal offence and liable to a fine of BWP 30 000[78] or to imprisonment of up to two years.
- In Barbados, wilful refusal or failure by the director or officer of the undertaking to produce information or submit documents required by the competition authority can be sanctioned by a fine of BBD 50,000. An additional fine of BBD 10,000 will be imposed for each day or part thereof during which the offence continues.
- In Jersey, obstructing an investigation may be sanctioned by fines, whilst, providing false or misleading information, or withholding information, can lead to imprisonment for up to five years and/or a fine[79].
- In Kenya, knowingly submitting false information to the competition authority exposes a person to a fine of up to 500 000 shillings and/or up to three years imprisonment.
- In New Zealand, attempting to deceive or knowingly mislead the competition authority is punishable by a fine not exceeding $NZ 10,000 for an individual and $NZ 30,000 for a body corporate[80]. Only courts can impose these fines.
- In the United States, individuals that commit certain non-antitrust offenses involving the integrity of the antitrust investigative process, (e.g., providing a false statement) may be subject to fines and imprisonment.

[76] Division 137 of the Commonwealth Criminal Code.

[77] Division 149 of the Commonwealth Criminal Code.

[78] Approx. USD 3657 or EUR 2792 (based on the exchange rate on March 7th, 2013.

[79] Art. 33, 27(4) and 55 of the Competition Law 2005.

[80] A bill currently before the New Zealand parliament proposes raising these fines to $NZ 100,000 for an individual and $NZ 300,000 for a corporate body.

6. COMPULSORY INTERVIEWS

6.1. Legal basis

Almost all competition agencies have the possibility to conduct compulsory interviews with the exception of the EU (EC). In some cases this power applies specifically to the parties under investigation (e.g. Russian Federation, Vietnam) and in others it applies more broadly to any person capable of furnishing information, producing documents, or giving evidence relating to an infringement (e.g. Australia, Botswana, Barbados, Chile, Israel, Mexico, Sweden, the UK OFT in criminal investigations, the United States).

The rules governing compulsory interviews can be set forth in the competition laws, although in some jurisdictions specific rules are foreseen in general administrative law, commercial law, criminal law and competition agency rules.

There is generally no substantial difference between parties under investigation and third parties during compulsory interviews. A main difference in some jurisdictions is that a third party generally does not have the right to remain silent, whilst a party under investigation may refuse to answer questions on the basis of the right not to incriminate oneself (e.g. Germany[81], Switzerland). In Colombia, third parties may be summoned by the competition agency and by the parties to the investigation, whereas the investigated parties may only be summoned by the competition authority.

6.2. Types of interviews

As mentioned under Section 2.4.4, most jurisdictions distinguish the power to conduct compulsory interviews or question witnesses from the power to ask questions during inspections (e.g. Australia, Barbados, Croatia, Hungary, Japan[82], New Zealand, Sweden, Taiwan). In some jurisdictions, e.g. Croatia and Spain, compulsory interviews may however be conducted only during inspections. Some jurisdictions reported that the competition agency has a general power to conduct compulsory interviews, during inspections and over the course of an investigation (e.g. France, Poland).

Specific rules apply to compulsory interviews conducted during inspections with searches in France: only the occupier of the premises (i.e. the person to whom the court order is notified, or his/her legal representative) can be questioned.

6.3. Procedural requirements

Compulsory interviews are conducted largely along the same procedural steps as voluntary interviews, although additional requirements apply in certain jurisdictions.

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[81] Parties under investigation in administrative fines procedures have the right to remain (totally) silent while the parties of an administrative procedure only have the right to refuse to answer specific questions under the privilege against self-incrimination. In administrative fines procedures, third parties (in particular witnesses) can only refuse the interview (remain total silent) if close relatives are under investigation or if they have a specific profession. They can refuse to answer specific questions in cases of self-incrimination. In administrative procedures, witnesses are obliged to testify but can refuse to answer specific questions under the privilege against self-incrimination.

[82] Only in administrative procedures.

In several jurisdictions (e.g. Australia, the Czech Republic, Japan, Mexico, Poland, Switzerland, Taiwan, the United States), the interviewee will receive a summons or request indicating various types of information, which may include, depending on the jurisdiction, the name and address of the person summoned, the legal basis for the request, the case, the subject of the interview, the place and time of the interview, the sanctions for non-compliance, the interviewees' rights and obligations and the name of the official conducting the interview. In addition, the interviewee may be informed of his/her right to be accompanied by a lawyer (e.g. Australia, Sweden). In some jurisdictions, e.g. the Czech Republic and Switzerland, the summons must be sent at least four to five days before the compulsory interview.

In some jurisdictions the compulsory interview is typically conducted by a lawyer (e.g. Colombia, the United States), and is conducted under oath (e.g. Australia[83], the United States).

The following specificities may be highlighted:

- In Australia, interviewees will not normally be questioned for more than one and a half hours at a time before being given a 15 minute adjournment. As a general rule, the examination time for one interviewee on any one day will not exceed four and a half hours.

- In France, there is no obligation to inform interviewees of their right not to incriminate themselves, since they do not face individual sanctions.

- Likewise, in Colombia there is no obligation to inform the interviewee of the privilege against self-incrimination.

- In Sweden, if the interviewee is a representative of the undertaking under investigation, he/she must be informed before the start of the interview about the Competition Act and the possibility of a trading prohibition (depending on the type of investigation and the interviewed person's position).

Many jurisdictions admit the presence of the interviewee's legal counsel during the compulsory interview (Australia, Bulgaria, France, Germany, Italy, Mexico, New Zealand, Norway, the Russian Federation, Sweden, Slovakia, Switzerland, the UK). In Canada, counsel for a company under investigation may attend examinations of employees, former employees and other third parties.

The extent of the legal adviser's powers during interviews varies across jurisdictions:

- In Australia, the legal adviser will only be permitted to object to questions asked as being unclear, unfair, likely to reveal information covered by LPP, or irrelevant. He may re-examine the interviewee in order to clarify any response to an earlier question, and may also make submissions on any relevant matter at the end of the interview.

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[83] Section 155(3) of the Competition and Consumer Act (2010) empowers the competition authority to require evidence to be given under oath or by way of affirmation. For that purpose, any member of the competition authority may administer an oath/affirmation.

- In Canada, the role of counsel is limited to objecting to improper questioning and clarifying a client's statements. There is no express right to cross-examine other parties to the investigation.

- In Mexico, the legal adviser may only object to the legality of the questions and may be forced to leave the room if he/she attempts to answer on behalf of the interviewee or otherwise assists him/her.

- In New Zealand, the interviewee will be entitled to consult in private with his/her lawyer at any point during the interview.

- In Switzerland, the legal adviser is not allowed to answer the questions of the examiner in place of the interviewee. He/she only has the right to ask supplementary questions at the end of a block of questions or at the end of the interview.

- In the United States, in the civil context, the witness may be accompanied, represented and advised by counsel. Further, counsel may object on the record to a question and briefly state the reason for the objection. An objection by counsel may be based on any constitutional or other legal right or privilege (including the attorney-client privilege and privilege against self-incrimination) that would entitle the witness to refuse to answer the question. In the criminal context, compulsory interviews (i.e. grand jury proceedings) are secret and counsel for the witness is not permitted. The witness will be afforded a reasonable opportunity to consult with counsel outside of the grand jury room during the witness' grand jury appearance.

6.4. Limitations

The power of the competition agencies to ask for information in the context of compulsory interviews may be limited or circumscribed for various reasons. For instance, in France, in the context of inspections with searches, only the occupier of the premises under inspection (i.e. the person to whom the warrant must be notified) can be interviewed. Questions can be asked only in the presence of a policeman entrusted with judiciary powers.

Most competition agencies recognise the privilege against self-incrimination in the context of compulsory interviews. Specifics from individual jurisdictions include:

- In Australia and Canada, persons subject to compulsory interviews cannot refuse to answer a question on the grounds that they might incriminate themselves, but evidence given before the competition authority may generally not be held against them in criminal proceedings.

- In Germany, persons under investigation may refuse to speak during interviews[84]. Third parties, however, can only refuse to participate in an interview if close relatives are involved, if they have a specific profession, or if they would risk incriminating themselves.

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[84] Only in administrative fines procedures.

- In Japan, the interviewee cannot refuse to answer questions in the context of the administrative procedure, although he/she can refuse to answer them in the criminal procedure based on the right not to incriminate oneself. In both procedures, the competition authority may only ask questions that are necessary for the conduct of the investigation. In addition, a statement obtained under an administrative compulsory interview cannot be used as evidence against that person in a criminal prosecution unless the person knowingly or recklessly made a false or misleading statement.

- In Poland, the same limitations apply as for RFIs (see *Section 4.2.2*).

- In New Zealand, interviewees cannot refuse to answer questions, but what is said during interviews cannot be held against them. The information can, however, be used against other persons (legal or natural).

- In the UK, a statement obtained under a compulsory interview cannot be used as evidence against that person in a criminal prosecution unless the person knowingly or recklessly made a false or misleading statement, and is prosecuted therefor, or when that person is on prosecution for some offence where in giving evidence he/she makes a statement inconsistent with the statement obtained during the compulsory interview.

- In the United States, in the criminal context, at the time of the witness's compulsory interview (i.e. appearance before the grand jury), the witness will be informed of his/her Fifth Amendment right to refuse to answer any question if a truthful answer would tend to incriminate the witness. With the exception of a granting of immunity, anything the witness says may be used against the witness in any criminal proceedings. In the civil context, unless granted immunity, a witness may refuse to answer a question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination.

The competition agencies' power to conduct compulsory interviews may also be limited by LPP (or attorney-client privilege) (e.g. Australia, France, Switzerland, the United States).

6.5. Judicial review

In most jurisdictions it is possible to contest the conduct of the compulsory interview (in particular the breach of procedural rules or the rights of the defence) along with the final decision (e.g. Botswana, Bulgaria, Colombia, France, Hungary, Mexico, Poland, the Russian Federation, Slovakia, Switzerland, Taiwan).

The following specificities should be noted:

- In France, interviews conducted during an inspection and authorized by a court can be challenged on a standalone basis before the President of the Appeal Court.

- In Germany, the interview cannot be challenged as such, however, if the interviewee has not been informed about his/her right to refuse to testify, or about the right not to incriminate oneself (witness in a compulsory interview), his/her testimony may not be used as evidence.

- In Italy, in case the competition authority applies sanctions for non-compliance and/or incomplete or misleading information by a decision, then an appeal may be filed before the Administrative Court of the Lazio within 60 days.

- In Mexico, recipients of a citation may challenge its constitutionality before the federal judge (see *Section 4.3*)

- In New Zealand, a party may file judicial review proceedings in the High Court to challenge the exercise of the competition authority's statutory powers.

- In Sweden, the competition authority's request for an interview may be appealed before a court.

- In Taiwan, a party or an affected person who is dissatisfied with the decision made or the action taken by an administrative authority in the course of an administrative procedure, may file a statement (appeal) to this effect only when he/she also appeals the substantive decision.

- In the UK, an individual may seek to judicially review the decision to conduct a compulsory interview, but he/she can also appeal the final conviction.

- In the United States, the US FTC and the US DOJ may seek enforcement of a subpoena or a CID in federal district court. Refusal to comply with a court enforcement order is subject to penalties for contempt of court. Likewise, failure to comply with a subpoena or CID (including intentionally withholding information or falsifying information) can amount, in certain circumstances, to a criminal obstruction of justice charge.

6.6. Sanctions for non-compliance and/or interference with an investigation

All jurisdictions foresee sanctions for failing to fulfil the obligation to submit to a compulsory interview, or not fully cooperating with the competition authority during the interview.

In general, the interviewee is informed of the sanctions for non-compliance and/or interference with an investigation in the summons or at the start of the compulsory interview. In some jurisdictions, e.g. Colombia, the competition authority officials must inform the interviewee of the legal consequences of his behaviour before sanctions can be imposed.

In many jurisdictions (e.g. Australia, Bulgaria, Canada, Chile, France, Japan, Jersey, Kenya, Norway, New Zealand, Poland, the UK, the United States) the sanctions are the same type as those foreseen for failure to comply in context of a RFI (see *Section 4.4*)[85]. As a rule, refusal to answer or providing false or misleading information leads to either fines or custodial sentences.

[85] In the case of Japan for instance, this means that the sanction is available only for the administrative investigation procedure and not for the criminal investigation procedure.

In some cases, failure to comply may be sanctioned through penalty payments (e.g. Bulgaria, France, Germany, Sweden), and in others the competition agency may apply to a court (e.g., the United States) or to law enforcement to compel testimony (e.g. the Czech Republic, Germany, Hungary, Switzerland).

7. VOLUNTARY SUBMISSIONS[86]

Most jurisdictions permit voluntary submissions of information to the competition agencies, though not all provide a legal framework for such submissions (e.g. Norway, Switzerland, the UK).

Parties or third parties may spontaneously submit information to the competition agencies [87], or may be prompted by a non-compulsory request for information. In some situations, competition agencies may prefer to use non-compulsory requests as a first step to obtain information, rather than compulsory measures (e.g. in the EU (EC), New Zealand, Sweden). Voluntary submissions may occur in merger proceedings, particularly in jurisdictions where all market participants are invited to submit their views on the transaction under review.

Certain jurisdictions reported complaints and market information as a form of voluntary submission (e.g. France, Israel, Japan[88]).

There are generally no restrictions on the type of information that may be submitted, and it is left to the competition agency to decide whether the information is relevant to the investigation. In Germany, information may even be submitted anonymously. The following exceptions should be noted:

- In Australia, the information must comply with the Evidence Act to be admissible in court as evidence. Moreover, judges have discretionary power to decide whether or not evidence is admissible, in full or in part.
- Likewise, in Colombia the persons gathering and submitting the information must respect due process requirements such as loyalty and honesty.
- In France, similar to many other jurisdictions, complaints must meet certain requirements as to their content[89]. The complaint must specify its object and the related legal basis (national and/or EU competition rules). In addition, it must indicate

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[86] Submissions as part of leniency/immunity programs are not covered by this chapter.

[87] In the United States, for instance, third parties such as industry associations, trade groups, or consumer organizations that are interested in US FTC or US DOJ investigations sometimes voluntarily provide the agencies with "white papers" or statements of their views on the investigation.

[88] In Japan, pursuant to Article 7-2 of the Notification Rule (available at http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/todokedekisoku.pdf), the notifying undertakings can submit the written opinion or necessary materials to the competition authority any time during the review. In addition, although not explicitly stated in the Notification Rule, the competition authority can request the companies or third parties to voluntarily cooperate or submit materials or reports.

[89] The requirements are set forth in Art. R.463-1 of the Code of commerce.

the full name, social name or form, activity, home address or headquarters address of the complainant. Four copies of the complaints must be submitted. Moreover, the competition authority cannot use evidence which has been gathered illegally.

- In Poland, the information submitted must relate to a specific on-going case (which may however be at an explanatory stage). Only original documents or copies certified by a public administrative body, notary, attorney, legal adviser or authorized employee of the undertaking, may serve as documentary evidence in the proceedings before the competition authority. In addition, specific formal requirements apply to the "notification of suspected restrictive practices". It must identify the undertaking allegedly carrying out restrictive practices, describe the situation founding the notification, indicate the provision of the antimonopoly Act or of the TFEU which is allegedly infringed, provide plausible indications of the infringement and identify the person submitting the notification. Documents that might constitute evidence of the infringement shall be attached to the notification.

As regards requests for voluntary submissions, few jurisdictions foresee specific requirements. In New Zealand, the competition authority will send a written request containing an outline of the information received, a brief explanation of the relevant law and applicable penalties/fines, an outline of the concerns the information raises, a request for answers to specific questions or for a general explanation to be provided on a voluntary basis, along with the timeframe for the response.

In the United States, due to the voluntary nature of the requests, there are few procedural and substantive requirements for non-compulsory RFIs. The US DOJ and US FTC often make voluntary requests in writing, but requests may also be communicated to the parties orally. Voluntary RFIs generally are used in situations to determine whether the matter warrants further, detailed inquiry using compulsory process (i.e. sent to merging parties during the initial waiting period if the agency needs more information to determine whether a second request is necessary). Voluntary RFIs are less suited for substantial investigations where prompt compliance is required.

Many jurisdictions place limitations on the subsequent use of the information in order inasmuch as it is confidential (e.g. Australia). For example, in several jurisdictions complainants may request the protection of business secrets contained in the documents it provides to the competition authority.

In many cases, the voluntary nature of the submission excludes sanctions for providing incomplete or false information (e.g. France, Germany, Japan, Poland). However, knowingly attempting to deceive or mislead the competition authority is oftentimes an offense punishable by fines or imprisonment (e.g. Australia, Barbados, Germany, Hungary, Israel, Italy, Jersey, Kenya, New Zealand, the United States, Vietnam).

In the EU (EC), the UK and Mexico, sanctions may be imposed for providing incorrect or misleading information also when replying to voluntary requests for information.

8. PHONES OR WIRETAPS

Few jurisdictions allow their competition agencies to resort to phone- or wiretapping. In some jurisdictions, this power is reserved for cartel cases (e.g. Australia, Chile, the UK OFT, the United States).

Phone or wiretapping generally requires a warrant or prior authorization from a court (e.g. Australia, Canada, Chile, Israel, the United States) and it is usually enforced with the assistance of law enforcement (e.g. Australia, Israel, Kenya, the United States).

In Canada, the competition authority may apply for authorisation to intercept private communications with the consent of a participant in the conversation, or, in specific circumstances[90], without the consent of any participant. In the second case, the competition authority will need to establish that other investigative tools have been tried and failed, that other investigative tools would be unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation using only other investigative procedures. The concerned persons may seek review of the authorisation to intercept private communications at trial.

In the UK, intrusive surveillance requires the personal authority of the Chairman of the OFT and the prior approval of the Office of Surveillance Commissioners. In cases of urgency, the approval of the Surveillance Commissioners can temporarily be waived, but the Chairman of the OFT will give notice as soon as is reasonably practicable, explaining why it was necessary to use the urgency provisions. The Surveillance Commissioners retain the power to quash the Chairman's authorisation to deploy surveillance.

In the United States, in criminal investigations, government agents, acting with the consent of a party to a communication, may engage in warrantless interceptions of telephone communications, as well as oral and electronic communications[91]. In specific circumstances provided by statute, the US DOJ has the authority to intercept electronic communications without the consent of the parties to the communication.

In some jurisdictions, the person under investigation will be informed of the recording (e.g. the Czech Republic; in Canada notice of the interception will be given to the person concerned within 90 days after the period for which authorisation was given).

In Chile, the competition law prohibits the interception of communications covered by professional secrecy (i.e. communications between the investigated party and persons who, given their condition, profession or legal function – such as an attorney, doctor or confessor – must keep the secret confided to them). The persons under investigation have the possibility to file a complaint before the Minister of the Court of Appeals if the competition authority does not comply with the requirements or formalities prescribed by the Competition Act. If they are successful, evidence resulting from the infringing measures cannot be held against them in court proceedings.

In New Zealand, an officer from the competition authority may record what he/she hears or sees with the aid of a surveillance device either in a public place or if he/she is lawfully in a private place.

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[90] Section 183 of the Criminal Code permits the competition authority to intercept private communications without consent to investigate (1) conspiracies, agreements or arrangements between competitors, (2) bid-rigging, (3) deceptive telemarketing.

[91] See Fourth Amendment to the United States Constitution, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986 (Title 18 United States Code §2510, *et seq.*), and the Foreign Intelligence Surveillance Act of 1978 (Title 50 United States Code 1801, *et seq.*). This power is restricted to the US DOJ’s criminal investigations.

9. OTHER

The traditional investigative tools described above are generally complemented by *ad hoc* measures allowing the competition agencies to gather further information or secure evidence.

9.1. Border watches

Several competition agencies can rely on border watches (e.g. Australia, Canada, Chile, Israel, Kenya, the United States[92], Vietnam), generally by applying to the border control authority to obtain passenger movement records or to monitor entry of potential parties or witnesses in an investigation. In some jurisdictions, in some circumstances, e.g., Australia, Israel[93], the Russian Federation, the United States[94], the competition agencies may ask for a person to be detained at the border. In other jurisdictions the administrative nature of the enforcement system excludes border watches/controls (e.g. France).

9.2. Precautionary measures

Whilst most jurisdictions rely on a system of *ex post* sanctions to deter parties or witnesses from concealing or destroying evidence, in some jurisdictions the competition agencies may take precautionary measures. Faced with an imminent risk of destruction of evidence, the competition agencies may be authorized to conduct inspections without a warrant (e.g. Germany, Switzerland), or before proceedings are formally opened (e.g. the EU (EC)).

9.3. Public notice for comments

As a rule, competition agencies may seek public comments during merger proceedings, in particular to test market commitments. Fewer competition agencies (e.g. Australia, the EU (EC), Italy, Sweden, Vietnam) have also the power to seek public comments in other instances, such as to seek observations on draft commitments. In the United States, members of the public have the opportunity to comment on proposed settlements of antitrust suits before a judicial consent decree is pronounced[95]. In several jurisdictions,

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[92] In the United States, only the US DOJ has the authority to request the US Department of Homeland Security to institute border watches. See US DOJ Manual Chapter VI.D.3 (Liaison with the Department of Homeland Security).

[93] In Israel, the competition authority will require a warrant to have a person detained at the border.

[94] In the United States, upon indictment by the grand jury in a criminal investigation, federal courts can deny bail, or on condition or the defendant's release on bail, seize a defendant's passport to impede the defendant from leaving the United States.

[95] The Tunney Act (Title 15, United States Code §16) sets forth procedures that must be followed whenever the US DOJ proposes to settle a civil antitrust suit through the entry of a judicial consent decree. Pursuant to the Tunney Act, members of the public have an opportunity to comment on the proposed settlement before the federal district court accepts it. US FTC consent decrees are subject to a public comment period "for the receipt of comments or views from any interested person," see 16 Code of Federal Regulations § 2.34(c). Specifically with respect to members of the public who are victims of crimes, certain statutes provide victims with the right to confer with the attorney for the US DOJ and US FTC handling the case, and the right to be reasonably heard at any public proceeding in the federal district court involving release, pleas and sentencing.

basic information on on-going investigations is publically available, meaning that interested persons can submit comments to the competition agency (e.g. Bulgaria, the EU (EC), Germany, Mexico). Botswana reported that they only have this power in relation with merger proceedings, where the notice is published in a newspaper of wide circulation or in the Government Gazette.

9.4. Evidence from other investigations

In many jurisdictions the competition agency has the possibility to use evidence collected in the course of another investigation, or to refer the evidence to another law enforcer. However, certain competition agencies will collect the evidence a second time in order to avoid potential legal challenges (e.g. the Czech Republic[96], the EU (EC)[97] and Switzerland[98]). Within the European Competition Network (ECN), the competition agencies may also exchange information, including confidential information, on the basis of Article 12 of Regulation 1/2003, subject to certain conditions.

The following specificities may be mentioned:

- In Germany, the competition authority can use information from administrative procedures (e.g. merger control) in cartel cases unless the individual who provided the information is under investigation in the cartel case and did not have the right to refuse to provide the information concerned in the administrative procedure under the privilege against self-incrimination.

- In Poland, the competition law contains a general prohibition on the use of previously collected information in proceedings based on different provisions, but foresees an exception for criminal proceedings resulting from public complaints, criminal fiscal proceedings and other proceedings conducted by the President of the competition authority. Information may be re-used in such proceedings.

- In the United States, the US DOJ has the authority to share or receive evidence, subject to certain exceptions and limitations, from other investigations within the US DOJ, with other federal agencies, with State Attorneys General and with international enforcement agencies. The US FTC may consider evidence obtained during another investigation, or may make a referral to another law enforcer.

- In the UK, information and documents gathered for the purposes of criminal investigations may generally be used in civil proceedings and vice versa. In addition, the competition authority can use evidence from market investigations or gathered in

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[96] In the Czech Republic, if the investigated person did not have the opportunity to peruse the evidence over the course of the other investigation/proceedings, he/she might be able to challenge the evidence in court.

[97] In the EU, the EC can only use the information for the purpose for which it was acquired, see Article 28 of Regulation 1/2003).

[98] In Switzerland, Art. 25 of the Cartel Act prohibits the competition authorities from using information obtained in the performance of their duties for a purpose other than the one for which it was obtained or for a purpose other than the investigation's purpose. It is uncertain whether this prohibits the use of evidence obtained in other investigations, or merely the exchange of information with other authorities.

the course of merger control investigations for antitrust investigations, the latter subject to certain disclosure provisions.

9.5. Use of experts

Almost all competition agencies have the power to seek expert or technical advice when necessary for the investigation of the case. In Jersey, the opinion of an expert witness will qualify as evidence in proceedings. In Bulgaria, the competition authority is not bound to adopt the expert's report but it must take it into consideration. In Italy, the competition authority board may authorize the production of expert reports and statistical and economic analysis and may consult experts in relation to any matter of relevance to the investigation[99]. The UK reported that although the competition authority can take into account third party reports in its decisions, it is not common practice to commission an expert to provide a formal report/ opinion to the competition agency which would be accessible via the case file. The competition authority may nevertheless also seek informal assistance from an expert. In merger investigations, evidence may be taken from external experts in a hearing and their views will be made known to the parties in order for them to comment (transcripts may be published). The US FTC and US DOJ have the ability to use outside experts during the course of competition investigations. Outside experts – often economic consultants and/or academics with economic and/or industry expertise – may advise on a matter and testify during litigation.

9.6. Any other available tools

Several jurisdictions have reported cooperation with foreign competition agencies or with international organisations among investigative tools. Within the ECN, the competition authority may seek the assistance of other members of the ECN to carry out inspections or other fact-finding measures on their behalf. In the United States, the US DOJ has adopted a policy of placing fugitives on a "Red Notice" list maintained by the International Criminal Police Organization (Interpol)[100]. The list serves as a basis for provisional arrest with a view towards extradition.

The Canadian competition agency may, subject to obtaining a court order, examine a person on behalf of other competition authorities in countries with which Canada has entered into agreements under the Mutual Legal Assistance in Criminal Matters Act ("MLAT"). The person being examined pursuant to the order is required to answer questions and produce records in accordance with the laws of the requesting jurisdiction, but may refuse to disclose information that is protected by Canada’s laws of non-disclosure and privilege.

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[99] Section 11 of the Proceedings Regulation

[100] A Red Notice is essentially an international "wanted" notice that many of Interpol's approximately 184 member countries recognize as the basis for a provisional arrest with a view toward extradition to the requesting jurisdiction.

10. CONCLUSION

The Investigative Tools project has sought, by considering a representative number of ICN member jurisdictions, to identify *what tools* are available to competition agencies to obtain all relevant information and views relevant to specific antitrust or merger proceedings. The project also looked into *what the processes and practices* are for making use of these tools in an effective and efficient manner.

The tools identified cover both antitrust and merger control and are available to competition agencies operating under different enforcement systems (i.e., administrative or criminal). The project explicitly recognises that there are significant differences in the institutional and organisational set-up of competition agencies in different jurisdictions and in the legal and constitutional context in which they operate.

Whilst the Investigative Tools survey and Report does not cover the full ICN membership, a representative number of 29 jurisdictions participated in the project and it is hoped that their experience may nevertheless prove an interesting basis for discussions among ICN members.

It can be observed for instance that, in spite of the differences in the institutional and legal environment, most jurisdictions have in fact very similar investigative tools at their disposal. This reflects the importance for any competition agency to have an appropriate box of investigative tools in order to obtain the necessary evidence and views (which is often with the parties) to effectively enforce competition rules.

Although few jurisdictions provided detailed responses on the frequency of use of the various investigative tools, there are certain discernible trends: RFIs are by far the most frequently used tool, along with interviews (both voluntary and compulsory) and inspections/ dawn raids.

Another observation is that some differences that exist can often be explained by the specificities of the underlying enforcement systems, which may require an "individualized" solution for optimizing the efficiency of a given investigative tool in a given system. There is therefore not necessarily a "one size fits all" solution required for each investigative tool.

Finally, the manner in which investigative tools are applied is a key element to their success: competition agencies seek the balance for instance between the interest of the investigation and the interest of the businesses subject to the investigation.