American Bar Association
Section of Antitrust Law

Assessment of
Global Competition Agency
Implementation of
ABA Best Practices for
Antitrust Procedure

Report by the Procedural Transparency Task Force

April 29, 2019

The views stated in this submission are presented on behalf of the American Bar Association’s Section of Antitrust Law (“Section”). These comments have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association as a whole.
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Executive Summary and Objectives

In May 2015, the ABA Section of Antitrust Law (Antitrust Section) issued Best Practices for Antitrust Procedure (Best Practices).1 The exercise of identifying and cataloguing best practices in a systematic way was motivated by a desire in the Antitrust Section to contribute to and advance a dialogue in the international community promoting norms of procedural fairness in antitrust enforcement. The publication of the Best Practices facilitated the next natural step; namely, the establishment of the Procedural Transparency Task Force (PTTF) in 2016 to study, assess and report on the extent to which competition authorities around the world are applying principles of due process, procedural transparency and fundamental fairness consistent with the principles presented in the Best Practices.2 Although the Best Practices do not purport to dictate the specific policies or procedures of any individual Agency, they articulate basic standards for practice that the PTTF believes all competition authorities should apply. As has been noted by the International Competition Network, “[i]nternal safeguards and agency practices that support informed decision making improve the quality of enforcement actions, increase the likelihood of effective outcomes, and strengthen agency credibility.”3 The PTTF fully endorses this objective.

The objective of the PTTF is to stimulate continued focus and discussion on the importance of “procedural transparency,”4 and to contribute practical observations about the application of basic standards of fairness across jurisdictions. There have been a number of initiatives in recent years designed to articulate procedures that should be applied to competition investigations undertaken by competition authorities.5 In turn, perhaps due to the increasing international attention on competition agencies’ internal practices, a number of agencies have reevaluated their own rules and procedures. At times, they have made modifications designed to improve their processes. At other times, they have concluded that their stated procedures are adequate. Other agencies have elected not to engage in any self-assessment, or at least not to acknowledge such self-examination. In any event, to date, there has been very little assessment by third parties of the extent to which agencies are applying procedural transparency practices that measure up to objective standards. The PTTF has taken on that challenge by conducting a survey assessment (as

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1 ABA Section of Antitrust Law, Best Practices for Antitrust Procedure (May 22, 2015), available at www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_bestprac_20150522.pdf. A copy of the Best Practices is also included at the end of this report.

2 Appointed members of the PTTF include Rachel Brandenburger, Cecil Chung, John Davies, Bruno Drago, Joy Fuyuno, Steve Harris, Stephen Kinsella, John Oxenham, Miguel Rato, Anne Riley, Bill Stallings, Chuck Webb, Mark Whitener, and Koren Wong-Ervin, as well as Young Lawyer Representatives (YLRs) Christine Ryu-Naya and Roisin Comerford. More than fifty other practitioners were involved in the assessments contained herein. PTTF members are not responsible for the contents of the report. As the project methodology involved extensive, but necessarily piecemeal, contributions, the contents of the report do not necessarily reflect the views of the PTTF members.


4 The concepts of due process, procedural transparency and fundamental fairness share a common identity, and we consider them to be fully intertwined and the terms interchangeable for many purposes. We use the term “procedural transparency,” the namesake of the PTTF, to embody all of these concepts.

described below), with the goal of advancing understanding and adherence with the basic norms of fairness by competition agencies around the world.

**Methodology and Limitations**

The PTTF has attempted to assess the extent to which, in both their stated actions and their actual practices, agencies are adopting and implementing procedural transparency practices in their investigations and case evaluations as measured against the Best Practices. The evaluation of whether an agency’s practices comports with an individual Best Practice considers: (1) whether the authority (or authorities) within a jurisdiction has adopted, by statute, regulation, rule, or written guideline in the public domain, a procedure that purports to correspond (in substantial part) with the Best Practice; (2) if it has adopted such a procedure, whether in practice it applies the procedure as written on a consistent and predictable basis; and (3) if it has not adopted such a written procedure, whether it nonetheless, in practice, applies the Best Practice on a consistent and predictable basis. The most compliant jurisdictions were deemed to be those that have both a compliant written procedure and a consistent practice of applying that procedure. The least compliant jurisdictions were those that did not have a written procedure, or a predictable track record of applying the Best Practice or, in some cases, those that have a written procedure that runs counter to the Best Practice.

The PTTF determined early in its existence that it would be neither possible nor practical to assess the application of all of the Best Practices at all agencies around the world. Completing such a task would require time and resources that far exceeded the scope of the Task Force. Nonetheless, the PTTF concluded that it was necessary to consider how the Best Practices are applied by a range of different agencies operating in different geographic areas, under different legal regimes and operating within different statutory and regulatory frameworks. To facilitate a reasonable sampling, the PTTF organized agencies by jurisdiction into five regions. In examining a particular practice, the PTTF identified candidate agencies across the five regions in an effort to assess whether there are significant differences in approach and, ultimately, compliance. Overall, the PTTF strove throughout the report for balance: balance in the attention devoted across regions; balance in its deference to agencies and parties equally; and balance in its approach of offering constructive critique over criticism.

The PTTF likewise endeavored to be objective in its assessment of agency practices. Task Force members were asked to contribute their own experience and to gather experiences from others with diverse experiences before the relevant agencies. Because our analysis necessarily required an evaluation of the experience of practitioners and companies who had been engaged in some capacity with the relevant agency (i.e., as parties, third-parties, complainants, applicants, etc.), some degree of experiential bias necessarily entered into the equation. The PTTF attempted to moderate that bias by ensuring that multiple members of the Task Force and non-Task Force members conveyed their experience with agencies, and that the Chairs and other Task Force members reviewed each evaluation with fresh eyes. The Chairs take ultimate responsibility for the content of the Report.

The PTTF operated on a substance-neutral basis with respect to the application of the underlying antitrust laws. In other words, the PTTF approached its analysis agnostic as to the standard of substantive violation of the particular competition laws in question.

Although the Best Practices were drafted to accommodate different legal structures and regulatory approaches (e.g., prosecutorial vs. administrative enforcement), it was at times difficult
to interpret and apply the language of the Best Practices to the individual legal and regulatory frameworks of the jurisdictions studied. As such, the PTTF acknowledges that it has had to accept a certain degree of "apples and oranges" comparison, which is to say that it frequently was not possible to evaluate a single practice perfectly across different jurisdictions. Indeed, in some cases, it was necessary to evaluate different aspects of the same procedure, or to evaluate the same procedure as it applied to different areas of competition law.\(^6\) In some cases, this was done to highlight the key issues around the match or mismatch with the Best Practice. In other cases, it simply reflects the challenge inherent in the different ways agencies (owing to statutory mandate or otherwise) organize and approach their cases.

Finally, as the PTTF report was developed over the course of nearly two years, more recent changes, reforms and even agency reconfigurations (e.g., China) have taken place while the project progressed. The Task Force did not attempt to reevaluate as these changes occurred. As a result, some recent developments are not reflected in the studies presented. To the extent that former criticisms of an agency practice have been moderated or eliminated by these changes, the Task Force views that as progress that should be lauded. Nonetheless, the PTTF believes that the observations and critiques offered herein remain important today and into the future.

**Evaluation and Agency Ranking in This Report**

The PTTF determined that it was not appropriate, based on the information available, to provide an absolute "grade" for any individual agency as to any given practice, and only rarely concluded that an agency was "compliant" or "non-compliant" with an individual Best Practice. Rather, for each Best Practice, we have evaluated several agencies (typically five, but occasionally four or six) and examined their level of compliance relative to one another for that particular practice. We have attempted, in most cases, to highlight and list first the agency or agencies whose practice more closely conforms to the Best Practice and contrast with agencies whose practices do not. Thus, we rank the most compliant agency first, and the least compliant agency, among those studied, last. This is not to imply that the first listed agency is necessarily fully compliant, nor that the last is entirely non-compliant. That said, it should be inferred that in most cases the first agency ranked is largely compliant with the Best Practice, and the last agency listed is largely not compliant.

Among our principal objectives through this [non-scientific] survey sampling and ranking exercise is to allow an agency (whether evaluated or not as to that Best Practice) to see what type of procedure is necessary to achieve real compliance, and what causes a practice to be considered inadequate and in need of improvement. Indeed, the PTTF views this as the most important objective of the Report: to differentiate between agency practices that demonstrate a real commitment to the application of procedural transparency, and those that do not, distinguishing between practice and talk. Agency practice evidencing actualization of Best Practices should be applauded, while agencies that have fallen short should be encouraged to take steps to achieve internationally recognized procedural norms.

Finally, the Task Force acknowledges that, in some instances, we may have "gotten it wrong" by misapprehending a particular practice of a particular agency, notwithstanding our best efforts. We would welcome feedback from any agency that believes we may have misunderstood or inaccurately characterized its practices and further engagement on how they can demonstrate

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\(^6\) For example, a single practice may have been discussed principally with respect to mergers in one jurisdiction but with respect to cartels in another jurisdiction.
their compliance with the Best Practices. It is equally important, however, for agencies to consider the possibility that their own perception of their practices does not comport with how their practices are viewed in the international community. In either case, we consider the reactions and engagement of the agencies as crucial to making further progress in implementing and abiding by international due process norms.

**Conclusions**

The PTTF Report reflects that while many agencies are utilizing adequate individual practices, there is still a significant gap between the procedures applied in many jurisdictions and the Best Practices, despite the apparent belief by some agencies that their practices are sufficient. The PTTF observes that this disconnect could have several causal factors, including (1) a lack of training for case teams and other staff carrying out the agency mandate which, despite adequate written procedures in some cases, leads to a deficiency of procedural fairness; (2) a lack of oversight of case teams and other staff to ensure that procedures are followed; (3) a lack of adequate resources to provide the required process; (4) an overriding desire to achieve an outcome in a particular case which can lead to a desire to rationalize the use of procedural “short-cuts” or to ignore due process protections to ensure that a party does not escape consequence on “technical” grounds; and (5) a lack of experience within the agency, or by the individual case team members, as to procedural requirements.

The PTTF has not studied the causes of these gaps in sufficient depth to conclude that any of these factors necessarily applies to any particular case. Whatever the causal factors may be, there is need for significant reform in some agencies, and all agencies could improve compliance in at least one material respect. The PTTF emphasizes that there is no one “right” way to respect and implement the elements of procedural fairness. The report does not seek to dictate a single universal model, recognizing that there are different, equally legitimate, assessment and enforcement frameworks, all of which should be capable of operating with proper procedural protections.

The Task Force hopes that this study will inspire reform. For agencies that desire to make reforms, we hope that it will offer evidentiary substantiation to use with legislatures or supervisory authorities in advocating measures to support procedural fairness and transparency.

The PTTF is indebted to Randy Tritell and Tad Lipsky, the principal authors of the Best Practices document, for their invaluable perspectives and insights on the Best Practices and their intended interpretation (although they were not involved in the assessment itself). We would also like to thank and acknowledge the efforts of the PTTF members and the more than fifty other practitioners around the world who generously contributed significant time to this survey effort, as well as to draft, review and revise this Report.

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7 See ICN GUIDANCE, supra note 3, at 1 (“Competition agencies operate within different legal and institutional frameworks that impact the choice of investigative process and how these fundamental procedural fairness principles are implemented. Consequently, there can be different approaches to achieving fairness during investigations. . . . [A]gencies’ approaches to implementing fair and effective investigative processes evolve in light of developments in the applicable law and agency practice.”).
Country Assessments
**Practice No. I.A**

**Description**

In conducting investigations and seeking evidence, officials should make every reasonable effort to define clearly the specific potential legal, factual and economic contentions being considered.

**Jurisdictions Evaluated:**

- United Kingdom
- Peru
- Mexico
- India
- Japan
- Kenya

**United Kingdom – Competition & Markets Authority (CMA)**

As set out in Transparency and Disclosure: Statement of the CMA’s Policy and Approach (Transparency Guidance), the CMA is not subject to a general obligation to disclose its thinking in advance of its provisional decisions. The Transparency Guidance identifies certain circumstances, however, in which the CMA is required to take steps to share its provisional thinking or proposed decisions.9

For example, during an investigation to enforce the Competition Act 1998, the CMA, if it proposes to issue an infringement decision, must first issue a Statement of Objections to any party suspected of the infringement.10 The Statement of Objections represents the CMA’s provisional view and proposed next steps, and is intended to allow the parties under investigation to know the full case against them and, if they choose to do so, to respond formally in writing and orally.11

During this stage of an investigation, the CMA is expected to provide a clear explanation of the theories of harm which are, in its view, established by the evidence which it has obtained. Where the CMA has failed to establish a link between the theories of harm which ultimately appear in its infringement decision, and the evidence on which the CMA relies in order to establish such harm, the Competition Appeal Tribunal has quashed the infringement decision.12

At the same time as issuing the Statement of Objections, the CMA will also give the addressees of the Statement of Objections the opportunity to inspect the case file, typically for a period of 6-8 weeks.13 Such right of inspection is intended to ensure that each addressee can properly defend itself against the allegation of its infringement. The access to file is usually given by supplying the file in electronic form on a CD, or by other suitable electronic means.

Prior to the issuance of a Statement of Objections, however, the CMA will take a flexible approach to sharing its developing thinking and/or evidence with the parties to the investigation.

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9. Id. ¶ 3.12.


11. TRANSPARENCY GUIDANCE, supra note 8, ¶ 11.4.


13. TRANSPARENCY GUIDANCE, supra note 8, ¶ 11.19ff.
and/or (if appropriate) other interested persons, where the CMA determines that doing so may assist the case’s progression.\(^{14}\)


The Technical Secretariat of the Antitrust Commission of INDECOPI (Technical Secretariat) is the entity authorized with conducting investigations and gathering the required evidence to determine the existence of antitrust infringements. The Technical Secretariat has technical autonomy, and its capacities are governed by the Legislative Decree No. 1034 (Antitrust Law).

During its preliminary investigations and prior to the initiation of a sanctioning procedure, the Technical Secretariat should be able to determine certain aspects of the market and the types of practices that are subject to its investigation. In some cases, such determinations are communicated to the potential offenders during the preliminary investigation. Furthermore, said determination should be used as a parameter for the Technical Secretariat’s activities during this stage. In fact, the Technical Secretariat is under the obligation to circumscribe all its investigative work to such parameter, which is mainly established from preliminary studies and evaluations of the relevant markets and any other related information.

During this stage, Technical Secretariat may conduct dawn raids (with or without prior notification) to gather evidence (i.e., all kinds of data and documentation, including electronic devices, corporate books, and accounting information) as well as interviews with the relevant subjects. Also, it may require potential offenders or third parties to provide any relevant information by requesting them to answer questionnaires prepared by the authority.

After the Technical Secretariat has gathered enough evidence, if sufficient grounds determine the existence of an infringement, a sanctioning procedure is initiated. In every case, the decision that determines the initiation of the procedure (indictment) must include the following: the conduct being indicted, the legal qualification of such conduct, the potential sanctions, as well as the identification of the Antitrust Commission as the entity empowered to issue a first instance decision for the procedure. In practice, the Technical Secretariat conducts its activities in compliance with the applicable regulations.

**Mexico – Comisión Federal de Competencia Económica (COFECE)**

COFECE and the Instituto Federal de Telecomunicaciones (IFT)\(^{15}\) (the Enforcers) follow FECL, their own implementing regulations, and non-binding guidelines specifying procedures for the conduct of investigations and the collection and request for evidence. Such written regulations and guidelines broadly permit the Enforcers to inquire regarding specific legal, factual and economic issues under consideration by any of them.

Depending on the type of investigation at issue, the Enforcers are empowered to request evidence in several ways, including through (i) written formal requests for information, (ii) dawn raids and on-site interviews and (iii) formal orders from the Enforcers to certain individuals to compel testimony or attend hearings. The written regulations do not specifically address (i) the protection of attorney-client privileged information (which is addressed under separate legislation

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\(^{14}\) *Id.* ¶ 3.13.

\(^{15}\) The IFT has jurisdiction to enforce the Federal Economic Competition Law (FECL).
and jurisprudence), or (ii) the return of information or documents directly obtained by enforcers that are not related to the subject-matter of the relevant investigation.

Actual practice tends to comply with the written regulations. In most cases, the Enforcers will issue acts or determinations (i.e., requests, hearing, dawn raids, etc.) that fully comply with the relevant legislation to gather evidence.\textsuperscript{16} Failure to comply with the relevant legislation allows recipients or those under order to challenge such acts before the judiciary only after a final decision is issued by the Enforcer.

The Enforcer will grant access to the file to defendants only after a “dictamen de presunta responsabilidad” (DPR) has been issued. Issued after the investigation phase is complete, the DPR will contain, among other things, the monopolistic activities the defendant allegedly committed and evidence that support such accusations. To be granted access to the file, defendants are required to make a request in writing after receipt of the DPR, listing the individuals that will be authorized for such purpose.

When the individuals authorized by the defendants are granted access to the file, they will not have access to information that is deemed to be confidential. Under FECL, “Confidential” means information that (i) if disclosed may cause harm to the competitive position of the party that delivered such information; (ii) contains personal data; (iii) may put at risk the security of the information provider; or (iv) by statute cannot be disclosed. Defendants will have access to a public summary of the confidential information if the nature of such information permits so.

**India – Competition Commission of India (CCI)**

In India, antitrust investigations are conducted by the investigating arm of the CCI known as the Office of the Director General (DG). Under the provisions of the Competition Act, 2002 (Act), the DG cannot initiate investigations \textit{suo motu} and can only do so pursuant to a direction by the CCI. Such a direction is given only after the CCI forms an opinion that there is a \textit{prima facie} case of contravention of provisions of the Act and an order is issued under Section 26(1) of the Act. According to the Supreme Court of India, an order under Section 26(1) of the Act, while not determinative of the final rights and obligations of the parties,\textsuperscript{17} should “outline the area in which investigations were required to be undertaken by the DG.”\textsuperscript{18} Such an order normally provides a brief summary of the allegations made against the investigated party(s) and the reasons supporting the \textit{prima facie} opinion formed by the CCI.

Notably, under the provisions of the Act and applicable regulations, the party being investigated does not have a right to be heard prior to issuing an order under Section 26(1) by the CCI.\textsuperscript{19} It is left to the CCI’s discretion whether or not to grant the investigated party such an opportunity prior to rendering a decision to order an investigation.\textsuperscript{20} However, recently the CCI

\textsuperscript{16} When COFECE fails to consider the specific potential legal, factual and economic contentions being considered when issuing a written request, such action by COFECE may be null and void. However, it is highly unlikely that a challenge to such illegal action could be successful until a final decision is issued by COFECE.

\textsuperscript{17} See Competition Commission of India v. Steel Authority of India Limited, (2010) 10 SCC 744, ¶ 97 (Sup. Ct. India); Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India and Another, (2016) SCC Online Del 1951 (Delhi High Court, India).

\textsuperscript{18} Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Comm’n of India, (2016) SCC Online Del 1951, ¶ 209.

\textsuperscript{19} Competition Commission of India v. Steel Authority of India Limited, (2010) 10 SCC 744, ¶ 91 (confirming that there is no obligation on the CCI to provide the investigated party an opportunity of being heard before passing the order under Section 26(1) of the Act).

\textsuperscript{20} Regulation 17 of the CCI (General) Regulations, 2009 (“the Commission may, if it deems necessary, call for a preliminary conference to form an opinion whether a prima facie case exists”).
has, on several occasions, exercised this discretion in favor of the investigated party(s) and has sought their views and response on the allegations made against them prior to issuing an order under Section 26(1) of the Act.

The DG investigation is initiated pursuant to the order under Section 26(1) of the Act being conveyed to the DG. The CCI has the discretion to publish orders passed under Section 26(1) of the Act. In some cases, mostly cases concerning abuse of dominance and/or allegations of anti-competitive vertical agreements, the orders are published on the CCI’s website while in some other cases (mostly cartels), the orders are not. For a party under investigation, this implies that, in cases where the order is published, the party becomes aware of the area of investigation, the allegations made against it as well as potential legal, factual and economic contentions, prior to the DG issuing a probe notice. In contrast, in cases where the order is not published, the investigated party becomes aware of the case against it only after the DG sends a probe notice seeking information. Such a notice may or may not be accompanied by a copy of the order. However, in both situations described above, the investigated party can, after receipt of the probe notice from the DG, file an application seeking inspection of documents or records pertaining to the investigation against it, as available with the CCI, subject to any claims of confidentiality over such records.

A notable exception is cases involving leniency applications under the CCI (Lesser Penalty) Regulations, 2009, where neither a right of inspection of records nor access to a copy of the order passed under Section 26(1) of the Act is granted to investigated parties who are informed in the DG probe notice that an investigation has been initiated and that they are required to provide information. This process has been challenged before the Delhi High Court by way of a writ petition and, while a final decision is awaited, the High Court has in one instance directed that an inspection be permitted. Recently however, the CCI has proposed amendments to the CCI (Lesser Penalty) Regulations, 2009 which inter alia seek to clarify that inspections will only be permitted after the DG has completed its investigations in such cases.

In sum, except in cases involving leniency applications, the investigated party has the right to access the records available with the CCI following the receipt of a probe notice which enables the party(s) under investigation to understand the broad contours of the potential legal, factual and economic contentions being considered by the DG.

Japan – Japan Fair Trade Commission (JFTC)

JFTC investigation procedures are detailed in the Guidelines on Administrative Investigation Procedures under the Antimonopoly Act (Investigation Procedures Guidelines),

21 Regulation 18 of the CCI (General) Regulations, 2009.
22 Regulation 37 of CCI (General) Regulations, 2009 (“Subject to the provisions of Section 57 and regulation 35, a party to the proceeding of an ordinary meeting of the Commission may on an application in writing in that behalf, addressed to the Secretary, be allowed to inspect or obtain copies of the documents or records submitted during proceedings on payment of fee as specified in regulation 50.”).
24 NOK Corporation v. CCI: W.P. (C) 11628/2016 order dated 15 December 2015 (the High Court granting an interim relief noted that “in case an application is made by the petitioner for inspection or supply of records, the respondents shall furnish the information available with them, for which no confidentiality is being claimed under Regulation 35 of the (General) Regulation 2009 or Regulation 6 of the (Lesser Penalty) Regulation 2009.”).
which were revised in 2015.\textsuperscript{27} Under the Investigation Procedures Guidelines, there are basically two stages at which the JFTC is required to provide notice of the contentions against an investigation target, namely: 1) the outset of the investigation; and 2) the end of the investigation. In addition, it is explicitly required to provide written notice of the “main point of the alleged fact violating the provision of the Act” at the outset of an on-site inspection by the JFTC and when ordering the production of a witness or information.\textsuperscript{28} The JFTC must also provide a written description of the “major evidence” and “application of laws and regulations to the facts found by the Fair Trade Commission” in draft cease and desist and surcharge orders.\textsuperscript{29}

Other than these provisions, there is no formal requirement to define the contentions being investigated. Limiting the value of the “disclosure,” most of the investigative procedure rules and guidelines tend to focus on form over substance—e.g., by requiring a notice in the form of a document but not specifying the required content such as would actually provide adequate notice of claims and allegations. The Investigations Procedures Guidelines require that officials explain procedures, but not that they identify the contentions against the investigation target.\textsuperscript{30}

In practice, the notice provided with an on-site investigation or request to produce information or witnesses generally cites only the relevant legal provision of the AMA and does not articulate factual allegations. In some instances, in particular in unilateral conduct (e.g., unfair trade practices) investigations, the relevant markets are not clearly defined or not defined at all. Parties often only become aware of specific factual and economic allegations at the end of the investigative phase when the JFTC issues a draft cease and desist or surcharge order and then typically have only a relatively short deadline to present their defenses. In some instances, the JFTC has provided verbal explanations of the contentions prior to the issuance of the draft order, despite the lack of a formal requirement to do so; however, this is not a consistent practice.

**Kenya – Competition Authority of Kenya (CAK)**

When initiating a complaint, the CAK usually only refers to Part III of the Kenyan Competition Act, No. 12 of 2010\textsuperscript{31} (the Act) which deals with restrictive trade practices. Doing so indicates that the CAK has reason to believe that the target has contravened the Act. Very limited information is provided to the target.

Parties who are subject to investigations have often raised concerns in relation to the lack of disclosure and/or availability of the potential legal, factual and economic contentions which form the basis of a complaint against the target. To date, however, none of the objections raised by target firms in this regard have been dealt with by the High Court. The matters are usually settled prior to any adjudication by the High Court. Accordingly, until the Kenya High Court orders otherwise—or unless the CAK undertakes to amend its current process—it appears unlikely that the CAK will substantively change its current practice.


\textsuperscript{30} See JFTC INVESTIGATION PROCEDURES GUIDELINES, supra note 27, §13(3) (“Compliance with due process”).

Officials should adopt management practices designed to help ensure that the expected costs and other burdens of investigation – including those imposed upon targets and others who provide information or otherwise cooperate with the investigation – are proportionate to the expected value of the evidence sought. The expected significance of the potential competitive harm also should be considered in making this assessment.

Jurisdictions Evaluated:
- Chile
- Singapore
- Zambia
- Canada
- European Union
- United States

Chile – Fiscalía Nacional Económica (FNE)

The FNE tends to adopt proportional investigative measures. The FNE normally limits its requests to the related matter and specific conduct in question. The FNE is flexible when it comes to coordinating with parties on their responses for information or depositions. In fact, the FNE usually asks for the availability of executives that are summoned to render a deposition, confers reasonable extensions for the delivery of information that take time to collect, and sometimes talks beforehand with the parties in order to better/more effectively frame its requests for certain data, so as to facilitate its submission. The FNE tends to be flexible in order to ensure the attendance of the deponent, in working with parties to schedule convenient times, to re-schedule meetings and even to have conference meetings by phone if the executive is located abroad and is not able to travel to Chile. The FNE has also given the opportunity to hold meetings via conference to discuss information requested in connection with the investigation of a case.

Singapore – Competition Commission of Singapore (CCS)

As a general rule, the CCS has adopted proportional investigative measures in conducting investigations and seeking evidence. The CCS has always been fair and endeavors to be thorough. The one concern that arises frequently is the scope of its investigations. While the scope is usually stated in the request for information, the statement is in such broad terms that it sometimes defies full comprehension of what is being investigated.

Under the Competition Act, the CCS may impose interim measures. However, such measures can only be imposed if CCS “has reasonable grounds for suspecting” an infringement of sections 34 or 47 and acting on this suspicion is a “matter of urgency for the purpose (i) of preventing serious, irreparable damage to a particular person or category of persons; or (ii) of protecting the public interest.”32 Such high thresholds that must be met before such measures can be imposed suggests that the CCS’s investigative powers do have proportionality. However, in practice, such interim measures have not been imposed since the Act came into force in 2004.

The CCS’s investigative measures/powers are tempered by the following safeguards: (a) legal professional privilege, which extends to in-house lawyers;\(^{33}\) (b) privilege against self-incrimination in relation to criminal proceedings;\(^{34}\) (c) parties’ right to ask for legal representation;\(^{35}\) and (d) the Powers of Investigation Guidelines, which provides that the CCS will not ask for documents or information beyond what it believes is necessary for the investigation.\(^{36}\)

In this context of proportionate action during an investigation, it is worth noting that the CCS has various investigative powers, including: (1) the power to require the production of documents and information; (2) the power to enter premises for inspection; (3) the power to enter premises without a warrant; and (4) the power to enter and search premises under warrant.

**Zambia – Competition and Consumer Protection Commission (CCPC)**

Under the Competition and Consumer Protection Act, 2010 (Competition Act), the CCPC may conduct investigations into allegations of competitive harm on its own initiative or following a complaint by a third party.\(^{37}\)

The CCPC does engage in a screening test to decide which complaints to pursue by way of a formal investigation. A number of factors are generally considered at this stage, including the nature and gravity of the alleged contravention, and will dictate whether the CCPC pursues an investigation.

Regarding search and seizure operations, the CCPC generally only utilizes such an investigative tool when pursuing allegations of hard-core cartel conduct.\(^{38}\)

With regard to “excessive pricing,” the Competition Act does not clearly define what constitutes a violation thereby imposing costs on the targets in obtaining economic evidence when the tests themselves are uncertain. This has on occasion led to the allocation of substantial time and resources in carrying out the investigations.

In terms of bringing an investigation to an early resolution, the CCPC recently introduced Settlement Procedure Guidelines providing that it may either initiate or accept a request for settlement during any stage of the investigation.\(^{39}\) This, however, remains at the sole discretion of the CCPC. Furthermore, settlement negotiations must be concluded within 30 days, unless this period is extended by the CCPC.\(^{40}\)

Targets are also free to engage with the CCPC informally for purposes of negotiations to either settle or resolve the case against them—this may lead to the termination of the investigation by the CCPC. Nonetheless, the concerns as to proportionality of ongoing investigations remains.

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\(^{33}\) *Id.* § 66(3)(a) (“Nothing in this Part shall (a) compel a professional legal adviser to disclose or produce a privileged communication, or a document or other material containing a privileged communication, made by or to him in that capacity.”).

\(^{34}\) *Id.* § 66(1)-(2). However, this does not extend to civil proceedings.


\(^{36}\) *Id.* ¶ 3.13. But note that in practice, the CCS may have a very broad scope of investigation which may increase the risk of fishing expeditions.


\(^{40}\) *Id.* § 7(ii).
Canada – The Competition Bureau (CCB)

The Canadian Competition Act (the Act) includes criminal offenses, civil reviewable practices, and private rights of action. Procedurally, criminal offenses under the Act are subject to section 7 of the Canadian Charter of Rights and Freedoms (the Charter). Section 7 makes procedural fairness a constitutional requirement when a person faces criminal charges that threaten life, liberty, or security of the person. Civil investigations are subject to the common law duty of procedural fairness, which applies to all administrative officials. The requirements of this duty are laid out by the Supreme Court of Canada (Supreme Court) in Baker v. Canada (Minister of Citizenship and Immigration). In Canada, the Act is enforced by the Commissioner of Competition (Commissioner) and the CCB.

Sections 11, 15 and 16 of the Act provide the CCB with powerful investigative tools that apply to both criminal and civil investigations. These tools grant the CCB extremely broad investigative authority. Section 11 allows the Commissioner to obtain ex parte (without notice) court orders, which allow it to collect information through oral examination, production of records, and written responses. The order may apply to the subject of the investigation, as well as third parties, and can extend to affiliates in Canada and abroad. Sections 15 and 16 allow for search and seizure. The Commissioner frequently relies on these powers, though they are quite controversial. It has been argued that the provisions circumvent the duty of procedural fairness (which requires notice and a fair hearing) and raise concerns regarding the constitutional right against self-incrimination and unreasonable search and seizure. Despite this, courts have consistently upheld these powers as constitutional. When investigating criminal offenses, the CCB can also rely on investigative tools under Canada’s Criminal Code. For example, section 183 of the Criminal Code allows the CCB to use wiretaps to collect information.

When the CCB is concerned that a merger has the potential to substantially lessen or prevent competition, it will issue a Supplementary Information Request (SIR) to the parties. The information requested is subject to the CCB’s discretion, which often results in fairly burdensome requirements. In practice, the CCB has become quite aggressive in its demands, extending the definition of “senior officers” from whom “all records” must be searched to mid-management positions. While there are guidelines that purport to introduce balance to production demands, the guidelines are not generally followed in that respect. Aggravating the burden, all electronic information provided to the CCB must meet very specific requirements outlined in the CCB’s Production of Electronically Stored Information guidelines. The instructions strongly suggest that the CCB expects parties to provide it with a large volume of electronic documents when responding to SIRs. For example, the CCB typically requests three to five years’ worth of documents and/or data. Parties must also provide a specification coding index which tags each record produced with the SIR specification to which it is responsive. Complying with this

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requirement properly is a highly manual process that can be extremely costly and is outdated given the improvements in document review technology since the guidelines were published.45

Ongoing substantive discussions with the CCB can—but rarely—reduce the scope of information required if the CCB becomes convinced the information in question is no longer necessary. Under section 116 of the Act, when swearing the completeness of a SIR, parties have the ability to “carve out” information that is not available, has already been provided to the CCB, or is not relevant to its review. When a party maintains that certain information is unavailable, it must explain why (the CCB considers a simple “not available” to be insufficient). There is only a limited scope to challenge the extent of a CCB production order; particularly in a merger scenario, it is not prudent to do so owing to timing concerns. The CCB has been subject to considerable criticism over the extensive information and data compelled from parties and third parties in merger and conduct investigations in particular.

**European Union – European Commission DG Competition**

The European Commission DG Competition (EC) does not have specific management practices ensuring that the expected costs of an investigation are proportionate. The EC does not publicize its procedures determining which investigations it prioritizes and pursues. Regulation (EC) No 1/2003 allows the EC to exercise its discretion in requesting information from undertakings.46

The Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU states that the EC is allowed to refuse to investigate where “given the limited likelihood of establishing the proof of the alleged infringements and the substantial investigatory resources which the [EC] would have to invest in order to verify their existence, allocating the resources necessary to further investigate the case would be disproportionate.”47 While the general principle of proportionality limits the EC’s power of investigation,48 there are no specific checks on the type and extent of investigations the EC may choose to pursue.

The EC process has been criticized for granting excessive discretion in relation to the cases DG Competition may pursue. In addition, the EC is not subject to any deadlines, which can lead to disproportionately and excessively lengthy investigations.49 This is particularly evident in cases of merger control, where the EC can request extensive financial, business and market information. Practice indicates that this type of burden on the parties is not limited to complex types of acquisition and is particularly evident during “pre-notification” discussions, where there is no deadline imposed on the EC. The EC did attempt to address this issue with its merger simplification. However, some amendments are still criticized as imposing too great of a burden on targets.50

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United States – Department of Justice Antitrust Division (DOJ) and Federal Trade Commission (FTC)

The U.S. DOJ and FTC (the Agencies) have adopted certain management policies designed to address concerns regarding burden to the parties but, in practice, significant issues persist with respect to the Agencies issuing overly burdensome document and information requests during civil investigations.

The Agencies have powerful investigative tools, with few effective limitations, at their disposal, such as the ability to issue Second Requests in merger investigations, as well as subpoenas and Civil Investigative Demands (CIDs)—for documents, testimony, or both—in conduct investigations or to third parties in merger reviews. For example, Second Requests in merger reviews can be extremely broad, e.g., calling for “all documents” relating to categories such as competition, pricing strategies, and the proposed transaction, and, as discussed below, not tailored to specific circumstances. Similarly, CIDs—even to non-parties—often include broad “all documents relating to” requests that impose significant burden on the recipients. The requests for information are often written in a way that makes it difficult for the parties to comply without the Agencies’ agreement to modifications or limitations, but the Agencies retain sole discretion in deciding whether to grant relief and agree to a modification or limitation. Parties are often forced to comply with vague requests in order to move the investigation along.

The resulting costs and burdens of investigations in the United States continue to be a recurring concern. In 2008, the American Bar Association noted, “The burden—financial and otherwise—imposed by the U.S. merger review process surpasses those of any other jurisdiction in the world. Parties expend considerable time and expense in providing information requested during the merger investigation.”51 These concerns persist and, given the breadth of currently available e-discovery tools, may be worsening. Indeed, there continues to be calls for reform, including from top agency officials.52

Given the breadth of electronic records kept within companies, such broad requests for information have the potential to impose significant costs on parties. Reviewing thousands or even millions of records for relevance and privilege can be enormously expensive and time-consuming. The burden affects the Agencies as well, given the limited government resources to review the multitude of documents typically produced during the course of an investigation. Thus, it is critically important to determine the appropriate scope of requests for information upfront, balancing the Agencies’ legitimate need for information against the burdens imposed on the parties.

To their credit, the Agencies have adopted certain management tools designed to address burden concerns, including:

- **Negotiation:** The Agencies’ position is that they are always available to discuss a respondent’s concerns about the burden imposed by particular requests, and they encourage recipients to engage in such discussions. In most merger investigations, staff and counsel typically reach an agreement regarding modifications and/or deferrals,

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including regarding practical issues like the search terms to be used when culling through electronic files and the individuals whose files should be reviewed (known as “custodians”).

- **Internal Review Procedures:** When negotiations with staff fail to reach a successful outcome, both Agencies have procedures for appeals. In the merger context, the U.S. Congress mandated that both Agencies institute an appeals process for second request negotiations utilizing independent decision-makers. The resulting FTC process identifies the FTC’s general counsel as the official to hear a dispute, and DOJ’s process relies on a deputy assistant attorney general not in the chain of command for the specific matter.

- **Agency Process Reforms:** Both Agencies, from time to time, modify their processes to address burden concerns. For example, the Model Second Request has been updated to address issues like e-discovery and privilege logs. And, in 2006, both Agencies announced merger review process reform initiatives to provide a framework around issues such as time periods for searches, Second Request modifications, limitations on the number of custodians and schedules for meetings with decision-makers. The DOJ’s reforms included a formal “Process & Timing Agreement” option under which, in exchange for providing information to the DOJ early in the investigation and agreeing to a post-complaint discovery period, parties will be able to limit second request searches to central files and 30 or fewer employees.

While these tools are useful, it is not clear that they have had a significant effect in reducing burden in practice. For example, even though Agency staff is willing to negotiate limitations in subpoenas and Second Requests, the modification process often takes a significant amount of time and can result in only limited reduction of the compliance burden. Parties are faced with limited effective choices if they cannot reach agreement with staff on the scope of the production. Internal appeals are rare, as utilizing the established processes may take longer than agreeing to, and complying with, a burdensome production request. Moreover, the internal appeals processes utilize Agency employees as the “independent” decision-makers to handle appeals, thereby calling into question the independence of such processes. In theory, parties can assert compliance with a Second Request by producing what the parties believe to be a reasonable production even if the Agency disagrees, thereby forcing the Agency to file a protest in court. But this option is often not a practical one given the procedural demands and unpredictability of court review and the time constraints of a pending transaction. Accordingly, parties often have no practical choice but to acquiesce to agency demands, resulting in a production of a disproportionate amount of material simply to “start the clock” on the substantive review.

Moreover, the Agencies’ continued use of a “model” Second Request ignores the requirement in the recommended practice that investigative demands be “proportionate” to the

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54 16 C.F.R. § 2.20(b)(4).
expected value of the evidence sought. The model is necessarily broad and not tailored to the specific issues of any particular investigation. Moreover, the model contains numerous requests that seek “all documents relating to” a given subject, which is a formulation highly disfavored by the courts and commentators.\textsuperscript{58} While the Agencies state that staff should focus a Second Request to the transaction at hand, the practice places a burden on staff to substantiate the basis for any proposed deviation from the model, and staff may use this burden as an argument against agreeing to proposed modifications.\textsuperscript{59} This typically results in the default issuance of the model form with only minimal revisions.

The Agencies should have a more committed practice to tailor each Second Request to the needs of each particular investigation. Indeed, the rules applicable to civil litigation in the United States were recently amended to mandate that discovery requests must be “proportional to the needs of the case.”\textsuperscript{60} While the federal rules are not binding on Agency investigations, they provide useful guidance that the Agencies should follow.

\textsuperscript{58} For example, the highly-influential Sedona Conference advises that parties should avoid using “blanket requests for ‘any and all documents,’ and documents that ‘refer or relate to,’ in order to encourage substantive responses to the requests.” The Sedona Conference, Federal Rule of Civil Procedure 34 Primer 7 (Sept. 2017), available at https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Federal%20Rule%20of%20Civil%20Procedure%2034%20Primer.


\textsuperscript{60} Fed. R. Civ. Pro. 26(b)(1).
Jurisdictions Evaluated:

- United States
- Singapore
- Argentina
- Kenya
- Mexico

United States – Department of Justice Antitrust Division (DOJ) and Federal Trade Commission (FTC)

The U.S. DOJ and FTC (the Agencies) take appropriate steps to ensure that staff and decision-makers reassess the bases for investigations and tailor matters accordingly. This continuous re-assessment provides parties the opportunity to be heard and to potentially affect the course of the investigation.

The Agencies engage informally with parties throughout an investigation to determine if changes to the investigation are warranted. DOJ encourages parties to meet with the investigation lawyers and economists throughout the investigation to discuss the procedural course of the investigation and substantive theories of the case.61 Similarly, the FTC has long “encourage[d] the parties to engage the staff in a dialogue on substantive issues, beginning at the earliest possible date;” these discussions should occur “on an ongoing basis as the investigation proceeds and concerns evolve, change, or are refined.”62

Both agencies routinely encourage companies under investigation to present evidence or arguments, both orally in informal meetings and through written “white paper” submissions. Many merger investigation timing agreements have specific placeholders for meetings with parties at various stages of the investigation to discuss issues. For the most part, the Agencies’ staffs discuss with the parties how an investigation is proceeding and disclose the general factual, legal, and economic theories that the agency is pursuing.

The Agencies also employ a more formal process at specific milestones to carefully assess whether an ongoing investigation should be modified or terminated. Senior decision-makers are involved at all key stages of an investigation, such as the opening of a preliminary investigation, the issuance of compulsory process to obtain information, the recommendation made to senior-

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61 U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION MANUAL, 5TH ED. III-15 (Aug. 2017), available at www.justice.gov/atr/file/761141/download (“An ongoing critical analysis of a proposed transaction and a transparent discussion of that analysis can lead to a quicker and more effective process of arriving at the ultimate enforcement decision.”); see also U.S. DEP’T OF JUSTICE, ANTITRUST DIV., MERGER REVIEW PROCESS INITIATIVE 4 (Dec. 14, 2006), available at www.justice.gov/atr/public/220237.pdf (“[T]he Division may agree to meetings or teleconferences with the parties on a regular basis (e.g., every other week) throughout the investigation to promote a continuing dialogue and provide a regular opportunity to discuss progress made on both sides.”).

most officials and the filing of a court case. At both Agencies, staff is required to present memoranda to management that include the factual, legal, and theoretical bases for the action it is recommending, with information on expected arguments by the parties and how they will be countered. Prior to taking action to challenge, the top decision-makers typically will meet with parties to explain concerns, provide an opportunity for the companies and individuals to present their best arguments, and explore remedies. It is not unusual for the Agency to change or refine its thinking in response to those meetings.

**Singapore – Competition & Consumer Commission of Singapore (CCCS)**

There are some formal procedures by which CCCS is required or encouraged to reassess the potential contentions or tailor its investigation, such as after the issuance of a Proposed Infringement Decision (PID). In practice, CCCS has been known to informally reassess if an investigation should continue and to this end has closed numerous investigations. Some investigations have been closed with commitments being provided. The CCCS has in some cases decided not to pursue investigations based on lack of evidence, lack of competitive harm in Singapore, or sufficiency of voluntary undertakings.

One example is the CCCS’s issuance of the first Supplementary Proposed Infringement Decision (SPID) against thirteen fresh chicken distributors. On March 8, 2016, the CCCS had issued a PID against these fresh chicken distributors for engaging in anti-competitive agreements to coordinate the amount and timing of price increases and agreeing not to compete for each other’s customers in the market for the supply of fresh chicken products in Singapore.\(^{63}\) Following the issuance of the PID, new evidence was brought to the attention of the CCCS during the course of the Parties’ written and oral representations to the PID. As a consequence, on December 21, 2017, the CCCS formally notified the Parties that further investigation would be conducted and ultimately issued a supplementary PID and accepted further leniency applications.\(^{64}\) This is an indication that the CCCS does reassess the evidence periodically to determine if investigations should continue.

Another example is the CCCS’s investigation into capacitor manufacturers which started off on a very wide scope, encompassing different types of electrolytic capacitor manufacturers such as titanium electrolytic capacitor manufacturers. However, eventually, the CCCS only issued an Infringement Decision (ID) against aluminum electrolytic capacitors.\(^{65}\) This suggests that the CCCS had reassessed the scope of its investigation.

It has been reported that the CCCS could be more transparent during the course of its investigations. Recent procedural guidance encourages more state of play meetings, so this is likely to improve.


Argentina – Comisión Nacional de Defensa de la Competencia (CNDC)

The CNDC is ruled by Antitrust Law No. 25,156 and Administrative Procedural Law No. 19,549. There are no provisions within the law or regulations that require public officials to reassess on a periodic basis the potential contentions or tailor the investigation as it proceeds.

However, there are three stages in which reassessment can be carried out, albeit in an informal manner. The first is upon the request of explanations to the parties, as set out in article 29 of the Antitrust Law, entailing the first approach to the parties under investigation in order to determine whether the investigation should be closed without further proceedings. The second takes place after the submission of the explanations by the parties and the commencement of the investigation proceedings by the CNDC; in other words, at the moment of issuance of the statement of facts that set out the scope of the process, set out under article 32. The final and third stage in which a reassessment of the case could take place is once the closing arguments by the parties are filed after the entirety of the evidence of both parties has been attached. At this stage, the CNDC must issue a final decision. As previously noted, there are no fixed stages set out by any regulation or law which could be invoked to require officials to carry out any type of reassessment.

Please note that any decision to reassess is a discretionary decision by the CNDC and, as such, there is no formal obligation to carry it out. In practice, the previous Administration of the CNDC did not reassess any case and declined to specifically address matters raised by the parties in their submissions.

Kenya – Competition Authority of Kenya (CAK)

Following receipt of a third-party complaint or in initiating a complaint on its own initiative, the CAK will initially gather evidence regarding the alleged contravention. Target firms are advised of the CAK’s decision to investigate the matter. The CAK will assess at this time whether there is insufficient evidence against the target. If the CAK determines that there is insufficient evidence, the CAK will terminate the investigation and notify the target of its decision to abandon the investigation.

Should the CAK obtain what it considers sufficient prima facia evidence against the target, it will proceed to inform the target of its case, at which point the CAK would most likely invite the target to settle its case with the CAK. The CAK has the authority to enter into settlement agreements at any time, without the requirement for such a settlement to be approved by an administrative judge.

Should settlement negotiations be unsuccessful and further investigation produced insufficient evidence to sustain a case of anticompetitive conduct, the CAK would reassess and terminate the investigation by way of a formal notice to the target.

Once the CAK has taken the view that there is in fact a contravention, the CAK will communicate to the parties the nature of the contravention and the intended remedial action(s) sought within three days of such a decision being taken (Section 34 of the Act). In recent matters, the CAK has also provided targets with the evidence it relied upon in reaching its conclusion. The target party will then have twenty-one days to submit written representations and indicate whether it requests a hearing conference. To the extent that a target does not submit a written representation or request a hearing conference, a contravention shall be presumed, and a final decision will be issued. Should the target submit written representations only, the CAK shall review the submissions within 14 days and issue a decision. If the parties wish to make both written and oral representations, the CAK usually convenes a hearing conference within 21 days during which it
will assess both the written and oral submissions made by the target before making a final determination.

At the hearing conference, a target may challenge the information which the CAK relies upon and produce documents for purposes of rebutting the evidence relied on by the CAK. The hearing conference usually takes the form of a meeting/discussion and is not a formal trial hearing, i.e., there will be no examination in chief, cross examination or re-examination of witnesses (under oath). There are no witnesses per se, but targets may attend the hearing conference with representatives who are able to explain the evidence or their conduct to CAK.

Based on the outcome of the hearing conference or on the content of the documents/evidence produced by the target, the CAK may i) request additional documents, ii) confirm its decision, or iii) change its decision.

**Mexico – Comisión Federal de Competencia Económica (COFECE)**

The Statutory Framework neither contemplates, nor regulates, the possibility of reassessing or tailoring an ongoing investigation. Although in some matters Enforcers managing a particular investigation have pursued additional lines of investigation, there are no regulations that specifically provide for this. Once an investigation is opened, except in very few cases, Enforcers tend to fully conduct their investigation until an issue or concern is found or the Enforcer concludes no such issue has arisen.

Enforcers have considerable authority to conduct an investigation and consequently such investigations may last a long time, for example, the investigative phase of a cartel investigation can last up to approximately 600 business days. Once the investigative authority has initiated an investigation a very complex procedure is required to close or dismiss that investigation. This is true of each investigative agency in Mexico but is particularly true of COFECE.
Officials should strive for balance, pursuing and considering both exculpatory and inculpatory evidence and analysis.

1. Officials should not limit pursuit or consideration of exculpatory evidence to that provided by targets’ counsel. Officials should pursue and consider potentially exculpatory evidence from third parties, especially when such evidence may not otherwise be available to targets or their counsel.

**Jurisdictions Evaluated:**
- Canada
- United Kingdom
- Zambia
- Brazil
- Korea

**Canada – The Competition Bureau (CCB)**

Parties under civil investigation by the CCB have ample opportunity to provide the reviewing officers with submissions and evidence that are helpful to their case. The CCB encourages meetings between the parties and the case officers, often involving both CCB and parties’ experts. The CCB considers inculpatory and exculpatory evidence, both that given by the parties (and their experts, if applicable), and feedback from market contacts, in assessing the strength of any potential enforcement action.

The CCB is entitled to compel information during the course of an investigation, from parties and third parties, including by seeking ex parte production orders from the court. In applying for a section 11 order as part of a criminal or civil investigation, the CCB is required by court rules and precedent to present all material evidence, whether exculpatory or inculpatory, to the judge. Courts, including the Federal Court of Canada, have stressed that ex parte relief is extraordinary, as it allows the applicant to circumvent the duty of procedural fairness. Ex parte orders like section 11 orders deprive those subject to it of the right to challenge the case made against it, which warrants mandatory disclosure of all material facts to the court.66 The record provided in the CCB affidavit in support of section 11 orders can be revealing as to the inculpatory and exculpatory evidence available to the CCB, and the relative emphasis being brought to bear by the CCB at that stage of the proceedings.

A specific (and unusual) example of the requirement for the CCB to consider exculpatory evidence relates to the availability of Canada’s efficiencies defense (in the context of mergers under section 96 of the Act and civil review of competitor collaborations under section 90.1 of the Act); the section also requires the CCB to consider the efficiencies to be gained from a transaction and balance them against any harm to competition. This test requires that any competitive harm be balanced against the potential effects generated by efficiencies, including consideration by CCB concerning positive evidence submitted by the parties.

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The CCB has specifically stated that, in conducting criminal investigations, its officers are responsible for preserving all exculpatory and inculpatory information obtained. Moreover, under sections 7 and 11(d) of the Charter, anyone accused of a crime has a constitutional right to make “full answer and defense.” This requires the government to provide the defendant with all relevant information in their possession, with no distinction between inculpatory and exculpatory evidence. However, this right only applies to those charged with a criminal offense and is not yet engaged at the investigative stage, pre-laying of charges.

United Kingdom – Competition & Markets Authority (CMA)

The CMA is governed in its procedures to enforce the Competition Act 1998 by its Guidance on the CMA’s investigation procedures in Competition Act 1998 cases (Guidance). The Guidance identifies two key phases of investigation during which the CMA gathers evidence and its procedures for evaluating the robustness of the findings.

During its initial assessment, the CMA may gather information from the target(s) of the investigation, any complainant(s) (if applicable), and/or third parties on an informal basis, through either written requests for information or meetings with the CMA. If it then decides to open a formal investigation, the CMA may require the production of specified documents or information, conduct interviews, and search premises (with or without notice).

The CMA is not specifically obligated to pursue potentially exculpatory evidence from third parties, e.g., where such evidence may not be available to the parties under investigation or their counsel. However, the CMA’s conduct remains subject to judicial review on the general grounds discussed in section V.A, by which the CMA’s decision not to investigate certain facts may constitute grounds for an application for judicial review.

For example, in Unichem v. Office of Fair Trading, the Competition Appeal Tribunal (CAT) held that ordinary judicial review principles permit the CAT to examine “whether [the CMA’s] conclusions are adequately supported by evidence, that the facts have been properly found, that all material factual considerations have been taken into account, and that material facts have not been omitted.”

The Court of Appeal, setting out the general framework for overturning the decision of a public authority made on the basis of a flawed fact-finding exercise, has held that the claimant must show:

(i) an erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case); (ii) the fact was

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70 Id. ¶ 4.11.

71 Id. ¶ 6.1.

72 For a recent example, see R (on the application of Gallaher group Ltd and others) v CMA, [2018] UKSC 25.

‘established,’ in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence; (iii) the claimant could not fairly be held responsible for the error; (iv) although there was no duty on the [public authority] itself… to do the claimant’s work of proving her case, all the participants had a shared interest in cooperating to achieve the correct result; [and] (v) the mistaken impression played a material part in the reasoning.74

As to the information which the CMA does obtain from third parties, the CMA has indicated that it will not routinely treat its notes of meetings and conversations with third parties as “internal documents” for purposes of the “access to file” procedure, as doing so could deprive the parties under investigation of access to potentially exculpatory material.75 At the time of issuing a Statement of Objections, the CMA will give each party under investigation the opportunity to inspect the case file, including any exculpatory evidence from third parties.76

In respect of the evidence gathered during each phase, the Guidance states that the CMA will routinely review and analyze the information in its possession in order to test the CMA’s factual, legal and economic arguments, and to establish whether such information supports or contradicts each theory of competition harm pursued by the CMA.77

This internal review involves seeking advice from specialist advisers on the legal, policy and economic issues that arise. In order to provide a further internal check and balance before issuing a Statement of Objections or a final decision on infringement, the CMA may also seek advice from external specialist lawyers and economists.78

Such safeguards stop short, however, of an institutional separation between investigation and decision-making, with certain practical implications for the evidence on which an infringement decision is based. Specifically, the case team which conducts the antitrust investigation and the Case Decision Group which ultimately decides whether an infringement has occurred both form part of the CMA’s administrative framework.79

Yet the case team remains the primary point of contact for each party under investigation. As a consequence, it is the case team which will be responsible for relaying information from each party to the Case Decision Group, and a party and its representatives will be unable to contact the Case Decision Group directly, outside certain oral hearings attended by its members.80

76 GUIDANCE, supra note 69, ¶ 11.19; The Competition Act 1998 (Competition and Markets Authority’s Rules) Order 2014, Rule 6(2), available at www.legislation.gov.uk/uksi/2014/458/schedule/paragraph/6/made. The CMA may withhold a document provided by a third party, however, to the extent that it contains information whose disclosure the CMA determines might significantly harm the legitimate business interests of the person(s) to which the information relates.
77 Id. ¶ 9.4.
78 Id. ¶ 9.1.
79 Furthermore, the decisions of the Case Decision Group must be formally adopted by the CMA’s Case and Policy Committee—rather than by an institutionally independent decision-maker—before they can be issued by the CMA: GUIDANCE, supra note 69, ¶ 13.3. The CMA’s Case and Policy Committee operates under the delegated authority of the CMA Board and appoints the Case Decision Group. Id. ¶¶ 9.9, 11.30.
80 Id. ¶ 11.34. The Case Decision Group will attend all oral hearings on the Statement of Objections and will also invite parties on which it proposes to impose a financial penalty to attend an oral hearing (in person or by telephone) on the draft penalty statement. Id. ¶¶ 12.13, 12.32.
Thus, the Case Decision Group will be called upon to decide a case based solely on the documents obtained during the investigation and put to it by the case team. A party and its representatives should prepare written submissions to the case team, therefore, with the understanding that they will be the sole opportunity in writing to influence the Case Decision Group’s decision.\(^{81}\)

**Zambia – Competition and Consumer Protection Commission (CCPC)**

The CCPC is authorized in terms of section 55 (2) and (4) of the Competition and Consumer Protection Act No. 24 of 2010 (CCP Act) to obtain evidence of an alleged infringement through public consultations during which the CCPC can gather evidence from customers, competitors and sector regulators, if any, in relation to a target. The CCPC also obtains information from the target itself by way of information requests. The information from the target may take the form of a written statement as to the facts or documentary evidence such as business records.

Neither the CCP Act nor the Administrative and Procedural Guidelines of the CCPC specifies the information/documents which targets are obliged to provide to the CCPC. The CCPC is generally empowered to collect any information/documentation it believes would assist in its investigation. In terms of section 55 of the CCP Act, the CCPC may subpoena any person(s) (including third parties) to furnish it with any information which may be relevant to the CCPC’s investigation. A failure to produce information/documentation is a contravention under section 55(5) of the Competition Act and can lead to a fine, imprisonment, or both. In practice, before deciding whether to investigate and subsequently prosecute a target, the CCPC usually considers both inculpatory and exculpatory evidence which may have been obtained from the parties and various third-party sources.

**Brazil – Conselho Administrativo de Defesa Econômica (CADE)**

Brazilian Competition Law (Law 12,529/11) regulates antitrust activity at the administrative level in Brazil.\(^{82}\) During the investigation period, CADE’s General Superintendence (the GS) can request the production of any evidence it considers relevant. In particular, under Article 13 §2 of Law 12,529/11, in order to obtain information, the GS may “request information and documents from any individual or legal entity, bodies and authorities, whether public or private, maintaining confidentiality, as the case may be, as well as to determine the inquiries deemed necessary for the exercise of its functions.”\(^{83}\)

The laws do not specifically refer to pursuing and considering both exculpatory and inculpatory evidence. However, under Article 72, the GS “shall determine the production of evidence it considers relevant, provided that it shall be entitled to exercise the fact-finding powers set forth in this Law, maintaining confidentiality, as necessary.”\(^{84}\)

Nowadays, the majority of CADE’s investigations are opened based on Leniency Agreements. These Leniency Agreements report any anticompetitive practices, along with the evidence that supports their claim, being CADE’s main source of evidence. Although the most common conduct reported by Leniency Agreements are cartels, these agreements are also available


\(^{82}\) Lei No. 12.529/11, de 30 de Novembro de 2011 D.O.U. de 30.11.2011 (Braz.).

\(^{83}\) *Id.* art. 13 II.

\(^{84}\) *Id.* art. 72.
for other antitrust conduct set forth in Article 36 of Law No. 12,529/2011, which includes price discrimination, resale price maintenance, among other unilateral conduct.\textsuperscript{85} In addition, after the opening of any investigation, the defendants are able to execute Cease and Desist Agreements (TCC), in which the proponents present new evidence in order to cooperate with CADE. Another possibility is the search and seizure by CADE of companies that are under investigation. This can also result in new evidence.

Given the high level of consideration the GS places on inculpatory evidence provided by Leniency applicants and settling parties in the context of TCCs, the Authority is reluctant to consider, at early stages of the investigation, exculpatory evidence from target’s counsel, even when such evidence is significantly strong.

However, the weight given to (and standard expected from) inculpatory evidence in the context of an abuse of dominance claim is less clear. Arguably, the overall impression is that the burden of proof imposed on Complainers before CADE, bringing a claim against their competitors or suppliers, is relatively high in order to obtain intervention from the Antitrust Authorities. This may give the impression that exculpatory evidence is considered more seriously by CADE on such occasions.

While it is less common in administrative proceedings than in merger reviews, third-parties may request to assist in the investigation and are authorized to file submissions and provide evidence that supports their claim against the defendants.\textsuperscript{86} This procedure often imposes high costs on defendants to carry out the factual and legal discussions throughout the investigative proceeding until a final decision is reached by the GS or, as we have seen in most cases, of CADE’s Administrative Tribunal (responsible for a final decision).

In the context of administrative proceedings, the request for intervention is usually submitted by third parties that consider that the anticompetitive conduct under investigation has produced harmful effects on the affected market. It is common that associations and unions request third-party status on behalf of their members affected by the conduct. In order to be admitted as a third party, the applicant must demonstrate how it could be affected by the outcome of the administrative proceeding. For example, in a cartel investigation involving the foreign exchange market, five companies and associations requested to be admitted as third parties. Four requests were not granted by CADE, because the applicants failed to demonstrate how they could be affected by the outcome of the administrative proceeding,\textsuperscript{87} leaving one intervening party, with access only to the public records.

In the context of merger reviews, CADE may admit third-parties’ intervention, including customers, suppliers and competitors, provided that such request is filed with CADE within fifteen days following the publication of the summary of the transaction in the Brazilian Official Gazette.\textsuperscript{88} Third-parties assist CADE during the analysis, providing studies, arguments and evidence that support their claim. CADE will consider the arguments submitted by third parties, but will conduct the analysis of the case independently, and will also take into consideration competitors and clients’ opinions consulted during the market test.

When third parties request to assist CADE during the analysis of a merger review case, it is often because the party is against the deal, either because the third party understands that the

\textsuperscript{85} Id. art. 36.
\textsuperscript{86} Lei n° 12.529/11, art. 50, item I.
\textsuperscript{87} The requests were submitted by ISS Marine Services LTDA., Associação Mato-grossense dos Produtores de Algodão (AMPA), Centro do Comércio de Café do Rio de Janeiro, IMCOPA—Importação, Exportação e Indústria de Óleos Ltda.), and the Association of Foreign Trade of Brazil (AEB). Only AEB was approved.
\textsuperscript{88} CADE’s Internal Rules, art. 158.
transaction could raise competition concerns or because the third party is interested in acquiring the assets/company involved in the transaction. Third parties usually provide CADE with studies, arguments and evidence that support their arguments. CADE usually considers the arguments submitted by third parties in its analysis, even if exculpatory, although it is not common for third parties to provide exculpatory evidence.

Such intervention is more common in complex cases that entail high concentrations. For example, in a recent merger review case (Linde AG and Praxair, Inc.), five companies were admitted as third parties.\(^\text{89}\) The case was cleared by CADE’s Tribunal subject to structural remedies on the ruling session held on June 13, 2018.

**Korea – Korea Fair Trade Commission (KFTC)**

The Monopoly Regulation and Fair Trade Act (MRFTA) is the main antitrust statute in Korea.\(^\text{90}\) The KFTC enforces the MRFTA, which provides both substantive and procedural rules. In addition, the KFTC has issued various notifications, rules, regulations and guidelines. For greater procedural transparency, the KFTC adopted in 2016 what it dubbed the Enforcement Process 3.0, the most significant procedural reform in 30 years.\(^\text{91}\) Now formally part of Chapter 3 (Articles 10 through 74) of the KFTC Rules on KFTC Commission Meetings and Matter Procedures, it provides the first-ever “explicit” and “written” guidance on certain key procedural issues relating to matter initiation, on-site investigations, internal record management and other related issues.

Despite its recent procedural reform efforts, nothing in the MRFTA and related rules, regulations and guidelines explicitly discusses the consideration of exculpatory or inculpatory evidence. In practice, KFTC investigators are not known to identify or reveal with targets or their counsel potentially exculpatory evidence from third parties or other sources.

This is related to the criticism that at times KFTC investigators closely guard their theories of the case and key factual support until they issue an Examiner’s Report. While KFTC investigators may from time to time share with targets and their counsel as to where the investigation stands in a general way, they do not consistently articulate their concerns during the investigation. They disclose or share potentially exculpatory evidence even more sparingly. However, once the KFTC issues an Examiner’s Report (or Statement of Objections), then respondents or targets of investigations do get a clearer view of the KFTC’s position. At that point, respondents may have access to third-party materials that the KFTC relied on in its Examiner’s Report. While it is rarely granted in practice (except in connection with proposed economic experts), respondents may request access to certain other third-party documents and witnesses.

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\(^{89}\) Air Liquide Brasil Ltda., ESHO–Empresa de Serviços Hospitalares S.A., Companhia Brasileira de Alumínio, Braskem S.A., and Magnesita Mineração S.A.

\(^{90}\) Monopoly Regulation and Fair Trade Act, Act No. 12095, Feb. 14, 2014 (S. Kor.).

\(^{91}\) The KFTC formulated and implemented Rules on KFTC Investigation Procedures on February 4, 2016, as part of the Enforcement Process 3.0 Reform Initiative.
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<th>Practice No.</th>
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<td>I.E(i)</td>
<td>At key points in a pending investigation (or periodically) officials should disclose (subject to limitations reasonably reflecting and tailored to any legitimate concerns such as the preservation of evidence of covert criminal behavior or maintaining confidentiality of business secrets) all potential contentions of infringement and (in reasonable detail) the underlying evidence, analysis and argumentation relevant to the defense, to targets and their counsel, and provide reasonable opportunities for and carefully consider all responses to such disclosures (including submissions as to facts, economic analysis, legal analysis, policy, and other forms of argumentation).</td>
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**Jurisdictions Evaluated:**
- Italy
- United Kingdom
- Argentina
- Korea
- South Africa

**Italy – Autorità Garante della Concorrenza e del Mercato (ICA)**

Targets of ICA investigations have the right to access the ICA’s file more than once throughout the investigation, both before and after the adoption of the Statement of Objections. This right stems from Articles 23 and 24 of the Law on Administrative Proceedings, which govern Italian administrative proceedings in general, and from Article 13 of the Regulation on ICA’s Proceedings, which is the specific legal basis for the right of access to the files of investigation proceedings carried out by the ICA and which explicitly extends such right to claimants and third parties with a substantial interest in the outcome of the proceedings. Article 13 of the Regulation on ICA’s Proceedings strikes a balance between opposing rights and interests by providing that access to ICA’s file can be denied, or limited, with respect to confidential, personal, commercial, and business information, related to persons and the undertakings involved in the proceedings.

In practice, the Italian administrative courts are particularly careful to recognize the right of access to ICA’s files whenever it is indispensable for parties’ right of self-defense. Indeed, according to general Italian administrative case law, the right of access to the file should, in practice, allow the parties to understand the evidence underlying the ICA’s contentions and to effectively prepare their defense. The right of access to file is paramount to ensuring respect for the right of defense, equality of arms, and fair participation in the proceedings.

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94 Id. art. 13, § 2 (“if documents referred to in paragraph 1 contain confidential personal, commercial, and business information, related to persons and the undertakings involved in the proceedings the right of access is ensured, in whole or in part, to the extent that this is necessary to secure the cross-examination”); id. art. 13, § 3 (“documents containing business secrets are not accessible. If they provide evidence of an infringement or essential elements for the defense of an undertaking, the offices limit the access to those elements.”).
95 Settled case-law, see Council of State, decision No. 652 of 12 February 2001.
According to Article 7 of the broadly applicable Law on Administrative Proceedings and Article 6 of the Regulation on ICA’s Proceedings, the ICA shall inform the targets of the initiation of proceeding. This notice shall include (i) the directorate and the case handler in charge of the investigation; (ii) the subject matter of the proceeding; (iii) the essential elements of the alleged infringements; (iv) the date of conclusion of the proceeding; (v) the office where the files can be accessed; and (vi) the time frame within which the parties may exercise their right to be heard.

However, Italian administrative case law has clearly stated that the analytical assessment of the infringing conduct is exclusively accomplished at the final stage of the investigation. In particular, Article 14 of the Italian Law on Competition and Article 14 of the Regulation on ICA’s Proceedings, clarify that potential contentions of infringements are communicated to the parties at the end of the investigation by means of the Statement of Objections (SO) which is normally adopted months (usually more than one year) after the opening of the case. The issuance of the SO is authorized by the ICA’s College, provided that the latter considers the officials’ conclusions to not be manifestly groundless.97

The SO contains the ICA’s “preliminary findings,” an extensive elaboration of the reasons supporting the ICA’s assessment of the case and shall be shaped so as to allow the investigated parties to understand the object of the investigation and to present their defense accordingly.98 According to Italian administrative case law, there should be a substantial similarity between the SO and the ICA’s final decision. Any elements or alleged conduct that would lead to a modification of the infringement scenario depicted in the SO must be the object of a new contention.99

**United Kingdom – Competition & Markets Authority (CMA)**

As set out in the Transparency and Disclosure: Statement of the CMA’s Policy and Approach (Transparency Guidance),100 the CMA is not subject to a general obligation to disclose its thinking in advance of its provisional decisions. However, the CMA will take a flexible approach to sharing its developing thinking and/or evidence with the parties to the investigation and/or (if appropriate) other interested persons, where the CMA determines that doing so may assist the case’s progression.101 The Transparency Guidance identifies certain circumstances, however, in which the CMA is required to take steps to share its provisional thinking or proposed decisions.102 For example, during an investigation to enforce the Competition Act 1998, the CMA, if it proposes to issue an infringement decision, must first issue a Statement of Objections to any party suspected of the infringement.103 The Statement of Objections represents the CMA’s

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97 D.P.R. n.217/1998, art. 14 (It.).

98 Settled case-law, see Council of State, decision No. 5085 of 2 October 2007, Regional Administrative Court of Lazio, decision No. 8945/2011 and 8952/11 clarified that an analytical assessment of the argumentation can only be made at the final stage of the investigation. On the other hand, the decision to start proceedings, which is based on a succinct assessment of the evidence available, is intended to determine the framework of the alleged infringing conduct and to identify the parties of the proceedings in order to permit a fair participation to the investigation.

99 Council of State, decision No. 4362 of 30 August 2002.


101 Id. ¶ 3.13.

102 Id. ¶ 3.12.

provisional view and proposed next steps, and is intended to allow the parties under investigation to know the full case against them and, if they choose to do so, to respond formally in writing and orally.\textsuperscript{104}

Similarly, in the exercise of its merger review and market investigation powers,\textsuperscript{105} the CMA must consult affected parties on any undertakings in lieu, the proposed final orders and undertakings, and must publish its provisional findings and possible remedies in Phase 2 merger inquiries and market investigations. Further guidance is available in the Chairman’s Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders.\textsuperscript{106}

Argentina – Comisión Nacional de Defensa de la Competencia (CNDC)

Under Section 41 of Antitrust Law No. 27,442 (the Law), the CNDC issues a statement of facts regarding a possible antitrust infringement. The parties then have the opportunity to submit evidence and provide an explanation of their view regarding the facts and legal merits of the case. The CNDC then issues a resolution in which the evidence against the parties is outlined in order for them to file their formal defense. Section 41 of the Law does not have a specific provision regarding the level of detail that is necessary for the issuance of this resolution.

In the past, the CNDC failed to notify the parties of the economic analysis that formed the basis of the statement of objections. This lack of economic evidence, which the CNDC also failed to include in some of its decisions, was questioned by the courts upon later appeal as a basis for overruling the entirety of the sanction.\textsuperscript{107} Likewise, the courts’ case law has stated that the resolution prescribed by Section 41 of the Law must objectively and subjectively specify the conduct that is attributed to the defendant(s) and enable them to submit the evidence that is deemed relevant to their defense.

Korea – Korea Fair Trade Commission (KFTC)

Nothing in the MRFTA and related rules, regulations and guidelines explicitly discusses this issue. However, while KFTC investigators typically do not share or disclose potentially exculpatory evidence to targets or their counsel, on balance they are generally open to discussing where the investigation stands and what concerns they may have in a general way. In practice, it varies significantly depending on the particular investigators on the matter.

Even when particular KFTC investigators share their theories of the case, they typically do not point to all key underlying evidence. Rather, they typically devote their effort to convincing


\textsuperscript{105} Section 90 and Schedule 10 in respect of mergers, and section 155(1) in respect of market investigations, of the Enterprise Act 2002.


\textsuperscript{107} For example, the vital importance of market definition as a requirement to impose sanctions for anticompetitive conduct was confirmed by the Federal Court of Appeals of Posadas (and further ratified by the Supreme Court), which reversed a 2008 decision adopted by the Antitrust Authority that failed to properly define the relevant market, and thus to assess the power of the alleged offenders to affect the general economic interest. See Supreme Court of Justice, Shell Gas S.A. y Totalgas Argentina S.A. (2010).
targets and their counsel to admit wrongdoing. Nonetheless, KFTC investigators usually provide to targets and their counsel reasonable opportunities to submit responses and rebuttal evidence.

**South Africa – Competition Commission (SACC)**

*Anticompetitive Conduct*

Investigations by the SACC into anticompetitive conduct generally consist of three key stages: i) the initiation of the complaint; ii) settlement negotiations; and iii) the referral of the complaint to the South African Competition Tribunal (Tribunal) for adjudication. The SACC initiates a complaint by way of an “initiation statement” in terms of section 49B(1) of the Competition Act No. 89 of 1998 (The Act). The initiation statement is a high-level document informing the target that the SACC will be investigating conduct based on a complaint and/or reasonable suspicion of a contravention of the Act. The SACC does not disclose to the target the identity of the complainant nor the evidence upon which the complaint is based. There is no obligation to notify the accused firm of the existence of the complaint.

After the initiation of a complaint of anticompetitive conduct, the SACC ordinarily seeks to engage in settlement negotiations with targets prior to the SACC formally referring the matter to the Tribunal. Although there is no legal obligation to provide a target with the evidence of which the SACC is in possession, the SACC would generally on a “without prejudice basis” inform the target of the nature and extent of the case against the target in an effort to reach a “full and final settlement” of the SACC’s entire case against the target. However, the SACC generally does not engage in substantive discussions with the accused firm on the merits of the matter or provide targets with the underlying evidence of its case, prior to a referral to the Tribunal. In recent cases, the SACC has referred matters to the Tribunal without informing the targets of the complaint initiation. In these instances, targets would only be alerted to the complaint against them via the media or the SACC’s press statement.

Should the SACC elect to refer the matter, the referral must be done by a referral affidavit. In terms of the Tribunal’s Rules, a referral affidavit must set out a concise statement of the grounds of the complaint and all material facts or the points of law relevant to the complaint. A referral affidavit should, therefore, contain sufficient information to enable a target to meet the case that has been brought against it. The Tribunal recently upheld a challenge by Unilever South Africa on the basis that the SACC’s referral affidavit is “vague and embarrassing” and ordered the SACC to amend its referral affidavit to provide further clarity to enable Unilever to answer the case brought against it.

In a separate investigation, in relation to cartel conduct in the South African construction sector, a target challenged the Tribunal’s order that it should plead its case referred to the Tribunal, prior to being provided access to the SACC’s entire investigatory record. The Competition Appeal Court held that a litigant’s right to access the non-restricted part of the SACC’s record does not derive as a result of the target being a litigant, but rather on the basis that the target is also a member of a cartel.

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109 See Competition Comm’n v. Yara (South Africa) (Pty) Ltd [2013] ZASCA 107 [24].


111 Unilever South Africa (Pty) Ltd v. Competition Comm’n, CR223Mar17/EXC064May17.
of the public. A member of public may approach the SACC for access to a copy of the non-
restricted part of the SACC’s record.

The Tribunal recently broadened the scope of “restricted information” where the targets
sought access to certain annexures attached to the leniency applicant’s application.\footnote{112} Although
the relevant annexures were prepared before the leniency applicant contemplated applying for
leniency and were not covered by legal privilege, the Tribunal held that the annexures form part
of the leniency application and are, therefore, restricted in the hands of the SACC.

From a timing perspective, once a complaint has been referred to the Tribunal, a target has
a limited amount of time (twenty days) within which to plead its case. However, upon receiving a
request to access the Tribunal’s record, the SACC must provide access within a “reasonable time.”
Accordingly, once a matter is referred, a target is not necessarily entitled to access the SACC’s
record prior to pleading its case as it will be required to submit its answering affidavit regardless
of whether or not the SACC has provided access to its record. The question as to what constitutes
a reasonable time is evaluated on a case by case basis and could be either before or after the target
has filed its answering affidavit. This was confirmed by the Tribunal in a recent challenge brought
by Standard Bank in the Forex Investigation.\footnote{113}

\textit{Merger Control}

In relation to merger control, an important distinction must be made between intermediate
mergers and large mergers. In relation to intermediate mergers, the SACC is responsible for
investigation and ultimately approving, approving with conditions or prohibiting the proposed
transaction. The SACC has a finite sixty business day period within which to make its decision. In
practice, the SACC is reluctant to provide the merging parties with the underlying evidence which
supports any concerns which the SACC may have raised on its own accord or received from third
parties. Furthermore, given the finite time period of review, merging parties often do not have
sufficient opportunity to make submissions or address concerns which are raised by third parties
(often towards the end of the review period). The SACC often imposes onerous conditions (absent
obtaining any submissions from the merging parties to address the perceived concerns) or
alternatively prohibits the merger outright. The merging parties are, therefore, frequently placed
in the invidious position of having to accept these onerous conditions or request that the Tribunal
then consider the merger in what would then be a contested hearing (with significant timing and
cost implications).

In relation to large mergers, the SACC is tasked with investigating the merger and then
making recommendations to the Tribunal. The SACC may effectively extend its period of review
significantly beyond its initial forty business day review period (subject to any challenges brought
by the merging parties before the Tribunal). Accordingly, in large mergers the merging parties
typically have more time to engage with the SACC and address any concerns which the SACC
may raise during the investigation. Having said that, in instances of third party ministerial
intervention, particularly on public interest grounds, there is usually very limited underlying
evidence made available to the merging parties during the investigation period. This is often a
result of the concerns simply not being merger-specific, and the prospect of facing a contested
Tribunal hearing is utilized as leverage to extract commitments from the merging parties which
are beyond what would strictly be required to address any merger specific concerns.

\footnote{112} \textit{WBHO Construction (Pty) Ltd v. Competition Comm'n; Group Five Construction Ltd, CR162Oct15/ARI187Dec16.}
\footnote{113} \textit{Standard Bank South Africa Ltd v. Competition Comm'n, CR212Feb17/DSC027Apr17.}
**Jurisdictions Evaluated:**
- European Union
- Brazil
- Spain
- Colombia
- Taiwan

**European Union – European Commission DG Competition**

The Directorate-General for Competition (DG Competition) endeavors to “give, on its own initiative or upon request, parties subject to the proceedings ample opportunity for open and frank discussion and to make their points of view known throughout the procedure.”\(^{114}\) In this respect, it “may hold meetings (or conduct phone calls) with the parties subject to the proceedings, complainants, or third parties.”\(^{115}\) Specifically, DG Competition offers State of Play meetings for targets, and Triangular meetings, where targets, complainants and third parties can express their views and verify the accuracy of factual issues.\(^{116}\) Only DG Competition can request Triangular meetings.

Chapter 2.9 of Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU sets out the procedure for State of Play meetings. The senior management of DG Competition or the responsible head of unit attend these meetings, which are conducted face-to-face, by telephone or videoconference. DG Competition offers these meetings at various stages, including: (i) shortly after opening of the proceedings, where parties have the opportunity to react to the issues identified; (ii) at a sufficiently advanced stage in the investigation, where “parties can clarify certain issues and facts relevant to the outcome;”\(^{117}\) and (iii) after the issue of a Statement of Objections. These meetings do not preclude discussions between the targets and DG Competition throughout the procedure.\(^{118}\)

In addition, it is normal practice to offer senior officers of the targets “an opportunity to discuss the case either with DG Competition, the Deputy Director-General for antitrust or, if appropriate, with the Commissioner responsible for Competition.”\(^{119}\) Their legal advisors may accompany the targeted parties.

In sum, at various stages of the procedure, targets and counsel for targets have reasonable opportunities to present their views in face-to-face meetings with the European Commission’s officials conducting the investigation. Typically, therefore, parties subject to investigations and


\(^{115}\) Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, 2011 O.J. (C 308), § 42.

\(^{116}\) Id. § 67.

\(^{117}\) Id. § 63(2).

\(^{118}\) Id. § 66.

\(^{119}\) Id. § 70.
their counsel believe that there are adequate opportunities to be “heard” throughout the investigative procedure.

**Brazil – Conselho Administrativo de Defesa Econômica (CADE)**

Individuals or companies facing investigation by CADE are permitted to schedule meetings with officials conducting the investigation, as well as officials managing the investigation. The investigation procedure carried out by CADE is divided into two phases: (i) preliminary inquiry, and (ii) formal investigation. Targets have full opportunity to respond to potential contentions of infringement in both phases of the investigation. During the preliminary inquiry, targets are notified, on a confidential basis, in order to present these views and observations about the investigation. During the formal investigation, article 70 of Law 12,529/11 states that targets shall be notified to present their defenses within thirty days from the decision initiating the administrative proceeding.

Even though formal responses to potential contentions of infringement must be formally submitted to CADE, face-to-face discussions may take place before or after the formal submission, and targets and their counsel have the opportunity to schedule meetings with officials during both phases of the investigation.

Article 181, § 2º of CADE’s Internal Rules states that, during the preliminary inquiry, CADE’s General Superintendence may request the target’s clarification in writing or personally. As a practical matter, at this stage CADE usually takes into consideration the parties’ views, so they have significant opportunities to present and argue their position before CADE. Therefore, targets and counsel for targets are fully granted with the opportunity to have face-to-face meetings with CADE’s officers during an investigation procedure.

**Spain – Comisión Nacional de los Mercados y la Competencia (CNMC)**

The CNMC has a two-phase antitrust proceeding: the investigatory phase, which is carried out by the Competition Directorate, and the decisional phase, led by the Council of the CNMC.

The investigatory phase may be subdivided into three stages: (i) the preliminary stage during which the Competition Directorate may collect all the relevant documentation and data in order to find evidence of the existence of a potential infringement; (ii) the intermediate stage, where all the relevant facts obtained in the preliminary phase may lead the Competition Directorate to conclude the existence of an antitrust infringement which would be reflected in a statement of objections to be notified to all the potential infringing companies; and (iii) the final stage, in which the case would be submitted to the Council with a proposal for resolution having taken into account the comments and the submissions of evidence submitted by all interested parties.

In the decisional phase, the Council of the CNMC, after assessing the information gathered by the Competition Directorate and the arguments of the interested parties, must issue a final decision on the infringement and, if infringement is found, will impose fines.

The interested parties typically make comments and/or propose the submission of evidence after receiving the statement of objections and the proposal for resolution. However, interested parties are entitled to make comments and/or propose the submission of evidence at any stage of the antitrust proceedings, including any further supplementation to the submissions already made.
These rights stem from Article 53(e) of the Law on Administrative Proceedings,\textsuperscript{120} which generally regulates Spanish administrative proceedings, and from Article 32.2 of the Competition Defence Regulation,\textsuperscript{121} which is the specific legal basis addressing the right to make comments and/or propose the submission of evidence in investigation proceedings carried out by the CNMC. This same provision compels the CNMC to provide an answer in a reasoned manner to all evidence proposed.

In addition, the structure of the Spanish antitrust proceedings described above enables interested parties to gradually know the details of the accusation which helps to better decide the necessary evidence and the content of the defense writ to be submitted. For this purpose, it is also important to note that, according to Article 31 of the Competition Defence Regulation, interested parties are entitled to access, at any stage of the antitrust proceedings, all the information contained in the file except those documents, or part of them, that have been declared confidential.

**Colombia – Superintendence of Industry and Commerce (SIC)**

The investigation procedure carried out by the SIC is regulated in Article 52 of Decree 2153 of 1992. The investigation is divided in two phases: (i) preliminary inquiry and (ii) formal investigation.

The preliminary inquiry is a confidential stage in which the SIC collects any evidence that could indicate that an unlawful conduct occurred. In this stage, the SIC can request information, conduct dawn raids, and interview officers or employees to gather all necessary evidence. The companies or individuals, however, do not have access to any information, as no formal contention of infringement has been issued.

If the result of the preliminary inquiry is that, based on the evidence collected, anticompetitive conduct may have occurred, the SIC will open a formal investigation. This stage begins when the Deputy Superintendent for the Protection of Competition issues a decision opening an investigation against one or more parties. This decision must clearly indicate the alleged conduct being investigated and disclose the evidence supporting the decision to investigate. The parties have no opportunity to present responses prior to the issuance of the decision by the Deputy Superintendent, but may, within twenty days following the decision, submit and/or request evidence.

Once all evidence has been duly presented, the Deputy Superintendent for the Protection of Competition will summon the parties to a hearing in which they are allowed to present their closing arguments regarding the investigation.

The Deputy Superintendent for the Protection of Competition then prepares a report for the Superintendent of Industry and Commerce, the head of the SIC, containing a summary of the investigation, its findings, and a recommendation either to impose a sanction, if any anticompetitive conduct was proved, or terminate the investigation, if no such conduct was proved to have existed. Within twenty days following the report, the parties may submit their comments to the report.

A final decision is then issued by the Superintendent of Industry and Commerce, including all arguments and reasons to either accept or reject the recommendation of the Deputy Superintendent’s report, and imposing a fine or terminating the investigation.


The disclosure of the evidence collected by the authority takes place in the decision to initiate a formal investigation, which must clearly state the alleged anticompetitive conduct to be investigated and the evidence that supports it. In addition, the investigated parties have access to the investigation docket only from that point on, which contains all evidence collected by the SIC.

In this sense, face-to-face meetings with the officers in charge of the investigations are not provided for in the applicable procedural provisions and, in practice, face-to-face meetings do not normally occur. The only possible such instance would be the hearing summoned before the Deputy Superintendent prepares his report although this hearing is aimed at having the parties present their closing arguments regarding the investigation; in that sense, the access is too late to afford the procedural protection in question.

**Taiwan – Fair Trade Commission of Taiwan (TFTC)**

The TFTC does not have prescribed rules or practice to provide for regular meetings or interactions between the investigating staff (case team) and the parties subject to the investigation. The TFTC staff is not obligated to meet with parties and, if it allows a meeting, is not obligated to disclose the facts or theories on which it is proceeding.

In practice, meetings between the TFTC case team and parties and practitioners have occurred in most cases. At these meetings, the parties are permitted to present information and arguments to the TFTC case team, but the TFTC case team usually is not forthcoming with information about the specific theories on which they are proceeding, or the factual evidence on which those theories are based. Thus, parties are left to present their arguments based on speculation about the probable nature of the TFTC’s theories and facts. Moreover, because the TFTC does not issue a Complaint or Statement of Objections before rendering a decision, there is no opportunity for the parties to provide a formal response to a written allegation of wrongdoing.

Although Article 46 of the Administrative Procedure Act provides that parties can request to read, transcribe, photocopy or photograph the TFTC’s relevant materials or files as required for the advocacy or defense of legal rights and interests, this right is subject to broad exceptions provided by the Act itself and the TFTC’s internal rules. For example, the TFTC can deny parties’ requests for access to materials whenever it deems access to be a potential impediment to its enforcement efforts or the public interest. This includes routinely denying requests to produce documents that were provided to the TFTC by third parties, even subject to outside-counsel-only protections. Thus, parties are often without the ability to undertake a robust review of the evidence on which the TFTC is relying in rendering its ultimate decision.

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<tr>
<th>Practice No.</th>
<th>Description</th>
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<tr>
<td>I.E(iii)</td>
<td>Subject to the foregoing, officials should maintain the confidentiality of evidence and all other aspects of the investigation (including its existence).</td>
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<tr>
<td>I.G(iii)</td>
<td>Protections for material reasonably regarded as confidential should be afforded by such mechanisms as restricting access to counsel or outside counsel only, use of data rooms (physical or virtual), or disclosure pursuant to protective order.</td>
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**Jurisdictions Evaluated:**
- Mexico
- Egypt
- Japan
- European Union
- Korea

**Mexico – Comisión Federal de Competencia Económica (COFECE)**

The relevant legislation and regulations are aimed at maintaining confidentiality at all times and are well-applied by enforcers. The Statutory Framework, and the FECL, its Regulations and the Internal Regulations of the Enforcers, provide for a number of protections to guarantee confidentiality of evidence and related aspects of an investigation.\(^{124}\) For example, the identity of a leniency applicant must remain confidential. The Immunity Guidelines provide that, during the immunity application process, only the Head of the AI and the case handlers of the Cartel Unit have access to the immunity application file, although during the trial phase or issuance of the final resolution, the Commissioners and other COFECE officers may have access.

All information and documents obtained during its investigations are classified as: (i) “Reserved,” which is information that is available only to the agents that have a legal standing (“interés jurídico”) in a specific procedure; (ii) “Confidential,” which is information that (a) if disclosed may cause harm to the competitive position of the party that delivered such information, (b) contain personal data, (c) may put at risk the security of the information provider, or (d) by statute cannot be disclosed; or (iii) “Public,” which is information publicly available.

A party must request that specific information is kept confidential, and they must provide sufficient grounds justifying its confidentiality. Depending on the nature of the information, a public summary of the information that can be used instead of disclosing all of the information.

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\(^{124}\) These regulations are applied in connection with other local legislation, such as the Federal Law of Transparency and Access to Public Governmental Information, for the protection of confidential information under the control of Mexican government entities.
Egypt – Egyptian Competition Authority (ECA)

The ECA discharges its functions in accordance with the Competition Law (CL) N. 3 and the Executive Regulations (ER) N. 1316 of 2005. The Executive Regulations prescribe a number of rules and procedures which must be followed by the ECA during an investigation.

Article 16 of the CL restricts access or disclosure of any information or documents obtained or submitted to the ECA during the course of its investigation or its sources. Accordingly, all information in the ECA’s record is treated as confidential (in the hands of the ECA). All employees of the ECA, including the Board of Directors, are prohibited, in terms of Article 16 of the CL, from disclosing any information or data or the source of such information or data. Employees of the ECA risk paying a fine of up to 50,000 Egyptian Pounds (roughly US$2,800) for disclosing confidential information without permission to do so.

Once a competition matter is referred for prosecution, parties may, in terms of Article 16, gain access to a non-confidential version of the ECA’s record for purposes of preparing for Court proceedings and determining an appropriate fine.

Access to any confidential information contained in the ECA’s file is only permitted if authorized by a Court order. Once the ECA submits the entire file (including all the collected data and information) to the Public Prosecutor, the Public Prosecutor proceeds with the investigation. If a third party makes an application to the Court to obtain access to the confidential information, the Court has the inherent jurisdiction to make an appropriate order in this regard which may include unrestricted access. This is, however, unlikely in practice.

Japan – Japan Fair Trade Commission (JFTC)

Both the Antimonopoly Act and the Guidelines on Administrative Investigation Procedures under the Antimonopoly Act (Investigation Procedures Guidelines) require the JFTC not to divulge confidential information acquired during the course of an investigation. The JFTC is generally viewed as assiduously keeping company documents and information confidential. However, the same is not always true for “all aspects of the investigation.”

There are no formal provisions requiring the JFTC to keep all aspects of the investigation confidential, e.g., the fact of investigation, dawn raids, orders, etc. Indeed, the AMA explicitly states that the JFTC “can make any necessary matters public” except for confidential company information. The fact of an investigation may also be disclosed directly in questionnaires to third parties issued by the JFTC during the course of an investigation.

Dawn raids, the fact that a party is being investigated, and even draft cease and desist or surcharge orders have on occasion been disclosed or leaked to the public via the media. This is not to say that the JFTC itself disclosed such information and in no case has that been confirmed. The result, however, is that the fact of, and key events in the course of, an investigation often make their way into the public domain.

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128 Antimonopoly Act, Art. 43.
In Japan, as in Korea, there is no attorney-client, work product, or other similar privilege, although attorneys are responsible for keeping their clients’ confidences. As such, the JFTC may procure materials that are privileged under another nation’s laws in dawn raids or through other legitimate means of obtaining information, and any privilege may consequently be deemed to be waived.

**European Union – European Commission DG Competition**

The European Commission (EC) is under a duty to maintain confidentiality of business secrets and other types of confidential information, particularly where the disclosure of such information would significantly harm an undertaking. To do so, the EC will publish non-confidential versions of document, or, where the EC can assure confidentiality only by summarizing the relevant information, a summary.

Targets can request the EC, with a justification, to treat any part of the Statement of Objections and final decision as confidential. In practice, there is a discussion between the EC and the targets in order to agree on what information should be removed. This process can take several months, particularly in high-profile cases that involve a large number of parties.

The EC will generally not agree to treat information which is already publicly known, or which is five years old, as confidential. This general presumption applies even to commercially sensitive information that is more than five years old. The EC can exercise its discretion and can disregard the confidential nature of information where it considers that the benefit of disclosure is greater than its harm, such as proving an infringement or exonerating a party. In addition, the EC may disregard confidentiality requests where targets fail to comply with its procedural requirements, such as submitting the information by the set deadline. Finally, the EC may simply disagree with a claim for confidentiality. In this case, the parties can initially express their views to the EC. If there is still a disagreement, the parties can challenge the EC’s decision and submit their objections to the Hearing Officers, who act independently and decide if the information is confidential and whether there is an overriding interest in its disclosure.

Although the EC strives to respect confidential information, the discretion remains at first instance with the EC to accept or deny a request for confidential treatment. There is, however, some recourse: in cases of potential competitive harmful disclosure, the parties can bring a confidential claim to the European Ombudsman.

Leaks assumed to be from the EC itself are relatively common—the fact of an investigation by the EC and certain case developments are sometimes widely reported by news organizations or trade publications before formal EC statements are released on the matter. In practice, there also have been cases where highly sensitive information was leaked to the press, presumably by parties.

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130 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (2005/C 325/07), § 17.
131 Id. § 23.
other than the EC itself, potentially due to the wording in the standard confidentiality declaration.\textsuperscript{135}

**Korea – Korea Fair Trade Commission (KFTC)**

Article 58 of the MRFTA provides protections for confidential materials. In addition, when the KFTC adopted its “Enforcement Process 3.0” in 2016, it also improved its internal record management procedures. One benefit is to better safeguard materials submitted by targets and third-parties. Previously, there had been some anecdotal evidence at least of lost or misplaced materials occasioned by frequent personnel changes. In Korea, employees at the KFTC are regularly rotated through various units, often staying in positions for just two years or so.

In Korea, there is no legislatively or judicially recognized concept of attorney-client privilege, attorney work product, or other similar privileges. While some court decisions have come close to providing much needed guidance, this remains an ambiguous area in Korea as in most Asian jurisdictions. As such, there is no official concept of “protective order” and clear guidance on who may have access to materials with different levels of confidentiality designations (including those that might be designated as privileged elsewhere) during investigations or ensuing litigation. In practice, KFTC investigators and practitioners try not to get into the awkward situation of deciding what to do with inadvertently confiscated or disclosed privileged information by not requesting and not producing such materials. Dawn raids pose a particularly tricky issue. In Korea, there is no procedural equivalent to the U.S. or EC system of segregating potentially privileged documents at the time of dawn raids and later having someone other than members of the case team separately determine the privilege issue.

Until the KFTC issues an Examiner’s Report (or Statement of Objections) and affirmatively cites leniency applicants’ or third-party complainant’s materials for support, respondents will not have access to others’ confidential information. When the KFTC issues an Examiner’s Report, it does not disclose confidential exhibits but keeps them in a secure data room. Under Article 52(2) of the MRFTA, respondents or interested third-parties may request limited access to such materials. The KFTC must accommodate such requests only when the owner/submitter of such materials consents or the public interest requires granting of the access request.

For non-privileged types of confidential information, in practice, respondents and their counsel mark them as confidential and most KFTC investigators do honor and accommodate such designations and requests. However, in the process of eliciting competitors and third parties’ views, there could be inadvertent disclosures. On occasion, especially in heavily contested matters, there have been accusations that the KFTC has not properly protected the confidentiality of highly sensitive materials.

\textsuperscript{135} In the case referred to, the European Ombudsman found that, although the EC was not the source of the leaks to the press, the wording of the EC standard confidentiality declaration was not sufficiently clear as to the recipient’s obligation to ensure that the document remained confidential. Decision of the European Ombudsman closing his inquiry into complaint 1342/2007/FOR against the European Commission (Apr. 27, 2009), available at www.ombudsman.europa.eu/en/cases/decision.faces/en/3972/htmlbookmark.
Prior to the time when any contention of infringement is asserted, each target should be provided with all evidence (regardless of whether subject to any assertion or finding of confidentiality) then known to officials and upon which they intend to rely in support of such contention.

**Jurisdictions Evaluated:**
- United Kingdom
- European Union
- Germany
- Canada
- Korea
- China

**United Kingdom – Competition & Markets Authority (CMA)**

Guidance on the CMA’s investigation procedures in Competition Act 1998 cases (Guidance)\(^\text{136}\) sets out the circumstances in which the target of an investigation will have access to all the evidence known to CMA officials and upon which they intend to rely in the enforcement of the Competition Act 1998, prior to the issuance of any infringement decision against such target.

The first circumstance is the CMA’s issuance of a Statement of Objections, which the CMA must issue to any party suspected of the infringement if the CMA proposes to issue an infringement decision.\(^\text{137}\) The Statement of Objections represents the CMA’s provisional view and proposed next steps and is intended to allow the parties under investigation to know the full case against them and, if they choose to do so, to respond formally in writing and orally.\(^\text{138}\)

Separately, at the same time as issuing the Statement of Objections, the CMA will also give the addressees of the Statement of Objections the opportunity to inspect the case file, typically for a period of six to eight weeks.\(^\text{139}\) Such right of inspection is intended to ensure that each addressee can properly defend itself against the allegation of its infringement. The access to file is usually given by supplying the file in electronic form on a DVD, or by other suitable electronic means.

**European Union – European Commission DG Competition**

The European Commission (EC) is governed in its procedures by the Antitrust Manual of Procedures, the internal Directorate-General for Competition (DG Competition) working document on procedures for the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Section 2.2 of the Antitrust Manual of Procedures states that “all documents, whether inculpatory or exculpatory evidence and other information, which have been obtained by, produced to

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\(^{138}\) [GUIDANCE ON THE CMA’S INVESTIGATION PROCEDURES, supra note 136, ¶ 11.4.](GUIDANCE_ON_THE_CMA%27S_INVESTIGATION_PROCEDURES supranote 136, ¶ 11.4.)

\(^{139}\) [Id. ¶ 11.19ff.](Id. ¶ 11.19ff.)
and/or assembled by DG Competition in the Commission’s file need to be rendered accessible.”

The EC must strike a correct balance between providing the targets all the necessary evidence and respecting any complainant’s right of confidentiality.

The EC grants the parties access to the file after it issues a Statement of Objections (SO). While full access to the file is granted relatively late in the course of procedure, the SO is typically comprehensive, detailed and fully informs the parties concerned of the objections raised against them. If the EC wants to make a new allegation, it must issue a new SO, which ensures that the parties receive all the necessary information.

Prior to the issue of the SO, the parties receive a letter notifying them that there is a preliminary investigation being conducted, which typically describes the subject matter of the investigation in very broad terms. The General Court has recognised that the EC sets out its presumed infringements in general terms, which might well be made more precise, but justifies it as being consistent with the requirements of EU law.

The Antitrust Manual of Procedures further sets out the mechanism for disclosure of materials. Parties gain access to the file on the single occasion following the issuance of the SO. To obtain access to the file, parties are typically required to make a request in writing within five working days of receipt of the SO. The EC must make further access to the file available if the EC subsequently receives additional incriminating or potentially exonerating materials. Further discussions over access may also be necessary if a party determines that it needs further access to specific undisclosed information in the file (such as confidential information, business secrets, or internal documents). In these cases, the party must send a request to the case team for review and potential approval.

In practice, the EC can choose to prepare a data room where the parties can view electronic versions of the documents. The EC does so particularly where a case file is large because it involves submissions from multiple parties or quantitative data. The EC’s Best practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation regulates access to data rooms. The EC limits access to a restricted group of legal and/or economic advisors of parties, under strict confidentiality obligations, increased security measures and appropriate supervision. The advisors are allowed to take notes and print documents; however, they are not allowed to take such printouts and notes outside of the data room and EC officials ensure they are destroyed. They cannot communicate externally with anyone and can only provide a non-confidential data room report to the targets.

141 Id., Module 12, § 1.4.
142 Id., Module 11, § 1.
143 Id., Module 11 § 8.1.
144 Id., Module 6 § 2.4.
146 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, 2011 O.J. (C 308) 6.
147 Best practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation regulates access to a data-room §22, available at http://ec.europa.eu/competition/mergers/legislation/disclosure_information_data_rooms_en.pdf.
148 Id. § 27.
149 Id. § 28.
150 Id. § 24.
Germany – Bundeskartellamt

While German competition law is generally compliant, there is some room for improvement in German practice. Companies and/or individuals that are subject to an antitrust investigation have a right to access the file.\textsuperscript{151} In practice, this right is attenuated. In quasi-criminal antitrust investigations, only defense counsel is allowed access to the file\textsuperscript{152} and even they will usually gain unfettered access to the file only after the Bundeskartellamt has issued a Statement of Objections (SO). Before that, the Bundeskartellamt will grant only limited access to the file, if any. Such limited access would usually be granted with respect to information that directly concerns the defendant (e.g., minutes of oral hearings of the defendant itself). By contrast, minutes of oral hearings of, for example, other participants in the conduct, would not be disclosed in the name of not jeopardizing the investigation.

Canada – The Competition Bureau (CCB)

The CCB has said it is committed to maintaining dialogue with those subject to its investigations,\textsuperscript{153} though it is not required to disclose evidence gathered during the investigation, nor is it always willing to do so. Section 10(2) of the Act provides parties with the right to be informed of the progress of an inquiry, though it does not grant the parties access to the evidence itself. For example, parties subject to a non-criminal investigation are not informed, during the course of the investigation, the identity of any complainants, nor will they be provided with the statements underlying any complaints. Section 18(2) of the Act grants parties the right to inspect a record seized from it pursuant to sections 11, 15 or 16, at “any reasonable time.” However, this provision only applies to records seized from the party itself, not from third parties.

Once the Commissioner makes an Application for an order to the Competition Tribunal, there is some articulation of the grounds upon which the Commissioner relies in the Notice of Application; more significantly, rights of discovery are triggered. However, the “contention of infringement” has been already “asserted.” A recent decision of the Federal Court of Appeal has removed a formerly accepted class “public interest” or “informant” privilege that previously was used by the Commissioner to protect from disclosure all documents and statements provided by third parties. No longer can the Commissioner claim a class-wide protection over all such third-party documents and information; rather, going forward if the Commissioner wants the protection, he or she will have to justify it on a document by document basis.\textsuperscript{154}

The CCB is responsible for investigating, but not prosecuting, criminal offenses under the Act. Following an investigation, the CCB may elect to refer the matter to the federal Public Prosecution Service of Canada for prosecution. Those accused of a criminal offense under the Act have a constitutional right to “make full answer and defense.” In \textit{R v. Stinchcombe}, the Supreme Court held that the Canadian Charter of Rights and Freedoms imposes a duty on the public prosecutor to disclose all material information it proposes to use at trial. However, these rights and obligations arise only \textit{after} the investigative stage, once charges have been laid.

\textsuperscript{151} Principle of German administrative law set out in § 29 VwVfG (i.e., German Administrative Procedure Act). Access to file must include the entire file, but not handwritten files of the individual civil servant and internal drafts.
\textsuperscript{152} StPO § 147 (i.e., Criminal Procedures Act).
Korea – Korea Fair Trade Commission (KFTC)

Nothing in the MRFTA and related rules, regulations and guidelines explicitly discusses this issue. KFTC investigators typically do not share or disclose potentially exculpatory evidence to targets or their counsel. Nonetheless, they are generally open to discussing where the investigation stands and what concerns they may have. In practice, the extent of disclosure of any evidence to be relied upon varies significantly depending on the particular investigators on the matter. Even when particular KFTC investigators share their theories of the case, they typically do not point to all key underlying evidence. Rather, they typically devote their efforts to convincing targets and their counsel to admit wrongdoing. Nonetheless, KFTC investigators usually provide to targets and their counsel reasonable opportunities to submit responses and rebuttal evidence.

China – the National Development and Reform Commission (NDRC); State Administration of Industry and Commerce (SAIC); & the Ministry of Commerce (MOFCOM)

Both the AML and the three authorities’ procedural rules conspicuously lack provisions to require the authorities to provide targets with evidence in their investigations. Therefore, the authorities enjoy great discretion in what information or evidence they provide to the targets.

In practice, it is often a gradual process for the authorities to provide any information or evidence to a target under investigation: information is often unclear during the initial contact with the authority. For example, the first round of questions from the NDRC to a target will not necessarily reveal the basis of a complained infringement. As investigations proceed to a second or third round of questions, agencies will possibly provide some additional information or evidence, although the latter does not constitute “evidence” in the western concept. For example, an authority is unlikely to hand over any actual evidence provided by a complainant but will extract information and summarize such information or evidence in the agency’s own language. This means that information from a complainant will be presented to a target in an indirect manner, and only such indirect “evidence” summarized by the authorities will be available for the target to review or rebut.

The ability of a target to obtain information also depends on the particular authority and the type of investigation. For example, MOFCOM is relatively easier to deal with among the three authorities; a target also has a better chance to obtain information in cases involving a “Commission concern” as compared to a “failure to file” case. In the case of a “Commission concern,” it can be easier for targets to get information from MOFCOM and from the complainants, including local and international competitors. Overall, the biggest difficulties still lie in the authorities’ not providing direct evidence and their use of vague paraphrasing language when providing targets with the “evidence” that exists.
Each target should be provided with the opportunity to present a full response, including as to all matters of fact, economic and other expert analysis, legal, policy, and other argumentation.

A target should be permitted to present its response through documentary submissions and through face-to-face presentation to the official(s) responsible for making any contention of infringement.

Jurisdictions Evaluated:
- United States
- Japan
- European Union
- India
- Egypt

United States – Department of Justice (DOJ) and Federal Trade Commission (FTC)

DOJ and FTC have slightly different internal policies, but both provide ample opportunity for parties involved in antitrust investigations to present evidence and arguments through both documentary submissions and face-to-face presentations, including to the ultimate decision-makers.

DOJ seeks substantive input from parties throughout the investigation process to ensure it is aware of all relevant facts. Prior to filing a case in either a civil or criminal suit, the Antitrust Division Manual explains that DOJ “generally should afford counsel for the parties an opportunity to present their views to staff and the chief, time permitting. Staff should make this offer to all counsel whose clients staff believes, in good faith, may be parties to a suit.”

The Manual further encourages staff to “inform counsel of the theories of competitive harm underlying the proposed case, the nature of the evidence that supports it (without violating CID, HSR, or grand jury confidentiality provisions or exposing sources or potential witnesses), the staff’s economic analysis and the possible scope of relief. This information should be conveyed to counsel sufficiently in advance of the meeting with staff and the section chief so that counsel may respond.”

In addition to meetings and presentations, parties may, and often do, make voluntary written submissions in the form of “white papers” containing arguments and facts that they believe are important to a proper resolution of the matter.

DOJ also has published a Merger Review Process Initiative that identifies best practices for quickly determining legal, factual and economic issues in proposed transactions, including through early dialogue with the merging parties. The Initiative encourages staff to “request a consultation with the [merging] parties to discuss the parties’ views of the transaction, the structure of each party’s organization, and the industr(ies) that are likely to be affected by the transaction”
as soon as possible.\textsuperscript{158} Staff often requests that “appropriate business persons participate in [these] consultations and that, where possible, parties provide relevant documents to support their contentions.”\textsuperscript{159} Additionally, during the initial 30-day waiting period before a transaction receives HSR approval, staff of both agencies often request, and parties often voluntarily submit, additional information to the investigating staff, such as customer and competitors lists, business plans, and sales data. Before staff makes a formal recommendation for a merger action, the parties also may request to meet with senior officials to respond to the staff’s theories of competitive harm. In both civil and criminal cases, meetings with the Assistant Attorney General normally occur before any potentially adverse decision is taken.

Similarly, during FTC merger and non-merger civil investigations, parties are encouraged to meet frequently with staff and agency management—ultimately including the Commissioners of the FTC—to present their positions on relevant issues. The FTC’s Best Practices for Merger Investigations manual encourages parties to provide information to staff early in order to “resolve staff’s questions about the transaction during the investigation’s preliminary phase.”\textsuperscript{160} The FTC has issued Guidance for Voluntary Submission of Documents During the Initial Waiting Period that urges counsel “to discuss staff’s most likely concerns and voluntarily provide documents and information that may assist staff in quickly and efficiently evaluating whether the proposed transaction raises competitive concerns.”\textsuperscript{161} If a Second Request is issued, the FTC Rules of Practice require staff to initiate a conversation with the parties regarding the Agency’s concerns and the most effective way to obtain information relevant the competitive issues.\textsuperscript{162} As with investigations conducted by DOJ, parties to FTC investigations also may submit white papers to the staff presenting procompetitive justifications for the proposed transaction.

Japan – Japan Fair Trade Commission (JFTC)

In JFTC investigations, parties are provided with the opportunity to present a full response to the allegations against them after receiving notice of a draft cease and desist or surcharge order, in a hearing before the Commission, and/or in written or oral statements.\textsuperscript{163} The Antimonopoly Act explicitly provides that cease and desist or surcharge orders can be issued “only after careful consideration of the contents of the record,” including all evidence submitted by the parties.\textsuperscript{164}

In practice, parties are also free to make submissions and request face-to-face meetings with the JFTC prior to such formal stages of the investigation. The JFTC is widely perceived as being receptive to such meetings and submissions, particularly in the merger context. This attitude is reflected in guidelines that require the JFTC to “sincerely listen to explanations given by companies involved in an alleged violation” and “carefully listen to the contents of the statement from testifying parties without any prejudice.”\textsuperscript{165}

\textsuperscript{158} Id. § II.B. 2; see also DOJ ANTITRUST DIVISION MANUAL, supra note 155, at III-17.
\textsuperscript{159} DOJ MERGER REVIEW PROCESS INITIATIVE, supra note 157, § II.B.2.
\textsuperscript{162} 16 C.F.R § 2.20.
\textsuperscript{164} Id. arts. 60, 62.
The opportunity to present a full response is somewhat attenuated, however, by the fact that the contentions being investigated may not be fully disclosed until the notice of the draft order.  

European Union – European Commission DG Competition

The European Commission (EC) provides an opportunity for the undertakings and associations of undertakings that are the subject of investigative proceedings to be heard on the matters to which the EC has taken objection, with the EC basing its decisions “only on objections on which the parties concerned have been able to comment.” Parties have the opportunity to present documents and written submissions and to conduct face-to-face meetings with the members of the case team in advance of a contention of infringement (in particular as part of so-called “State of Play meeting”). These interactions can influence the recommendation of the staff but are not directly made to the official(s) responsible for making the contention of infringement. While the EC’s practices generally afford the target an opportunity to present its response, full compliance with this best practice is attenuated, due to the timing of this opportunity. The parties can provide formal written and oral responses only after the EC issues its Statement of Objections (SO) which serves as the contention of infringement. The EC often accompanies this with a press release, making it a de facto public announcement of investigation (the EC may also issue a press release to make the openings of proceedings public). While such press releases generally explicitly specify that the issuance of an SO does not prejudge the outcome of the investigation, in practice, they are opening the target up to potential prejudice.

The EC’s Antitrust Manual of Procedures, the internal DG Competition working document on procedures for the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), elaborates that targets are given the opportunity to respond both in writing and at an oral hearing. The period for preparing and submitting a written response is set out in the SO and must be at least four weeks long. Targets may request an oral hearing in the written SO response. Oral hearings, which are non-public, typically take place between six to eight weeks after the target submits the written response to the SO. A Hearing Officer oversees the hearing, and it is the practice of the DG Competition to “ensure the continuous presence of senior management (Director or Deputy Director General) in oral hearings in antitrust cases, together with the case team of Commission officials responsible for the investigation.” The EC also invites relevant cabinet members, economists, and the principally concerned EC services also attend, as well as the competition authorities of the Member States. However, the EC does not require the continuous attendance of necessary attendees (such as the Commissioner, Chief

See discussion above under Practice I.A.
Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1, art. 27.
While DG Competition will offer a State of Play meeting shortly after the opening of proceedings, this meeting is intended to “inform the parties subject to the proceedings of the issues identified at this stage and of the anticipated scope of the investigation.” Rather than an opportunity to present a full response, the meeting takes place before access to the file is granted and thus practically gives the target only the opportunity “to react initially to the issues identified.” Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, 2011 O.J. (C 308) 6, § 63.
Id., Module 13, § 3.2.
Id., Module 13, §3.4.
Economist and Legal Service) which can make the hearings less useful. While third parties may not request an oral hearing, they have a right to be heard at a scheduled hearing if they can demonstrate a sufficient interest.

Typically, each speaker at an oral hearing will be heard by all attendees. In exceptional circumstances, such as a legitimate interest in protecting business secrets or other confidential information, the hearing officer can decide that speakers will be heard in separate closed sessions. There are no official minutes of oral hearings, but they are recorded for use in the proceedings themselves. Hearing attendees may obtain a copy of the recording by submitting a request (in the case of a closed session, only parties present at the closed session may request a recording).

In practice, these oral hearings can be useful, notably in merger proceedings, but the parties do not systematically request them in contentious antitrust proceedings, and hearings have in the past been criticized as a “waste of time.” Some consider oral hearings unnecessary where the parties intend to offer commitments, as the hearings may narrow the window for agreeing to commitments. Others suggest that oral hearings tend to favor complainants, which can affect a party’s decision to request one. The usefulness of an oral hearing can also be impacted by the sequence of an investigation: these oral hearings are held after the issue of an SO, when the EC has already adopted a clear position, and there is therefore little scope for constructive discussion between the EC and the targets. At the same time, the case team often sees its role as having to defend its case and can adopt a hostile approach to the parties. In addition, neither the EC nor the parties have the right to question or cross-examine witnesses, which is a necessary requirement for a fair hearing. The hearings often end up being either a summary of the investigation, or a way for the EC to obtain inculpatory evidence from the targets, and the utility of such hearings can therefore be limited.

**India – The Competition Commission of India (CCI)**

Under the provisions of the Competition Act, 2002 (Act) and applicable regulations, the CCI’s Office of the Director General (DG) has the power to 1) summon and enforce the attendance of any person and examine him on oath; 2) require the discovery and production of documents; 3) receive evidence on affidavit; 4) issue commissions for examination of witnesses or documents; and 5) requisition any public record or document or copy of such record or document from any office.

Typically, during the course of an investigation, the DG issues probe notices seeking certain information/documents/data from the investigated party(s). Such information/documents/data constitute evidence and are admissible in the proceedings before the CCI. In addition, the DG also has the power to summon and examine a person on oath, and it

175 Section 41(2) read with Section 36(2) of the Act.
176 Regulation 41(2) of the CCI (General) Regulations inter alia provides that DG may admit evidence taken in the form of verifiable transcripts of tape recordings, unedited versions of video recording, electronic mail, telephone records including authenticated mobile telephone records, written signed unsworn statements of individuals or signed responses to written questionnaires or interviews or comments or opinions or analyses of experts based upon market surveys or economic studies or other authoritative texts or otherwise, as material evidence.
177 Section 41(2) read with Section 36(2) of the Act and Regulation 45 and Regulation 41(2) of the CCI (General) Regulation.
may record the statement of relevant persons, such as an employee of a party under investigation. Such a statement is generally provided in the form of responses to specific questions asked by the DG and forms a part of the evidence.

Except in cases where an application has been filed under CCI (Lesser Penalty) Regulations, 2009, the party under investigation has a right to inspect the information filed against it, and in practice most investigated parties file a detailed response to the information (complaint), notwithstanding there is no specific provision permitting them to do so. The detailed response usually provides a comprehensive factual, legal and economic submission and can be accompanied by reports from experts. However, the applicable Regulations and practice prevalent in India do not presently contemplate providing the party under investigation with an opportunity to file any response or to rebut any factual, legal or economic submissions made by the complainants or other parties before the DG during the investigation phase. In terms of Regulation 20(4) of the CCI (General) Regulations, 2009, the DG is required to submit its investigation report to the CCI together with all evidence, documents, statements, or analysis collected during the investigation. In effect, the party under investigation is given the opportunity to respond to factual, legal and economic arguments and contentions presented by the complainant and/or other third parties, but only after conclusion of the investigation phase.

Before the CCI orders a full investigation by the DG, the parties are generally informed about the allegations against them and the legal provisions under which the complaint against them has been issued. The parties are not informed as to the specific theories of harm or specific potential allegations at this stage, but where it is ordered to investigate, the DG will prepare an Investigation Report which gives specifics as to the investigation and outlines the theories of competitive harm.

The process of investigation before the DG is primarily driven by the requisitions made by the DG. The nature of information provided and the opportunity for face-to-face interaction hence depends on the investigation strategy adopted by the DG. That said, there is no bar to the investigated party interacting with the DG officials to make presentations and additional submissions, without specific directions to do so. It is in fact essential for the investigated party to provide all information/documents within its “knowledge” or “possession” to the DG since the investigated party is barred from producing any such information/document to the CCI after conclusion of the investigation by the DG. That said, where it can be shown that the DG did not give sufficient opportunity to present evidence then such information/documents or oral evidence can be presented before the CCI.

**Egypt – Egyptian Competition Authority (ECA)**

The ECA provides targets with the opportunity to respond in writing once the authority has notified the target of the investigation. The Notice will typically be in the form of a request for information and will also list the information or documents which the ECA requires the target to provide.

At any stage during the ECA’s investigation, a target may make representations or submissions by way of legal opinions, expert analysis or any other supporting submissions, both in written and oral form. These submissions form part of the ECA’s record. Recently, the ECA has

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178 Regulation 37 of the CCI (General) Regulations.

179 Regulation 43 of the CCI (General) Regulations provides that investigated party shall, “not be entitled to produce before the Commission additional evidence, either oral or documentary, which was in the possession or knowledge but was not produced before the Director General during investigation.”
in practice been more accommodating in engaging targets who themselves approach the ECA to make submissions, particularly in the case of a leniency applicant. However, targets are typically given very limited insight as to the case against it or evidence of any wrong doing. Accordingly, a target is required to anticipate the evidence which it will be required to rebut or make representations in respect of.

The ECA does not permit a target to challenge or rebut any evidence which the ECA may have during the course of the investigation. In practice, targets make submissions without substantive insight into the theory of harm or underlying evidence upon which a complaint is based.

In relation to criminal proceedings, Article 21 of the Competition Law provides for criminal proceedings to be initiated, at the request of the Competent Minister, regarding an alleged violation of the Competition Law. Accordingly, at this stage of the proceedings the target will be granted the opportunity to respond in accordance with the normal rules of the Egyptian criminal procedure.
The disclosure of an investigation, or the possibility of a future investigation, should ensure that targets and/or potential targets are not prejudiced or otherwise unnecessarily disadvantaged. Such disclosure should be accompanied by a clear statement that there has been no contention of infringement, and that any future such contention would be subject to assessment on the merits.

Jurisdictions Evaluated:
- France
- Canada
- Tanzania
- Italy
- Argentina

France – Autorité de la Concurrence (Autorité)

The Autorité does not disclose the existence of future or ongoing investigations against individual companies. It also systematically refuses to comment on rumors of investigations. That said, in a few instances, the Autorité issues press releases to indicate when it has carried out dawn raids in a specific sector. Such press releases do not mention the name of the companies targeted by the Autorité. Rather, the aim is to inform the companies which have not been dawn raided of the existence of an investigation, so as to give them the opportunity to apply for leniency.

In addition, such press releases always indicate that the investigations do not prejudge the liability (if any) of the companies involved in the alleged practices and that only a full enquiry into the merits of the case will enable the Autorité to decide on the existence of the alleged practices. The Autorité also always states in its press releases that it will not comment on the identity of the companies which have been dawn-raided and the practices targeted.

Canada – The Competition Bureau (CCB)

Under section 29 of the Competition Act (the Act), CCB officials are prevented from communicating information received in the course of an investigation, or the identity of the party providing that information, to any person except a Canadian law enforcement agent. This does not apply to information that has already been made public, or where the party that provided the information has authorized disclosure. However, the CCB is allowed to disclose non-confidential information “for the purposes of administration or enforcement of the Act.” The CCB, for example, takes the position on the basis of section 29 that it does not require a waiver to disclose information to a foreign agency for the purposes of enforcement (e.g., in the context of a global merger or multinational cartel investigation).

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181 Id.
In addition, section 10(3) of the Act specifies that all inquiries conducted under the Act shall be conducted in private. Consistent with this provision, the Bureau will usually not comment publicly on the existence of an inquiry under examination, unless it has already become public.\textsuperscript{182} However, in the course of a merger review, the CCB may seek public comment on a transaction, thereby disclosing the existence of an ongoing inquiry. This is often used in cases where there are no specific customers that represent a significant portion of the parties’ revenues, such that customer feedback is otherwise unavailable. While the CCB typically begins making market contacts shortly after commencing its review, in the past it has agreed to postpone contacting market participants temporarily if a transaction has not yet been announced publicly.

The CCB has also specified that it will not disclose information received in the course of an investigation to parties seeking private remedies under section 36 of the Act. However, in both the 2014 and 2015 cases \textit{Imperial Oil v. Jacques} and \textit{Canada (Attorney General) v. Thouin}, the Supreme Court granted the plaintiffs in a section 36 action access to wiretaps obtained by the CCB. In light of these decisions, the Bureau released a publication clarifying its general policy on private actions and disclosure of evidence. The CCB’s publication clarified that the CCB will not voluntarily provide information to private parties in section 36 actions. If served with a subpoena, it will inform the information provider, oppose the subpoena, and seek protective court orders if opposition fails.

\textbf{Tanzania – The Fair Competition Commission (FCC)}

A complaint under the terms of the Fair Competition Act of 2003\textsuperscript{183} (Act) may be initiated by the FCC of its own accord or be initiated by the FCC following submissions from a third-party complainant. The complaint is initially assessed by the FCC’s Screening Committee in accordance with Rule 10(4) of the Fair Competition Commission Procedure Rules, 2013.\textsuperscript{184} The Screening Committee generally considers certain preliminary issues, such as whether the FCC has jurisdiction and whether that matter necessitates the FCC allocating substantial resources to the investigation.

Based on the Screening Committee’s findings, the FCC may either decline to informally investigate the complaint further or proceed with a formal investigation. This decision is taken internally and is not publicly disclosed.

Should the FCC proceed with a formal investigation, the FCC may issue a summons to any person (including target firms and third parties) to appear before it and to produce any evidence in an effort to demonstrate a \textit{prima facie} contravention. The FCC also has the powers to conduct search and seizure operations at the premises of target firms. At this stage, no formal disclosure of the investigation is made to the public.

Once the FCC has sufficient evidence to support a \textit{prima facie} contravention, the FCC will publish a Rule 12(3) Statement of the Case, which will contain the identity of the target(s), a concise statement of the claim, the facts constituting the complaint and the provisions of the law that the targets have purportedly contravened. The Statement of Case is provided only to the main parties (as part of the FCC’s investigation) and is not publicly available.

\textsuperscript{182} \textit{Id.} \\
\textsuperscript{183} The Fair Competition Act, 2003, available at \url{http://unctad.org/sections/dite_ccpb/docs/dite_ccpb_ncl_Tanzania_en.pdf}. \\
\textsuperscript{184} The Fair Competition Commission Procedure Rules, 2013, available at \url{www.competition.or.tz/phocadownload/the_FCC_Procedure_Rules_2013-1.pdf}. \\

Report of the Procedural Transparency Task Force  
55
The Statement of the Case will indicate that the target(s) may wish to challenge the allegations leveled against them and the FCC’s conclusion that a *prime facie* case has been established. The FCC’s investigation would not necessarily have been completed at this stage, and the FCC will continue to gather evidence from various sources.

After receiving a target’s response, the FCC will, if it has grounds to believe the target(s) have contravened the Act, publish its provisional findings in terms of Rule 19(7). The FCC’s provisional findings also include the evidence relied on and the proposed recommendations or remedies. The provisional findings will also indicate that interested third parties and the targets are entitled to make written or oral representations in relation to the provisional findings.

A Rule 19(7) notice is published on the FCC’s website and is publicly available in various newspapers. Rule 19(7) notices clearly state that the FCC’s findings are provisional findings and invites affected persons (including targets) to make further representations to the FCC. This includes both written and/or oral representations. Once the FCC has considered all the representations and other available evidence, the FCC will make a Final Finding and publish its Final Findings on its website. The Final Findings set out in great detail the background of the matter, engagements with the target, details of the evidence against the target as well as the arguments raised by the target. The Final Finding also contains a caveat that a respondent has the right to appeal against these findings within the 28-day notice period.

The FCC will, from time to time, issue press releases regarding investigations, search and seizure operations and decisions (including mergers) in the “media releases” section of its website. These press releases are generally plain statements of the case (sometimes only noting that an investigation is being conducted). In some instances, the FCC has published detailed documents setting out *inter alia* the history of the matter, the issue to be decided, etc.

**Italy – Autorità Garante della Concorrenza e del Mercato (ICA)**

The involvement of the undertakings concerned in an investigation is officially disclosed for the first time by the ICA to the public by means of press releases (Notice of Commencement), required by Presidential Decree no. 217/98.\[^{185}\] Only the key elements of the case are disclosed; namely, the scope of the investigation, the allegations grounding the proceedings and its expected duration. There are usually no clear statements that any future contention of infringement will depend on an assessment on the merits.

The undertaking concerned does not have any chance to discuss the disclosure with ICA prior to the public announcement of the investigation, insofar as such announcement is made immediately following a dawn raid, usually the very same day. In cartel cases, dawn raids are generally the first investigative act on the basis of which the undertaking concerned is informed about its involvement in the investigation.

**Argentina – Comisión Nacional de Defensa de la Competencia (CNDC)**

Until recently, the CNDC rarely issued a press release regarding an ongoing or future investigation and, as such, the existence of, or potential for, an investigation would not have been publicly known such that it could lead to prejudice or disadvantage for the parties involved.

However, the CNDC has recently started to comment publicly on ongoing investigations. For example, the CNDC has recently investigated an alleged abuse of dominance and alleged cartel

in the credit card industry and publicly released information related to that investigation, while the investigation was ongoing. While there was no official statement issued by the CNDC before and during the investigation, certain off the record comments made by the competent authorities and other involved agents were published by different sources (mainly, newspapers).186

In another example, the CNDC released information regarding an ongoing investigation initiated by Farmacity (a local chain of pharmacies) against the Argentine Pharmaceutical Confederation and the Argentine Federation of Chambers of Pharmacy (the Farmacity Case). The CNDC made public on its website the document whereby it outlines the merits of the case against the defendants and requested further explanation and/or submissions of evidence from them.

To the best of our knowledge, there were no complaints made by the parties based on this disclosure. However, since the disclosure occurred in late 2017 and the final resolution regarding the investigation has not yet been issued, it is not clear whether the parties have considered the disclosure as being prejudicial. The parties could allege that there had been a clear infringement of Antitrust Law No. 27,442 which states, in Section 34, that the docket and proceedings shall be solely accessible to the parties and may not be accessed by third parties.

Such release of information regarding an ongoing competition investigation in Argentina represents a departure from past practice. It is yet to be determined whether this approach will be carried out in other cases, and how, if at all, this will prejudice involved parties.

Practice No. II.A

Asserting Contentions of Infringement

Description

The official decision to make a contention of infringement should be based on a well-considered assessment, including balanced and conscientious evaluation of both exculpatory and inculpatory evidence, that the completion of proceedings (including obtaining a final determination of infringement and defining, implementing and administering a remedy) is highly likely to serve the fundamental purposes of competition law. A contention of infringement should include a clear explanation of the evidence and the legal and economic theories and analyses that support it.

Jurisdictions Evaluated:

- United States
- European Union
- Peru
- Poland
- South Africa
- China

United States – Department of Justice (DOJ) and Federal Trade Commission (FTC)

Where the DOJ and/or FTC (the Agency(ies)) finds a party has infringed the antitrust laws, the DOJ may challenge the actions of an infringing party in Court, and the FTC may challenge in Court or in front of an Administrative Law Judge (or in some instances both paths on parallel tracks). In order to challenge a party’s behavior, the Agency is required to file a complaint against the party. In order to be persuasive and result in a finding against the infringing party, the complaint must necessarily include a clear explanation of the legal and economic theories under which the party is violating the antitrust laws and must, at least generally, outline the evidence available to the Agencies in proving that the infringement has occurred. However, in the initial complaint, or contention of infringement, the Agencies are not required to include a detailed explanation of the evidence against a party. The Agencies typically wait until they are at trial against a Party before such evidence is revealed and explained. For example, there may be testimony from a third party against the party that is only truly explained or revealed at trial. In the case of settlement, the Agencies must also draft and file a complaint against the infringing party, but such complaint need not be shared with the party before the party agrees to a settlement, either by paying a fine or accepting conditions on their behavior, and no evidence (either exculpatory or inculpatory) need be shared with the party.

Throughout an investigation into suspected infringement, Agency staff assess both the inculpatory and exculpatory evidence, presented by the party under investigation or third parties either in response to Agency issued Subpoenas or Civil Investigative Demands, or proactively by the party under investigation. In addition, Agency staff must present findings to management and decision-makers, and staff generally includes both inculpatory and exculpatory evidence. Management and the decision-makers at either Agency may agree or disagree with staff’s findings and also consider both the inculpatory and exculpatory evidence presented in order to assess the strength of a potential litigation against a party. If a complaint is filed against a party, the Court or
Administrative Law Judge will also consider inculpatory evidence offered by the Agency and exculpatory evidence offered by the party in its finding as to whether an infringement has occurred.

European Union – European Commission DG Competition

According to Article 296 Treaty on the Functioning of the European Union, European Commission (EC) decisions must state the reasons on which they are based in a clear and unequivocal manner enabling the parties concerned to ascertain the reasons for the measure.

The Statement of Objections (SO) must clearly set out the legal assessment of the facts raised and identify the documents used as evidence in support of the objections. The EC is notoriously very detailed when it issues its SO, indicating the essential facts and matters of law that may result in the imposition of a fine, such as the duration and gravity of the infringement, as well as whether the infringement was committed intentionally or by negligence. The EC gives extensive details of its reasoning in prohibition decisions and explains its theory of harm exhaustively, identifying the documents used as evidence in support of the objections. The case handler is able to refer to the Chief Economist Team when drafting the SO and practice indicates that economic advice is often sought in the more complex cases involving new issues, delicate competitive situations and large transactions. “Notwithstanding that” the questions of fact and law must conform to the standards of evidence set by the European Courts, and the EC is very thorough when making a contention of infringement, the general perception is that while the EC considers both exculpatory and inculpatory evidence, it does not give enough weight to exculpatory facts, and the balance of evidence is often tilted toward the inculpatory evidence.

Commitment decisions contain a summary of the facts of the case and the EC’s legal assessment. In particular, the EC needs to explain in its decision that it has identified competition concerns. The EC must base its decision on a coherent theory of harm and must have evidence for its concerns, which it details in both the SO and the final decision.

Peru – National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI)

After finalizing its investigation, gathering all relevant evidence, and analyzing the potential offenders’ arguments, the Technical Secretariat of the Antitrust Commission of the

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192 Id.
193 Id., Module 11 § 4.1
196 EC PROCEDURE MANUAL, supra note 190, Module 16 § 3.6.1.
197 Competition Policy Brief, supra note 196, § 2.
INDECOPI (Technical Secretariat) must provide its findings to the Antitrust Commission, which is the entity authorized for the issuance of a first instance decision. Such findings are presented in the form of a Technical Report (Report). For the issuance of a first instance decision, the Antitrust Commission may or may not follow the recommendations included in such Report.

For purposes of preparing its Report, all information gathered through the investigations and the sanctioning procedure is analyzed by the Technical Secretariat in order to determine (i) whether the procedure should be terminated without imposing any fines and/or remedies, given that there is not enough evidence to conclude that an infringement has been perpetrated; or (ii) whether fines and/or remedies should be imposed given that an infringement has been found.

While conducting this assessment, pursuant to the “Primacy of Reality Principle” stated in the Antitrust Law, the Technical Secretariat must verify the true nature of the investigated conduct, observing the reality of the situation and economic relationships that are intended, developed or established in each case.

After conducting such analysis, the Technical Secretariat issues its Report, which, pursuant to article 33 of the Legislative Decree No. 1034 – Antitrust Law (Antitrust Law), must include the following: (i) the facts as found; (ii) the determination of the infringement; (iii) the identity of the offenders; (iv) a proposal for the fines for each offender; and (v) a proposal of remedies to be imposed.

For the purposes of preparing its Report, the Technical Secretariat conducts an analysis of the exculpatory and inculpatory evidence. Said analysis considers all reviewed documentation and evidence that may rule out the potential offenders’ liability or prove and/or generate conviction regarding the perpetration of the infringement. In most cases, in the event the Technical Secretariat determines the existence of an infringement, the Report provides an explanation as to why each argument and/or evidence submitted by each of the potential offenders should be dismissed by the Antitrust Commission.

The Report also includes an analysis of the investigated practices, the economic and legal grounds for the determination of an infringement, and the conclusions obtained from the gathered evidence, and, in general, all facts which support the determination of the infringement. Although it is possible to question the methodologies and criteria used in each case, in most occasions, the Technical Secretariat does include a detailed identification of the legal and economic theories that led to its findings. In fact, the Report is usually a long and detailed document which provides a legal and economic assessment for each of the disputed issues of the case.

Regarding the initiation of sanctioning procedures, the Technical Secretariat is motivated to provide a solid economic and legal basis, to serve as a guideline in the conduct of such procedure. As part of its obligation to act diligently, the Technical Secretariat is careful in its decision to initiate a procedure, to avoid initiating procedures that may be terminated and dismissed due to their lack of grounds and/or evidence.

While the applied criteria and/or the approach of the authority may vary by case depending on its particular circumstances and aspects, INDECOPI is generally recognized as a serious entity, which carries out its duties in compliance with its regulation and is comprised by competent and well-trained personnel.
Poland – Office of Competition and Consumer Protection (OCCP)

In Poland, there are two phases of proceedings that can be carried out by the OCCP: (i) “explanatory” and (ii) “antimonopoly.” The first phase of a case is typically in the nature of an explanatory proceeding, during which both inculpatory and exculpatory evidence is considered. While the explanatory proceeding is non-obligatory, it usually precedes the main proceeding in the case; namely, the antimonopoly proceeding. The purpose of the explanatory proceeding is to examine the preliminary suspicions that the OCCP may have. In practice, this stage allows the OCCP to gather information, both inculpatory and exculpatory, which is then used in the antimonopoly proceeding to support the OCCP’s charges. It is worth noting that an explanatory proceeding is not conducted against any entity—it is rather an internal proceeding of the OCCP during the course of which the OCCP can gather information. The companies involved in explanatory proceedings are not considered parties to such proceeding and, as a result, their participation in this phase is usually limited to responding to the requests for information sent by the OCCP.

Both the notice of initiation of antimonopoly proceedings and, to a greater extent, the Detailed Justification of Charges—the Polish equivalent of a Statement of Objections used elsewhere in EU competition enforcement and regulated in Poland by soft law—which is issued once the OCCP has finished gathering evidence in the case, include explanations of evidence and supporting theories. In this sense, both official phases of the OCCP decision-making process reflect a consideration, and an effort to weigh, exculpating and inculpatory evidence.

It is worth noting, however, that, not infrequently, courts reviewing the OCCP’s infringement decisions have arrived at more modest assessments of the severity of the market effects or other inculpatory factors, resulting in a fine reduction. It sometimes happens that the OCCP seems to be too severe in assessing market effects of a given alleged practice or other inculpatory circumstances, thereby having an impact on the possible fine imposed on parties to the proceedings and suggesting that the OCCP underestimated or under-evaluated exculpatory factors. In many cases, the courts reviewing the OCCP’s decisions in the appeal proceedings assess them differently and consequently decrease the fines imposed by the OCCP.

South Africa – Competition Commission (SACC)

Once the SACC has concluded its investigation, it may elect to refer a matter to the Competition Tribunal (Tribunal) for adjudication by way of pleadings in the form of a “referral affidavit” under section 50(1) or 50(2)(a) of the Act. In terms of Rule 15(2) of the Tribunal Rules of 2001, a referral affidavit must be supported by a concise statement of the grounds of a complaint and the material facts or the point of law relevant to the complaint and relied upon by the SACC.

Recent intermediate appeals court case law (i.e., Competition Appeal court) has established that the referral affidavit must contain sufficient particularity and clarity to survive the test of legality and intelligibility. Essentially, the referral affidavit must contain all such information that a target may require to defend and rebut the case against it, similar to a criminal summons. In

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this regard, the Tribunal held that the affidavit must contain sufficient information to enable a
target to understand the case against it and to answer it.  

In reviewing a decision of the SACC to refer a matter, the Tribunal clarified that it will
consider whether there was “a proper application of its mind [by the SACC] to the facts or evidence
before it. Did the [SACC] take into account irrelevant factors and ignore relevant factors, properly
applying the theory and principles of competition law so that its decision was not unreasonable or
unjustified.” Accordingly, the Tribunal has placed a positive duty on the SACC to ensure that a
balanced view exists of all the facts that have been placed before the SACC’s executive committee
(which is ultimately tasked with deciding whether to investigate or refer a matter to the Tribunal).

The referral affidavit is drafted by the SACC on the evidence available to it at the time.
Due to the nature of anticompetitive conduct (particularly cartel conduct), the referral affidavit is
often drafted in broader terms with the aim of securing further evidence at the hearing of the matter.
This has resulted in the SACC’s referral affidavit being challenged in a number of cases on the
basis of being “vague and embarrassing,” and firms are often uncertain as to the precise nature of
the elements of the conduct which the SACC considers to constitute the contravention.

The Competition Tribunal has allowed the SACC some leniency in this regard as the
adjudicative process before the Competition Tribunal is an inquisitorial one which means that the
Tribunal may itself play a part in investigating the evidence on which the matter is argued. The
South African Constitutional Court held that section 52(1) of the Act expressly states that the
Tribunal must conduct a hearing into every matter referred to it. In this regard, the Constitutional
Court held that:

This section gives the Tribunal freedom to adopt any form it considers proper for a
particular hearing, which may be formal or informal. Most importantly, it also
authorises the Tribunal to adopt an inquisitorial approach to a hearing. Confining a
hearing to matters raised in a referral would undermine an inquisitorial enquiry.

Accordingly, the Tribunal, through its inquisitorial powers, may raise issues (and ultimately make
findings in respect of these issues) during the hearing itself, including issues which are not
expressly contained in the SACC’s referral affidavit. This can result in delays in the proceedings
as parties may require additional time to consider the issues raised by the Tribunal.

Notably, cartel conduct is a per se contravention under the Act. The Tribunal will not
consider exculpatory evidence relating to pro-competitive conduct or a “rule of reason defense,”
for purposes of establishing whether section 4 of the Act has been contravened. In this regard,
the Supreme Court of Appeal approved the Competition Tribunal’s reasoning in the ANSAC
judgment where it was stated that:

the Tribunal has found that once the conduct complained of is found to fall within
the scope of the prohibition, that is the end of the enquiry. There is no potential for
a further enquiry as to whether the conduct is justified (an enquiry of the kind that

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203 Caxton and CTP Publishers & Printers Ltd v. Competition Comm’n, Paarl Media (Pty) Ltd & Primedia (Pty) Ltd. (July
205 Id. ¶ 50.
206 Exculpatory evidence in this context refers to evidence which justifies the conduct of the target, after it has been found
that a target acted in contravention of the Act. Exculpatory evidence relating to whether or not a target acted in contravention
of the Act may and will be considered by the Tribunal.
is envisaged by § 4(1)(a)), and evidence to that end is not relevant and thus inadmissible.\textsuperscript{207}

The Tribunal will, however, consider exculpatory evidence for purposes of calculating an administrative penalty.

**China – the National Development and Reform Commission (NDRC); State Administration of Industry and Commerce (SAIC); & the Ministry of Commerce (MOFCOM)**

Both the AML and the three authorities’ procedural rules conspicuously lack provisions that require specific and clear explanation of evidence or supporting theories in the authorities’ assertions. For instance, the NDRC’s procedural rules\textsuperscript{208} merely require that if written questionnaires are used in an investigation, they should include an outline of the investigatory items.

In practice, the authorities’ explanation of the evidence is often unclear. In cartel cases, for example, when the authorities question parties, they usually do not provide a clear explanation of what evidence they possess or how their evidence comports with their theories of the cases. Except for high-profile cases,\textsuperscript{209} the explanation of supporting theories is usually rather brief and cursory. Targets often do not know how the authorities have reached certain conclusions. Furthermore, even if targets manage to gradually obtain some extra information from the authorities, such information is not supported by “evidence” as understood in other jurisdictions.

Depending on how targets react, however, it appears that the authorities may be willing to provide more explanation of their evidence or supporting theories when targets make well-prepared arguments and formal requests. Overall, practitioners have observed that all three authorities have made improvement as to this aspect of investigations over the past several years. Among the three, MOFCOM appears to be the most willing to accommodate requests for further explanation of evidence and theories, although such willingness may be compromised by the pressure that MOFCOM is under to close its review of transactions within a specified timeline. In any event, these practices do not conform to the requirements for a clear explanation of evidence and legal and economic theories that support the decision.

\textsuperscript{207} Am. Nat. Soda Ash Corp. & Another v. Competition Comm’n of South Africa, [2005] 3 All SA 1 (SCA), ¶ 37.


\textsuperscript{209} Examples include the Qualcomm and Tetrapek cases.
Practice No. II.C
Asserting Contentions of Infringement

Description
No official contention of infringement should be made before providing respondents a genuine opportunity to settle the matter by consent without additional contested proceedings.

Jurisdictions Evaluated:
- United States
- Brazil
- Germany
- Korea
- Mexico

United States – Department of Justice (DOJ) and Federal Trade Commission (FTC)

It is the FTC’s policy to “secure an effective order by consent if feasible.”\textsuperscript{210} FTC staff may propose a consent agreement at all stages of an investigation. The Administrative Procedure Act, which governs FTC proceedings, requires that “when time, the nature of the proceeding, and the public interest permit,” every person with an interest in an adjudicative proceeding shall be granted the opportunity to submit “facts, arguments and offers for settlement or adjustment.”\textsuperscript{211} The FTC provides respondents with an opportunity to submit facts, arguments and settlement offers during the course of an investigation and after a complaint is issued.\textsuperscript{212} The FTC Operating manual suggests that the conclusion of pretrial discovery is a “propitious time for serious negotiations looking toward settlement of the case by means of a consent agreement.”\textsuperscript{213}

DOJ’s settlement policies are described in the Antitrust Division Manual.\textsuperscript{214} Generally, DOJ encourages settlements and, by practice, prefers for parties to first offer a settlement. The settlement can be offered at any stage in the investigation, although DOJ will want to satisfy itself that “there is good cause to believe that the antitrust laws have been broken.”\textsuperscript{215} Once defense counsel initiates settlement discussions with DOJ, the Agency will consider if an effective remedy is feasible. If the parties reach agreement, DOJ staff will prepare a proposed draft settlement agreement. The draft needs to be approved by the Director of Civil Enforcement before it is presented to the parties.\textsuperscript{216}

Brazil – Conselho Administrativo de Defesa Econômica (CADE)

Brazilian Competition Law offers two ways to settle preannouncement: the leniency program and the cease and desist agreement (TCC).

\begin{footnotesize}
\textsuperscript{210} \textit{FED. TRADE COMM’N, OPERATING MANUAL} § 6.1, \textit{available at} \url{www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch06consents.pdf} [hereinafter FTC \textit{OPERATING MANUAL}].
\textsuperscript{211} 5 U.S.C. 554(c).
\textsuperscript{212} 16 C.F.R. §§ 2.31(a) and 3.25.
\textsuperscript{213} FTC \textit{OPERATING MANUAL}, supra note 210, § 6.13.9.
\textsuperscript{215} \textit{Id. at IV-55}.
\textsuperscript{216} \textit{Id}.
\end{footnotesize}
The leniency program allows companies and/or individuals involved—or that were involved—in an antitrust wrongdoing to obtain administrative and criminal benefits by applying for a leniency agreement with CADE. The agreement requires a commitment to cease the illegal conduct, report and confess its participation in the wrongdoing, and cooperate with the investigation by submitting information and documents relevant to the investigation. The requirements for entering into a leniency agreement are legislated under Article 86 of Law No. 12,529/2011 and Article 198 of CADE’s Internal Rules. Nowadays, the majority of CADE’s investigations are opened based on leniency agreements. Although the most common conduct reported by leniency agreements are cartels, these agreements are also available for other antitrust conduct set forth in Article 36 of Law No. 12.529/2011, which includes, for example, price discrimination and resale price maintenance, among other unilateral conduct.

The TCC (cease and desist agreement) is an agreement executed between CADE and the companies and/or individuals investigated for violation of the economic order under which the antitrust authority agrees to halt investigations against TCC signatories as long as the signatories comply with the terms of the referred agreement and agree to the commitments expressly provided thereunder.

Under Article 85 of Law No. 12,529/2011 and Article 184/185 of CADE’s Internal Rules, the requirements for entering into a TCC are (i) cooperation of the party within the investigation and the administrative proceeding; (ii) payment of pecuniary contribution to the Fund for the Defense of Diffuse Rights; (iii) establishment of the value of the fine in the event of total or partial noncompliance with the obligations undertaken; (iv) acknowledgement of participation in the investigated conduct by the party; and (v) specification of the obligations of the TCC PropONENT to not practice the investigated conduct or its harmful effects. The common practice of the General Superintendence is to permit and engage in settlement negotiations, whenever requested by the parties, and even invite the parties to settle in appropriate cases. This occurs with respect to both the leniency agreement and the TCC and can occur in the very early stages of the investigation, even before it becomes publicly announced, therefore avoiding additional costs of litigation for the parties.

In the context of merger cases, parties may negotiate remedies either with CADE’s General Superintendence, in a preliminary stage of the analysis of the merger case, or directly with CADE’s Tribunal, in order to address the authorities’ concerns and have the transaction cleared subject to remedies. The remedies can be behavioral (e.g., commitments of commercial, financial or economic practices to be made by the parties involved in the transaction) or structural (e.g., the divestiture of assets). In behavioral cases, settlements are a negotiated solution, which permits CADE to suspend the continuation of investigations related to legal entities and/or individuals. Under Brazilian Law, investigated parties may benefit from reductions in the amount of the fine and, in addition, may avoid costs related to lengthy investigations. In cartel cases, the payment of a pecuniary contribution is mandatory as well as the acknowledgement of participation in the conduct. Another mandatory requirement for cartel cases is the collaboration of the signatory when the case is still under investigation of the General Superintendence.

Germany – Bundeskartellamt

Antitrust settlement procedures for all antitrust matters are well-established in Germany. The Bundeskartellamt has published a comparatively short settlement guidance which sets out the principles in terms of (i) legal framework; (ii) subject; and (iii) timing of settlements in quasi-
criminal antitrust proceedings. The rules for settling quasi-criminal antitrust proceedings are very flexible: “There are no formal requirements under ordinary law for the agreement of a settlement to conclude the administrative offence proceedings of an administrative authority.” This flexibility also extends to the timing for commencing settlement discussions. Following an initial review of the evidence, the Bundeskartellamt is open to entering into settlement discussions at any time, including before the contention of infringements. Settlement discussions can be initiated by either side (i.e., the Bundeskartellamt or the target of the investigation). Generally, the Bundeskartellamt engages in substantive discussions with the parties regarding the crafting of an appropriate settlement, as opposed to outright acceptance or rejection of a settlement proposal from the parties. Such discussions occur particularly frequently in the merger context.

**Korea – Korea Fair Trade Commission (KFTC)**

Article 51(2) of the MRFTA provides a procedure for the acceptance of consent decrees, but it has procedural limitations. The Korean consent agreement system does not offer a genuine pre-complaint consent settlement discussion opportunity. As such, in practice, it is of only limited value, and, while available in theory, is rarely used in practice.

In late 2011, the KFTC embraced and adopted the concept of consent agreement for the first time. However, in practice, the KFTC’s consent agreement system is cumbersome and complicated. In a Korean consent decree proceeding, respondents propose voluntary remedial measures—such as compensation to consumers who were allegedly adversely affected by the conduct at issue—without admitting any wrongdoing. If the KFTC approves the proposed remedial measures after a public comment period, then it issues a consent decree without formally determining the legality of the conduct at issue. To date, only a few matters have successfully used the consent decree mechanism in Korea. Significantly, the consent decree procedure in Korea is not available for cartels or other concerted conduct allegations.

Thus, to the extent there is no admission of wrongdoing, the Korean consent agreement system resembles those of the “civil” consent agreement system in the U.S. and the “commitment” procedure in Europe. However, in Korea there is no equivalent to the “plea bargain” mechanism in criminal matters in the U.S. or the “settlement” procedure for cartel cases in Europe where an admission of wrongdoing is required. Nonetheless, in practice, respondents may admit their wrongdoing and fully cooperate with the KFTC and receive a fine reduction credit of up to 30%.

**Mexico – Comisión Federal de Competencia Económica (COFECE)**

Under the Statutory Framework, the investigation phase begins when the AI issues the investigation initiation order which must be published on the webpage of COFECE. It may initiate a new investigation for monopolistic practices if it has objective cause to do so. Objective cause includes any indication of the existence of evidence of such practice. It lasts for at least 30 and up to 120 business days, with the possibility of extending the period for up to four additional periods.

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218 Id. at 2.

219 Id. at 3 (“If the Bundeskartellamt has already inspected the evidence in order to gain an adequate amount of information, settlement discussions can be proposed by both sides at any time; they are not conditional upon the despatch of an extensive notice of hearing.”).
of 120 business days. During such phase, the AI gathers evidence to determine possible monopolistic activities by requesting information and documentation from any person that it considers it may have relevant information. The AI can also conduct dawn raids with the same purpose. During the investigation process, all documentation and information obtained by COFECE is confidential and unavailable to anyone outside COFECE and its personnel.

The Statutory Framework allows for settlement only during the investigation phase. Once an investigation has been initiated, the enforcers are required to exhaust the complete procedure (investigation phase), even where the investigation is being closed due to lack of evidence. Only in certain, very specific matters—investigations of monopolistic practices (i.e., vertical or abuse of dominance conducts or unilateral anticompetitive conduct)—and only during the investigation phase of the procedure, do potential offenders have the opportunity to potentially end the investigation of the alleged conduct by offering remedies in exchange for the reduction or even dismissal of fines. However, to take advantage of this procedure, offenders must admit the unlawful conduct.

As a result, COFECE is effectively required to find unlawful conduct to enter into a settlement agreement with the parties during the investigation phase, and this is only possible in the case of investigations into monopolistic practices. The admission of unilateral conduct constitutes a first offense against the FECL and becomes relevant for future cases involving the alleged offender, as recidivism is a factor to consider when sanctioning an offender.
<table>
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<th>Practice No.</th>
<th>Description</th>
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<tr>
<td>II.D</td>
<td>The process of publicizing a contention of infringement should ensure that such publication does not prejudice or otherwise unnecessarily disadvantage respondents. Specifically, publication of any contention of infringement should be accompanied by a clear statement that such contention is subject to assessment on the merits and does not constitute a determination or finding of infringement.</td>
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### Jurisdictions Evaluated:

- India
- United Kingdom
- United States
- Ukraine
- China

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**India – Competition Commission of India (CCI)**

There is no mandatory requirement for the CCI to publicize its orders under Section 26(1) of the Act. As per Regulation 53 of the CCI (General) Regulations, 2009, the CCI “may cause publication of a brief summary or the full texts of its orders or decisions in the media, if it so desires in the interests of public. . . .”\(^{220}\) As a matter of practice, the CCI uploads orders passed under Section 26(1) of the Act where the allegations pertain to abuse of dominant position (which may include allegations of anti-competitive vertical agreements) on its website. In contrast, where the allegations pertain to cartelization, the orders are not published on the website of the CCI.

According to the Supreme Court of India, the orders under Section 26(1) of the Act are regarded as a “direction simpliciter” to the Director General (DG) to cause an investigation and do not “effectively determine any rights or obligations of the parties to the list.”\(^{221}\)

Consistent with the above, orders under Section 26(1) of the Act generally provide a description of the parties, a brief summary of the allegations raised, a brief analysis of the key provisions relevant to the allegations and, finally, they record the prima facie view of the CCI on the issues, along with a direction to the DG to cause an investigation and submit a report thereon. Notably, the orders under Section 26(1) of the Act specifically conclude with a clear observation that “[t]he Commission, however, makes it clear that nothing stated herein shall be tantamount to an expression of opinion on the merits of the case and the DG shall conduct the investigation without being influenced by any observation made herein.”

As noted above, an order directing an investigation is not published in all cases and, where it is, it is clarified that the order does not reflect the final opinion of the CCI. Having said that, it has been recognized by the Delhi High Court that “the fact that an enterprise is being investigated in respect of allegations of its anti-competitive conduct may also result in loss of reputation and

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\(^{220}\) It is pertinent that for orders passed under Section 26(2) and Section 26(6) of the Act, i.e., orders directing closure of the matter, a summary of all orders or decisions is required to be published on the website.

\(^{221}\) Competition Comm’n of India v. Steel Auth. of India Ltd., (2010) 10 SCC 744, ¶ 38. Additionally, the Supreme Court has clarified that, at the stage of Section 26(1) of the Act, while the CCI “may not really record detailed reasons, but (sic) must express its mind in no uncertain terms that it is of the view that [a] prima facie case exists, requiring issuance of direction for investigation to the Director General.” Id., ¶ 97.
goodwill.” The Delhi High Court has also separately recognized this and observed that “an investigation against a public company tends to shake its credit and adversely affects its competitive position in the business world even though in the end it may be completely exonerated and given a character certificate.” The High Court further went on to state that the very initiation of investigation “is likely to receive much press publicity as a result of which the reputation and prospects of the Company may be adversely affected.” The publication of the Section 26(1) orders has been known to have had an effect on the stock prices of the investigated party.

Hence, while the orders by the CCI do clarify their nature and scope, making explicit that the merits have not been opined upon, and notices are not published in every case, the investigated party may nonetheless face adverse press publicity which may have a negative impact on its reputation and prospects.

United Kingdom – Competition & Markets Authority (CMA)

The Guidance on the CMA’s Investigation Procedures in Competition Act 1998 Cases (Guidance) sets out the steps undertaken by the CMA to ensure that public notice of the issuance of a Statement of Objections (SO) does not unnecessarily disadvantage the addressees of the SO. It is the CMA’s ordinary practice to publicly announce the issuance of an SO on its website and to update the administrative timetable on the case page. The Guidance also states that, as far as possible, the CMA aims to give the directly affected parties fair and sufficient notice, as well as advance sight of the announcement documents, in order to allow them to prepare their responses.

The timing of the announcement, and of any advance notice thereof, will depend upon any market sensitivity with respect to that announcement. The CMA will seek to balance its responsibilities concerning the control and release of market sensitive information against the objective of giving directly affected parties fair and sufficient notice and will have regard to the guidance of the UK Financial Conduct Authority on the control of price sensitive information.

The announcement on the CMA’s website itself is ordinarily accompanied by an explanatory note. This describes such issuance as provisional only and notes that an SO does not necessarily lead to an infringement decision. It further notes that parties have the opportunity to make written and oral representations, which will be considered by the CMA before the Case Decision Group (which is separate from the CMA’s case team) reaches a final decision in the case.

United States – Department of Justice (DOJ) and Federal Trade Commission (FTC)

For the most part, announcements of a contention of infringement by DOJ and FTC (the Agencies) are non-prejudicial. The Agencies issue press releases when either filing a contested complaint or settling a matter. These announcements, which are carefully drafted and subject to

224 See generally, Monsanto India shares down 4 per cent; hit 52-week low, TIMES OF INDIA (Feb. 18, 2016), available at http://timesofindia.indiatimes.com/business/india-business/Monsanto-India-shares-down-4-per-cent-hit-52-week-low/articleshow/51037053.cms. The article describes how the stock prices of the company experienced a downward trend in the aftermath of an investigation by the CCI.
226 Id. ¶ 11.7.
227 Id. ¶ 11.8.
228 Id. ¶¶ 11.9-11.12.
internal review processes, typically set forth the competitive concerns and the reasons for the Agency’s action. While the draft press releases are not provided to the parties in advance for fact-checking or review, the announcements typically do not unnecessarily disadvantage respondents.

That being said, the Best Practice calls for each announcement to have “a clear statement that such contention is subject to assessment on the merits and does not constitute a determination of finding of infringement.” While such statements are typically found in settlement papers, they are not usually included when the Agency announces a contested infringement in civil cases and could be read to definitively declare conduct by the parties illegal. (That being said, many observers in the United States understand that Agency determinations are subject to review.)

Additionally, some U.S. practitioners have expressed concern about press leaks. Certain press outlets—especially with regard to high-profile matters—will report on the status of, and developments regarding, Agency decision-making, usually without source attribution. As described by a recent head of the Antitrust Division, such leaks raise significant concerns as they may unjustifiably affect a party, thereby providing competitors an unfair advantage, and are “damaging to perceptions of procedural fairness—parties rightly feel something is amiss when they learn more from the newspapers than enforcers about the status of an investigation.”229 By their very nature, it is difficult—if not impossible—to identify the source of press leaks. There is no direct evidence that Agency decision-makers are providing such leaked information, and the sources may very well be the parties or other marketplace participants. But, the extent of such stories and the apparent proximity to Agency decision-making is a cause for concern.

Ukraine – Antimonopoly Committee of Ukraine (AMC)

The AMC is not required to publicize a contention of infringement and the relevant process is generally not regulated. In practice, the AMC usually publicizes most significant investigations or those which have already attracted public interest or that of competition (i.e., became “hot topics” on which the authority is expected to react). The contents of such publications vary as they do not necessarily invite comments from interested parties and the extent to which the AMC discloses facts and findings differs from one case to another. Publications are not usually accompanied by a clear statement that the relevant contention is subject to further assessment and does not constitute a determination of infringement. Typical recent publications close as follows: “Based on the outcome of the investigation the AMC will take appropriate measures as mandated by the law.” This statement does not appear to properly serve the purpose of eliminating prejudice towards respondents, especially in some publications which are worded more aggressively, and sends quite a strong message about AMC suspicions that an infringement has been committed.

China – the National Development and Reform Commission (NDRC); State Administration of Industry and Commerce (SAIC); & the Ministry of Commerce (MOFCOM)

Most investigations to date started confidentially without public allegations (such as a statement of objections).230 The enforcement authorities generally will not issue formal statements

230 These investigations have so far been conducted by the National Development and Reform Commission (NDRC), State Administration for Industry and Commerce (SAIC), and Antitrust Bureau of the Ministry of Commerce (MOFCOM). These three enforcement authorities have now merged to form the new State Administration for Market Regulation (SAMR).
about ongoing investigations. However, there have been a number of cases where details of ongoing high-profile cases have been reported by the press or by the companies themselves. In each of these cases, the authorities have subsequently confirmed the existence of these investigations and given high-level briefings to the press. Formal statements and decisions are not typically published until the end of the investigation, when enforcement authorities are alleging that an infringement has taken place.

Accordingly, while the enforcement authorities generally do not go public with allegations until the conclusion of the investigation, there is, equally, no standard practice of disclaimer that the matter remains subject to investigation (so as to reduce stigma/reputational harm) when matters become public through other means.

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231 Anti-monopoly Law of the People’s Republic of China (promulgated by Standing Comm. of the Nat’l People’s Cong., Aug. 30, 2007), available at www.china.org.cn/government/laws/2009-02/10/content_17254169.htm, art. 44 (the enforcement authorities may make the matter known to the public after the investigation into and verification of the suspected monopolistic conduct).

232 For example, in 2013, the official Xinhua News Agency broke the news of an SAIC investigation into Tetra Pak across 20 provinces and cities; in 2013, Qualcomm itself issued a statement disclosing the start of an NDRC investigation into the company; and in 2014, Sina.com reported that the SAIC raided Microsoft China’s offices in four cities across China.
### Practice No. III.A
**Assessing Contentions of Infringement**

**Description**
Following a contention of infringement, officials should follow specific procedures for the assessment of such contention in accord with the following practices. No finding of infringement should be made absent compliance with such procedures.

### Jurisdictions Evaluated:
- United Kingdom
- Canada
- Japan
- Chile
- Egypt

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**United Kingdom – Competition & Markets Authority (CMA)**

In its enforcement of the Competition Act 1998, statutory provisions govern the CMA’s investigation of an alleged infringement from the initial assessment through the issuance of an infringement decision. Such statutory provisions are supplemented by procedural guidance issued by the CMA itself as to the exercise of its powers under the Competition Act 1998. These stated procedures are consistently followed and predictable. During its initial assessment, for example, the CMA may gather information from the target(s) of the investigation, any complainant(s) (if applicable), and/or third parties on an informal basis through either written requests for information or meetings with the CMA. If it then decides to open a formal investigation, the CMA may require the production of specified documents or information, conduct interviews, and search premises (with or without notice).

The CMA has set out that its Guidance on the CMA’s Investigation Procedures in Competition Act 1998 Cases (Guidance) both represents the CMA’s procedures and explains the way in which the CMA conducts investigations into suspected competition law infringements. The Guidance also states, however, that the CMA will retain flexibility in the application of the Guidance such that the CMA may adopt a different approach where the facts of an individual case so justify. Once a formal investigation has been opened, any complaints about the CMA’s procedures or how investigations are handled may be made in writing to the Senior Responsible Officer in the first instance, along with copies of any relevant supporting documents or correspondence. Unresolved complaints may be referred to the independent Procedural Officer. The role of the Procedural Officer does not prejudice a party’s rights in respect of judicial review and/or any appeal before the Competition Appeal Tribunal.

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234 Id. ¶ 6.1.

235 Id.

236 Id. ¶ 1.4.

237 Id. ¶ 1.8.

238 Id. ¶ 15.3.

239 Id. ¶ 15.4.

240 Id. ¶ 15.12.
Canada – The Competition Bureau (CCB)

The CCB has provided extensive guidance regarding the processes it will follow when carrying out its mandate. These processes are generally communicated through enforcement guidelines and information bulletins, which are posted on the CCB’s website. Examples of key enforcement guidelines include the Merger Enforcement Guidelines,241 the Enforcement Guidelines on the Abuse of Dominance Provisions,242 and the Competitor Collaboration Guidelines.243 Examples of important information bulletins include those on communication during inquiries,244 communication of confidential information,245 on sections 15 and 16 of the Act,246 and on the CCB’s immunity247 and leniency248 programs. The CCB also provides a template for consent agreements that it will generally accept. In practice, the CCB follows the procedures laid out in these publications.

As an administrator, the CCB is also subject to the common law rules of procedural fairness (which are constitutionally mandated in criminal investigations where section 7 of the Charter is engaged). The requirements of procedural fairness are meant to create stability in the law by ensuring that administrative actors behave consistently and predictably.

Japan – Japan Fair Trade Commission (JFTC)

JFTC investigation procedures are set forth in detail in the Antimonopoly Act and corresponding guidelines and rules. The procedural guidelines were recently revised with the goal of “further ensuring the appropriateness of administrative investigation procedures” and “enhanc[ing] transparency.”249 The applicable rules and guidelines also provide that parties to an investigation can object to or complain about any failure to adhere to procedures.250 In practice, the JFTC is widely viewed as having clear investigative procedures that are followed diligently. Any complaints are generally not about transparency or failure to follow procedures, but rather in

249 Guidelines on Administrative Investigation Procedures under the Antimonopoly Act (Investigation Procedures Guidelines), Introduction.
250 Rules on Administrative Investigations by the Fair Trade Commission (Fair Trade Commission Rule No. 5 of 2005), Section 22; Investigation Procedures Guidelines, II.4.
some cases about the procedures themselves, for example, not allowing counsel in witness interviews.

**Chile – Fiscalía Nacional Económica (FNE)**

There are no rules relating to Law Decree No. 211 (DL 211) providing procedures or steps for how the FNE should assess a contention of infringement, although the FNE has issued substantive guidelines relating to some matters (e.g., concentration operations, vertical restriction, public procurement and trade associations) in order to provide some guidance on its analysis of the merits of certain conduct.

There are no predictable procedural steps followed in the assessment of investigated conduct. It is known, as per the faculties conferred by DL 211, that the FNE may call executives for depositions, make requests for information both to private parties and State authorities, and contact other players in the market. However, it is unclear whether, or when, any of these steps may be implemented. Furthermore, there are no stated rules or procedures governing how the investigative case team or agency management makes its decisions, except for the final report which has to be signed by the head of the agency.

As explained above, DL 211 does not establish a procedure to be followed by the FNE, and only determines its faculties. The FNE has issued an internal manual with general rules for the admissibility of contentions and the development of investigations, but with no specific procedure. This manual addresses when complaints should be investigated and sets out general steps that must take place in any investigation, such as the resolution ordering the beginning of an investigation, the communication to the involved persons, the making of an investigative file and the different ways to close an investigation, among others. However, there is no clear procedure and the opportunity to use the different investigative measures (depositions, request for information to parties or third parties, dawn raids, etc.) is not articulated. Hence, it is unknown which and when such measures would apply. Also, there is no predictability about the duration of the investigation.

**Egypt – Egyptian Competition Authority (ECA)**

Neither the Competition Law nor the Executive Regulations expressly provide for comprehensive procedures in relation to the assessment of whether the asserted conduct constitutes a contravention. In terms of the ECA’s current practices, the ECA generally compiles a comprehensive record including all relevant documentary evidence, legal arguments, and expert analysis as part of its administration of proceedings. If the ECA believes there was an infringement, this record will be provided to the prosecutor who then proceeds to prosecute the target in accordance with the court’s rules and procedures in relation to criminal offences. The ECA does, however, have the discretion as to whether to refer the matter to the prosecutor and may, instead, order the target to cease its conduct without prosecution.

The ECA has not published guidelines or regulations which set out the procedure and steps which will be followed by the ECA during its assessment of the contention of infringement. This lack of guidance denies predictability to targets and practitioners as to the applicable procedural steps.
Practice No. III.B
Assessing Contentions of Infringement

Description
Any assessment (hereinafter “first-instance decision”) of a contention of infringement should be made by an independent official or officials, personally identified to the parties.

1. “Independent” in this context means (1) having no prior role in the investigation or in formulating the contention of infringement (except as a neutral decision maker regarding interim or preliminary matters required for management of prior proceedings, as provided by law); (2) having no specific personal interest in the matter or material relationship to any party; and (3) having sufficient expertise in the law and economics of competition and/or other relevant disciplines to conduct the proceeding and to make the assessment in a disinterested, efficient and accurate manner.

Jurisdictions Evaluated:
- France
- South Africa
- Italy
- Colombia
- China

France – Autorité de la Concurrence (Autorité)

The Autorité is composed of two main bodies. The Investigation Services (composed of case handlers) role is (i) to investigate the case—to gather evidence by sending out requests for information to the companies concerned, hearing companies’ representatives, or by carrying out unannounced inspections at the companies’ premises; and (ii) to prosecute companies by sending them a Statement of Objections. The College take the “first instance decision” based on the Investigation Services’ findings, the companies’ submissions and an oral hearing.

First, in accordance with the French courts’ interpretation of the principles of equality of arms and the separation of powers, as enshrined in the French constitutional principles, the FCA’s investigation and decision-making procedures are separate. Thus, the investigations are carried out by the Investigation Services, headed by the Rapporteur General, while the assessment and ruling of a contention of infringement is made by the College. As a result, the Rapporteur General (or his deputy) and the case handler in charge of the case are only allowed to attend the College’s deliberations but do not have voting rights.

Second, the members of the College, like all Autorité officials, must sign a sworn statement when they take up their position according to which they undertake to act independently, impartially and in conscience, and to respect the secrecy of the deliberations. Autorité officials also indicate to the President of the Autorité, if need be, the list of their current and former direct/indirect interests, as well as the list of their former and current economic activities and mandates. These requirements are also enshrined in the Autorité’s Deontology Charter.

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251 Conseil Constitutionnel, 12-10-2012, n°2012-280.
253 Autorité’s Internal Rules, art. 1.
254 Autorité’s Internal Rules, art. 2.
Third, the College is composed of seventeen members, who all have specific expertise and experience to carry out their missions. Pursuant to Article 461-1 of the French Commercial Code, the President of the College is appointed by the President of the French Republic on the basis of his competence and expertise in the legal and economic fields; the College also comprises six current/former judges, five persons chosen for their competence and expertise in the legal and economic fields, and five persons carrying out or having carried out their activities in the sectors of production, distribution, crafts, services or independent professions. In practice, these individuals are viewed as possessing the requisite expertise in law and economics to execute their responsibilities.

**South Africa – Competition Commission (SACC)**

In investigations into anticompetitive conduct, after receiving a complaint, the SACC’s Screening Division will conduct a preliminary investigation into the complaint. If there are sufficient grounds to initiate a complaint, the SACC will submit a memorandum to the Executive Committee (which consists of the SACC’s Commissioner, two Deputy Commissioners and the relevant team managers). The Executive Committee will then decide whether to initiate a complaint. Once the complaint has been initiated, the Commissioner will appoint a lead investigator and investigatory team (which includes legal and economic experts who will investigate the case and engage with target(s)).

Targets are always informed of the identity of the lead investigator and, in some instances, the broader investigatory team. The lead investigator is ordinarily in charge of dictating proceedings (e.g., the gathering of evidence by means of summons) and for ultimately making a recommendation or referral to the Tribunal (subject, again, to the approval of the SACC’s Executive Committee).

The SACC is a public body which is mandated, under the Competition Act, to be impartial and to perform its functions without fear, favor, or prejudice. In terms of section 20(2) of the Act, the Commissioner or any other member of the SACC staff may not participate in any investigation where it has a direct financial or any similar personal interest. In the event that targets suspect a conflict of interest in this regard, a target may approach the SACC or the Tribunal for the appropriate relief or continue to have the decision (e.g., to refer the matter to the Tribunal) taken on review.

The Tribunal remains the ultimate “decision maker.” The Tribunal consists of a panel of three members. These members must be independent from the SACC and must perform their functions “without fear, favor or prejudice.” Targets are ordinarily aware of the panelists who will be adjudicating the matter. Tribunal members are appointed by the President on the recommendation of the Minister of Trade and Industry, based on their specific knowledge of and experience in either economics, law, commerce, industry or public affairs (which is required in terms of the Act). The Chairperson of the Tribunal will assign each matter to a panel of any three members of the Tribunal and in doing so must ensure that at least one member of the panel has legal training and experience, joined by a team of suitably qualified experts best equipped to deal with the facts of each matter. Once it becomes apparent that such an appointed Tribunal member may have a conflict of interest in any matter which it has been assigned, the Tribunal member would, upon request by the parties, withdraw and be replaced by another member of the Tribunal. The Tribunal members have traditionally been well-qualified and demonstrate a good understanding of both competition law and economics.
Italy – Autorità Garante della Concorrenza e del Mercato (ICA)

Proceedings before the ICA, as any other administrative proceedings in Italy, are governed by principles of transparency and impartiality laid down by Article 1 of the Law on Administrative Proceedings.255 Consistent with the generally governing principle of transparency, Article 6 of the Regulation on ICA’s Proceedings prescribes that the notice of opening of proceedings and any formal act thereafter should clearly state the ICA directorate from which it originates and the name of the case handler.256 In turn, the case handler is responsible for ensuring the investigation’s compliance with Italian and EU law, deciding on requests to access the file, and providing an adequate non-confidential version of the documents.

Further, the independence and impartiality of the ICA is mandated by Art. 10 § 2 of the Italian Law on Competition pursuant to which the ICA shall carry out its functions with full autonomy and independence. Moreover, and as a further petition, the judicial review of administrative courts, in accordance with Article 133 of the Code of the Administrative Process,257 grants control over the ICA’s jurisdiction in order to ensure the correct implementation of rules governing Italian competition law.

Colombia – Superintendency of Industry and Commerce (SIC)

Under Colombian law, the contention of infringement is prepared by the Deputy Superintendent for the Protection of Competition. This individual is in charge of conducting the investigation and weighing the evidence collected in the process. The Deputy Superintendent will then issue a report containing the findings of the investigation and a recommendation either to impose a sanction, if an unlawful conduct has been proved, or to terminate the investigation. The investigated parties may submit their comments to the report.

The report and the parties’ comments are then delivered to the Superintendent of Industry and Commerce, who will issue a final decision, either accepting or rejecting the Deputy Superintendent’s recommendation, and either imposing a sanction or terminating the investigation.

In one sense, the decision-maker is independent in that the Superintendent has not been involved in the investigation procedure in any way, as it has all been instructed by the Deputy Superintendent. The former’s role is only to take a decision on the basis of the latter’s report on findings and the parties’ response to said report. The only firewall to prevent communication between the Superintendent and Deputy Superintendent is the existence of separate functional departments (i.e., each of them have separate investigative teams and advisors) so that no individual participates in an investigation at both the Deputy-level and Superintendent-level. In practice, verifying if this independence is strictly guarded is not possible; however, there is no evidence to support that the Superintendent has influenced investigations.

Nevertheless, the Deputy Superintendent is hierarchically linked to the Superintendent, who is the sole head of the authority. In addition, the Deputy Superintendent is freely appointed and may be removed by the Superintendent. Thus, the independence is not absolute; while two distinct individuals are ostensibly in charge of the investigation and the final decision, the Deputy Superintendent reports to the Superintendent.

255 L. n.241/1990 (It.).
256 D.P.R. n.217/1998 (It.).
The Superintendent of Industry and Commerce is freely appointed by the President. Once appointed he will serve for as long as the President remains in office and cannot be removed prior to the elapsing of his term. Therefore, there is always a certain closeness between the Superintendent and the President; however, since he cannot be removed once appointed, the Superintendent has considerable independence in his decision-making.

China – the National Development and Reform Commission (NDRC); State Administration of Industry and Commerce (SAIC); & the Ministry of Commerce (MOFCOM)

Chinese laws require that decision-making officials are “independent.” Further, they are typically qualified from an educational perspective: officials are usually graduates from well-known Chinese universities with economic, management, legal, or antitrust degrees. However, this does not mean there is no bias in decision-making. At MOFCOM, the relatively clear rules and transparent procedure for merger filings meant that MOFCOM officials were more independent when analyzing cases and making decisions. However, officials could be improperly influenced in cases due to the interests of state-owned enterprises, national industrial policies, and diplomatic relationships. At the NDRC and SAIC—responsible for enforcement investigations—procedures were relatively unclear, and officials had more discretion, leaving them open to influence from non-independent factors.258

However, parties that consider that their lawful rights and interests have been infringed by an administrative decision may seek to have a decision reviewed by an independent administrative organ.259 A decision by enforcement authorities may also be reviewed by the courts.260

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258 Note, for example, that the NDRC Rules on the Hearing and Review of Price-Related Administrative Punishment Cases, Fa Gai Jia Jian [2013] No. 1950 requires that the case hearing and the issuance of the Advance Notice of Administrative Punishment both involve the person in charge of the competent price department or price supervision and inspection agency.


260 See, for example, the administrative suit brought by Hainan Yutai Technology and Feed Co., Ltd. against the Hainan Provincial Price Bureau in the courts of Hainan Province in 2017. Hainan Provincial Price Bureau v Hainan Yutai Technology and Feed Co., Ltd. (2017) Qiong Xing Zhong No. 1180.
**Practice No.**
III.C(i)  
Assessing Contentions of Infringement

**Description**
The decision-making officials should compile a record whose contents are clearly ascertainable by respondents and any reviewing authorities (subject to proportional limitations to protect specific and reasonable confidentiality concerns).

**Jurisdictions Evaluated:**
- United Kingdom
- Singapore
- Mexico
- India
- Kenya

**United Kingdom – Competition & Markets Authority (CMA)**

The CMA gathers all materials considered in assessing a contention of infringement. Its records in respect of an investigation in which the CMA has issued a Statement of Objections (SO) are open to inspection by the addressees of such SO, subject to exclusions of certain confidential information and of CMA internal documents. Addressees will ordinarily be able to inspect the file for a period of six to eight weeks. Access to the file is usually given by supplying the file in electronic form on a DVD or by other suitable electronic means. The SO itself represents the CMA’s provisional view and proposed next steps and is intended to allow the parties under investigation to know the full case against them, if they choose to do so, to respond formally in writing and orally. In this way, the parties are able to ascertain the record evidence in view of the specific contentions of the CMA.

**Singapore – Competition Commission of Singapore (CCS)**

In assessing contentions of infringement, the CCS must compile a clear record of all the evidence that it has considered in arriving at its decision. According to paragraph 2.4 of the Enforcement Guidelines, if the CCS proposes to make an infringement decision, it must give the person likely to be affected by its decision a written notice setting out the facts on which the CCS relies and its reasons for the proposed decision. Similarly, paragraph 2.5 of the Enforcement Guidelines states that after issuing the PID, the CCS will give access to the affected persons to their file relating to the investigation in order to inspect the documents relating to the investigation.

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262 Under Rule 1(1) of the Competition Act 1998 Rules, confidential information means commercial information whose disclosure the CMA thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or information relating to the private affairs of an individual whose disclosure the CMA thinks might significantly harm the individual’s interests, or information whose disclosure the CMA thinks is contrary to the public interest.

263 Rule 6(2) of the Competition Act 1998 Rules.

264 UK Guidance, supra note 261, ¶ 11.19ff.

265 Id. ¶ 11.4.
As such, the CCS must keep a clear record of all the evidence that it has considered in arriving at a decision and make it available to the respondent.

**Mexico – Comisión Federal de Competencia Económica (COFECE)**

Mexico complies with procedure rules laid out specifically in the Federal Economic Competition Law (FECL) and its Regulations, which are designed to guarantee certain constitutional rights. The Statutory Framework, and specially the FECL and its Regulations, contemplate a formal process through which all information (except information classified as confidential), evidence, and documents are available to interested parties once the investigative phase of a procedure has ended. Likewise, administrative counts against individuals for potential offenses are asserted through the issuance of a Statement of Objections (Dictamen de Probable Responsabilidad), through which the Investigative Body of the Enforcers have to lay out and sustain their allegations against specific conduct by the offender. The Statutory Framework also provides formal regulations for the serving process of the Statement of Objections, as well as a relevant time-frame and other ancillary rules to access the docket of the investigation once the Statement of Objections has been served, with the goal of protecting confidentially at all times.

Case-handlers or decision-making officials typically abide strictly to the provisions of the relevant legislation, and as such, comply with the formal procedure described above. Nevertheless, there still are some areas for improvement, such as (i) guaranteeing alleged offenders better access to the relevant investigation dockets during the investigation (considering that once the Statement of Objections is served, alleged offenders have just a 45 business-day term to address the Statement of Objections but will need to review a very long and substantive investigation docket during that time); and (ii) streamlining the original accusation in the Statement of Objections with the final decision rendered by the Board of Commissioners of the Enforcers, to cure any constitutional harms caused by discrepancy between the two.

**India – Competition Commission of India (CCI)**

The CCI, in all cases, maintains a record which can be inspected by a party to the proceeding and certified copies of this record can be obtained by such party(ies).\(^\text{266}\) The record comprises “copies of documents or records submitted during the proceedings.” Typically, the CCI segregates the records into the following broad categories:

- **Orders passed by the CCI** – This is accessible by all parties to the proceedings; however, content of the order over which confidentiality has been claimed may be redacted.
- **File containing documents/submissions filed by the informant** – This file is accessible to the investigated party(s) subject to claims of confidentiality by the informant, which at times can be very broad. Information over which confidentiality has been claimed is redacted and only the public version is placed on the file for inspection.
- **File containing documents/submission filed by other investigated party(s)** – In the case of cartels, such files are not accessible to all investigated parties, other than the party making such submission. However, the informant has the right to access the public version of the files of the investigated party(s).

\(^{266}\) Regulation 37 of the CCI (General) Regulations, 2009.
File containing the findings of the DG – The finding of the DG, contained in a report, is provided to the parties by the CCI.\textsuperscript{267} As per Regulation 20(4) of the CCI (General) Regulations, 2009, the report of the DG “shall contain his findings on each of the allegations made in the information or reference, as the case may be, together with all evidences or documents or statements or analyses collected during the investigation.” However, this obligation is subject to claims of confidentiality made by the parties, which can be very broad, and the DG is required, where necessary, to protect the confidential information, to submit the report in two versions viz., (i) a confidential version; and (ii) a non-confidential version. The non-confidential version of the report of the DG, along with the material relied upon, is also placed on record by the CCI and is open for inspection by all parties.\textsuperscript{268}

All information/documents to which access is provided by the CCI is subject to claims to confidentiality by the parties. Hence, access to confidential information is normally restricted. Significantly in this respect, no access is granted to any party to any information/document which is collected and/or is relied upon by the DG during the investigation phase. Access to material obtained during the investigation by the DG is permitted only after the report of the DG has been finalized, submitted to the CCI, placed before the CCI, and a direction has been passed by the CCI to forward copies of the DG report to the parties concerned for their comments/objections.

A notable exception to the general rule is where an application for leniency has been filed by a cartel participant. As per the CCI (Lesser Penalty) Regulations, 2009, the CCI is obliged to treat as confidential “or the identity of the applicant information obtained from it”\textsuperscript{269} unless a disclosure is a) required by law; b) the applicant has agreed to the disclosure in writing; or c) there has been public disclosure by the applicant.

In most cases, then this translates into no access to any information/document filed by the applicant before the CCI, or the order of the CCI in leniency cases. In cases involving leniency, the investigated parties (i.e., the other cartel participants) do not have access to the case files. This was challenged recently before the Delhi High Court on the grounds of violation of principles of natural justice.\textsuperscript{270} While final orders are awaited, the High Court in certain cases has granted interim relief allowing inspections and access to the order under Section 26(1) and to other information, subject to claims of confidentiality.\textsuperscript{271}

\begin{footnotesize}
\begin{itemize}
\item Section 26(4) of the Act which provides that “The Commission may forward a copy of the report.... to all parties concerned” read with Regulation 21 of the CCI (General) Regulations, 2009. While the Section does not make it mandatory for the CCI to forward the report to the investigated parties, the CCI routinely provides the parties with the report directing them to file their objections/suggestions to the same.

\item The DG Report is available for inspection only once the report has been placed before the CCI and the CCI has directed that copies of the same be forwarded to all parties concerned. Hence, in cases where the CCI directs a “further investigation” without inviting comments/suggestions from the parties, the report will not be accessible to the parties.

\item Regulation 6 of the CCI (Lesser Penalty) Regulations, 2009.


\item See NOK Corporation v. CCI: W.P. (C) 11628/2016 order dated 15 December 2015. Further, in Forech India Ltd v. CCI & Anr: W.P. (C) 11072/2015, vide order dated 1 April 2016, the CCI inter alia agreed to,

\begin{itemize}
\item [ii)] that the petitioner if so desires at that stage, will also have a right of inspection of the entire record in terms of Regulation 37;
\item [iv)] that the documents with respect to which the respondents at this stage claim confidentiality will not be furnished to the petitioner but the petitioner will be furnished the orders of the CCI upholding the confidentiality plea with respect to the said documents after redacting therefrom the portion which may disclose the nature of the documents, in terms of Regulation 35(14) and Regulation 6 of The Competition Commission of India (Lesser Penalty) Regulations, 2009.
\end{itemize}
\end{itemize}
\end{footnotesize}
For each case in which the CAK initiates an investigation, a file is opened. The CAK’s record is kept confidential and neither the public nor the target has access to the contents in the CAK’s file. The CAK’s record is, therefore, for internal use only and may be accessed only by the CAK’s Enforcement Department, the Board, and the CAK’s senior management. It is only in exceptional circumstances that another department (e.g., the CAK’s legal department) will be granted access to the file.

The contents of the CAK’s files will generally include all information and evidence obtained during the course of the CAK’s investigation and may include both relevant and irrelevant materials—provided that the materials are related to the target and/or the investigation.

The target is not entitled to review or make copies of the CAK’s file nor is any other form of alternative access (i.e. by way of legal representatives only) to the content of the CAK’s file permitted. This makes it particularly challenging for a target who the CAK alleges has contravened the Act to defend its case as it is not provided with insight as to the evidence which the CAK relies on in reaching its decision. The CAK has, however, in recent times provided targets with some of the evidence it relied upon in reaching its proposed decision—prior to a hearing conference.

Kenya – Competition Authority of Kenya (CAK)
Practice No. III.C(ii)
Assessing Contentions of Infringement

Description
Officials should provide specific and enforceable means to exclude from the record all extraneous matter.

Jurisdictions Evaluated:
- South Africa
- United States
- United Kingdom
- Chile
- Taiwan

South Africa – Competition Commission (SACC)

Any evidence or documentation which is placed before the South African Competition Tribunal (Tribunal), by way of either discovery proceedings or otherwise, is restricted to evidence or documentation which is, or might be, relevant to the SACC’s referral. Discovery proceedings in South Africa follow the “close of pleadings,” i.e., after each party has set out its case and indicated which documentary evidence it would rely on to support its case. This process ensures that only documents which are subsequently placed on the record are relevant to the proceedings.

Under Competition Tribunal Rules 21 and 22, parties may be required to attend a pre-hearing conference. The purpose of such a conference is, inter alia, to establish procedures for protecting confidential information, including the terms under which participants may have access to that information. A target, at this juncture, may object to the production of documentation or evidence on the ground of relevance. It is now common procedure to set dates in advance for discovery requests, responses, objections, and challenges.

Accordingly, although the evidentiary rules before the competition authorities are generally considered less formal than before a civil court, there are specific and enforceable procedural steps to exclude extraneous evidence from the record.

United States – Department of Justice (DOJ) and Federal Trade Commission (FTC)

The Federal Rules of Civil Procedure (FRCP) and the Federal Rules of Evidence (FRE), which apply to all proceedings in United States federal courts, set limits on the types of information that may be sought during the discovery phase of litigation and admitted into evidence for consideration by a judge or jury. Because the DOJ brings its enforcement actions in federal court, it is required to follow the FRCP and the FRE in presenting matters in court. The FTC also is subject to federal court rules when it seeks preliminary relief in merger matters or proceeds directly in federal court in conduct cases. (The FTC’s internal adjudicative functions are discussed below.)

FRCP 26(b) sets the scope and limits of discovery. 272 Parties only may obtain discovery of information that is “relevant to any party’s claim or defense and proportional to the needs of the case.” 273 Evidence is deemed relevant if it has any tendency to make a fact more or less probable. 274

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273 Id.
274 Fed. R. Evid. 401.
While the scope of discovery is extremely broad, the rules are designed to exclude extraneous matter that is not relevant to the claims or defenses in the case. To the extent a party believes that a discovery request demands irrelevant information, it has a right to object to that request under FRCP 33 and 34.275 In cases of continued disagreement, the discovery dispute is resolved by a judge, magistrate, or designee of the court, such as a special master.

During trial, the FRE safeguard against the consideration of extraneous or irrelevant material, even material that may be fully subject to discovery under FRCP 26. As an initial matter, FRE 401 requires that evidence be relevant (i.e., the evidence make the existence of a material fact “more probable or less probable than it would be without the evidence”) to be admissible.276 Judges have the discretion to exclude relevant evidence if its probative value is “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.”277 Parties may file motions in limine to alert the judge to evidentiary issues before trial, including disputes regarding the relevance and admissibility of evidence. During trial, counsel may raise objections to documents and testimony (including expert testimony) before they are admitted into evidence.

In an FTC administrative proceeding, which proceeds before an Administrative Law Judge (ALJ), the admissibility of evidence is governed by Rule 3.43 of the Commission’s rules, as opposed to the FRE.278 Under Rule 3.43, “[r]elevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded.”279 However, relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”280 Like the FRE, the Commission’s rules allow the parties to raise objections to evidence, which are ruled on by the ALJ.281

The parties are limited to evidence admitted by the ALJ in administrative proceedings. The adjudicative rules of the Commission—as interpreted by the Commission, the courts, and ALJs during litigation—are the authority under which proceedings are conducted. However, since many adjudicative rules are derived from the FRCP, the latter is often consulted for guidance and interpretation of Commission rules where no other authority exists. The ALJ, for example, may apply the FRE where appropriate (e.g., to exclude unreliable evidence).

United Kingdom – Competition & Markets Authority (CMA)

The CMA’s Guidance on the CMA’s Investigation Procedures in Competition Act 1998 Cases (Guidance)282 provides opportunities for both the agency and the parties to examine and consider the information in the record and, if necessary, provides a procedure for the parties to lodge complaints about the CMA’s procedures or handling of the investigation (which may be

275 See FED. R. CIV. P. 33-34.
276 FED. R. EVID. 401.
277 FED. R. EVID. 403.
278 16 C.F.R § 3.43.
279 Id.
280 Id.
281 Id. § 3.43(g).
applicable to the inclusion of certain evidence in the record, provided the issue is procedural rather than substantive).

For example, in a Phase 1 merger investigation, the CMA informs the parties of any third-party evidence on which it wishes to rely in sufficient detail to allow them to respond (in Phase 2, third-party hearing reports and other submissions can be published subject to reaction of confidential information). The CMA’s jurisdiction and procedure guidance states that it will not rely on self-serving statements from any parties and will in particular seek corroborating evidence (particularly internal documents) from all sides to support relevant arguments. The CMA is therefore aware of the possibility of irrelevant, weak or erroneous evidence and can disregard and police it of its own accord.

Generally, the CMA discloses key submissions to respondent parties, albeit redacted to take account of confidential information, which gives those parties the chance to review and respond to the submissions and highlight if they contain inaccuracies or misleading information. The CMA can then review the submissions again in light of the responses provided.

Once a formal investigation has been opened, any complaints about the CMA’s procedures or how investigations are handled may be made in writing to the Senior Responsible Officer in the first instance, along with copies of any relevant supporting documents or correspondence. Unresolved complaints may be referred to the independent Procedural Officer. The role of the Procedural Officer does not prejudice a party’s rights in respect of judicial review and/or any appeal before the Competition Appeal Tribunal.

The Procedural Officer must give notice of his or her decision to the complainant within twenty working days following receipt. The scope of the Procedural Officer’s remit includes requests relating to confidential treatment of information in the CMA’s file, or its disclosure, the dates of hearings or the deadlines for requests for information, and “other significant procedural issues” that may arise during the course of an investigation.

The decisional practice of the Procedural Officer, however, expressly states that the Procedural Officer’s jurisdiction does not extend to any issues which relate to substantive matters (e.g., the nature of an alleged infringement, the potential application of the prohibitions contained in the Competition Act, and the level of any penalty proposed to be imposed).

Generally, challenges relating to the evidence on which the CMA has relied in an infringement decision, or to a final decision concerning its confidentiality, should be brought under the judicial review and/or appeals procedure.

Chile – Fiscalía Nacional Económica (FNE)

The FNE—either ex officio or upon request of the investigated parties—may remove from the investigation extraneous matters when these are not related to the investigation. There are no

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283 Id. ¶ 15.3.
284 Id. ¶ 15.4.
285 Id. ¶ 15.12.
287 GUIDANCE, supra note 282, ¶ 15.4.
specific rules for exclusion of extraneous matters, but there is a related rule. In practice, extraneous matters could be excluded (to a limited extent) on case-by-case basis by the FNE founded on the reasonableness of the request made by the parties. When opening an investigation, the FNE must inform the investigated entities, stating the name of the official, the applicable rules, and the economic activities and markets which will be investigated. This notification could be used, in theory, upon request of the parties and if accepted by the FNE to potentially exclude matters that are not related to the market or activities stated in the resolution. The applicable rule is Article 39 letter h) of DL 211 (which empowers the FNE to request information that it deems necessary to individuals). It includes a right to refuse when such delivery of information entails harm to its interest or to the interest of third parties. There has to be a request by the parties and the Antitrust Court decides after receiving FNE’s opinion. The standard for this procedure is high, because actual harm in the delivery of certain information must be proven, and the mere argument of extraneousness (or work load to collect extraneous matters) is not enough.

Given the high standard in practice, the scope for excluding extraneous matter from the record is limited and the opportunity is presented only when parties approach the FNE with a reasoned request to exclude matters, and when that request is accepted by FNE, which is neither specific nor enforceable.

Taiwan – Fair Trade Commission of Taiwan (TFTC)

The relevant laws and regulations lack provisions that would allow parties an opportunity or a right to exclude extraneous matters from the record. Since there is no clear procedure for doing so, parties to a great extent will depend on the TFTC’s experience and discretion. Notably, if any extraneous matters can qualify as confidential information, such as trade secrets, then parties can request protection from disclosure. This includes any material submitted by a third-party in the course of a TFTC investigation. If a claim of confidentiality is made, there is normally no basis for challenge by the TFTC or the respondent parties to this claim, although the TFTC can nonetheless rely on these materials in reaching a decision. The parties are thereby rendered unable to challenge the relevance of such materials.

In practice, there is a mixed experience of success and failure. For instance, in some past global cartel cases, where parties had concerns whether information provided in exchange for leniency would be used to cause extraterritorial effects, parties’ counsel have successfully requested that the TFTC remove—or at least not disclose—some information. However, without clear provisions or procedures on point, parties cannot always rely on their requests. In other cases, decisions on the materials to be included in the record are seemingly arbitrary, both as to materials to be included and excluded from the record, with no clear basis for decision. Thus, no specific and enforceable means to exclude extraneous material appears to exist.
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<td><em>Off-the-record communications with decision-making officials by the parties or their counsel or other agents or representatives should be prohibited throughout proceedings.</em></td>
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**Jurisdictions Evaluated:**
- Japan
- Mexico
- Brazil
- European Union
- South Africa

**Japan – Japan Fair Trade Commission (JFTC)**

The Antimonopoly Act (AMA) requires that JFTC officials duly record all investigative measures, and the Guidelines on Administrative Investigation Procedures under the AMA emphasize ensuring the “appropriateness of the procedures” and the “discipline and dignity” of officials’ conduct. These requirements generally are observed and upheld. The JFTC is viewed as an agency that conducts interactions with parties within the confines of the investigative procedures in a professional manner. It is generally considered that the JFTC does not engage in any “off-the-record” communications regarding the outcome of an investigation.

**Mexico – Comisión Federal de Competencia Económica (COFECE)**

The current Statutory Framework now contemplates important restrictions regarding the rules of contact with case handlers or decision-making officials, especially with certain bureaus or offices within the Enforcers (i.e. Board of Commissioners). Such restrictions apply to all kinds of procedures, including investigations against unlawful conduct, guidance procedures, and merger control, among others. In addition, the Internal Regulations of the Enforcers provide for additional restrictions for case handlers or decision-making officials when dealing with involved parties or practitioners.

In the case of contact with Commissioners, an interview must be requested in writing via email. All Commissioners are invited to the meeting and at least two must attend for it to be possible. A record is kept, noting the participants, place, date, start and end time, and matters discussed. Interviews are recorded and saved in electronic files. Similarly, in case of contact with other public officers of COFECE, including case handlers, at least two of such public officers must be present at the meeting, which must be requested in writing via email. A record is kept, noting the participants, place, date, start and end times, and matters discussed.

Case handlers and decision-making officials apply and respect the Best Practice, but the new practice has created certain issues given their blanket application and the fact that not all types of investigations are of the same nature (i.e., a cartel investigation vs. merger control). In some

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types of investigations—for example merger control proceedings where remedies may be offered—frequent and direct contact with the decision-making officials (especially the Board of Commissioners) is vital. Remedies need to be accepted by the Enforcers prior to the issuance of a final resolution; if they are rejected, the parties do not have the opportunity to offer amendments or changes. Therefore, the new contact rules provided in the Statutory Framework are effective in certain types of procedures but have raised additional complexities in others.

**Brazil – Conselho Administrativo de Defesa Econômica (CADE)**

There are no rules, under the Brazilian Competition Law (Law nº 12.529/11) or its regulations prohibiting off-the-record communications. In practice, off-the-record communications do not happen frequently in CADE’s proceedings. CADE has historically maintained on-the-record communications between decision-making officials and the parties, including their counsel or other agents or representatives. In addition, CADE has a policy of maintaining transparency in its communications. CADE’s website contains a section dedicated to publishing the agendas of Authorities, which includes the date, time, duration, and subject matters of meetings with the CADE’s president, cabinet members, and other members of authority (with exception made for investigations still subject to confidentiality). Other meetings of lower level officials are not routinely recorded.

**European Union – European Commission DG Competition**

The European Commission (EC) tries to keep records of communications it has with parties during an investigation. In practice however, third-parties can sometimes influence the EC through informal contacts and off-the-record communications at various levels of DG Comp and the College of Commissioners. For example, Microsoft was concerned about off-the-record communication between the EC and Microsoft’s long-time competitors, and accused the EC of “encouraging and facilitating these communications to occur in the dark, and without any record of the content of the communications apparently being kept.” The Advocate General of the Court of Justice, Nils Wahl, recently addressed this issue in its opinion in the *Intel* case, where he considered Intel’s argument that, in the course of its investigation, the Commission failed to make a proper note of the meeting with a key witness from one of the customers. Wahl concluded that the information about the meeting contained in the Commission’s file was indeed insufficient and argued that any meeting between the EC and third parties, whose purpose is to collect information on an investigation, should be seen as an interview and properly recorded. This would ensure that the EC keeps a written record of the meetings’ substance in accordance with Article 19 of Regulation (EC) No 1/2003. Some have criticized the EC for making an artificial distinction between formal and informal communication, and call for the Court of Justice’s intervention

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against such a practice. In other cases, parties are known to engage lobbyists in an effort to influence the Commission members, particularly Commissioners in interested Member States.

South Africa – Competition Commission (SACC)

As a general rule, all communication with the SACC is “on the record,” and the SACC is obligated, in terms of Rule 57 of the Competition Tribunal Rules, to ensure that a proper record is kept of all information provided to the SACC during the course of its investigation, including inter alia, all correspondence between the parties and the SACC.

Parties, however, are entitled to engage in “without prejudice” settlement negotiations with the SACC. The correspondence and information provided to the SACC for purposes of “without prejudice” discussions will not form part of the record.

In practice, the SACC generally does not include minutes of meetings or telephonic engagements in the record and does not include email correspondence in its “record of proceedings” and, therefore, parties must ensure that all communications with the SACC are properly recorded and presented to the Tribunal.

It is also an offence under section 70 of the Act to obstruct or unduly influence any person who is exercising a power or performing a duty in terms of the Act.

The role of ministerial intervention, however, particularly in merger control, has resulted in significant ministerial influence. It is apparent that the Minister of Economic Development, under whose auspices the competition authorities fall, has a direct influence on the SACC’s decision-making process. This has resulted in some merging parties opting to lobby the Minister and address the Minister’s concerns as opposed to rather engaging on those of the SACC. The Anheuser-Busch InBev SA/NV / SABMiller PLC merger is one such example. The merger parties agreed to substantial non-merger specific remedies with Minister Patel in order to pave the way for an expedited large merger approval—which was approved within six months (way before other contested large hearings which took up to eighteen months to finalize). In a parallel transaction, the Coca Cola Beverages Africa Ltd and Various Coca-Cola and Related Bottling Operations merger, the SACC recommended to the Tribunal that the transaction be approved subject to certain conditions. Following ministerial intervention, the SACC, at the Tribunal hearing, requested that more onerous conditions be imposed than previously recommended, as a result of ministerial influence in the SACC’s decision-making process.

Accordingly, the distinction between independent third-party intervention by the Minister and the Minister playing a direct role in the SACC’s decision-making process has been muddled. In terms of the Competition Amendment Bill which may be brought into effect, it expressly grants the Minister a right to participate in the competition decision making process. This further increases the risk of third parties seeking to lobby the Minister to intervene in the competition process.

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295 LM211Jan16.
Counsel for respondents should be permitted to introduce all relevant evidence, argument and expert analysis on all material issues (subject to reasonable administration of proceedings – e.g., limits on merely cumulative evidence, reasonable requirements as to timeliness and/or sequence of submission).

Jurisdictions Evaluated:
- United States
- Ukraine
- Colombia
- Korea
- China

United States – Department of Justice (DOJ) and Federal Trade Commission (FTC)

While the DOJ and FTC (the Agencies) will often issue voluntary or compulsory information requests and may also seek to interview executives of the parties and knowledgeable third parties (e.g., industry participants, suppliers, and customers), the Agencies also rely on additional information provided by the parties. Respondents are permitted, and often encouraged, to submit documents, information, and analysis that may augment agency staff’s understanding of the competitive dynamics of a particular industry or transaction.

Procedures also allow party evidence in court and administrative proceedings, where formal rules govern the introduction of evidence by the parties. Pursuant to the Federal Rules of Evidence (FRE), respondents to antitrust proceedings in federal court are permitted to introduce all relevant evidence on all material issues, if its probative value is not “substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” This evidence includes many materials related to the subject matter of the proceeding, including but not limited to witness testimony, physical objects, demonstrative evidence, and audio or video recordings. Courts will admit analysis by qualified experts—in the form of written reports and oral testimony—if the analysis meets the requirements of FRE 702.

Similar evidentiary rules apply to FTC administrative proceedings. Under the FTC Rules of Practice 3.43, respondents may introduce all “[r]elevant, material, and reliable evidence,” including expert analysis. It remains within the discretion of the presiding administrative law judge to exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

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296 Fed. R. Evid. 403.
297 Fed. R. Evid. 702 (identifies 4 factors that must be present for expert testimony to be admissible: “(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case”).
298 16 C.F.R § 3.43.
299 Id.
Although not formally bound by the FRE, in practice, administrative law judges tend to follow the FRE, or at least use them to assist in interpreting the FTC Rules of Practice relating to evidence.

**Ukraine – Antimonopoly Committee of Ukraine (AMC)**

A case review involves the following steps. Initially, the AMC informs defendant(s) that a case has been initiated and asks questions that it deems necessary to collect the relevant evidence. Once the evidence is collected, and it is sufficient—in the view of the AMC—to support a violation for the defendant, the AMC will prepare and issue a submission with a preliminary conclusion on the case. A copy of the submission is sent to the defendant. After receipt, the defendant may elect to take advantage of a number of procedural rights prescribed by the law, including 1) review the file (except for information with limited access); 2) provide evidence, oral and written clarifications; 3) file motions; 4) receive a copy of the decision in the case (except for information with limited access); 5) present position and objections; 6) participate in the case hearings; and 7) appeal the decision in accordance with procedures prescribed by law. Although the rights of submission occur after the preliminary conclusion of the AMC is offered, this process generally allows the parties broad discretion to introduce evidence and arguments in advance of a first instance decision.

**Colombia – Superintendencia de Industria y Comercio (SIC)**

Article 52 of Decree 2153 of 1992 allows the investigated parties to submit and request any evidence they deem relevant for their contentions. In this sense, the parties may submit any type of documents, request and offer testimonies of employees, officials or experts, and, in general, introduce all relevant evidence to support their arguments. The submission and request of evidence must be made within the twenty business days following the decision by the Deputy Superintendent for the Protection of Competition to open a formal investigation. In practice, this term is strictly observed, and submissions of information/evidence outside of this period may be rejected. Thus, while the scope of submission generally is broad, the time period is very narrow, which in practice limits the ability of parties to present full argumentation and evidence prior to a first instance decision. In regard to evidence that must be approved by the authority prior to admission (i.e., evidence that cannot simply be submitted by the parties, such as witness testimony), the Deputy Superintendent issues a decision in which he either accepts or rejects the requests. The latter may occur if the evidence requested is deemed to be irrelevant or impertinent to the investigation. A rejection decision may be appealed by the party whose request was denied.

**Korea – Korea Fair Trade Commission (KFTC)**

Nothing in the Monopoly Regulation and Fair Trade Act (MRFTA) and related rules, regulations and guidelines explicitly discusses this issue. At the same time, nothing under the MRFTA and related rules prevents respondents or their counsel from introducing or submitting information to KFTC staff investigators or the Commission. In practice, respondents or their counsel (and formal and informal third-party intervenors) do submit to staff investigators materials they feel relevant at whenever time they feel appropriate.

This is generally true during both the pre-formal complaint (the issuance of an Examiner’s Report or Statement of Objections) and post-formal complaint stages. As a practical matter, respondents or their counsel generally have more effective opportunities to submit their defense...
arguments and support while the matter is still in the investigation stage. Even then, because staff investigators typically do not clearly articulate their concerns and theories of the case, at times respondents and their counsel may hesitate to “shoot in the dark,” i.e., mount a vigorous defense not knowing what particular points to respond to or rebut. Moreover, on occasion, staff investigators have issued an Examiner Report without warning or on short notice.

Once staff investigators issue an Examiner’s Report, the KFTC typically provides a very short period of time for respondents to submit their reply or rebuttal briefs, even following very long and complex investigations. This poses a serious issue and hardship, particularly to foreign respondents due to translation issues. Oftentimes, translating Examiners’ Reports into English (or whichever foreign language) and then also translating draft reply briefs into English for foreign respondents’ review entails a significant amount of time. On occasion, the KFTC has refused to grant even reasonable requests for an extension, citing internal scheduling conflicts. In practice, this severely limits the parties’ ability to present argumentation and evidence in response to the allegations.

In addition, what KFTC investigators actually do with information submitted by respondents or their counsel varies. If staff investigators do not agree with such defense arguments and factual evidence, staff investigators may simply exclude these from the Examiner’s Report (or Statement of Objections) or discuss them in only a perfunctory manner.

**China – the National Development and Reform Commission (NDRC); State Administration of Industry and Commerce (SAIC); & the Ministry of Commerce (MOFCOM)**

Article 43 of the Anti-Monopoly Law (AML) provides that targets have a right to voice their opinions, and that authorities shall verify the facts, reasons and evidence provided by the targets. Both the NDRC Procedural Rules (Article 11) and the SAIC Procedural Rules (Article 13) contain language identical to AML Article 43. MOFCOM also has this language in its procedural rules for handling “failure to file” cases (Article 11).

In practice, the authorities routinely request that targets provide more evidence and permit targets to submit evidence either in written form or in presentations during in-person meetings. The authorities allow targets to introduce all sorts of evidence, argument, and analysis and are flexible regarding how such materials are presented. However, because the authorities are not forthcoming about the specific concerns or allegations of the investigation and are not obliged to respond as to how they view the targets’ evidence, it is not always effective for targets to introduce particular evidence, arguments, or analysis. Moreover, requests for meetings with the authorities are not always granted and possibly can cause further delay. Among the three, MOFCOM and SAIC have been more willing to hold in-person meetings with targets.

Although there has been significant progress by all three authorities in terms of their willingness to engage targets, one other issue remains a big challenge for at least some practitioners—foreign counsel is on many occasions limited in their participation. For example, foreign counsel has been permitted to attend certain meetings with the authorities, but not allowed to communicate with their clients during those meetings. And it is not always clear when their participation will be allowed.

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**Practise No. III.E**  
Assessing Contentions of Infringement

**Description**

All evidence, arguments and expert analysis placed in the record should be subject to challenge on the basis of authenticity, relevance, materiality and/or other potentially significant aspects. All documentary and testimonial evidence, argument and analysis should be subject to challenge by means tailored to provide tests of credibility, completeness and weight.

1. Allowing counsel for parties to challenge inculpatory or opposing testimony by live cross-examination should be permitted to the extent feasible. In legal systems that do not present this opportunity, as in some administrative, inquisitorial and/or civil-law systems, other equivalent means for testing the quality and credibility of such testimony should be made available, such as questioning of witnesses by the independent decision maker sua sponte or upon request of the parties.

**Jurisdictions Evaluated:**
- United States
- Canada
- France
- Japan
- Chile

**United States – Department of Justice (DOJ) and Federal Trade Commission (FTC)**

Respondents in court proceedings have an opportunity to challenge all evidence, arguments and expert analysis, through both objections to the admission and consideration of evidence and cross-examination of witnesses during pre-trial depositions and in trial. This process is governed by the Federal Rules of Civil Procedure, which govern civil proceedings in U.S. district courts with the purpose of securing “just, speedy, and inexpensive determination of every action and proceeding,” 302 and the Federal Rules of Evidence, which govern the introduction of evidence in U.S. federal trial courts.

After information has been offered for evidence, and before it is admitted for consideration by the court, respondents to litigation brought in federal court may make a variety of objections to the evidence, including but not limited to irrelevance, 303 cumulative, 304 lack of authentication or identification, 305 prejudice outweighs probative value, 306 inadmissible opinion of a lay witness, 307 privileged, and inadmissible hearsay. 308 Additionally, respondents have an opportunity to cross-examine all witnesses—within the reasonable discretion and control of court—regarding any topic or subject matter addressed on direct examination and all matters affecting the witness’s credibility. 309

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303 Fed. R. Evid. 401-402.
304 Id. at 403.
305 Id. at 901.
306 Id. at 403.
307 Id. at 701.
308 Id. at 801.
309 Id. at 611.
Canada – The Competition Bureau (CCB)

The CCB has different procedures for civil and criminal cases. In the criminal context, if the CCB believes it has gathered sufficient evidence through a criminal investigation, it will refer the matter to the Director of Public Prosecutions (DPP) with a recommendation to prosecute. The case will then be heard by the Federal criminal courts, as the Competition Tribunal (the Tribunal) does not hear criminal cases. Once the DPP commences a criminal prosecution, all of the rights available to an individual defending a criminal action in Canada will apply. These include the right to make a full and fair defense, which allows the accused to challenge the CCB’s evidence in front of an independent judge through full rights of authentication, cross-examination, etc.

When the CCB refers a matter to the Tribunal following a civil investigation, the Tribunal’s Rules of Practice (the Rules) will apply. To oppose an application, parties must serve a response on the CCB and file this response with the Tribunal within forty-five days of being served the notice of application. During the (documentary and oral) discovery phase that follows, the respondent will be provided with all relevant documentary evidence in the CCB’s possession or control subject to any applicable legal privilege. The Tribunal and courts have, historically, given broad scope to public interest privilege claims by the Commissioner, typically barring respondents’ access to the CCB’s internal investigation notes, other than in summary form. A recent Federal Court of Appeal decision has rejected the Bureau’s ability to continue to claim such a broad class privilege and thereby avoid disclosure; the Bureau can still make a claim for public interest (or “informer”) privilege, but must establish its position on a document by document basis. It is anticipated that the Bureau’s disclosure will be more expansive in the future (although the Bureau may also respond with broader claims to litigation privilege).

Both the CCB and the respondent can rely on documents, witness statements and industry/expert evidence in making their case at a hearing before the Competition Tribunal (or in limited cases, the Federal Court). Parties before the Tribunal have the ability to test all evidence and can cross-examine witnesses, including expert witnesses.

Finally, in the course of a private action under section 36 of the Act, the defendant can challenge the evidence presented by the plaintiff under the common law and the rules of civil procedure in the province where the action is taking place. Such rights at trial include cross-examination of fact and expert witnesses.

France – Autorité de la Concurrence (Autorité)

Once a Statement of Objections is received, the parties are given access to all the elements in the record, if need be in non-confidential versions. Throughout the investigation, the parties have the possibility to produce evidence, briefs, testimonies, expert/economic analysis in support of their arguments and/or against the arguments of the Autorité and/or the other parties.

Meanwhile, the Investigation Services of the Autorité may question the companies’ representatives and the current or former employees involved in the anticompetitive practices. Parties may also request that a specific person within their company or within another involved company be heard by the Investigation Services.

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Once the investigation is closed, the members of the College are granted access to the entire case file before the oral hearing. The procedure before the Autorité is mostly written, and all the elements are provided in written form in the record. Before the hearing, the parties’ counsel has the opportunity to test and respond to the evidence submitted in the Statement of Objections by submitting briefs. At the hearing before the College, the parties’ lawyers and economists and companies’ representatives may intervene if they wish. In addition to submitting briefs before the hearing, the parties’ lawyers may test the evidence during the hearing as well. The members of the College may ask the parties questions during the hearing, and typically do so after the Investigation Services have submitted their observations and after the parties’ pleadings. However, the College does not (re)interview people involved in the anticompetitive practices during the oral hearing; no live cross-examination is permitted at the hearing.

**Japan – Japan Fair Trade Commission (JFTC)**

In JFTC investigations, the sole opportunity to challenge evidence in the record is upon notice of a draft cease and desist or surcharge order at the close of the investigation, at which point the JFTC will disclose evidence in the record.312 “All” evidence placed in the record is not made available to the investigation target, only the evidence that the JFTC relied on to support its draft order—in other words, not including exculpatory evidence.313

Furthermore, any challenge to the authenticity, relevance, materiality or other aspects of the evidence that is disclosed can be raised as part of the party’s defense in submissions to the investigation team (due within a relatively short period of time after receipt of the draft order) or at the hearing on the merits.314 There is no opportunity to review evidence in the record prior to this penultimate stage, and there is no interlocutory or separate process to challenge the evidence disclosed. However, it is possible to raise objections based on procedure, e.g., coercive methods, prior to the issuance of the draft order,315 and some practitioners have had productive discussions on such procedural topics with the JFTC prior to such stage.

The JFTC does not permit photocopying of third party statements in the record, although notetaking is permitted.316 As a practical matter, this unusual procedural restriction may make it more difficult to challenge third party statements.

**Chile – Fiscalía Nacional Económica (FNE)**

There is no a particular moment where the parties have access to the investigative file, but rather they have to request elements of the file, through Law No. 20,285 Access to Public Information (which is applicable to all public institutions). Normally, a great part of the file is redacted (names of the parties, addresses, requests for information), and there is little information available for public consultation. In some cases, the investigation team may also not disclose exculpatory evidence.

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313 Id.
316 See Antimonopoly Act, art. 52.
that could be used by the investigated companies before or after the FNE delivers its assessment. The parties may redact their own pieces of information when delivering them to the FNE, and as general principle stated in Article 39 a) of DL 211, parties would have access to the investigative file, except for the confidential pieces. There is no procedural opportunity to challenge redactions or decisions to withhold pieces within antitrust regulation.

In practice, parties to an investigation may request the investigative file (as a whole) and the FNE should deliver the investigative file. However, very little information can be obtained through these requests. If there were any confidential information, it would be redacted. Parties are not able to know by themselves the full content of the investigative file, because it is not public.

The parties subject to an investigation, prior to a final binding decision by the FNE, may not have complete access to the information that has been provided by third parties, due to assertions of confidentiality. Moreover, depositions rendered by third parties cannot be accessed, given that only the deponent is entitled to access the record.

In practice, parties may use the limited information obtained from the investigative file and prepare a brief or request a meeting in order to expose their arguments based on the additional data, in order to convince the FNE about a certain fact which may be relevant for its decision.
Practice No. III.F
Assessing Contentions of Infringement

Description
Presentation of or challenges to evidence, arguments and expert analysis should be made in the presence of the first-instance decision-making official(s).

1. For reasons of efficiency, certain procedural stages may call for written submissions by counsel, such as briefing of a request for summary disposition, a request for narrowing of the issues, or upon final submission of the matter for decision. Where submissions are made in writing, counsel for respondents should have the opportunity for oral presentation of argument before the decision maker(s).

Jurisdictions Evaluated:
- Belgium
- United Kingdom
- Mexico
- Egypt
- Poland

Belgium – Belgian Competition Authority (BCA)

During the investigation phase, the targeted company and/or individuals have different opportunities to challenge evidence, arguments and expert analyses before the first instance decision makers (or, alternatively, before an independent third-party decision maker). The procedure provides for both oral and written submissions.

For example, in situations where the investigation involves a dawn raid (i.e., where the authorities search the target’s premises), the BCA’s Guidelines with regard to Inspection Procedures lay down in detail the procedure for challenging the authority of the officials to seize or copy certain documents (either because they fall outside the scope of the mandate or because they are protected by legal professional privilege (LPP)).

In such cases, the contested documents are placed in a sealed (electronic) envelope and the target company is invited to submit within ten working days its written arguments supporting the LPP and out-of-scope claims. The target is then invited to an oral hearing in which a third-party independent auditor provisionally decides whether to include the contested documents in the case file. If after that first hearing the disagreement persists, the BCA’s working practice is to grant the target company an additional ten working days to present further arguments in support of its pleas. In the subsequent second oral hearing, the third-party independent auditor then makes a final decision on the validity of the outstanding claims.

In any case, upon receipt of the Statement of Objections (SO), the companies and/or individuals subject to the investigation are granted access to the investigation file, including all non-confidential versions of documents and information obtained during the investigation. They are then invited to submit in writing their responses to the upheld allegations.

318 Art. IV.42. §4 Code of Economic Law (Wetboek Economisch Recht).
Finally, and before the adoption of a final decision, the targeted companies and/or individuals can respond to the draft decision presented by the responsible auditor directly to the Competition College. The Competition College makes the final decision in merger cases, but its decisions can be appealed (note that in simplified merger filing cases, the members of the Commission of Competition Prosecutors can make decisions, which can also be appealed). After written submissions, the Competition College hears evidence directly from the targeted companies and/or relevant individuals. In addition, the Competition College can decide to hear from any natural or legal person that it deems necessary or that shows a sufficient interest in the proceedings.

**United Kingdom – Competition & Markets Authority (CMA)**

Guidance on the CMA’s Investigation Procedures in Competition Act 1998 Cases (Guidance) provides that the addressee of a Statement of Objections (SO), through an oral hearing, may highlight directly to the Case Decision Group (CDG) the issues of particular importance to its case and which the addressee has set out in its written representations. The CDG is responsible for taking decisions on the existence of an infringement and the appropriate amount of any penalty. The oral hearing may also provide a useful opportunity for the addressee to clarify the detail set out in its written representations and to respond to questions posed by the CDG and by other members of the CMA staff present.

CDGs are appointed when the CMA has issued an SO under the Competition Act 1998 rather than in merger cases. In such cases, addressers of the SO have the opportunity to attend an oral hearing but do not need to take it up. The general rule is that an addressee should only raise points at the oral hearing that it has already submitted in writing. It is therefore a “real” opportunity but not a cross-examination as might be available in other contexts (e.g., high court litigation). Underlining this is that an agenda for the hearing is agreed in advance (or decided by the Procedural Officer who will chair the hearing if no agreement is reached ten working days before the hearing)—which is limited scope and therefore no “surprises” in the oral hearing.

In the merger context, there are no hearings during phase 1, but there is an “issues meeting” in more complex cases. The issues meeting is not a hearing but is the closest equivalent to one during the phase 1 process. The CMA case team and, usually, the phase 1 decision maker attend, along with a CMA official from outside the Merger Unit who acts as “devil’s advocate” on the case team’s recommendations (that advocacy is normally conducted behind closed doors at the CMA rather than before the parties). While parties cannot quiz the CMA team on their evidence at the issues meeting, they can put forward their views persuasively on such matters.

If a case is referred to phase 2, there is a main party hearing during that phase, normally towards the end of the assessment phase, when the CMA has published an issues statement, the parties have responded in writing and the CMA has sent an annotated issues statement to the parties. Generally, there are separate hearings for each party, but if the merger is completed there

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319 Cf. Art. IV.45 §1, §3 and §4 CEL.
320 Cf. Art. IV.45 §5 CEL.
322 Id. ¶ 12.16.
323 Id. ¶ 11.30.
324 Id. ¶ 12.17.
might be an additional joint hearing. The hearing gives the parties the opportunity to meet the CMA team directly; the entire Inquiry Group and members of supporting case team typically attend. The CMA team pre-prepares questions to put to the parties on matters raised in their response. While lawyers and other advisors can attend, the CMA wants to hear from party representatives directly. If the parties are unable to respond to a question they can respond in writing after the hearing. Such hearings are therefore typically a “dialogue” between the CMA team and the businesses—they are (like under the CA98 equivalent) not cross-examination opportunities so much as ones for clarifying arguments and issues. The majority of questions normally come from the CMA to the business (rather than the reverse).

**Mexico – Comisión Federal de Competencia Económica (COFECE)**

**Trial Phase:** In certain types of procedures (investigations against potential violations of the FECL), alleged offenders have the legal right to challenge allegations from enforcers as part of the first-instance or administrative procedure (investigation phase). Once the investigative phase is terminated, alleged offenders may be served within sixty business days with a written Statement of Objections that will contain, among other things, the monopolistic activities the defendant allegedly committed and the evidence that supports such allegations. With such Statement of Objections, the trial phase begins.

Alleged defendants will have forty-five business days to file a response including all necessary evidence. Once all the evidence has been gathered and presented before COFECE, it shall provide ten business days for the Investigative Authority and the parties to provide their final arguments in connection with the procedure. Once such arguments are filed, or when the period expires, the respective file is deemed to be complete. Ten days after all the parties have filed their final arguments, the defendant(s) or the parties that filed a claim with COFECE denouncing the investigated practice, may request an oral hearing with the Plenary of COFECE to make the statements they deem appropriate. Any third party that filed a claim denouncing the investigated practice may participate in the proceedings.

When the file is complete, COFECE issues its final resolution within forty business days. A COFECE Commissioner, by instructions of its Chairman, receives such file for his/her analysis and will be responsible for drafting and submitting a proposal of final resolution to the Plenary. The Plenary will hear the challenge of evidence directly and will then approve, reject or modify the proposal.

**Constitutional Challenge:** Against COFECE’s final resolution, the defendant may file a constitutional appeal before a specialized antitrust Federal Court in order to claim that the defendant’s party’s constitutional rights were denied or violated. Such appeal does not suspend the effectiveness of such final resolution unless it imposes a fine, in which case, only the fine may be suspended during the appeal process.

When referring to the Trial Phase, the Statutory Framework generally complies with the Best Practice as such procedure is handled before the same enforcer. However, regarding the Constitutional Challenge, there is no administrative challenge that individuals may file against acts or determinations from enforcers, forcing particulars to challenge before Federal courts which is out of the scope of the enforcers.
Egypt – Egyptian Competition Authority (ECA)

The ECA does not permit access to any part of its investigatory file prior to referring the matter to the prosecutor for purposes of criminal investigations. Therefore, a target is not afforded an opportunity to consider or challenge the evidence which the ECA has obtained from other sources (as the ECA does not disclose such evidence to the target or provide the target with access to such evidence).

However, a target is entitled to present evidence and make submissions to the ECA during the course of the investigation. In practice, these submissions are limited as a target will not have insight into the evidence upon which the ECA has based its contention of infringement. Engagements with the ECA prior to a referral to the prosecutor would be predominantly high-level discussions aimed at settling the matter without the need for a referral.\(^3\)\(^2\)\(^5\) If the ECA is intent on resolving the matter by way of a settlement, the ECA will in practice provide the target with additional insight into the case against it to enable the target to respond or remedy any potential concerns which the ECA may have. Once the matter has been referred to the prosecutor, a target would then be able to rebut all the evidence against it.

Poland – Office of Competition and Consumer Protection (OCCP)

In Polish administrative proceedings, the general approach is to conduct proceedings in writing. The parties to the proceedings therefore present their defense mainly in written submissions. In practice, when the OCCP’s investigation is coming to a stage of issuing the final decision, i.e., all evidence was collected and considered and a Detailed Justification of the Charges was issued, the OCCP sets a deadline for the presentation of the written defense by the parties.

In the course of OCCP proceedings, it is possible to request a meeting with the officials directly engaged in the case. The representatives of the case team are typically present during these meetings, as well as the director of a particular internal unit (e.g., a merger control or antitrust department) who supervises the proceedings and a representative from the Department of Economic Analysis. However, if such meeting is granted, it is limited to presentations by the parties, with no real opportunity to probe the OCCP’s theory evidence or concerns. According to the OCCP’s Rules for Contact with Enterprises, these meetings help the OCCP understand the parties’ position in all its details.\(^3\)\(^2\)\(^6\) The OCCP views these meetings as having a purely subordinate function, and, as such, they cannot be used to introduce new evidence. The OCCP’s unit director, working in consultation with the official in charge of the proceedings, decides within five working days following the OCCP’s receipt of a meeting request whether to grant the request. The basic criterion for assessing the justification for a meeting with the company (or its legal representative) is whether this meeting can reasonably be expected to move the proceedings forward.

In practice, such meetings are relatively common in more complicated cases. However, there is room for improvement in this respect since meetings mainly serve as an opportunity for the party(s) to present their position, and they do not offer a forum for engagement with the OCCP on its position or concerns, undermining the parties’ ability to effectively present/challenge evidence, arguments and expert analysis in the presence of the first-instance decision-making.

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\(^{3}\)\(^2\)\(^5\) Such high-level discussions would ordinarily originate with the lead investigator and be referred to the Chairman of the ECA. To the extent that a target wishes to initiate settlement negotiations, however, the target can approach the Chairman of the ECA directly.

official. Additionally, the first instance decision-makers (i.e., the President or Deputy President of the OCCP) are generally absent during meetings with the parties. There are exceptions to this in cases of substantial magnitude or when opposing views require discussion at a senior level (for example, if a headline consolidation is being opposed by the OCCP or a party wishes to respond orally to a statement of objections in an antitrust matter). Parties can also request the participation of first instance decision-makers, however, such requests should be made well in advance and include justification for their attendance.
Practice No. IV.A(i)  

First-Instance Decision

Description

Any assessment of infringement should be based only on matters of record as to which targets and their counsel have had full opportunity to respond.

Jurisdictions Evaluated:

- Canada
- European Union
- Zambia
- India
- Kenya

Canada – The Competition Bureau (CCB)

In Canada, what constitutes the “first-instance decision” (and correspondingly, the “record”) is somewhat unclear, since the Commissioner is not authorized to make decisions regarding civil or criminal matters. The Commissioner merely investigates and must initiate civil proceedings by filing an application with the Competition Tribunal or Court (as applicable) or refer criminal matters to the Director of Public Prosecutions (DPP). However, we address this practice with reference to the first-instance decision-maker Competition Tribunal (or Federal Court in limited circumstances).

When the Commissioner files an application seeking relief with the Tribunal or Court, this engages the full panoply of procedural rights available in a civil trial, including the right to know the case against them and to be heard. This includes the right to lead evidence and challenge evidence led by the Commissioner through rights of cross-examination of fact and expert witnesses. As such, the ultimate decision from the Court or Tribunal is subject, through a fully contested hearing, to a full opportunity by the target to respond and to challenge/add to the record on which the decision should be based.

In the criminal context, the first instance decision could be the Commissioner’s decision to refer the matter to the DPP to consider laying charges or the DPP’s decision to do so. At referral, while the Commissioner will typically inform the target why the referral action is being taken, and the Commissioner must provide a Report to Crown Counsel summarizing the evidence, there is no requirement to permit the target to respond or to challenge the contents of what is provided to the DPP (the “record” in this context). In contrast, at the time the DPP lays charges, this initiates a process through which the DPP must provide timely and complete disclosure of the case, consistent with the “Principles of Disclosure” set out by the Public Prosecution Services of Canada. Through the adjudication that follows, the target has a full opportunity to respond and to challenge and add to the record supporting the ultimate decision.

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327 Some would argue that, given the possibility to resolve civil matters through consent agreements—in which context the Commissioner often has considerable leverage—those “resolutions” are in the nature of a decision; in that context, there is no “record” (although the Commissioner is required by case law to have reached “conclusions”), and the parties’ opportunity is limited to meetings with Commissioner staff and management.

European Union – European Commission DG Competition

The European Commission (EC) adopts a decision “only on objections on which the parties concerned have been able to comment.”329 The Statement of Objections (SO) must set out the infringement’s legal assessment in such a detail as to ensure that the targets have an opportunity to contest their alleged infringement.330 Specifically, where the EC bases an infringement on a document, the SO must clearly cite the document so that targets have the opportunity to consider the document and provide their views thereto.331 Even in the case of a known document, the EC must make it clear that the document will be used as evidence in making its decision. Otherwise, the EC could be accused of contradicting the general principle that decisions should be based on facts that parties were able to comment on.332 The only exception is where the EC appends a document but does not mention it in the SO, and the target could reasonably deduce from the SO the conclusions that the EC intends to draw from that document.333 It is still recommended, however, to make express reference to a document.334 If the EC identifies new evidence that can extend the infringement after the SO’s issuance, it must issue a supplementary SO. The targets can respond to this new information in writing and at a State of Play meeting.335

In addition, although not legally required, in practice the EC generally provides the targets with information that is relevant to the calculation of fines imposed on them, including the relevant sales figures and the year(s) that are taken into account. The EC may also provide this information to the parties after the SO’s issuance. In both cases, the targets will have an opportunity to comment on the fine calculation.336

Zambia – Competition and Consumer Protection Commission (CCPC)

A notice of investigation, in the prescribed form, is sent to the target of the investigation to solicit a response. The target’s response and the CCPC’s subsequent investigations into the allegations of infringement culminate in a written Preliminary Report that explains the economic, factual and legal analysis relied upon. The target is normally afforded fourteen days within which to respond to the Preliminary Report. However, the target may request an extension of the time to respond. After the target submits its response, the CCPC prepares a Final Report which incorporates the target’s response.337 A copy of the Final Report is made available to the target for further comments (should the target wish to make any such comments) before submission of the report to the technical committee of the Board of Commissioners of the CCPC who will in turn

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334 EC PROCEDURE MANUAL, supra note 331, Module 11, § 2.2.1.
336 Id. § 85
337 The Final Report does not include all the evidence in the record. In some instances, reference will be made to the submissions of the merging parties in the application form, supporting documents and responses to additional information requests, if any. In other instances, the Final Report will include references to evidence received from third parties albeit only to a limited extent.
make preliminary findings on the allegations. The Board of Commissioners thereafter issues a detailed written decision, which constitutes the CCPC’s final findings.

Although the Competition Act does not expressly provide for oral hearings, a target may request to be present during the deliberations of the Board of Commissioners. The decision whether to allow such a request is solely at the discretion of the CCPC. Notwithstanding, the target may make oral submissions to the case officers when submitting responses to the Preliminary and Final Reports.

**India – Competition Commission of India (CCI)**

The CCI makes a final assessment of an infringement through an inquiry which involves consideration of the findings in the report of the Director General (DG) as well as the objections/suggestions to the DG report made by the targets. Under Section 26(4) of the Act, the report of the DG may be circulated to the targets, and the targets are permitted to submit their comments/objections to the findings in the report of the DG. This allows the targets (as well as the informant) an opportunity to address all findings of the DG’s investigation, including all material/evidence relied upon by the DG. Targets can also make use of the opportunity to point out further relevant documents/evidence which the DG has failed to consider.

The right to present fresh evidence before the CCI is limited as per the regulations. Regulation 43 of the CCI (General) Regulations, 2009 provides that “parties to the proceedings shall not be entitled to produce before the Commission additional evidence, either oral or documentary, which was in the possession or knowledge but was not produced before the Director General.” However, in certain cases where the CCI requires such information or the DG has not given sufficient opportunity to the party to adduce evidence, the CCI may permit additional evidence to be adduced. As per the CCI (General) Regulations, 2009, when such additional evidence is adduced it “shall be made available” to the other parties to the proceeding to afford them an “opportunity to rebut the contents of the said additional evidence.”

Under the Act and the regulations, the findings of the CCI are required to be based on the material on record, to which the targets and their counsel have had full opportunity to respond. However, in practice, there have been instances of deviation from this practice which led the Competition Appellate Tribunal (COMPAT) to set aside some orders passed by the CCI on the grounds of violation of principles of natural justice. For instance, in *Board of Control for Cricket in India v. CCI*, the COMPAT held that the CCI had “relied on the so called information available in the public domain without disclosing the same to the appellant” and CCI’s “failure to disclose the information/material proposed to be used by it for arriving at a finding on the issue of abuse of dominance and give an opportunity to the appellant to explain/controvert the same has not only resulted in violation of the principles of natural justice but also occasioned failure of justice.” The COMPAT also stated that where the CCI intends to differ from the findings recorded in the DG report, it has to give a specific “notice spelling out its intention to do so and give an opportunity of hearing” to the party concerned.

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338 Regulation 43(3) of the CCI (General) Regulations 2009.
339 The functions of the COMPAT now stand transferred to the National Company Law Appellate Tribunal (NCLAT).
341 Appeal No. 17 of 2013 judgment dated 23 February 20151 at para 24. This has been followed by the COMPAT in *Interglobe Aviation Ltd. (IndiGo Airlines) v. The Secretary, Competition Commission of India and Others* Appeal No. 07/2016, order dated April 18, 2016 and *Sunil Bansal & Others v. M/s Jaiprakash Associates Ltd. and Others* Appeal No. 21 of 2016, order dated September 28, 2016.
Kenya – Competition Authority of Kenya (CAK)

Under Section 35 of the Competition Act, the CAK must prepare a record of proceedings (i.e., submissions made) of the Hearing Conference. The record will be used as evidence of the submissions made during the Hearing Conference and will be considered by the CAK when making its decision.

The CAK’s ultimate decision, however, is usually based on a variety of sources, including, inter alia, information obtained during the CAK’s investigation, information obtained from third-parties, and the target’s own internal documents, such as minutes of board meetings or statements from employees. Accordingly, when making its decision, the CAK is generally not restricted to the information which has been formally placed on record. Furthermore, targets are not entitled access (in part or in full) to the CAK’s investigatory file at any stage during the investigation (including the Hearing Conference).

Accordingly, targets are often required to submit their representations or defense without having full insight into the CAK’s evidence or being provided with an opportunity to dispute or counter any evidence used by the CAK in reaching its decision. The CAK has, however, more recently provided targets with the evidence it relied upon in reaching its decision.

Lastly, section 35(5) of the Act affords the CAK the discretion to terminate the Hearing Conference if it is satisfied that a reasonable opportunity has been given for the expression of the views of persons participating in the conference. In practice, the CAK rarely uses its discretion to terminate a Hearing Conference. Furthermore, targets may also engage with the CAK after the Hearing Conference should they wish to do so.
Practice No. IV.A(ii)  
First-Instance Decision

**Description**  
The assessment should be in writing, explaining reasons for the assessment of evidence on each issue and the economic, factual and legal analysis relied upon.

**Jurisdictions Evaluated:**  
- United Kingdom  
- Canada  
- China  
- Korea  
- Taiwan  
- Kenya

**United Kingdom – Competition & Markets Authority (CMA)**

Guidance on the CMA’s Investigation Procedures in Competition Act 1998 Cases (Guidance)\(^{342}\) provides that the CMA will issue an infringement decision to each target the CMA has found to have infringed the law.\(^{343}\) Such infringement decision sets out the facts on which the CMA relies to prove the infringement and the action that the CMA is taking and addresses any material representations that have been made during the course of the investigation.\(^{344}\) The analysis of facts, the evidence, and the reasoning are typically extensive.

If the CMA imposes a financial penalty, the infringement decision will explain how the Case Decision Group decided upon the level of penalty, having considered the CMA’s statutory obligations in fixing a financial penalty\(^{345}\) and the target’s written and oral representations on the draft penalty calculation.\(^{346}\) The infringement decision may also direct the party(ies) to end the infringement.\(^{347}\)

**Canada – The Competition Bureau (CCB)**

When the Commissioner applies for an order, he or she must file (and serve on the respondent) a written application outlining the basis for the order, as well as the material facts and,


\(^{344}\) U.K. GUIDANCE, supra note 342, ¶ 13.8.

\(^{345}\) Competition Act 1998, § 36(7A).


\(^{347}\) Competition Act 1998, §§ 32-33. If an addressee fails to comply with the CMA’s directions, the CMA may seek a court order to enforce them under Competition Act 1998, § 34.
in most cases, a concise statement of the economic theory of the case.\textsuperscript{348} Once the application has been presented for decision by the Competition Tribunal or the Court (as applicable), the Tribunal or Court will almost invariably issue detailed written reasons supporting its decision, addressing each material issue raised in the Commissioner’s application, the relevant evidence, and the respondent’s defense, including the economic, factual and legal arguments advanced in the course of the adversarial proceeding. As parties have all had full participating rights (including to lead evidence and to test evidence presented by the other party), the Tribunal or Court has an extensive record from which to draw; typically, the decision will record, with respect to each contested material issue of fact and law, the respective parties position and evidence in support, following by the ruling.

In the criminal context, there are likewise two possible “first instance decision makers” and corresponding “decisions:” (i) the Commissioner in referring charges to the Director of Public Prosecutions (DPP); or (ii) the DPP in its decision to lay criminal charges. The Commissioner in referring a matter to the DPP has no obligation to provide reasons for decision, in writing or otherwise, to the parties. Nonetheless, the Commissioner is generally receptive to informal dialogue and in that context may be willing to provide parties with an explanation of why the Commissioner is making the recommendation for prosecution.\textsuperscript{349} Moreover, while the Commissioner is not required to provide reasons for decision, the Commissioner must provide a Report to Crown Counsel that summarizes the evidence gathered during the investigation, to support the DPP in meeting its mandatory disclosure requirements discussed below.\textsuperscript{350}

By contrast, at the juncture that the DPP lays charges against an accused, the accused must be provided with the full range of constitutional protections given to those charged with a criminal offence. The DPP in this context, as in all criminal prosecutions, has an obligation to provide timely and complete disclosure consistent with the “Principles of Disclosure” set out by the Public Prosecutions Services of Canada.\textsuperscript{351} The DPP’s disclosure should reveal the reasons for pursuing the prosecution and will be provided in writing at the time charges are laid.

\textbf{China – National Development and Reform Commission (NDRC); State Administration of Industry and Commerce (SAIC); & Ministry of Commerce (MOFCOM)}

Article 44 of the Anti-Monopoly Law (AML) provides that the authorities “may” release their decisions regarding AML violations to the public. The AML is silent as to how detailed or well-reasoned the decisions should be. The authorities’ own procedural rules\textsuperscript{352} mirror Article 44 of the AML and do not provide any further clarity on this issue.


\textsuperscript{349} Canada, Memorandum of Understanding between the Commissioner of Competition and the Director of Public Prosecutions (May 13, 2010), available at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03227.html.

In practice, all three authorities have been criticized for not publishing all their decisions or only publishing certain information in their penalty decisions. Except for certain high-profile cases, the decisions from NDRC or SAIC are usually short and lack robust explanation of the facts, evidence or analysis leading to the decision. MOFCOM’s decisions are longer and, over time, have become more detailed in terms of its explanation of the underlying reasons for the decision.

Not all decisions, however, are published. MOFCOM has started to publish some of its early decisions dating back to 2009. Starting in 2012, MOFCOM began publishing a quarterly list of cases approved without conditions. Those decisions to reject or approve with additional restrictive conditions include more detail, each being a few pages long and containing some fact-findings and analytical conclusions. However, these decisions still lack references to the supporting evidence or the basis of the authority’s reasoning. The good news is that some of the more recent MOFCOM decisions include a more detailed analysis on competition.

SAIC now also releases more timely announcements of its penalty decisions and has retrospectively published information of some cases dating back to 2013, including some cases handled by local AIC offices. Some (but not all) of the original penalty decisions from local AICs also include supporting evidence and analysis.

NDRC published the least amount of information regarding its cases, both in absolute numbers and in proportion of the number of cases it handled. The published penalty decisions include only limited information, usually consisting of only a short description of the allegations, facts, and the NDRC’s conclusions. Notably, NDRC officials have indicated that NDRC previously chose not to publicize certain cases at the request of the targets and that NDRC decided to publish all penalty decisions starting in 2015.

Korea – Korea Fair Trade Commission (KFTC)

In general, the KFTC publishes fairly detailed written decisions. This gives the respondents a reasonable basis on which to assess their options. Well-reasoned, written decisions also provide valuable guidance to the business community and antitrust practitioners as to the KFTC’s current enforcement policy positions in key areas.

However, some practitioners have pointed out an inherent flaw in the KFTC’s current system. Instead of announcing its formal, binding decision only upon completion of a well-reasoned decision fully supported by the relevant facts, the KFTC first publicly announces its

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353 See e.g., Shao Geng, The National Development and Reform Commission did not publish any anti-monopoly law enforcement cases. Why did it rarely publish the full penalty decision?, available in Chinese at https://zhuanlan.zhihu.com/p/19962334.

354 It does not publicize all its decisions and only selected cases that it rejected or approved with additional restrictive conditions. See http://fldj.mofcom.gov.cn/article/ptxw/24 (in Chinese).

355 For example, a list from the 4th Quarter of 2012 is available at http://fldj.mofcom.gov.cn/article/zcfb/201301/20130108512781.shtml (in Chinese).

356 Such announcements would include brief sections on 1) the investigation procedures, 2) the analysis of competition, including the definition of relevant markets, competitive effects, and entry, and 3) the review decision.

357 A related issue is that these authorities, including MOFCOM, generally do not provide information on cases before a final decision has been made.


360 For example, in a decision issued in September 2017, the NDRC has only described in one sentence what sources its fact findings were based on. See www.ndrc.gov.cn/xzcf/201710/t20171016_863710.html (in Chinese).

361 Id.
verbal decision within a week of the formal hearing, and then takes on average a month to release its non-public confidential version of the written decision which may give the appearance of justifying the outcome. Some believe this system should produce a written document that represents the decision in a more considered, neutral and balanced way rather than reviewing conflicting assertions of facts and legal and economic analysis.

Taiwan – Fair Trade Commission of Taiwan (TFTC)

The Taiwan Fair Trade Act (TFTA) Article 35 provides that “[i]n rendering an administrative disposition or carrying out other administrative acts, an administrative authority shall . . . give the party a notice of its decision and reasons therefor[e].”362 The TFTA is silent on the manner in which notice must be given under Article 35 and, therefore, does not require the notice to be particularly detailed. However, a change of the appeals rules has worked as something of a check on whether the TFTC has issued written decisions with detailed reasons. The TFTA amendments in 2015 allow targets dissatisfied with TFTC decisions to appeal directly to the Taipei High Administrative Court and then to the Supreme Administrative Court, without having to first submit to a review procedure by the Appeals Committee of the Executive Yuan as previously required.363 Since it is now subject to closer judicial review, the TFTC has begun to issue more detailed decisions.

In merger cases, although being the subject of criticism from time to time,364 the TFTC now issues decisions365 with more detailed explanations, especially if its decision is to reject a filing. Although in some cases it is arguable that the TFTC could have provided more details, its decisions now attempt to include evidence that was relevant to its decision—except when some evidence is confidential (which is very broadly interpreted). As permitted by the new appeals rules, targets can challenge the TFTC in court when they find that the TFTC has failed to provide sufficient evidence or reasoning in its decisions. The TFTC is frequently challenged, especially when the TFTC imposes a large fine. Important exceptions are merger review decisions, which are not challenged as often because the TFTC has much more discretion by the design of the law. In such cases, the law considers the TFTC to be making balancing decisions, which enjoy deference.

Kenya – Competition Authority of Kenya (CAK)

The CAK does not provide substantiated reasons for its decision. After a review of the target’s written submissions (setting out the grounds for its defense) and the evidence gathered at the hearing conference (if any), the CAK may: (i) declare the conduct to constitute an infringement of Part III of the Act (i.e. Restrictive Trade Practice); (ii) restrain the target from engaging in that

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363 It’s important to note that the new appeal rules work for both targets and the TFTC. Before the amendments, the TFTC’s decisions were reviewed within a hierarchical administrative system. TFTC also could not appeal to the high administrative court when the Appeal and Petition Committee of the Executive Yuan revoked its decision. See Chia Lin Yen, *Taiwan: Fair Trade Commission, as printed in THE ASIA-PACIFIC ANTITRUST REVIEW 2017*, GCR (Apr. 05, 2017), available at [http://globalcompetitionreview.com/benchmarking/the-asia-pacific-antitrust-review-2017/1138999/taiwan-fair-trade-commission](http://globalcompetitionreview.com/benchmarking/the-asia-pacific-antitrust-review-2017/1138999/taiwan-fair-trade-commission).


365 Note that most of TFTC’s decisions were on unfair competition (such as false or misleading advertisements), and the rest focus mostly on mergers and concerted actions.
conduct; (iii) direct any action to be taken by the target to remedy or reverse the infringement or effects thereof; (iv) impose a financial penalty; and/or (v) grant any other appropriate relief.

In practice, a target will usually receive a letter indicating that the target has engaged in conduct which amounts to a contravention of the Act, without detailed reasoning. In the majority of instances where the CAK issues such a letter, the CAK ultimately imposes an administrative penalty. In certain instances, a target may refer the matter to the Director of Public Prosecution if, for example, the conduct attracts possible criminal sanctions.366

Although the CAK does not issue detailed reasons for its decision, targets are entitled to request a meeting with the CAK, where a target may be informed of the reasons underpinning the decision against it. Even when provided with reasons, in practice, these still tend to fall essentially short of the substantiated and well-reasoned decisions which are typically issued by experienced agencies.

Under section 39(2) of the Act, the CAK’s decision must be published in the Kenyan Gazette and only the name of the undertaking involved as well as the nature of the conduct is required to be published in the Gazette. The CAK, however, does not generally publish written reasons for its decision.

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366 In such an instance, the Authority will no longer be involved in the investigation or prosecution, save for instances where some of its employees have been called as witnesses.
A finding of infringement should include a clear explanation of the evidence and the legal and economic theories and analyses that support it. The specification of remedy should be written and should explain why each element of the remedy is required by, and tailored to, the characteristics of the infringement.

**Jurisdictions Evaluated:**
- European Union
- United States
- Egypt
- India
- Argentina

**European Union – European Commission DG Competition**

From its beginning, the European Commission (EC) has published written decisions seeking to explain its legal and economic analysis and the reasoning underpinning its decision making. Over time, these decisions have become more detailed and comprehensive and can run to hundreds of pages. Detailed scrutiny by the European Courts has led the EC to explain its reasoning fully, including its approach to those weaker arguments and theories which it has justifiably dismissed with only a limited review.

In the merger field, this approach is taken both for approval decisions (other than in the most straightforward cases) and intervention decisions in both Phase 1 and Phase 2 cases. In antitrust, it applies to both intervention and settlement cases and also to formal decisions rejecting complaints against anti-competitive behavior by others.

This is one of the clear strengths of the EC system when compared to those jurisdictions which make public the detailed reasoning behind their decision making only in limited circumstances. It has led to the build-up of a vast accessible body of precedent allowing parties to understand better the likely EC approach to different economic markets and how its thinking has developed over time as markets have evolved.

This approach to decision making affords parties the possibility of detailed judicial review before the European Courts. Appeals are regularly based not only on the outcome of a decision but on the reasoning employed or on the adequacy of the inculpatory or exculpatory evidence referred to by the EC in its decision.

This does not mean, however, that parties are invariably satisfied by the quality of the written decision. Here again, a comparison with the EC’s approach to other cases can afford parties the opportunity to challenge a decision for inadequacy of reasoning.

When remedies are involved, the EC will explain the link to the competitive harm and, where necessary, why it considers that a more extensive remedy was required. The results of any “market test” of the remedy will be summarized and, where necessary, an explanation of why this led to modification of the remedy.

As a result, it is rare that parties raise concerns as to the transparency of the EC approach to decision making even if they disagree strongly with the substance of a decision or the approach the EC has taken to the assessment of the relevant evidence.
United States – Department of Justice (DOJ) and Federal Trade Commission (FTC)

The DOJ and FTC (the Agencies) have no specific obligation to provide a clear explanation of the evidence and the legal and economic theories and analysis that support it but typically do so in support of any contention of infringement. When the Agencies settle civil matters by consent, they release a cursory review of the allegations and the reasons why the remedy addresses the competitive concerns. The DOJ files a “Competitive Impact Statement” in federal court while the FTC publicly issues an “Analysis to Aid Public Comment.” These documents typically do provide some details supporting their conclusions, although often not extensive, providing a clear contrast between the U.S. practice and the practice in other jurisdictions (such as the EU).

If no consent is reached and a civil matter is contested, the Agencies file court “complaints” setting forth a short and plain statement of the allegations as required by legal standards of the particular court. These complaints typically provide an overview of the conduct, the basis for an allegation, and limited examples of supporting evidence (such as quotes from “hot” documents). But, complaints are advocacy papers that provide the Agency’s litigation views rather than objective assessments of the conduct at issue. During litigation, the Agencies retain economic experts who file detailed reports of their opinions on the competitive effects of the transaction or conduct at issue. These detailed reports are often placed “under seal” because they contain confidential information, so the public typically does not have access to them and, therefore, cannot learn of the specific bases for the Agency action. (The ABA recently recommended that the Agencies seek to “require public versions of expert reports so that analytical models, empirical methods, and their application can be evaluated.”)

An independent court makes the first-instance decision on the contentions alleged in the complaint. A federal judge deciding a case will write an opinion explaining the court’s decision. These opinions are usually reasonably detailed and provide the court’s rationale, but there is no requirement for a clear explanation of the evidence and the legal and economic theories and analyses that support it. The court can use its own discretion in issuing an opinion in which it explains the evidence and the supporting legal and economic theories and analyses. Some courts issue detailed opinions in which these subjects are discussed at length while others have taken a more cursory approach.

The FTC’s antitrust enforcement process can involve an administrative trial, which is conducted pursuant to Part III of the FTC’s rules and overseen by an administrative law judge, who will resolve the matter by issuing an initial decision. The respondent has a right to appeal the initial decision to the full Commission, which will conduct a de novo review of the administrative law judge’s decision and issue its own opinion. A Commission decision is typically fairly extensive with reference to facts, evidence and analysis of remedies. The respondent can then appeal the final decision of the full Commission to a U.S. Court of Appeals.

In criminal matters, a jury issues its verdict of either guilt or innocence, and there is no requirement for an explanation of its decision.

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Egypt – Egyptian Competition Authority (ECA)

Article 40 of the Executive Regulations permits the board, after considering a report on the inquiry, inspection and collection of information, to give a justified opinion either to terminate the matter or to proceed further. Article 43 of the Executive Regulations provides that the concerned person(s) shall be notified of the final decision by means of registered mail to be signed upon receipt.368

Furthermore, Article 24 of the Competition Law states, “Final judgments of conviction regarding the actions stipulated in Article 22 of this Law shall be published in the Official Gazette and in two wide spread daily newspapers, at the convicted person’s expense.”

Once the ECA has made a determination that the alleged conduct amounts to a contravention, the ECA will issue a report which includes substantiated reasons for the finding and any remedies imposed. This will ordinarily include a clear explanation of the evidence considered and the ECA’s conclusions. The Report will also address legal arguments made by the target as well as any expert economic or financial analysis submitted to the ECA or relied upon. In relation to the proposed remedies, the ECA’s practice is also to provide reasons for imposing a particular remedy.

India – Competition Commission of India (CCI)

There are no provisions in the Competition Act or the accompanying regulations which prescribe either the format or broad contents of an infringement decision. As a matter of practice, infringement decisions of the CCI provide a description of the facts, a description of the findings of the DG, a summary of the objections/suggestions/comments to the DG report advanced by the targets, followed by an analysis of the factual, legal and economic arguments by the CCI. While the analysis generally provides the legal basis, the CCI does not always provide the economic theory on which the findings are based. Economic assessments, where provided by the targets in support of their arguments, are not always taken into account by the CCI while passing an infringement decision.

In addition to the imposition of a monetary penalty, infringement decisions of the CCI also contain general directions to “cease and desist” from any anti-competitive or abusive conduct. The CCI has been reluctant to order specific remedies to redress any anti-competitive or abusive conduct. The only instance where specific measures were directed was in the Automotive Spare Parts Case.369 Having found car makers to be abusing their dominant position in the secondary market for spare parts and after-sale repair services, the CCI directed all manufacturers to implement several specific measures with a view to addressing the anti-competitive/abusive conduct identified in the infringement decision. The primary objective of these measures, according to the CCI, was to “correct the distortions in the aftermarket, to provide corrective measures to make the market more competitive, to eradicate practices having foreclosure effects and to put an end to the present anti-competitive conduct of the parties.”

It is relevant to note that the remedies suggested by the CCI in the Automotive Spare Parts Case were modified on appeal before the Competition Appellate Tribunal (COMPAT), which observed that “any direction given by a regulator should be pragmatic and capable of being

368 Registered mail in this context means that it has been recorded as “sent” in the ECA’s records. Egypt makes use of standard postage/courier services which allows for the tracking of parcels and the final decision is sent via these standard courier services.

Neither the CCI nor the COMPAT set out reasons supporting each remedy, or how such remedies were tailored to address the infringements in question.

**Argentina – Comisión Nacional de Defensa de la Competencia (CNDC)**

There are no specific provisions in this regard within the Competition Law. The previous administration of the CNDC was the subject of several Court decisions which overruled the decisions of the CNDC based on the lack of a clear explanation regarding evidence. As an example, in the *Shell/Totalgaz* case, the Posadas Federal Court of Appeals set out that “the material over which the resolution was based basically entailed witness testimonies, over which an examination under the evidentiary unity principle shows imprecise data and in some cases contradictory and these evidences attached to the proceedings do not have the required entity in order to fully conclude on the existence of a coordinated practice between the fined companies with the objective of allocating clients. . . .”

There have been no further cases against which the CNDC’s compliance with this provision can be assessed to determine whether such type of practice continues to take place.

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370 Toyota Kirloskar Motor Private Limited v. CCI & Anr, Appeal No. 60/2014 judgment dated 09 December 2016.
371 Decision dated 30 May 2008 of the Federal Court of Appeal of the City of Posadas, Province of Misiones, in the case Expte. Nº 9986/07 – Shell Gas S.A. y TotalGaz Argentina S.A.
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| V.A | First-instance decisions should be subject to review by an independent tribunal.  
1. “Independent” in this context means (1) having no prior role in the investigation, accusation, or first-instance proceeding (except as a neutral decision maker regarding interim or preliminary matters required for management of first-instance proceedings, as provided by law); (2) having no specific personal interest in the matter or material relationship to any party; and (3) having sufficient expertise in the law and economics of competition and/or other relevant disciplines to review the first-instance decision in a disinterested, efficient and accurate manner.  
2. “Tribunal” in this context means one or more named officials specifically designated to conduct the review and render decision and personally identified to counsel for the parties. |

**Jurisdictions Evaluated:**
- Germany
- Korea
- Belgium
- European Union
- China

**Germany – Bundeskartellamt**

In Germany, all decisions by public authorities are subject to judicial review. This applies equally to antitrust decisions issued by the Bundeskartellamt. According to the Act against Restraints of Competition, the Bundeskartellamt’s decisions are subject to review by the Higher Regional Court for the district in which the Bundeskartellamt has its seat, i.e., the Higher Regional Court of Düsseldorf (OLG Düsseldorf).\(^{372}\) Proceedings before the OLG Düsseldorf are conducted within the strict boundaries of German procedural rules. All parties have ample opportunity to make submissions and to be heard. The court has not been viewed as showing any partiality in its decision-making. Judges are civil servants with tenure who are in no way related to the first instance proceedings in front of the Bundeskartellamt. Finally, German competition law stipulates the creation of expert antitrust departments at each Higher Regional Court (not just in Düsseldorf).\(^{373}\) Judges sitting in these “specialized” antitrust departments have a sufficient expertise in the law and the economics of competition law. These judges have exclusive jurisdiction over competition appeals.

German competition law also stipulates the option of further appeals on points of law to the Federal Court of Justice (Bundesgerichtshof – BGH) against first instance decisions issued by the Higher Regional Courts.\(^{374}\) Such further appeals are, however, limited to points of law. In addition, they are only possible if the respective Higher Regional Court grants leave to appeal on  

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372 Cf. § 63(4) ARC.  
373 Cf. § 91 ARC.  
374 Cf. § 74 ARC.
points of law. Any decision not to grant leave to appeal on points of law can be challenged separately by way of an appeal against refusal to grant leave to the BGH.\textsuperscript{375}

**Korea – Korea Fair Trade Commission (KFTC)**

Under Article 54 of the Monopoly Regulation and Fair Trade Act (MRFTA), respondents may appeal the KFTC’s initial decision—or final agency action—to the Seoul High Court for judicial review within thirty days of receipt of the KFTC’s such formal written decision. The Seoul High Court has no prior role in the investigation of the case, and the participating members of the Court may have no personal interest in the outcome of the case. The Seoul High Court has exclusive jurisdiction over all appeals from KFTC decisions and reviews them de novo, thereby offering the respondents an opportunity to challenge the KFTC’s factual findings as well as legal analysis in a more neutral, balanced forum.

Before the Seoul High Court, parties may seek leave to call live witnesses and even introduce new evidence. Under Article 16 of the Administrative Litigation Act, third-parties whose rights or interests may be affected by the outcome of the case may also seek to present its views in court.

The losing party at the Seoul High Court level may further appeal to the Korean Supreme Court. Except in rare situations, the Supreme Court does not hold oral hearings but decides the appeal solely on briefs. Antitrust practitioners generally regard the country’s judicial review system to be independent, fair and well-balanced.

**Belgium – Belgian Competition Authority (BCA)**

Decisions by the BCA are subject to judicial review. In the first instance, the BCA’s decisions are subject to review by the Court of Appeals in Brussels.\textsuperscript{376} The Court is entirely independent, and its decisional practice does not indicate any partiality in favor of the BCA. The judges are civil servants with tenure who were not involved in—and are unlikely to be influenced by—the administrative proceedings before the BCA. Although the overall quality of the Belgian courts’ judgments is rather high and the judges’ qualifications in law well above all required standards, the judges generally are not specialized in antitrust matters. Since March 2017, a newly created section of the Brussels Court of Appeals—the so-called “Market Court”—aims to change this status by uniting judges with a special expertise in economic law. The Market Court will deal with cases involving a regulatory market aspect, such as cases brought by the FSMA\textsuperscript{377}, BIPT\textsuperscript{378} and also the BCA.

Belgian law allows for a further appeal against judgments of the Brussels Court of Appeals with the Court of Cassation. Such further appeal, however, is limited to points of law. The Court of Cassation can also rule on preliminary questions by both the Court of Appeals in Brussels and the Competition College of the BCA.\textsuperscript{379} The procedure for preliminary rulings has been tailored to the European example at the Court of Justice.

\textsuperscript{375} Cf. § 75 ARC.
\textsuperscript{376} Cf. Art. IV.79 CEL.
\textsuperscript{377} Financial Services and Market Authority (Autoriteit voor Financiële Diensten en Markten or Autorité des Services et Marchés Financiers).
\textsuperscript{378} Belgian Regulator for Postal and Telecommunication Services (Belgisch Instituut voor Postdiensten en Telecommunicatie or Institut belge des Services Postaux et des Télécommunications).
\textsuperscript{379} Cf. Book IV, Title 2, Chapter 2 CEL (i.e. Articles IV.75 until IV. 78 CEL).
Contrary to the EU courts, the CEL allows the Court of Appeals in Brussels to review the BCA’s decisions on restrictive practices with “full jurisdiction,” including the power to replace a decision made by the administration with its own. However, in practice, the Court of Appeals tends to adhere to a division of powers between the administration and the judiciary, and it limits its judicial power to a review in the strict sense. It usually sends the case back to the Competition College without replacing the decision adopted by the administration with their own. Therefore, in practice, the courts’ review is often in deference to the economic assessments and analyses made by the BCA.

A backlog of cases before the Court of Appeals in Brussels exists which can cause substantial delay, even though appeals in antitrust cases are required by law to be dealt with expeditiously.

European Union – European Commission DG Competition

Pursuant to Article 31 of EC Regulation 1/2003, the European Court of Justice has “unlimited jurisdiction to review decisions.” The European Commission (EC) must indicate in its decisions that targets have the right to have the decision reviewed by the General Court (GC). The judges of the GC and the Court of Justice of the European Union (CJEU) are chosen from legal experts whose independence is well established and who possess the general qualifications required for appointment to highest judicial offices in their respective countries or who are of recognized competence.

While all decisions are subject to review, some factors limit the effectiveness of the review. First, the scope of review respects the division of powers between the administration and the judiciary. At first instance, the judges of the GC must carry out a review of both the law and the facts of the pleas against an EC decision. However, they do not make a new assessment of the case file and instead review the legality of an EC decision on the basis of evidence adduced by the applicant in support of the arguments put forward, focusing on whether the EC has manifestly erred as to the facts or the law and whether the EC has respected due process. In cases of appeals against GC judgements, judges from the CJEU focus only on points of law. These safeguards provide a limit to the Court’s review; however, the Courts often end up carrying out a more comprehensive review as, in practice, it is not always easy to distinguish between facts, law and economic appreciations. Second, the EC enjoys a wide discretion in establishing the facts, particularly in cases involving complex economic assessments (such as those related to issues of market definition) or technical assessments. In practice, the GC will very rarely question these technical or economic facts but will act as a control on only whether the EC committed a “manifest

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380 This is not the case for decisions on concentration control, where the Court can only annul the BCA decision and refer it back to the Competition College.
381 Cf. Art. IV, §2, second paragraph.
382 Art. IV.79 §2 CEL.
385 Id., art. 253.
386 Id., art. 263.
error” of assessment. In contrast, the GC and CJEU have unlimited jurisdiction as to reviewing fines imposed by the EC and can void, amend, increase or reduce them. Third, in practice, both the GC and the CJEU have shown reluctance to overturn EC decisions, at least in part to avoid criticism that they are going beyond their judiciary function. As a final observation, there is no court dedicated to competition matters—judges hearing a case are not necessarily experts in antitrust proceedings. As a consequence, the benefits of such a review in highly technical cases can sometimes be limited.

China – the National Development and Reform Commission (NDRC); State Administration of Industry and Commerce (SAIC); & the Ministry of Commerce (MOFCOM)

While the Antimonopoly Law (AML) does not have any provisions regarding independent review of the authorities’ decisions, parties can seek “administrative reconsideration” from the same agency that made the initial decision. They have the right to appeal to a court after a decision is made by either agency. In practice, such appeals—while not unheard of—are quite rare.

In practice, the authorities often engage other government entities in their investigations and reviews. In the case of MOFCOM, for example, although it need not seek opinions from other ministries for “simple cases,” it is commonplace for MOFCOM to consult other ministries if those ministries would be concerned with the underlying transaction. Such consultation can alter MOFCOM’s view, including on purely commercial or industrial policy grounds, and sometimes be determinative. The same may be true for NDRC and SAIC. However, the authorities do not always let targets know what other government entities have been engaged and whether and to what extent such engagement impacted its analysis. There are also instances where the authorities receive unsolicited opinions from third-party regulators, which may also be influential.

390 For instance, it is widely believed that MOFCOM initiated its Didi/Uber investigation because there was significant pressure from outside parties. See e.g., www.ft.com/content/41b69c58-70fb-11e6-a0c9-1365ce54b926.
392 For instance, it is believed that the MOFCOM’s decision to block the Coca Cola/Huiyuan merger was influenced by non-competition factors raised by other government entities. See e.g., Matthew Sweeney, Foreign Direct Investment in India and China: The Creation of a Balanced Regime in a Globalized Economy, 43 CORNELL INT’L. L.J. 207, 210 (2010), www.lawschool.cornell.edu/research/ILJ/upload/Sweeney.pdf.
Counsel for the parties should be permitted to address the tribunal directly in face-to-face proceedings and through written submissions.

1. The opportunity for face-to-face proceedings should be subject to the discretion of the independent tribunal to forego such proceedings where they are highly unlikely to affect the outcome of or basis for the decision on review, in which case the tribunal should consider the parties’ written submissions.

### Jurisdictions Evaluated:
- United States
- India
- Ukraine
- Kenya
- China

**United States – Department of Justice (DOJ) and Federal Trade Commission (FTC)**

Most contested antitrust matters in the United States are ultimately decided by a federal court. The DOJ must challenge alleged anticompetitive conduct by filing a case in federal district court. The litigation proceeds according to the Federal Rules of Civil (or Criminal) Procedure.

At each stage of proceedings, parties have an opportunity to challenge the evidence before them and address the decision-making tribunal both in written submissions and in face-to-face proceedings. The Agency’s initial contention of infringement, a Complaint, is typically filed after a lengthy investigation by the Agency. (Parties have several opportunities to meet with investigating staff, as well as management and decision-makers, before a Complaint is filed against the party.) Once a Complaint is filed, parties have the opportunity to submit an Answer to the Complaint and may submit other pleadings to the decision-maker, addressing the Complaint, pursuant to the Federal Rules of Civil, or Criminal, Procedure, or the Federal Trade Commission Act, depending on the nature of the claims. Parties may, for example, bring a Motion to Dismiss or a Motion for Summary Judgment, seeking to have the litigation against them dismissed. In addition, at an evidentiary hearing or trial before a federal court or Administrative Law Judge (ALJ), parties have an opportunity to challenge evidence against them. Parties may cross-examine witnesses against them, bring forth and question their own witnesses, and address the decision-making tribunal directly.

Parties may appeal adverse district court decisions to the Court of Appeals as a matter of right, which allow appellants to file written briefs and, normally, to appear in person for an oral argument. Given the typical importance of antitrust matters brought by the government, in-person oral arguments are routinely granted in government antitrust matters, though it is a matter within the court’s discretion. The Federal Rules of Appellate Procedure set forth the applicable procedural rules in detail. Parties may then appeal an adverse decision by a Court of Appeals to the U.S. Supreme Court, which has discretion on which cases to hear. In practice, few antitrust appeals are heard by the Supreme Court.

The FTC’s administrative antitrust enforcement process can involve an administrative trial, which is conducted pursuant to Part III of the FTC’s rules and overseen by an ALJ, who will issue an initial decision. The respondent has a right to appeal the initial decision to the full Commission,
which will conduct a *de novo* review of the ALJ’s decision. The parties are provided an opportunity to submit written briefs and provide in-person arguments. The respondent can then appeal the final decision of the full Commission to a U.S. Court of Appeals and to petition the U.S. Supreme Court to review the court of appeal decision pursuant to the procedural rules discussed above. These courts will review the Commission’s legal conclusions *de novo*, while accepting its findings of fact if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The FTC may seek interim relief in aid of its administrative proceeding by seeking a preliminary injunction in U.S. district court, such as to block a merger. As discussed above, the district court’s action is subject to review by a federal appeals court and ultimately the U.S. Supreme Court.

**India – National Company Law Appellate Tribunal and Supreme Court of India**

Appeals against infringement decisions of the CCI lie before the National Company Law Appellate Tribunal (NCLAT). A memorandum of appeal typically sets out details of the factual and legal contention and grounds of appeal against the CCI’s infringement decision by the appellant. Respondent Parties (normally the informant and the CCI) are permitted to file written replies to an appeal memorandum, and the appellant is permitted further to file its rejoinder to any such replies filed by the Respondent Parties. Proceedings before the NCLAT are in the form of public hearings, where arguments are addressed by the parties or their counsel to the NCLAT directly. The NCLAT may also thereafter direct the parties to file written submissions in furtherance of their arguments.

An appeal against a decision of the NCLAT lies before the Supreme Court of India, which is the final adjudicating authority under the Act. Before the Supreme Court, the aggrieved party can be represented by an advocate or appear in person. Much like the NCLAT, a written memorandum of appeal is filed before the Supreme Court, and respondent parties are permitted to file written reply(s) to such appeal, with the appellant permitted to file a rejoinder to the any reply filed by the respondent parties. The proceedings before the Supreme Court are in the form of public hearings and, after conclusion of arguments, directions may be given to the parties to file brief written submissions.

Neither the NCLAT nor the Supreme Court have the discretion to deny an opportunity of oral hearing. Nonetheless, where a party fails to appear on a date fixed for hearing, despite notice and without being excused for cause, proceedings can be held *ex parte* which can result in *ex parte* decisions.

**Ukraine – Antimonopoly Committee of Ukraine (AMC)**

In principle, in most cases the target enjoys a wide range of procedural rights during the review of the decision. Such participation rights include the right to:

- review the file (save for information with limited access);
- provide evidence, including oral and written clarifications;

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393 A proforma of the memorandum of appeal is appended as Form I to the NCLAT Rules 2016.
394 Rule 54 of the NCLAT Rules 2016 permits the respondent to file written objections or counter.
395 Section 53T of the Act provides that any person aggrieved by an order of the NCLAT may file an appeal to the Supreme Court.
• file motions;
• receive a copy of the decision in the case (save for information with limited access on the basis of confidentiality);
• present position and objections;
• participate directly in the case hearings; and
• appeal the decision in accordance with procedures prescribed by law (including presenting and making appearances related to the appeal).

In practice, however, owing to the limited timeframe for the review, not all of the above rights can be fully exercised. Furthermore, the scope of review in practice requires improvement; courts are usually reluctant to review complex decisions on substance, concentrating on procedural issues instead. Courts rarely challenge the AMC’s discretion directly (i.e., by conducting a new trial and replacing the AMC’s decision with their own assessment of the merits). Rather, they point to substantive and procedural mistakes of the competition authority that render the AMC analysis unsustainable.

Kenya – Competition Authority of Kenya (CAK)

The Kenyan competition framework provides for “hearing conferences” as opposed to traditional trials or contested hearings common to many other jurisdictions. Notably, these hearing conferences have often been criticized on the basis that targets are not given a sufficient opportunity to participate. The lead investigator responsible for deciding on behalf of the CAK (which is merely confirmed by the Director-General) is part of the panel which presides over the hearing conferences.

The hearing conference is informal in nature and is more akin to a meeting than a trial or formal hearing. Its primary purpose is to provide the target with an opportunity to make representations in relation to the charges against it.

The hearing conference is not mandatory, and if the target does not indicate that it wants one, it need not be convened. Other than a few provisions in the Act, there are no statutory procedures which regulate the conduct or proceedings during these conferences. There is also no formal record of proceedings, although the CAK does take minutes of the hearing conference. The minutes are issued after the meeting and are circulated to targets for purposes of confirmation of their content and accuracy.

A hearing conference does not follow the evidentiary process followed by the Courts. It is an opportunity for the target to explain itself to CAK either verbally or through a written document or by producing information/documents that contradict the evidence of CAK and for CAK to seek clarification where necessary. No witness examination in chief, cross examination, or re-examination is conducted during these proceedings.

There have been instances where legal counsel for the target requested to be provided with the documents or evidence relied upon by the CAK in formulating the allegations against the target. In these cases, the CAK generally only provides a high-level oral summary of the evidence relied upon.

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397 Under Ukrainian procedural codes, review of an AMC decision on appeal should not exceed a two-month term after the claim has been accepted by the court for review. See Igor Svechkar, Alexey Pustovit & Oleksandr Voznyuk, Merger Control: Ukraine, in GETTING THE DEAL THROUG (Aug. 2018), available at https://gettingthedealthrough.com/area/20/jurisdiction/63/merger-control-ukraine/.
Targets can also make written submissions in response to the allegations against them. These written submissions do not equate to pleadings which necessitate a formal response from the CAK. Importantly, a target is only provided with an opportunity to make written submissions after the CAK has already made an initial determination that the target has contravened the Act.

**China – the National Development and Reform Commission (NDRC); State Administration of Industry and Commerce (SAIC); & the Ministry of Commerce (MOFCOM)**

The Antimonopoly Law (AML) does not grant notifying parties the opportunity to request a face-to-face meeting and directly address a reviewing tribunal. Instead, parties are left to seek “administrative reconsideration” from the same agency that made the initial decision. In practice, once an investigation begins, the parties usually request a formal face-to-face meeting. However, officials of the NDRC and SAIC have discretion to decide whether to grant such meetings. The parties cannot address a reviewing tribunal inside the NDRC and SAIC. Instead, they have the right to appeal to a court after a decision is made by either agency. In practice, such appeals—while not unheard of—are quite rare.

Parties are permitted to appeal to MOFCOM for “administrative reconsideration” of a decision within sixty days of receiving the decision; however, such reconsideration does not obligate the agency to take any face-to-face meetings or consider new written submissions. Once a request is made, MOFCOM has sixty days to reconsider its initial decision. If a notifying party is not satisfied after such reconsideration, it can bring an administrative action to challenge MOFCOM’s decision before a People’s Court. In practice, decisions by MOFCOM are generally regarded as decisions by the state and have not been challenged.

Although there has been significant progress by all three authorities in terms of their willingness to engage targets, one other issue remains a big challenge for at least some practitioners—foreign counsel is on many occasions limited in their participation. For example, foreign counsel has been permitted to attend certain meetings with the authorities but not allowed to communicate with their clients during those meetings. And it is not always clear when their participation will be allowed.
<table>
<thead>
<tr>
<th>Practice No.</th>
<th>Description</th>
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<tbody>
<tr>
<td>V.D Review</td>
<td>The basis for decision should be confined to matters addressed in the record in the first-instance proceeding (subject to reasonable exceptions for post-decision changes in law or fact and incontestable public-record facts).</td>
</tr>
</tbody>
</table>

**Jurisdictions Evaluated:**
- European Union
- Mexico
- Argentina
- Brazil
- Tanzania

**European Union – European Commission DG Competition**

Antitrust decisions adopted by the European Commission (EC) are subject to judicial review before the European Union (EU) courts. First, applicants may lodge an action for annulment of the EC decision before the General Court. The General Court has jurisdiction to review both the law and the facts set out in the decision and has the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. Second, the judgment of the General Court may be further appealed to the Court of Justice. Such appeals are, however, limited to points of law.

The scope of the judicial review of EC decisions carried out by the EU courts is limited to the claims of the parties, as set out in the forms of order sought in their written pleadings. In addition, the analysis by EU courts of the pleas in law raised in an action for annulment of EC decisions has neither the object nor the effect of replacing a full investigation of the case. The General Court, therefore, operates as a review court, which scrutinizes the legality of the EC decision on the basis of the parties’ applications, but it does not conduct a second, full investigation into the case. In particular, it may not substitute its assessment for that of the EC, except in relation to the assessment of the fine imposed by the EC, which the General Court is entitled to cancel, reduce or increase.

The review of the legality of the EC decision is carried out by the General Court based on the reasons set out in the decision. Facts relied on by the EC for the first time in its defense before the General Court are not taken into account in the judgment. However, when reviewing the legality of an EC decision, the General Court must take into account all the elements submitted by the applicant, whether those elements pre-date or post-date the contested decision, whether they were submitted previously in the context of the administrative procedure before the EC or, for the

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first time, in the context of the proceedings before the General Court, in so far as those elements are relevant to the review of the legality of the EC decision.\textsuperscript{402}

**Mexico – Comisión Federal de Competencia Económica (COFECE)**

Mexico’s Statutory Framework (in particular, the Federal Economic Competition Law (FECL) and its Regulations), along with other laws that regulate proceedings (such as the Federal Code of Civil Proceedings, which applies to the FELC), requires enforcers to ensure that all decisions are based only on the subject matter addressed in the record of the administrative proceeding. The record integrates the corresponding investigation docket, which includes all evidence gathered by COFECE during the investigation phase, whether obtained via information request or from dawn raids.

Decision-making officials, including the Board of Commissioners, cannot deviate or make any assessment based on additional elements that are not formally a part of the relevant investigation docket. Deviation from the requirements of the Statutory Framework and other applicable laws would constitute a direct violation of the constitutional rights provided in the Constitution and several international treaties ratified by Mexico. Legal consequences may be applicable to public servants who are found to violate the Constitution. Further, any acts or determinations by enforcers that do not fully comply with these legal requirements are likely to be challenged and potentially revoked by the judiciary.

**Argentina – Comisión Nacional de Defensa de la Competencia (CNDC) and Judicial Courts**

The appeal system in antitrust procedures is regulated by Antitrust Law No. 27,442 (the Law). It is also regulated by the National Criminal Procedural Code (the Code) which, pursuant to Section 79 of the Law, is the applicable procedural supplementary regime to the Law.

Pursuant to Section 66 of the Law, the following CNDC resolutions that can be brought forward to the courts of appeals (either the Federal Civil Court or Commercial Court) for review: those which (i) apply sanctions; (ii) order the cessation or abstention of a behavior; (iii) order the rejection or conditional approval of an economic concentration notifications; (iv) reject a request to investigate a potential illegal anticompetitive conduct; and/or (v) reject a leniency application.

Note, however, that the CNDC’s and courts’ case law has stated that the aforementioned list is not exhaustive.

Moreover, pursuant to Section 449 of the Code and the courts’ case law, any resolution which causes “irreparable damage” may also be appealed.\textsuperscript{403} While the courts’ case law has stated that an appeal may not be filed in those cases which are legally non-appealable under Section 42 of the Law (such as evidentiary matters), the admissibility, pertinence and adequacy of the evidentiary measures ordered by the CNDC may be appealed.\textsuperscript{404}


\textsuperscript{403} Federal Civil and Commercial Court: Indura Argentina S.A. v. CNDC on/complaint appeal, 2002/08/15; PSH and others on/complaint appeal, 2002/10/08; and YPF S.A. v. CNDC on/complaint appeal, 2003/06/10.

\textsuperscript{404} Federal Civil and Commercial Court, Praxair Argentina S.A. on/complaint appeal, 2005/03/15.
Pursuant to Section 445 of the Code, the ruling issued by the appellate courts shall be confined to those matters that were submitted in the parties’ appeal and must refer to the matters addressed in the first instance proceedings.\textsuperscript{405}

**Brazil – Conselho Administrativo de Defesa Econômica (CADE)**

According to the Brazilian Competition Law (Law nº 12.529/11, Article 9º II and III), CADE’s Tribunal is responsible for deciding whether an antitrust infringement exists—based on the conduct reported and investigated by the General Superintendence—and imposing relevant penalties on infringing parties.

The General Superintendence report is non-binding upon the Tribunal. The Tribunal may extend the instruction phase of the case to collect new facts and evidences and may base its findings on the new evidence collected.\textsuperscript{406} The Tribunal, therefore, is not limited to the investigation conducted by the General Superintendence. In practice, the Tribunal tends to follow the conclusions already reached by the General Superintendence. However, when the Tribunal considers it necessary, they conduct a more in-depth analysis, which can be held in several ways, for example conducting a new market test, sending new official letters to the parties, or asking for legal opinions—including from the Public Federal Ministry and/or CADE’s Attorney General—among other possibilities. In addition, it is common that defendants execute Cease and Desist Agreements with CADE during the course of the proceeding, collaborating with the authorities and bringing new evidence to the case records. In such cases, the remaining defendants must have the opportunity to defend themselves against the new evidence provided. After the General Superintendence renders its decision on the administrative proceeding, the defendants have five days to submit their final allegations before the ruling session by the Tribunal.

The Tribunal’s decision is determinative in the administrative phase of the case, but the parties may appeal an adverse decision to the judiciary courts in order to attempt to annul or reduce the penalties imposed. In such instance, although the Courts in most cases refrain from discussing the antitrust merits of the case, they often review whether procedural matters were properly followed by CADE. In either circumstance, however, the Courts are not confined to the matters addressed in CADE’s decisions. Despite the fact that the judiciary courts and CADE are independent from each other, the parties may appeal an adverse decision to the judiciary courts in order to attempt to annul or reduce the penalties imposed by CADE. In such instance, although the Courts in most cases still refrain from discussing the antitrust merits of the case, they often review whether procedural matters were properly followed by CADE. When reviewing a decision issued by CADE, the Courts might refer to the records compiled by CADE for a better understanding about the proceeding and CADE’s decision. However, the Courts are not confined to these records, and the parties are able to submit new evidence and arguments in support of, or in opposition to, the first instance decision by CADE.

**Tanzania – Fair Competition Commission (FCC)**

Under section 61 of the Fair Competition Act of 2003 (the Act), any person who has a material interest in a decision taken by the FCC in relation to (i) exemption applications, (ii)
compliance orders, or (iii) compensatory orders may appeal the FCC’s decision to the Fair Competition Tribunal (FCT). An appeal to the FCT requires a hearing *de novo*, and the FCT may permit interveners or members of the public to make submissions or representations during the appeal.

All other decisions by the FCC may be taken (by any person who has a material interest in the matter) to the FCT for *review* of the decision. Although the Act refers to a “review” and “appeal” interchangeably, the FCT will review the FCC’s decision in these cases only on the grounds that (i) the FCC did not have jurisdiction; (ii) the FCC relied on evidence not produced; (iii) there was an error of law; or (iv) there were other procedural irregularities. A party who has a sufficient interest in the outcome of an appeal or review decision by the FCT may apply to the FCT to be permitted to intervene as a third party and must introduce the evidence upon which the third-party intervenor relies.

Under the FCT’s rules, the FCT is entitled to re-appraise evidence and draw different inferences from the facts, direct or permit a request that additional evidence be introduced, and direct that any person or expert appear as a witness during the appeal proceedings. The introduction of new evidence may be made orally or by affidavit, and the FCT must permit cross-examination where relevant. Accordingly, the FCT may broaden the scope of evidence relied upon by the court of first instance (i.e., the FCC).
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<th>Practice No.</th>
<th>Description</th>
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<tr>
<td>V.E</td>
<td>The decision on review should be in writing and explain in detail the assessment of and conclusions upon all issues underlying the decision.</td>
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**Jurisdictions Evaluated:**
- United States
- Canada
- South Africa
- India
- Kenya

**United States – Department of Justice (DOJ) and Federal Trade Commission (FTC)**

The decision of a case brought by the DOJ or FTC is rendered either by the U.S. District Court or, in the case of FTC Part III proceedings, by an Administrative Law Judge (ALJ). In the case of a decision by an ALJ, the decision is appealable, on full review of facts and law, to the full Commission, which then renders its own (usually extensive) written decision. As a practical matter, nearly all ALJ decisions are appealed to the Commission. The decision of the Commission may then be appealed, as a matter of right, to a U.S. Court of Appeals. In the case of a decision by a U.S. District Court, the decision may be appealed, as a matter of right, to the U.S. Court of Appeals. Parties may then appeal an adverse decision by the U.S. Court of Appeals to the U.S. Supreme Court, which has discretion on which cases it hears. In practice, the Supreme Court hears few antitrust appeals in cases prosecuted by the agencies.

The U.S. Courts of Appeal issue detailed, written opinions that provide the basis for decisions. This practice applies to all cases heard, including antitrust matters involving the United States government (whether DOJ or FTC). These decisions are important not only for resolution of the specific case being decided but also as a matter of precedent for application to future cases.

**Canada – The Competition Bureau (CCB)**

The “first-instance” decisions discussed *infra* (save for a decision to elevate a case to the DPP for prosecution407) are subject to review by an adjudicative body. When the CCB decides to contest conduct or a transaction as contrary to the Competition Act (the Act), the Commissioner must apply to the Competition Tribunal (the Tribunal) for an order in respect of such conduct. As such, the CCB’s decisions will always be subject to review by the Tribunal. At least one Federal Court trial division judge sits on every Tribunal hearing. When the Tribunal makes a decision, it will publicly issue written reasons for doing so. This is a requirement of procedural fairness that applies to all administrative bodies which serve adjudicative functions. 408 The Tribunal’s decision is further reviewable by the courts—under the Competition Tribunal Act, any and all appeals go to the Federal Court of Appeal, from which they can be further appealed to the Supreme Court.

407 Of course, where a case is elevated to the DPP, charges laid in respect of a competition offense will be subject to prosecution before a court.
For example, in the 2015 case *Tervita Corporation, et al v Commissioner of Competition*, the Supreme Court overturned a divestiture order made by the Tribunal.\textsuperscript{409}

Even consent agreements with the CCB are reviewable, since they must be approved by the Tribunal. In *Rakuten Kobo Inc. v. The Commissioner of Competition*, the Tribunal said that it should not act as a “rubber stamp” in approving consent agreements. In the merger context, it must determine whether the transaction will substantially prevent or lessen competition without the agreement before it can be approved.\textsuperscript{410} However, the Tribunal is unlikely to investigate or contest a proposed consent agreement on its own initiative, where the Commissioner has included a statement in the proposed agreement confirming that, in his view, the transaction will substantially prevent or lessen competition absent a remedy.

Criminal actions and private claims under section 36 of the Act are typically heard by provincial courts of general application. Courts will provide a decision in writing, usually containing detailed reasons. Court decisions can be further reviewed by appellate courts, up to the Supreme Court.

**South Africa – Competition Commission (SACC)**

Section 61, read with sections 62 and 63 of the South African Competition Act, provides for a review of the South African Competition Tribunal’s (Tribunal) decisions by the Competition Appeal Court (CAC) which has the power to review any decision of the Tribunal and consider appeals arising from the Tribunal. On appeal, the CAC would be concerned with whether a (final) decision of the Tribunal was right or wrong, whereas in a review the CAC is concerned with the manner in which the Tribunal has arrived at its decision. Notwithstanding this distinction the reasonableness of the Tribunal’s decision will always be evaluated when considering whether or not the Tribunal’s conclusions are justified by the evidence before it.

The decision taken by the SACC to refer a matter to the Tribunal or to grant leniency to a target in accordance with its Corporate Leniency Policy may also be taken on review or appeal to the Tribunal under Section 27(1)(c) of the Competition Act.

The Tribunal, CAC, or any other competent court, in making its decision will hand down a written judgment which sets out the background, issues to be decided, and a detailed explanation of the reasons for its decision on review as well as where and how it differs from the prior decision on the matter. These judgments are publicly available.

**India – National Company Law Appellate Tribunal and Supreme Court of India**

A review of an infringement decision by the CCI is in the form of an appeal preferred to the NCLAT which, after granting a hearing to the parties, is required to pass orders as it deems fit either confirming or modifying or setting aside the infringement decision appealed before it.\textsuperscript{411} Orders passed by the NCLAT are required to be in writing and pronounced by way of a judgment.\textsuperscript{412}

\textsuperscript{409} Tervita Corporation, et al v. Commissioner of Competition, 2015 S.C.C. 3. The Supreme Court’s legal finding confirmed the merging parties’ and Competition Tribunal’s respective burdens in cases involving the efficiencies defense (which seeks to prevent the Tribunal from blocking a merger on the basis that the efficiencies are greater than and offset the anticompetitive effects of the merger).

\textsuperscript{410} Rakuten Kobo Inc. v. Commissioner of Competition, 2016 Comp. Trib. 11.

\textsuperscript{411} Section 53B(3) of the Act.

\textsuperscript{412} Rule 88 of the NCLAT Rules, 2016.
The NCLAT Rules, 2016 also clarify that “orders or directions of the Bench shall be stated in clear and precise terms in the last paragraph of the order.”\textsuperscript{413} Beyond this, there are no specific written regulations which prescribe the content of the NCLAT judgments. Moreover, since the NCLAT has recently replaced the Competition Appellate Tribunal (i.e., the COMPAT), no general trend vis-à-vis the practice of the NCLAT can be provided. However, judgments of tribunals generally, and of the former COMPAT specifically, provide the arguments raised by the parties, as well as the legal basis and assessment used to arrive at the same in sufficient detail.

Much like the NCLAT, the final decision of the Supreme Court is also in writing and is pronounced after the case has been heard in open court.\textsuperscript{414} The judgment provides the arguments raised by the parties as well as the legal basis and assessment used to arrive at the same.

**Kenya – Competition Authority of Kenya (CAK)**

Appeals are provided for under section 73 of the Act, which states that targets may appeal a decision of the CAK to the Competition Tribunal and that Tribunal decisions may in turn be appealed to the High Court. Targets may appeal in writing within thirty days of becoming aware of the CAK’s decision against it. The Tribunal may confirm, modify, or reverse the order appealed against, or any part of that order. The Tribunal may also direct the CAK to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates. When directing the CAK to reconsider, the Tribunal will provide a written statement that includes its reasons for ordering the reconsideration and any specific directions related to the matter. A party dissatisfied with the decision of the Tribunal may appeal to the High Court against the decision of the Tribunal within thirty days from the date following the day the notice/decision was served on him/her.

It should be noted that the rules regarding appeal procedures, provided for in Section 71(6) of the Act, have not yet been gazetted.

Finally, Part III of the Act dealing with restrictive trade practices does not provide for a review. The review practice under Part IV of the Act, therefore, only applies to mergers. Therefore, there is no provision for review and consequently no detailed written assessment.

\textsuperscript{413}Rule 89 of the NCLAT Rules, 2016.

\textsuperscript{414}Order XII of the Supreme Court Rules 2013.
Best Practices Applicable to All Phases of Antitrust Proceedings

**Practice No. VI.A**

**Description**

Officials involved in all steps of an antitrust proceeding should possess sufficient expertise in competition law, economics and/or other relevant disciplines to enable them to conduct their duties in a disinterested, efficient and accurate fashion.

**Jurisdictions Evaluated:**

- European Union
- Colombia
- Egypt
- India

**European Union – European Commission DG Competition**

The European Commission (EC) appoints members of the Directorate-General for Competition (DG Comp). The Director-General heads DG Comp and three Deputy Directors-General lead the three areas of competition enforcement—mergers, antitrust and state aid—ensuring that each team focusses on its specific expertise. The Chief Competition Economist provides independent economic advice on cases and policy. Permanent officials of the EC are selected by open competitions organized by the European Personnel Selection Office, which measures professional skills and core competencies. At a more senior level, Heads of Unit are required to have specialist knowledge, skills, good general education and leadership qualities. They need to be qualified in a specific field and have professional experience (normally between 10-15 years), giving them a clear expertise in a given field. However, the Commissioners who ultimately render the decisions of the EC (including for DG Comp) are member-state politicians, often with little antitrust experience or microeconomic training.

The EC also appoints Hearing Officers. They are independent of DG Comp and are attached, for administrative purposes, to the Competition Commissioner. They are charged with ensuring due process, safeguarding the parties and procedural rights, and contributing to the quality of the decision-making in the EC proceedings. Specifically, they act as a dispute resolution mechanism over DG Comp’s decisions, they have the power to make recommendations in relation to certain procedural issues and they can report on any procedural incidents in their interim and final reports.

Judges of the General Court and the Court of Justice conduct judicial review of the decisions adopted by the EC. The judges are chosen from legal experts whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries, and who are of recognized competence.

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417 *Id.*


Overall, the staff and management of the EC are highly qualified and experienced in relevant areas of competition law and economics. However, there is some variability as some members of the DG Comp staff are generalized administrators who lack extensive antitrust or microeconomic training.

Colombia – Superintendence of Industry and Commerce (SIC)

The SIC is one of the most “technical” institutions in the Colombian government and is entrusted with public enforcement of antitrust, unfair competition, consumer, intellectual property, data protection, and privacy laws. The SIC also has judicial powers to settle unfair competition, intellectual property, and consumer civil claims.

The head of the SIC is appointed by the President. As per Decree 1817 of 2015, eligible candidates must have (i) an undergraduate degree and a postgraduate degree (masters or doctorate) in a related field and (ii) at least ten years of professional or academic experience in a related field. Related fields, while not explicitly defined, would be law, economics, or a similar subject area. However, as the current Superintendent was appointed prior to the Decree, there is not yet any evidence on the strictness with which these rules will be applied. In more recent terms, the Superintendent has become a more political—rather than technical—position. With the increase in fines stemming from antitrust infringement and the increase in consumer protection cases under the current administration, the SIC’s decisions have taken on a political edge.

Each of the SIC’s functions is carried out by a delegate, or Deputy Superintendent, and director and their investigation team. The Deputy Superintendent for the Protection of Competition is in charge of instructing all investigations and issuing recommendations on sanctions. The position is freely appointed by the Superintendent, with no academic or professional requirements. Past Deputy Superintendents have been selected from various backgrounds—the former Deputy Superintendent was a competition lawyer in a local law firm, while the current one was the former Deputy Superintendent for Consumer Protection at the SIC.

Typically, an economist and a lawyer are paired up for each case—the former for merger control issues and the lawyer for antitrust prosecution issues. The merger control team is made up mostly of economists and some lawyers. The officers in charge of merger control are very familiar with antitrust economics and apply both European and U.S. merger control principles. The majority of the antitrust prosecution team is made up of lawyers with a background in antitrust issues and procedural law. They are frequently trained by local and foreign advisors, including the U.S. Federal Trade Commission and Department of Justice Antitrust Division. Recently, the antitrust prosecution team has relied significantly on digital evidence forensics experts, as well as a highly advanced forensics laboratory endowed by U.S. authorities.

Egypt – Egyptian Competition Authority (ECA)

The Competition law, as amended, requires that the ECA board be comprised of the following ten members, and there is no specific requirement for competence in competition law or economics: a Chairman selected by the competent Minister; Counsel from the State Counsel selected by the Chairman of the State Counsel; two members representing the relevant Ministries selected by the competent Minister; three experts in law and economics selected by the Chairman of the Board; and three individuals representing the Federation of Egyptian Industries, Federation of Egyptian Chambers of Commerce and Consumer Protection Agency respectively.
Although the ECA’s investigators generally possess sufficient competition and economic skills to investigate potential contraventions, the ECA’s Board is ultimately responsible for, *inter alia*, i) receiving requests and ordering inquiries, inspecting and collecting information regarding anti-competitive behavior; ii) ordering remedies or imposing sanctions; and iii) engaging in various advocacy initiatives and attending to administrative issues. Accordingly, the overall experience in competition law is mixed and at times lacking at the Board level.

**India – Competition Commission of India (CCI)**

The officials involved in antitrust proceedings can be divided into the different categories: a) Chairperson, Members and officers of the CCI, which include Advisors, Directors, other experts and professionals; and b) the Directorate General (DG) officials.

The Act and the attendant regulations lay down rules regarding the qualification for the Chairperson as well as the other members of the CCI. Section 8 of the Act provides that the Chairperson and the other members to be appointed to the CCI are required to possess special knowledge of and professional experience of at least fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy which, in the opinion of the Central Government, may be useful to the CCI. For the Secretary, other officers and employees of the CCI which include Directors and Advisors, “experience in Competition Law,” “financial analysis related to competition issues,” or “experience in Competition Economics” is desirable.420

The CCI also has the power to appoint experts, professionals and other officers as it “considers necessary for the efficient performance of its functions under the Act.”421 As per Section 17(3) of the Act, such experts, professionals and other officers should have “special knowledge of, and experience in economics, law, business, or such other disciplines related to competition.” Such experts are engaged on the basis of their qualifications in their respective fields of expertise which include law, economics, international trade, and science.422

As to DG officials, Section 16 of the Act provides for appointment of the DG who may be assisted by Additional, Joint, Deputy and Assistant DG or such officers or employees as prescribed. The Act further specifies that the DG and Additional, Joint, Deputy and Assistant DG or such officers, should have experience in the conduct of investigation and knowledge of accountancy, management, business, public administration, international trade, law or economics. While the Act does not require knowledge of Competition Law, the CCI (Rules, 2009 at Schedule 111 (directed at the number) of Additional, Joint, Deputy or Assistant Director General other officers and employees, their manner of appointment, qualification, salary, allowances and other terms and conditions of service) provide that “experience in Competition Law,” “financial analysis related to competition issues,” or “experience in Competition Economics” is desirable for certain posts like those of the Additional, Deputy and Joint DG.

In practice, CCI members generally do not have adequate competition law experience or expertise. This is attributed in part to the relative nascency of the Indian competition regime (which went into effect for the Act’s enforcement provisions in May 2009). It is hoped that this will change over time as the agency gains more experience and more staff with training in antitrust and

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420 Rule 3 read with Schedule I of the CCI (salary, allowances, other terms and conditions of service of the Secretary and officers and other employees of the Commission and the number of such officers and other employees) Rules, 2009.

421 Section 17(1) of the Act.

microeconomics are introduced into the agency and attain positions of influence. Increasingly, CCI members are being sent on secondments to other competition agencies to gain international exposure and insights into the functioning of more mature competition law jurisdictions.
Practice No. VI.B
Best Practices Applicable to All Phases of Antitrust Proceedings

Description
All rules and practices governing proceedings – procedure, evidence, review, etc. – should be clearly disclosed and made publicly accessible in advance of proceedings. Any exceptions should be proportional and based on specifically identified objective and legitimate reasons.

Jurisdictions Evaluated:
- United States
- Poland
- Mexico
- Japan
- South Africa
- China

United States – Department of Justice (DOJ) and Federal Trade Commission (FTC)

The U.S. DOJ and FTC (Agencies) utilize clear rules and procedures that are widely available publicly, including on the internet. With regard to substantive considerations, the Agencies publish guidelines that describe the standards they use to analyze various kinds of conduct that could raise antitrust concerns. For example, the joint Horizontal Merger Guidelines reflect the substantive standards that the Agencies follow and the types of evidence generally relied upon during a merger review. The Agencies also have published similar guidance regarding collaboration among competitors and issues concerning intellectual property.

DOJ’s internal practices and procedures are exhaustively described in the Antitrust Division Manual, which is published on its website and has been recently updated. DOJ’s criminal cartel enforcement website similarly provides information regarding its leniency program and other elements of its cartel investigations. The DOJ website provides many other useful documents regarding policies and procedures.

The FTC’s practices and procedures for investigating and enforcing the competition laws are codified in its publicly available Rules of Practice; Part II relates to investigational procedures, while Part III sets forth adjudicative procedures. The agency’s pre-merger notification requirements are fully set forth in subchapter H of the FTC’s rules. Both the DOJ and FTC follow these published procedures in practice. Deviations from standard operating procedures are typically discussed and agreed to between agency staff and the parties in advance (e.g., agency staff reviewing a merger may ask the parties to agree to extend the agency’s period for review via a timing agreement).

Both Agencies publish additional information on their web sites, including contact information for staff, organizational charts, descriptions of relevant economic and legal functions, and identification of key decision-makers.

For matters that are adjudicated in federal court, the court proceedings are governed by the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Federal Rules

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of Evidence, which are available and provide detailed rules about the course of a litigation and the kinds of evidence that can be considered.

**Poland – Office of Competition and Consumer Protection (OCCP)**

The OCCP’s proceedings are regulated by the Competition Law Act\(^ {425}\) and—to the extent that they are not regulated in the Competition Law Act—by the Administrative Proceedings Code\(^ {426}\) and the Civil Proceedings Code.\(^ {427}\) Rules laid down in these Acts are generally strictly followed by the OCCP’s officials, and, as a result, the proceedings before the OCCP are highly standardized and, in that sense, transparent. To a certain extent, the rules and practices governing proceedings before the OCCP are also governed by the guidelines issued from time to time by the President of the OCCP. These include, for example the Rules for Contact with Enterprises, and the Guidelines on a Detailed Justification of Charges. As non-binding soft law, the rules published in these documents are not binding on the OCCP, nor is their status clear in the context of a judicial review of the OCCP’s decisions within appeal proceedings. But they are nonetheless helpful in providing clear and transparent guidance on governing rules and practices.

**Mexico – Comisión Federal de Competencia Económica (COFECE)**

The Statutory Framework, and specially the FECL and its Regulations, contemplate and lay out a considerable framework of rules that directly apply to different procedures, how they are processed, and how evidence is gathered, managed and valued. Such regulations also provide clarity about relevant time-frames, rights for particulars and obligations for decision-making officials. Since the issuance of the new FECL, the Regulations, the Internal Regulations and the non-binding guidance and technical criteria, this practice has considerably improved.

In almost all cases, these rules are fully applied and respected by decision-making officials and procedures are processed under such scenario. However, some governing procedures are incomplete or still in the process of being developed. As one example, an issue has recently been identified related to the local leniency program as explained below:

(i) Local leniency programs, mainly regulated by the FECL and its Regulations, impose on applicants a series of obligations that must be complied with in order to receive leniency benefits.

(ii) Applicants need to comply with these obligations at all times and until the final resolution of a case is rendered by the Board of Commissioners of the Enforcers. In fact, leniency benefits are temporarily granted to applicants since the original application but are subject to the full compliance of requirements and final evaluation from the Board of Commissioners, which in the final decision, will confirm or revoke leniency benefits.

(iii) Nevertheless, the current Statutory Framework neither contemplates, nor provides guidance as to what happens when leniency benefits are revoked by the Board of Commissioners at the final decision, and the applicant does not have any opportunity to defend itself in case the Board of Commissioners revokes leniency benefits.


(iv) Therefore, even if a leniency applicant has recognized the commission of unlawful conduct and provided self-incriminatory evidence, the Board of Commissioners, in the final act of a procedure, may revoke such benefits, without granting the applicant the opportunity to respond against the revocation.

Recognizing that some exceptions exist, rules and practices governing procedures are generally clearly disclosed and publicly available.

**Japan – Japan Fair Trade Commission (JFTC)**

There are clear and thorough statutory provisions, rules and guidelines governing just about all aspects of JFTC investigation procedures. These are all accessible on the JFTC website in Japanese and English. There have been substantial amendments to JFTC investigation procedures in the last decade, including a major revision of the review of JFTC orders from an internal administrative Commission hearing to judicial review. The hearing reform bill also included measures for review of procedures in accordance with principles of due process. Several rules and guidelines have been revised with the aim of improving clarity, transparency, and fairness. Such revisions were subject to public comments, which the JFTC seemed to consider carefully.

The general view is that JFTC procedures are quite predictable and transparent and have been substantially improved taking into consideration feedback from the public. The primary criticism is not about transparency, however, but rather whether the procedural rules and guidelines focus on form over substance. Recently, various legal and industry associations have complained in particular about the lack of right to counsel in witness interviews and the lack of recognition of attorney-client privilege. Further, it could be said that some procedures may be too rigid with exceptions not applied in a practical or proportional manner. For example, restrictions on photocopying portions of the record are set forth in the Antimonopoly Act itself and may therefore be hard to change. Similarly, restrictions on attendance of attorneys at witness interviews and notetaking by witnesses are detailed in guidelines, with limited exceptions enumerated.

**South Africa – Competition Commission (SACC)**

In addition to the Competition Act, the SACC and the Competition Tribunal have binding Rules, published in 2001, which regulate the conduct and proceedings of and before the respective agencies. Furthermore, the SACC has published a number of policies (i.e. corporate leniency policy) and guidelines which provide further clarity in relation to how the SACC will evaluate certain conduct or aspects of enforcement.

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430 See [JFTC INVESTIGATION PROCEDURES GUIDELINES, supra note 428, II.2(3)(ii)].

However, in practice the SACC has not applied the guidelines with consistency, particularly those in relation to the determination of administrative penalties and the assessment of public interest considerations in merger control. The clarity and objectivity which the guidelines sought to provide have not yet been achieved as a result of these guidelines being non-binding. The SACC has, for instance, in recent cases opted to penalize firms based on their total turnover rather than the “affected turnover” as per the penalty guidelines. 432

In relation to the Competition Commission’s practice insofar as merger control is concerned, the Commission Rules set out the process and procedures and are generally followed as these are binding on the Commission. But the procedures governing decisional factors are difficult to access in practice as relates to public interest factors.

China – the National Development and Reform Commission (NDRC); State Administration of Industry and Commerce (SAIC); & the Ministry of Commerce (MOFCOM)

Within a decade after the AML’s enactment, the three authorities have made some progress in promulgating more procedural rules. MOFCOM, in particular, has rolled out the most rules, which also reflects its active enforcement, and is also in the process of updating some of its earliest rules from 2009. 433 The three authorities also started to publish their rules and decisions on their websites, some of which are available in English. 434 Moreover, the authorities have started to publish draft rules for public comment 435 before they adopt a new set of rules.

Nevertheless, there are still numerous gaps in the disclosure of procedures, and the authorities have been criticized for not assiduously following their own procedural rules, especially because the rules do not provide what consequences the authorities will face when they fail to do so. With the consolidation of the three former authorities, it is hoped that the authorities will provide more procedural transparency in its antitrust proceedings.

432 See, Omnico (Pty) Ltd; Cool Heat Agencies (Pty) Ltd vs The Competition Commission & Others 43/CAC/Jun16.
434 The relevant laws and decrees enacted by the State Council are published both in Chinese and English.
435 Sometimes these rulemaking efforts can take several rounds of comment-seeking and revisions.
### Practice No.

**VI.C**

**Best Practices Applicable to All Phases of Antitrust Proceedings**

**Description**

*Officials should provide for an effective system to prevent unnecessary delay at any stage in proceedings.*

### Jurisdictions Evaluated:

- Italy
- United States
- Kenya
- European Union
- Peru

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**Italy – Autorità Garante della Concorrenza e del Mercato (ICA)**

Once an investigation for an alleged violation of competition rules has been initiated, either upon a complaint, a leniency application, or on ICA’s own motion, a time limit is communicated to the parties in accordance with Article 6 § 3 of the Regulation on ICA’s proceedings. Although such time limit is not binding (the ICA can extend it by providing a sufficient justification, e.g. if the case is particularly complex or new factual or legal circumstances emerged during the course of the investigation to justify its extension), undue delay of infringement proceedings is rare. Infringement proceedings typically last approximately twelve to eighteen months. The ICA advises the parties when the investigation is terminated and shares the results at least thirty days before the deadline expires. According to Article 2 §9 of the Law on Administrative Proceedings, “failure or delay to issue the final decision within the time-limits constitutes an element for the assessment of individual performance, and may be, [a] source of disciplinary, and administrative liability.”

Regarding merger control proceedings specifically, the review process must be completed by the ICA within a short and well-defined timeframe as prescribed by Article 16 of the Italian Law on Competition. Phase I takes thirty calendar days from the date of the notification, after which the ICA may decide whether to clear the transaction or to open an in-depth Phase II which may take up to forty-five additional calendar days. This period may be extended for not more than thirty calendar days if the parties fail to supply relevant information requested by the ICA.

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436 L. n.287/1990, art. 12 (It.).
437 D.P.R. n.217/1998 (It.).
439 D.P.R. n.217/1998, art. 14, § 2 (It.).
440 L. n.241/1990 (It.).
441 L. n.287/1990 (It.).
United States – Department of Justice (DOJ) and Federal Trade Commission (FTC)

The policy manuals of both the DOJ’s Antitrust Division and the FTC impose requirements on the Agencies to conduct antitrust investigations without unnecessary delay. The FTC Rules state, “To the extent practicable and consistent with requirements of law, the Commission’s policy is to conduct such proceedings expeditiously. . . .” The Administrative Law Judge and counsel for all parties shall make every effort at each stage of a proceeding to avoid delay.” The DOJ Antitrust Division Manual urges staff to “prepare its cases as expeditiously as practicable” and “to streamline civil litigation to the greatest extent practicable.” And, while a defendant cannot assert laches as a defense to an antitrust suit brought by the government, the DOJ Manual acknowledges that, at least with respect to requests for preliminary relief, “courts likely would view with disfavor requests for emergency relief made only days before a scheduled closing when the Government was aware of the merger or acquisition months in advance.”

In merger proceedings, there are fixed time limits placed on the reviewing agency’s investigation into the competitive effects of the proposed transaction. The initial waiting period expires thirty days after merging parties submit their required merger clearance forms. If a Second Request is issued, the parties may close the transaction thirty days after they certify substantial compliance with the Second Request unless the reviewing Agency secures a preliminary injunction from a federal court (or the parties agree to refrain from closing for a set period after litigation is filed). In practice, parties often enter into timing agreements with Agency staff that extends the period for Agency review, usually by promising not to close the transaction or certify compliance with the Second Request for an additional period of time.

Despite these policies, the timeline for litigated merger cases continues to lengthen. In 2016, “[t]he average time between the complaint and the first day of trial was 179 days, and the average trial length is 34 days.” This was seventy-nine days longer than the average wait for

443 16 C.F.R. § 3.1.
444 DOJ ANTITRUST DIVISION MANUAL, supra note 442, at IV-25.
445 Id. at IV-57.
447 DOJ ANTITRUST DIVISION MANUAL, supra note 442, at IV-24-25. In a November 2017 speech, DOJ Antitrust Division Deputy Assistant Attorney General Donald Kempf noted that the agency is aware of the length of merger investigations and wants to “reverse the trend by increasing the speed and reducing the burden of merger reviews.” Donald G. Kempf, Jr., Dep. Asst. Att’y Gen., U.S. Dep’t of Justice, Antitrust Div., Merger Reviews: Do They Take Too Long? Address at the American Bar Association Antitrust Section Fall Forum 2 (Nov. 17, 2017), available at www.justice.gov/opa/speech/file/1012156/download.
450 According to an article from Bloomberg Law, significant merger investigations “lasted an average of 9.9 months in 2016 compared with 7.1 months in 2011, an increase of about 40 percent.” Alexei Alexis, Slow Merger Reviews Cause Headaches for Companies, BLOOMBERG LAW (June 14, 2017), available at www.bna.com/slow-merger-reviews-73014453245/.
trial in 2015 and twenty-two days longer to try the case.\textsuperscript{452} However, the DOJ has recently announced efforts to accelerate the merger review process.\textsuperscript{453}

In criminal antitrust matters, the DOJ is required to comply with the Speedy Trial Act, which establishes time limits for completing the various stages of a federal criminal prosecution.\textsuperscript{454} For example, the information or indictment must be filed within thirty days from the date of arrest or service of the summons and trial must begin within seventy days from the date the information or indictment was filed, or from the date the defendant appears before an officer of the court in which the charge is pending, whichever is later.\textsuperscript{455} Additionally, Rule 48 of the Federal Rules of Criminal Procedure grants trial courts discretion to dismiss cases that are not brought to trial promptly.\textsuperscript{456} In some instances, a defendant also may be able to assert that a delay has violated his Fifth Amendment due process rights. In practice, defendants are often happy to grant extensions in the time allowed to prepare for trial.

**Kenya – Competition Authority of Kenya (CAK)**

There are no timelines prescribed for conducting investigations and, in practice, the time periods of investigations vary significantly, based on the work load of each investigation. The CAK, however, does not generally spend disproportionately long periods of time investigating cases. As a matter of practice, the CAK’s “self-imposed” timelines are reasonable and usually adhered to. With regard to merger investigations, the CAK is required in terms of the Act to investigate and provide its decision within sixty days from acknowledging receipt. In instances where the CAK has requested further information (within thirty days) or requested a hearing conference, the period for review would be extended to be sixty days from the date of receiving such further information or date of conclusion of the hearing conference. In total, the CAK is required to provide its decision within 180 days.

**European Union – European Commission DG Competition**

The European Commission (EC)’s antitrust proceedings have often been criticized for their excessive length, usually taking several years to conclude.\textsuperscript{457} First, the investigation period of the EC can be excessively long. The statistics show that, from 2003 to 2013, the EC took on average four to six years to investigate abuse of dominance cases. The complexity of economic factors and cross-border elements can sometimes explain this; however, “the excessive length of these investigations is also due to the fact that the Commission is not subject to any deadline within which the investigation must be completed.”\textsuperscript{458} In fact, in antitrust investigations the EC can prepare its case through investigation for several years before proceeding to the decision-making
stage. In merger control proceedings, the EC can gather information for an unrestricted period during the “pre-notification phase.” Discussions between the targets and the EC can last several months, particularly in complex mergers, before the start of the first official phase of clearance. This renders the timeline of the EC merger review process somewhat meaningless.

The fact that there are two distinct stages—and that the EC only starts the decision-making process once it concludes its investigation—makes this problem worse. Thus, “the absence of deadlines at the procedural level, coupled with the possibility to conduct an investigation before opening a formal proceeding, result in the Commission’s tendency to overly expand the average time-span of its antitrust investigations.” This has also led to criticism that the EC is sometimes engaged in a fishing expedition without a clear theory of harm.

Finally, commitment decisions can also be a source of unnecessary delays. Before adopting a commitment decision, the EC market tests the offered commitment to assess whether it is appropriate, which can be a lengthy process. In addition, both the EC and the party offering commitments may withdraw commitments until the adoption of a decision. There is therefore always a risk that (unsuccessful) commitment discussions may significantly delay antitrust investigations.

Peru – National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI)

The procedural framework applicable to antitrust procedures is comprised by Law No. 27444—Law on the General Administrative Procedures (LGAP) and Legislative Decree No. 1034—Antitrust Law (Antitrust Law). These rules set forth the application of legal principles and defined time limits for the activities and stages of each administrative procedure with the purpose of providing for an effective procedural system. The most relevant principles regarding this issue are the following: (i) the principle of simplicity, under which all administrative authorities must conduct its procedures in a simple manner eliminating unnecessary complexities; and (ii) the principle of celerity, under which all administrative procedures should be as dynamic as possible, avoiding actions or requirements that may unnecessarily delay its duration, provided that due process is respected. In its current practice, the antitrust authorities guide their actions to ensure the compliance of these principles and to abide by all procedural rules, such as time limits for specific stages (i.e. preliminary investigation, trial period, term for the issuance of decision, among others), that are in the Antitrust Law. In fact, all procedural rules and time limits are determined in accordance with the aforementioned principles. These rules are applicable to all administrative procedures. There are cases in which legal terms are not met with exact precision, and this depends on the complexity of each case and the workload of the authority, but it should be noted that these rules are usually followed. In each particular case and in accordance with its complexity as well as other factors, the authority may establish extraordinary terms and also grant extensions, but it never exceeds the maximum limits established by law.

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459 For example, in July 2018 the EC announced that it was modifying and expanding its investigation into Qualcomm relating to the alleged predatory pricing of UMTS baseband chips. The investigation was originally opened nine years ago.

460 Id. § 273.


Although the Antitrust Law does establish legal terms for the actions and stages which are part of the procedure during its first instance, this is not the case for the second instance in which the case is reviewed by the Antitrust Tribunal of INDECOPI (Antitrust Tribunal). The Antitrust Law does not set forth any rules regarding time limits. This lack of regulations has led to circumstances in which the Antitrust Tribunal has taken more than four years to issue a second instance decision.\(^{463}\)

\(^{463}\) See “Arcos Dorados Case” solved under Case File No. 007-2007/CLC.
Summary of Outcome of Agency Assessments
## Country Outcomes by Practice

<table>
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<th>CATEGORY</th>
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<tr>
<td>I.</td>
<td>INVESTIGATION</td>
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</table>
| A.       | Define issues clearly (factual and legal) | 1. United Kingdom  
2. Peru  
3. Mexico  
4. India  
5. Japan  
6. Kenya |
| B.       | Adopt proportional investigative measures | 1. Chile  
2. Singapore  
3. Zambia  
4. Canada  
5. European Union  
6. United States |
| C.       | Reassess periodically whether to continue | 1. United States  
2. Singapore  
3. Argentina  
4. Kenya  
5. Mexico |
| D.       | Pursue and consider both exculpatory and inculpatory evidence | 1. Canada  
2. United Kingdom  
3. Zambia  
4. Brazil  
5. Korea |
| E(i).    | Make disclosure periodically to target | 1. Italy  
2. United Kingdom  
3. Argentina  
4. Korea  
5. South Africa |
| E(ii).   | Ensure target has a full opportunity to respond to potential contentions of infringement | 1. European Union  
2. Brazil  
3. Spain  
4. Colombia  
5. Taiwan |
| E(iii).  | Maintain confidentiality of evidence in all aspects of investigation | 1. Mexico  
2. Egypt  
3. Japan  
4. European Union  
5. Korea |
| G(iii).  | Protect confidential materials | 1. Mexico  
2. Egypt  
3. Japan  
4. European Union  
5. Korea |
| G(i).    | Provide target with all evidence | 1. United Kingdom  
2. European Union  
3. Germany  
4. Canada  
5. Korea  
6. China |
| G(ii).   | Provide target full opportunity to respond to evidence with documentary submissions and in-person meetings | 1. United States  
2. Japan  
3. European Union  
4. India  
5. Egypt |
### Country Outcomes by Practice

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>Practice</th>
<th>RANK ORDER</th>
</tr>
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</table>
| H.       | Disclosure of investigation should be non-prejudicial | 1. France  
2. Canada  
3. Tanzania  
4. Italy  
5. Argentina |

#### II. ASSERTING CONTENTIONS OF INFRINGEMENT

| A. | Include clear explanation of evidence and supporting theories | 1. United States  
2. European Union  
3. Peru  
4. Poland  
5. South Africa  
6. China |
| C. | Offer opportunity to settle pre-announcement | 1. United States  
2. Brazil  
3. Germany  
4. Korea  
5. Mexico |
| D. | Any announcement clear and non-prejudicial | 1. India  
2. United Kingdom  
3. United States  
4. Ukraine  
5. China |

#### III. ASSESSING CONTENTIONS OF INFRINGEMENT

| A. | Follow predictable procedural steps | 1. United Kingdom  
2. Canada  
3. Japan  
4. Chile  
5. Egypt |
| B. | Disclose identity of decision-maker | 1. France  
2. South Africa  
3. Italy  
4. Colombia  
5. China |
| C(i). | Compile clear record | 1. United Kingdom  
2. Singapore  
3. Mexico  
4. India  
5. Kenya |
| C(ii). | Provide means to exclude extraneous matter from record | 1. South Africa  
2. United States  
3. United Kingdom  
4. Chile  
5. Taiwan |
| C(iii). | No off-the-record communications with decision-making officials | 1. Japan  
2. Mexico  
3. Brazil  
4. European Union  
5. South Africa |
## Country Outcomes by Practice

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>Practice</th>
<th>RANK ORDER</th>
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<tbody>
<tr>
<td>D.</td>
<td>Target permitted to introduce all relevant evidence, argument, and</td>
<td>1. United States</td>
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<tr>
<td></td>
<td>analysis on material issues</td>
<td>2. Ukraine</td>
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<td></td>
<td></td>
<td>3. Colombia</td>
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<td>4. Korea</td>
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<td>5. China</td>
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<tr>
<td>E.</td>
<td>Evidence subject to challenge—process open to target</td>
<td>1. United States</td>
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<tr>
<td></td>
<td></td>
<td>2. Canada</td>
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<tr>
<td></td>
<td></td>
<td>3. France</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4. Japan</td>
</tr>
<tr>
<td></td>
<td></td>
<td>5. Chile</td>
</tr>
<tr>
<td>F.</td>
<td>Challenges made in presence of first-instance decision-making officials</td>
<td>1. Belgium</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. United Kingdom</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3. Mexico</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4. Egypt</td>
</tr>
<tr>
<td></td>
<td></td>
<td>5. Poland</td>
</tr>
</tbody>
</table>

### IV. FIRST-INSTANCE DECISION

| A(i).   | Base decision solely on record                                           | 1. Canada  |
|         |                                                                          | 2. European Union |
|         |                                                                          | 3. Zambia   |
|         |                                                                          | 4. India    |
|         |                                                                          | 5. Kenya    |
| A(ii).  | Issue written and detailed reasons                                       | 1. United Kingdom |
|         |                                                                          | 2. Canada   |
|         |                                                                          | 3. China    |
|         |                                                                          | 4. Korea    |
|         |                                                                          | 5. Taiwan   |
|         |                                                                          | 6. Kenya    |
| B.      | Articulate justification for any remedy                                  | 1. European Union |
|         |                                                                          | 2. United States |
|         |                                                                          | 3. Egypt    |
|         |                                                                          | 4. India    |
|         |                                                                          | 5. Argentina|

### V. REVIEW

| A.      | Independent review                                                       | 1. Germany  |
|         |                                                                          | 2. Korea    |
|         |                                                                          | 3. Belgium  |
|         |                                                                          | 4. European Union |
|         |                                                                          | 5. China    |
| B.      | Target given opportunity to fully participate                            | 1. United States |
|         |                                                                          | 2. India    |
|         |                                                                          | 3. Ukraine  |
|         |                                                                          | 4. Kenya    |
|         |                                                                          | 5. China    |
| D.      | Review is solely on the record                                           | 1. European Union |
|         |                                                                          | 2. Mexico   |
|         |                                                                          | 3. Argentina|
|         |                                                                          | 4. Brazil   |
|         |                                                                          | 5. Tanzania |
### Country Outcomes by Practice

<table>
<thead>
<tr>
<th>CATEGORY Practice</th>
<th>RANK ORDER</th>
</tr>
</thead>
</table>
| E. Issue written and detailed reasons | 1. United States  
2. Canada  
3. South Africa  
4. India  
5. Kenya |

#### VI. BEST PRACTICES APPLICABLE TO ALL PHASES OF ANTITRUST PROCEEDINGS

| A. Investigators / decision-makers must have relevant expertise | 1. European Union  
2. Colombia  
3. Egypt  
4. India |
| B. Procedures are clear, transparent and assiduously followed | 1. United States  
2. Poland  
3. Mexico  
4. Japan  
5. South Africa  
6. China |
| C. No undue delay | 1. Italy  
2. United States  
3. Kenya  
4. European Union  
5. Peru |
### Rank Order Outcomes by Jurisdiction

#### TOTAL CASE ASSESSMENTS PREPARED

<table>
<thead>
<tr>
<th>Category</th>
<th>North America</th>
<th>South America</th>
<th>Africa</th>
<th>Asia</th>
<th>Europe</th>
</tr>
</thead>
<tbody>
<tr>
<td>Practice</td>
<td>Canada</td>
<td>Mexico</td>
<td>US</td>
<td>Argentina</td>
<td>Brazil</td>
</tr>
<tr>
<td>I. INVESTIGATION</td>
<td>Canada</td>
<td>Mexico</td>
<td>US</td>
<td>Argentina</td>
<td>Brazil</td>
</tr>
<tr>
<td>A. Define issues clearly (factual and legal)</td>
<td>3</td>
<td>2</td>
<td>6</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>B. Adopt proportional investigative measures</td>
<td>4</td>
<td>6</td>
<td>1</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>C. Reassess periodically whether to continue</td>
<td>5</td>
<td>1</td>
<td>3</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>D. Pursue and consider both exculpatory and inculpatory evidence</td>
<td>1</td>
<td>4</td>
<td>3</td>
<td>5</td>
<td>2</td>
</tr>
</tbody>
</table>

### Report of the Procedural Transparency Task Force

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**TOTAL CASE ASSESSMENTS**: 160
# Rank Order Outcomes by Jurisdiction

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>NORTHERN AMERICA</th>
<th>SOUTHERN AMERICA</th>
<th>AFRICA</th>
<th>ASIA</th>
<th>EUROPE</th>
</tr>
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<tr>
<td>Practice</td>
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<td></td>
</tr>
<tr>
<td></td>
<td>Canada</td>
<td>Mexico</td>
<td>US</td>
<td>Argentina</td>
<td>Brazil</td>
</tr>
<tr>
<td>E(i).</td>
<td>Make disclosure periodically to target</td>
<td>3</td>
<td>5</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>E(ii).</td>
<td>Ensure target has a full opportunity to respond to potential contentions of infringement</td>
<td>2</td>
<td>4</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>E(iii).</td>
<td>Maintain confidentiality of evidence in all aspects of investigation; Protect confidential materials</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>G(i).</td>
<td>Provide target with all evidence</td>
<td>4</td>
<td>6</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>G(ii)</td>
<td>Provide target full opportunity to respond to evidence with documentary submissions and in-person meetings</td>
<td>1</td>
<td>5</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>H.</td>
<td>Disclosure of investigation should be non-prejudicial</td>
<td>2</td>
<td>5</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>

## II. ASSERTING CONTENTIONS OF INFRINGEMENT

### A. Include clear explanation of evidence and supporting theories
- Canada: 1
- Mexico: 3
- US: 5
- Argentina: 6
- Brazil: 2
- Chile: 4
- Colombia: 1
- Peru: 3
- Tanzania: 5
- Egypt: 6
- Kenya: 4
- Zambia: 3
- South Africa: 2
- China: 5
- India: 1
- Japan: 3
- Korea: 4
- Singapore: 2
- Taiwan: 3
- EU: 5
- Germany: 1
- Italy: 3
- Poland: 4
- Spain: 5
- Ukraine: 2
- France: 3
- UK: 1
- Belgium: 6

### C. Offer opportunity to settle pre-announcement
- 5
- 1
- 2
- 4
- 3

### D. Any announcement clear and non-prejudicial
- 3
- 5
- 1
- 4
- 2

## III. ASSESSING CONTENTIONS OF INFRINGEMENT

### A. Follow predictable procedural steps
- 2
- 4
- 5
- 3
- 1

### B. Discuss identity of decision-maker
- 4
- 2
- 5
- 3
- 1
### Rank Order Outcomes by Jurisdiction

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>NORTH AMERICA</th>
<th>SOUTH AMERICA</th>
<th>AFRICA</th>
<th>ASIA</th>
<th>EUROPE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Practice</td>
<td>Canada</td>
<td>Mexico</td>
<td>US</td>
<td>Argentinia</td>
<td>Brazil</td>
</tr>
<tr>
<td>C(i). Compile clear record</td>
<td>3</td>
<td>5</td>
<td>4</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>C(ii). Provide means to exclude extraneous matter from record</td>
<td>2</td>
<td>4</td>
<td>1</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>C(iii). No off-the-record communications with decision-making officials</td>
<td>2</td>
<td>3</td>
<td>5</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>D. Target permitted to introduce all relevant evidence, argument, and analysis on material issues</td>
<td>1</td>
<td>3</td>
<td>5</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>E. Evidence subject to challenge—process open to target</td>
<td>2</td>
<td>1</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>F. Challenges made in presence of first-instance decision-making officials</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>2</td>
<td>1</td>
</tr>
</tbody>
</table>

#### IV. FIRST-INSTANCE DECISION

| A(i). Base decision solely on record | 1 | 5 | 3 | 4 | 2 |
| A(ii). Issue written and detailed reasons | 2 | 6 | 3 | 4 | 5 | 1 |
| B. Articulate justification for any remedy | 2 | 5 | 3 | 4 | 1 |

#### V. REVIEW

| A. Independent review | 5 | 2 | 4 | 1 | 3 |
| B. Target given opportunity to fully participate | 1 | 4 | 5 | 2 | 3 |
### Rank Order Outcomes by Jurisdiction

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<th>CATEGORY</th>
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<tr>
<td></td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>D. Review is solely on the record</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E. Issue written and detailed reasons</td>
<td>2</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### VI. BEST PRACTICES APPLICABLE TO ALL PHASES OF ANTITRUST PROCEEDINGS

| A. Investigators / decision-makers must have relevant expertise | 2 | 3 | 4 | 1 |
| B. Procedures are clear, transparent and assiduously followed | 3 | 1 | 5 | 6 | 4 | 2 |
| C. No undue delay | 2 | 5 | 3 | 4 | 1 |
Best Practices for Antitrust Procedure
BEST PRACTICES FOR ANTITRUST PROCEDURE

REPORT OF THE ABA SECTION OF ANTITRUST LAW
INTERNATIONAL TASK FORCE

May 22, 2015

The views stated in this submission are presented on behalf of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

Executive Summary

The Report contains a list of best practices for antitrust procedures. It was developed by the Section of Antitrust Law in a project lasting several years as a response to recent and intensifying interest – by enforcement agencies, practitioners, academics, businesses subject to antitrust enforcement, multinational organizations and other members of the antitrust community -- in the relationship between quality of procedures employed by antitrust enforcement agencies and the credibility and effectiveness of antitrust-law enforcement, which is now found in over 130 jurisdictions worldwide.

The core of the Report is its identification of procedures best tailored to assure the accuracy, efficiency and impartiality (both real and perceived) of antitrust enforcement. The Report focuses on government proceedings that are intended to establish whether an antitrust violation has occurred, and if so, to specify and enforce an appropriate remedy. Although antitrust enforcement agencies engage in a much broader variety of activities, (competition advocacy, rulemaking, market and industry research, etc.), the “classic” and most significant activity is the government enforcement action. The Report was also intended to fill a gap due to the absence of any comprehensive past effort along these lines by any internationally recognized professional group, although international agency organizations such as the OECD Competition Committee and the International Competition Network had made similar albeit narrower efforts in the past.

Because antitrust enforcement is embedded in such an enormous variety of indigenous legal systems found in different jurisdictions, the Report identifies practices
that are sufficiently “generic” to be capable of inclusion within any basic approach to antitrust law enforcement. Thus the Report does not presume the superiority of any particular legal system – administrative or prosecutorial/judicial, adversarial or inquisitorial, whether civil-law or common-law based.

The Report divides the antitrust enforcement process into five distinct phases: (1) investigation, (2) assertion that an infringement of competition law may have occurred, (3) assessment of the contention, including the gathering, testing and presentation of evidence and the presentation of arguments based on fact, law and relevant expertise, (4) the rendition of a decision, and (5) appeal and review. The Report identified best procedural practices relevant for each of these five phases. There are also some general practices identified that should apply at all phases of an antitrust proceeding, such as the adoption of case-management practices intended to prevent undue delay.

In general the best practices identified correspond to common-sense notions of procedural fairness – disclosure of allegations and both inculpatory and exculpatory evidence to accused parties, providing the accused party of the opportunity to gather and present evidence and argument to rebut such allegations before an impartial tribunal with sufficient expertise to evaluate the case, a reasoned decision assessing all pertinent evidence and arguments, and providing a party found guilty of infringement an opportunity for review by a suitably constituted and independent tribunal.

INTRODUCTION

Among numerous policy studies and reform efforts underway throughout the global antitrust and competition-law community (enforcement officials, private antitrust-law practitioners, antitrust economists and academics, among others), significant recent interest has focused on improving antitrust procedures. Merger review procedures were among the first areas targeted for study and for proposals regarding best or
recommended practices, but more recently interest in reform of procedures has broadened to include all the main areas of antitrust enforcement.

As new antitrust laws and agencies continue to expand globally, an increasing variety of legal methods and institutions has been applied to competition matters. This offers both opportunities and challenges: on one hand this increased diversity allows comparison of different procedures, which may help identify those rules, institutions and other mechanisms that are most conducive to impartial, efficient and accurate enforcement. On the other hand, the increasing variety of the systems encountered in antitrust enforcement creates new challenges in developing principles and approaches likely to be widely accepted and implemented.

Adopting procedures that promote the impartiality, efficiency and accuracy of antitrust decisions can help achieve basic competition goals. Procedures that allow agencies to obtain and test relevant evidence, as well as the legal and economic approaches and analyses that inform their decisions regarding infringement and remedy, can enhance significantly the overall quality of enforcement decisions. This facilitates vigorous competition within established legal constraints and ultimately enhances productivity and consumer welfare. Moreover, procedures that are – and are rightly perceived to be – fair will enhance respect for competition law and its enforcement institutions and processes among counterpart agencies, within the business community, among consumers and by the general public.

As the latest development in a process that began several years ago, the ABA Section of Antitrust Law’s International Task Force has developed this proposal for best practices for antitrust procedure. This proposal is intended to stimulate and contribute to ongoing global dialogue on this fundamental subject, adding the perspective of the world’s oldest and largest association of antitrust professionals to current efforts to improve antitrust procedures. This proposal has been formulated based only on the anticipated ability of these practices to contribute to the impartiality, efficiency and accuracy of antitrust decisions. No specific system of enforcement – adversarial or inquisitorial,
common-law or civil-law, judicial or administrative – has been assumed superior in its relevant capabilities.

The best practices listed below are considered relevant to the conduct of any antitrust proceeding, defined as a process for determining whether one or more specific individuals or business organizations have infringed applicable competition-law standards, and to prescribe and enforce a remedy for such infringement. Antitrust enforcement involves many activities that do not fall into this category: competition advocacy, general market or industry studies (other than those that can lead to the imposition of remedies for identified anticompetitive practices), or amicus participation in judicial proceedings between private parties, just to name some of the most obvious. Such activities were not considered as part of the subject matter of this report, although they can each be vital to the broader success of a competition-law enforcement system.

The Report also does not address any but the most fundamental principles that govern the conduct of public officials and private parties engaged in the antitrust enforcement process. Thus, for example, aside from the most elementary protections against corrupt influence of the decision making process, rules of conduct for public officials or private parties are not included although they are obviously essential to sound antitrust enforcement. This report presupposes that such individuals and entities are subject to their own professional, legal, and other disciplines that assure orderly engagement with antitrust enforcement processes. Such practices may facilitate dialogue and compliance with applicable procedural rules, and are also likely to enhance efficient and accurate enforcement.

The proposed best practices have been divided into six specific categories, five of which correspond to conceptually distinct stages of an antitrust proceeding as it is defined in this proposal: (1) Investigation, (2) Asserting Contentions of Infringement, (3) Assessing Contentions of Infringement, (4) First-Instance Decision and (5) Review. We conclude with a brief list of best practices applicable at all stages of an antitrust proceeding.
ANTITRUST PROCEDURES – BEST PRACTICES

I. INVESTIGATION

A. In conducting investigations and seeking evidence, officials should make every reasonable effort to define clearly the specific potential legal, factual and economic contentions being considered.

B. Officials should adopt management practices designed to help ensure that the expected costs and other burdens of investigation – including those imposed upon targets and others who provide information or otherwise cooperate with the investigation – are proportionate to the expected value of the evidence sought. The expected significance of the potential competitive harm also should be considered in making this assessment.

C. At key points in a pending investigation (or periodically) officials should specifically reassess the potential contentions and tailor the investigation accordingly.

D. Officials should strive for balance, pursuing and considering both exculpatory and inculpatory evidence and analysis.

1. Officials should not limit pursuit or consideration of exculpatory evidence to that provided by targets’ counsel. Officials should pursue and consider potentially exculpatory evidence from third parties, especially when such evidence may not otherwise be available to targets or their counsel.

E. At key points in a pending investigation (or periodically) officials should disclose (subject to limitations reasonably reflecting and tailored to any
legitimate concerns such as the preservation of evidence of covert criminal behavior or maintaining confidentiality of business secrets) all potential contentions of infringement and (in reasonable detail) the underlying evidence, analysis and argumentation relevant to the defense, to targets and their counsel, and provide reasonable opportunities for and carefully consider all responses to such disclosures (including submissions as to facts, economic analysis, legal analysis, policy, and other forms of argumentation). Targets and counsel for targets should have reasonable opportunities to present such responses in face-to-face meetings with officials conducting the investigation and with officials managing the investigation. Subject to the foregoing, officials should maintain the confidentiality of evidence and all other aspects of the investigation (including its existence).

F. Officials should apply credible objective checks and balances to the process of investigation to ensure adherence to the foregoing practices.

1. It is important for officials to establish management practices that limit susceptibility of their processes to confirmation bias and other institutional characteristics that may allow or even encourage officials to broaden or persist with investigations beyond the point that disinterested analysis would consider well supported. Periodic review of investigations by retained experts with the ability and incentives to provide objective independent views may be one such practice; others might include the development of specialized offices or other units (a staff including experts in competition economics, law, and/or the particular sector involved) internal to the investigating institution or to another institution, subject to safeguards for their objectivity, independence and candor.
G. Prior to the time when any contention of infringement is asserted, each target should be provided with all evidence (regardless of whether subject to any assertion or finding of confidentiality) then known to officials and upon which they intend to rely in support of such contention. Each target should be provided with the opportunity to present a full response, including as to all matters of fact, economic and other expert analysis, legal, policy and other argumentation. Protections for material reasonably regarded as confidential should be afforded by such mechanisms as restricting access to counsel or outside counsel only, use of data rooms (physical or virtual), or disclosure pursuant to protective order. A target should be permitted to present its response through documentary submissions and through face-to-face presentation to the official(s) responsible for making any contention of infringement.

H. The disclosure of an investigation, or the possibility of a future investigation, should ensure that targets and/or potential targets are not prejudiced or otherwise unnecessarily disadvantaged. Such disclosure should be accompanied by a clear statement that there has been no contention of infringement, and that any future such contention would be subject to assessment on the merits.

II. ASSERTING CONTENTIONS OF INFRINGEMENT

A. The official decision to make a contention of infringement should be based on a well-considered assessment, including balanced and conscientious evaluation of both exculpatory and inculpatory evidence, that the completion of proceedings (including obtaining a final determination of infringement and defining, implementing and administering a remedy) is highly likely to serve the fundamental purposes of competition law. A contention of infringement should include a clear explanation of the evidence and the legal and economic theories and analyses that support it.
B. A contention of infringement, and the pursuit of remedies, should not be fashioned for any inappropriate purposes, including, for example: (1) primarily to prevail in infringement proceedings independent of any substantial competitive benefit; or (2) primarily to obtain any advantage over or concession from a target that is not directly justified by the competition law purposes of proceedings.

1. Key competition-law concepts such as “restraint of trade”, “restriction of competition”, “abuse of dominance”, “exclusionary conduct”, “substantial adverse impact on competition”, “substantial lessening of competition” and the like are inherently broad and flexible. Accordingly, assessing contentions of infringement of these laws often involves complex factual, economic and policy assessments of numerous interacting factors. Some circumstances exist in which it is possible for officials to secure a determination of infringement even where it might be questionable whether this would serve fundamental purposes of competition law. Moreover, some accused targets that may ultimately be entitled to exoneration may have powerful private reasons to avoid contesting official assertions of infringement -- to avoid the substantial expense, disruption, extended periods of legal, financial and commercial uncertainty, public opprobrium, and/or contentious relationships with a public institution associated with fully contested proceedings – leading such targets to settle quickly and/or by making concessions that exceed the relief that ultimately might be justified. This may create temptation for officials to press investigations -- consciously or unconsciously -- beyond the point that best serves fundamental purposes of competition law.

C. No official contention of infringement should be made before providing respondents a genuine opportunity to settle the matter by consent without additional contested proceedings.
D. The process of publicizing a contention of infringement should ensure that such publication does not prejudice or otherwise unnecessarily disadvantage respondents. Specifically, publication of any contention of infringement should be accompanied by a clear statement that such contention is subject to assessment on the merits and does not constitute a determination or finding of infringement.

III. ASSESSING CONTENTIONS OF INFRINGEMENT

A. Following a contention of infringement, officials should follow specific procedures for the assessment of such contention in accord with the following practices. No finding of infringement should be made absent compliance with such procedures.

B. Any assessment (hereinafter “first-instance decision”) of a contention of infringement should be made by an independent official or officials, personally identified to the parties.

1. “Independent” in this context means (1) having no prior role in the investigation or in formulating the contention of infringement (except as a neutral decision maker regarding interim or preliminary matters required for management of prior proceedings, as provided by law); (2) having no specific personal interest in the matter or material relationship to any party; and (3) having sufficient expertise in the law and economics of competition and/or other relevant disciplines to conduct the proceeding and to make the assessment in a disinterested, efficient and accurate manner.

C. The decision-making officials should compile a record whose contents are clearly ascertainable by respondents and any reviewing authorities (subject to proportional limitations to protect specific and reasonable confidentiality concerns). Officials should provide specific and enforceable means to exclude from the record all extraneous matter. Off-the-record
communications with decision-making officials by the parties or their counsel or other agents or representatives should be prohibited throughout proceedings.

D. Counsel for respondents should be permitted to introduce all relevant evidence, argument and expert analysis on all material issues (subject to reasonable administration of proceedings – e.g., limits on merely cumulative evidence, reasonable requirements as to timeliness and/or sequence of submission).

E. All evidence, arguments and expert analysis placed in the record should be subject to challenge on the basis of authenticity, relevance, materiality and/or other potentially significant aspects. All documentary and testimonial evidence, argument and analysis should be subject to challenge by means tailored to provide tests of credibility, completeness and weight.

1. Allowing counsel for parties to challenge inculpatory or opposing testimony by live cross-examination should be permitted to the extent feasible. In legal systems that do not present this opportunity, as in some administrative, inquisitorial and/or civil-law systems, other equivalent means for testing the quality and credibility of such testimony should be made available, such as questioning of witnesses by the independent decision maker *sua sponte* or upon request of the parties.

F. Presentation of or challenges to evidence, arguments and expert analysis should be made in the presence of the first-instance decision-making official(s).

1. For reasons of efficiency, certain procedural stages may call for written submissions by counsel, such as briefing of a request for summary disposition, a request for narrowing of the issues, or upon final submission of the matter for decision. Where submissions are
made in writing, counsel for respondents should have the opportunity for oral presentation of argument before the decision maker(s).

IV. FIRST-INSTANCE DECISION

A. Any assessment of infringement should be based only on matters of record as to which targets and their counsel have had full opportunity to respond. The assessment should be in writing, explaining reasons for the assessment of evidence on each issue and the economic, factual and legal analysis relied upon.

B. A finding of infringement should include a clear explanation of the evidence and the legal and economic theories and analyses that support it. The specification of remedy should be written and should explain why each element of the remedy is required by, and tailored to, the characteristics of the infringement.

V. REVIEW

A. First-instance decisions should be subject to review by an independent tribunal.

1. “Independent” in this context means (1) having no prior role in the investigation, accusation, or first-instance proceeding (except as a neutral decision maker regarding interim or preliminary matters required for management of first-instance proceedings, as provided by law); (2) having no specific personal interest in the matter or material relationship to any party; and (3) having sufficient expertise in the law and economics of competition and/or other relevant disciplines to review the first-instance decision in a disinterested, efficient and accurate manner.
2. “Tribunal” in this context means one or more named officials specifically designated to conduct the review and render decision and personally identified to counsel for the parties.

B. Counsel for the parties should be permitted to address the tribunal directly in face-to-face proceedings and through written submissions.

1. The opportunity for face-to-face proceedings should be subject to the discretion of the independent tribunal to forego such proceedings where they are highly unlikely to affect the outcome of or basis for the decision on review, in which case the tribunal should consider the parties’ written submissions.

C. Review should be permitted on any issue unless sound policy suggests deference to the first-instance tribunal (e.g., basic fact-finding, routine evidentiary and procedural rulings, assessments of witness credibility and the like).

1. Many basic facts are usually not appropriate for review on the merits, such as whether particular individuals participated in particular communications (cartel cases) or whether particular distributors traded in specific goods (exclusionary conduct cases). By contrast, competition proceedings frequently involve the drawing of inferences (e.g., the existence of conspiracy; whether a practice should be regarded as exclusionary) that implicate important economic and/or competition policy aspects (such as the probability and consequences of mistaken inferences) or otherwise intertwine fact, economic analysis, law and/or policy. Review should be permitted on such issues.

D. The basis for decision should be confined to matters addressed in the record in the first-instance proceeding (subject to reasonable exceptions for post-decision changes in law or fact and incontestable public-record facts).
E. The decision on review should be in writing and explain in detail the assessment of and conclusions upon all issues underlying the decision.

VI. BEST PRACTICES APPLICABLE TO ALL PHASES OF ANTITRUST PROCEEDINGS

A. Officials involved in all steps of an antitrust proceeding should possess sufficient expertise in competition law, economics and/or other relevant disciplines to enable them to conduct their duties in a disinterested, efficient and accurate fashion.

B. All rules and practices governing proceedings – procedure, evidence, review, etc. – should be clearly disclosed and made publicly accessible in advance of proceedings. Any exceptions should be proportional and based on specifically identified objective and legitimate reasons.

C. Officials should provide for an effective system to prevent unnecessary delay at any stage in proceedings.