

COMPETITION COMMITTEE



Procedural Fairness and Transparency

Key Points

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2012



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INTRODUCTION

This booklet summarizes three roundtable discussions on transparency and procedural fairness that took place in the February and June 2010 and October 2011 meetings of Working Party No. 3 (“WP3”) of the OECD Competition Committee. The very large number of written submissions and the lively debate among members and observers demonstrate the importance and topicality of this subject. With a total of 82 written submissions, eight in-depth presentations by individual delegations, and expert commentary from a distinguished practitioner and former agency official, we learned from one another’s practice and experience, in jurisdictions representing a wide range of legal traditions and economic settings. A key theme emerging from the discussions was a broad consensus on the need for, and importance of, transparency and procedural fairness in competition enforcement, notwithstanding differences between prosecutorial and administrative systems, and other legal, cultural, historical, and economic differences among members. As my predecessor, Assistant Attorney General Christine Varney, noted, “a fair, predictable, and transparent process bolsters the legitimacy of the substantive outcome” and “helps us to make better enforcement decisions by exposing our thinking to informed criticism” and “focusing all parties on the real issues in dispute.”¹

There was also broad consensus that the objective is not uniformity – one size does not fit all – and that transparency and procedural fairness can, and are, achieved in many different ways. As AAG Varney noted, “[d]ifferent legal traditions may well entail different processes yet still provide due process for the parties.”² In the same way, European Commission Vice President Joaquín Almunia has also stated that “both [the administrative and judicial enforcement] models can achieve the right results and both can be very effective;” and – given the “evolving nature” of systems – “there will always be room for improvement, both in due process, and in efficiency:” ... “the debate around

¹ Christine A. Varney, *Procedural Fairness* (Sept. 12, 2009), available at <http://www.justice.gov/atr/public/speeches/249974.htm>.

² *Id.*

due process should really be a debate about finding a dynamic balance that can adapt to ever-changing conditions.”³ Also, as the former Chairman of the UK’s Competition Commission Peter Freeman has observed, “there are two aspects to fairness—fairness as regards the public—in the sense of running an open and transparent procedure, and fairness to the parties—giving aggrieved parties and other interested parties appropriate information and opportunity to present their case.”⁴

These three roundtables were not the first discussions on transparency and procedural fairness in the Competition Committee and WP3. Although much of our work in the past two decades has focused on substantive legal and economic issues, in 2005 WP3, the Committee, and ultimately the OECD Council, took an important action that was very attentive to transparency and procedural fairness in the area of merger review: the Council Recommendation on Merger Review. In this Recommendation, OECD members agreed that they should provide for transparent rules, procedures, and decisions; notice to merging parties of competitive concerns with an opportunity to respond to those concerns and to seek appellate review of adverse decisions; the opportunity to consult with the competition authority at key stages; rights for third parties; and proper protection for confidential business information.⁵

The recent WP3 roundtables were the first time that we have discussed transparency and procedural fairness across the spectrum of competition enforcement: mergers, horizontal and vertical agreements, and single firm conduct.⁶ AAG Varney, as chair of WP3, initiated this discussion. She believed that the importance of raising awareness of these topics only increases

³ Joaquín Almunia, *Due Process and Competition Enforcement* (Sept. 17, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/449&format=HTML&aged=1&language=EN&guiLanguage=en>.

⁴ Peter Freeman, “*The Quest for the Holy Grail*” – *the Search for Good Competition Decisions* (Jan. 14, 2010), available at http://www.competition-commission.org.uk/media-centre/speeches/~media/BISPartners/competitioncommission/Docs/pdf/non-inquiry/speeches/pdf/2010/freeman_holy_grail_jan_2010.ashx.

⁵ At its meeting in February 2012, WP3 began an evaluation of the implementation of the Recommendation in the context of a possible report to the Council.

⁶ The WP3 roundtables did not include criminal investigations.

as the number of competition agencies with active enforcement programs around the world increases. AAG Varney chaired the first two WP3 roundtables in 2010, and I chaired the third one last fall. These rich and informative discussions were characterized by the open, respectful, and constructive dialogue between colleagues that is the hallmark of all OECD discussions.

The interest in transparency and procedural fairness in today's world extends well beyond the field of competition enforcement: it is, for example, a key feature of the global response to the recent financial downturn. For competition policy, the impetus for re-examining these areas comes from many sources: the courts, internal agency self-assessments, global business interests that must comply with rules across a multitude of jurisdictions, and important work in both the OECD Competition Committee (as in the 2005 Council Recommendation mentioned above) and the International Competition Network (ICN).⁷ Trading partners have begun to include procedural fairness provisions in the competition chapters of their free trade agreements,⁸ and the ICN is proposing to initiate a long-term project reviewing investigative processes, focusing on the tools agencies have to conduct effective investigations and how they ensure effective protection of procedural rights.

That takes me to the final and perhaps most salient aspect of our discussions within WP3 – their dynamic nature – as this is an area where our work is never done. This was well summarized by both the European Commission and BIAC during our third roundtable. Our discussions have revealed a desire on the part of the agencies, as the European Commission submission noted, to “continuously seek[] ways of further improvement”⁹ in the

⁷ See, e.g., ICN RPs for Merger Notification and Review Procedures, RP VII on Procedural Fairness and RP VIII on Transparency.

⁸ See, e.g., EU-South Korea Free Trade Agreement (2010), article 11.3.2 (“The Parties recognise the importance of applying their respective competition laws in a transparent, timely and non-discriminatory manner, respecting the principles of procedural fairness and rights of defence of the parties concerned.”); US-Chile Free Trade Agreement (2004), article 16.1.2 (“Each Party shall ensure that: (a) before it imposes a sanction or remedy against any person for violating its competition law, it affords the person the right to be heard and to present evidence, ... ; and (b) an independent court or tribunal imposes or, at the person’s request, reviews any such sanction or remedy.”).

⁹ Oct 2011, EU submission, ¶2.

areas of procedural fairness and transparency. As the BIAC delegate observed, developments in this area “border on the inspiring,” although she cautioned that there is still “a long way to go.” We all recognize the need to continue striving for improvement.

* * * * *

The initial section of this booklet attempts to capture the dynamic nature of our discussions by highlighting the themes covered and providing examples of the changes that members and observers reported and discussed during the course of our two years of discussions. Given the breadth and depth of the submissions and exchanges that these topics stimulated, it is impossible to do them full justice in the pages that follow, which seek only to give a flavor of our discussions. After this overview, the booklet includes the Secretariat’s executive summaries for each of the roundtables, along with the Secretariat’s “summary of discussion” records of the individual roundtables.

I want to express my gratitude to OECD members and observers for their contributions to these important discussions and to the Secretariat for compiling this booklet.

Sharis A. Pozen

Chair of Working Party No. 3
on Co-operation and Enforcement

April 2012

**CONTINUOUSLY SEEKING TO IMPROVE TRANSPARENCY AND
PROCEDURAL FAIRNESS:**

EXAMPLES FROM THE WP3 ROUNDTABLES

The February 2010 roundtable was devoted to transparency relating to competition law and agency procedures and practice, notice of charges and proceedings, party contacts with the agency, opportunities to be heard, hearings, publication and timing of decisions, and statements issued on the closing of investigations. The June 2010 session covered agency decision-making processes, confidentiality rules and the treatment of business secrets, agency requests for information, the possibility of agreed resolutions of enforcement proceedings, and judicial review and interim relief. In the third roundtable in October 2011, we discussed the relationship between the courts and agencies, the procedures applicable to public and private competition cases before the courts, and updates on developments relating to procedural fairness and transparency in individual jurisdictions.

The roundtable discussions and written submissions provided a rich source of information on recent developments in all the areas covered. The remainder of this introduction provides illustrative examples drawn from the roundtables and linked to the essential elements of transparency and procedural fairness that were discussed.

1. General Transparency Issues (laws, procedures, policies, decisions)

The roundtables demonstrated that jurisdictions almost universally provide transparency into their antitrust and competition laws and policies, and that most provide at least some degree of transparency into the processes encountered by parties to an investigation by an antitrust agency. From the agencies' submissions and the roundtable discussions, common themes related to transparency can be drawn. These themes can be grouped into two main types: First, agencies promote transparency with respect to the laws enforced by

and policies followed by the agency. Agencies agree that stakeholders should have available to them information relating to the laws and policies governing the agencies' activities, as well as internal rules and procedures that the agencies follow. Second, agencies promote transparency into the processes that the agencies implement in their investigation. In many agencies, this is achieved by, among other things, notification to subjects of investigations that an investigation has been opened, the grounds for the investigation, updates on case status and the agencies' theories of harm, the identities of case teams and the order and timetable of proceedings. Transparency with respect to enforcement decisions is also achieved by agency publication of outcomes and performance data, and by providing public access to information about ongoing investigations. During our roundtables, many agencies provided excellent examples of ongoing efforts to improve the transparency of their enforcement systems. Some examples of recent developments in each of these areas follow.

1.1. Transparency in Law and Policies

Several agencies have introduced or revised their public guidelines in recent years, giving more insight into the agencies' enforcement policies and practices. The examples that follow are but a small sampling of the great number of guidance documents recently issued by agencies, adding in many cases to an impressive stock of pre-existing material. In 2010, Canada's Competition Bureau issued guidelines on information sharing in the context of hostile transactions and a Leniency Program Bulletin; the Bureau also updated its Bulletin on Corporate Compliance Programs. In October 2011, the Bureau published updated Merger Enforcement Guidelines. In September 2010, the United Kingdom's Office of Fair Trading ("OFT") and Competition Commission jointly published Merger Assessment Guidelines, replacing earlier guidance issued individually by each agency. In August 2010, the U.S. Department of Justice ("DOJ") and the U.S. Federal Trade Commission ("FTC") issued revised Horizontal Merger Guidelines, and in June 2011, the DOJ issued a revised Policy Guide to Merger Remedies.

In the same spirit, the European Commission ("EC") has updated several of its so-called Block Exemption Regulations (essentially a safe harbour which exempts certain agreements and concerted practices) and accompanying Guidelines: this was done for vertical agreements and concerted practices in general in April 2010 and for vertical agreements and concerted practices in the motor vehicle sector in May 2010. In the same year, the EC also adopted Block Exemption Regulations for research and development agreements and specialization agreements, as well as Guidelines on horizontal cooperation

agreements in December 2010. The Japanese Fair Trade Commission (“JFTC”) in June 2011 published revised guidelines as to the Application of the Antimonopoly Act Concerning Review of Business Combinations and a new notice on Policies Concerning Procedures for Review of Business Combination Notifications. In February 2009, the Spanish Competition Authority (“CNC”) issued guidelines regarding the quantification of sanctions, and in September 2011, the CNC adopted guidelines regarding commitment decisions in infringement procedures. The Korean Fair Trade Commission (“KFTC”) has in recent years issued several notices and guidelines: in July 2011, the agency amended its Notification on Implementation of Cartel Leniency Program; in October 2010, the KFTC amended its Notification on Rules on Imposing Surcharges to explain changes to its fining policy, and between June 2010 and August 2011, the KFTC implemented three rounds of amendments to its Guidelines on Referring Antitrust Cases to the Prosecution. Likewise, Mexico’s Federal Competition Commission (“CFC”) recently produced guidelines on a number of enforcement topics, including guidelines for opening an investigation, on confidentiality issues, on its leniency program, for trade associations, on procedural aspects of merger notification and review, and on fine setting, along with reference papers on market definition and assessment of market power. In 2011, Greece’s Hellenic Competition Commission (“HCC”) issued a Notice on Enforcement Priorities, which enumerates criteria the HCC uses in prioritizing which cases to pursue.

1.2. Transparency in Processes

Several agencies have recently offered additional transparency concerning their internal processes, in many cases adding to pre-existing guidance in this area. In that regard, the OFT issued in March 2011 new investigation Procedures Guidance, which describes the investigatory procedures in non-criminal competition matters, from the opening of cases through their final resolution. In May 2010, OFT published a transparency statement setting forth several commitments relating to competition enforcement cases, including the identity of the OFT case team, contact details, and the expected time frame of the investigation.

The EC adopted new Antitrust Best Practices in October 2011 for antitrust (non-merger) investigations. The Best Practices had been circulated in draft in 2010, and the EC provisionally implemented several of its new recommendations at that time, including earlier opening of formal proceedings, state of play meetings at key points in the proceedings, early access to key submissions, including the complaint, publicly announcing the opening and

closure of a proceeding and the sending of a Statement of Objections, and providing guidance on how the commitment procedure is used in practice. Following public consultation, the EC added further improvements in the October 2011 Best Practices, including a section on fines in the Statement of Objections setting out the relevant parameters for the possible imposition of fines, including the value of sales affected by the infringement, as well as the period that the EC intends to consider for determining the value of such sales, extending state of play meetings to cartel cases and complainants in specific circumstances, enhancing access to “key submissions” of complainants or third parties prior to the Statement of Objections, and publishing rejections of complaints, either in full or as a summary.

After a public consultation in 2010, Mexico’s CFC decided to improve access to and disclosure of its public information, and created an on-line search engine for its decisions and opinions, made more information available about its plenum decisions and Commissioners’ votes, and produced a public handbook of internal procedures. Similarly, in 2009, Poland’s Office for Competition and Consumer Protection sought to improve transparency of internal decision-making by making available to the public an updated version of its decisions database. In August 2008, Chile’s legislature passed the Transparency Act, which regulates the transparency of government acts, and requires the Fiscalía Nacional Económica (“FNE”), the competition agency, to publish “all acts and resolutions which affect third parties,” which has been interpreted to include the closing of an investigation or the settlement of a case. As a result, since mid-2008, the FNE has published on its website all decisions regarding the closing of an investigation, settlements reached with parties, and the filing of charges before the Competition Tribunal. Germany’s Bundeskartellamt in 2009 began also to publish case summaries on investigations for which no formal decisions are published, in an effort to increase transparency. The DOJ has increased its use of closing statements, available on its website, which describe to the public the DOJ’s reasons for closing an investigation.

In January 2010, Brazil’s CADE made available on its website scanned copies of all records of its proceedings from 1962 to the present. In much the same way, in July of 2009, Bulgaria launched an electronic registry, available online, of all public versions of documents related to all proceedings initiated before the Commission for the Protection of Competition, including the case number, legal grounds, identity of the parties, and any decisions, rulings, or orders. A 2009 order by Russia’s Federal Antimonopoly Service (“FAS”) provides for the disclosure of FAS’s activities on the agency’s official website, including cases initiated, decisions taken on applications received by FAS,

results of inspections conducted following complaints received, results of market analyses, and decisions taken by FAS and court decisions on cases related to FAS.

During the course of the roundtable discussions, several agencies described plans for additional transparency initiatives. For example, the OFT, building on its previous work, plans to provide enhanced information on governance and decision making, including how and when the OFT will formally and informally consult, as well as publication of more information gathered during the course of investigations. A public consultation is running until June 19, 2012. In 2010, Canada's Competition Bureau undertook a self-assessment on transparency, which led the Bureau to commit to (1) creating a public Merger Registry, to be updated monthly, with information on completed merger reviews, (2) increasing the publication of position statements to describe the reasoning behind the Bureau's conclusions in certain complex merger cases, and (3) increasing the frequency of public announcements where no enforcement action was taken. The Finnish Competition Authority ("FCA") noted that it is required by law to publish on its website its strategic goals, planning documents, budgets, performance reports, and reports of the National Audit Office. The FCA is currently seeking to prioritize its enforcement activities, and to make transparent its prioritization principles. It is also working on a detailed flow chart of agency procedures to assist the business community.

2. Transparency and Procedural Fairness in the Investigative Stage

Most of the written submissions, and the bulk of the roundtable discussions, concerned procedural fairness during the investigative stages of the agencies' enforcement activities. Various themes emerged, and can be grouped into three main areas. First, agencies provide opportunities for party involvement in, and knowledge of, agency decision-making at both the interim and final decision-making stages. For example, during the investigative stage, many agencies advise parties under investigation of the legal and economic bases and factual allegations underlying the agencies' investigations, as well as the agencies' theories of harm. Some agencies also disclose supporting evidence and/or provide for the parties' access to the agency's file. Although they may differ in the timing, frequency, and level of participation provided, these agencies provide opportunities for parties to meet with investigative staff, agency leadership, and other decision-makers to discuss and exchange views.

With regard to agencies' recommendations to challenge investigated parties' conduct or mergers, many agencies provide an opportunity for parties to review the agencies' concerns or Statement of Objections before they adopt a final decision, and/or the underlying supporting evidence, and provide a right to comment. In some cases, agencies provide an opportunity for the parties to present evidence and argument to the investigative staff, agency leadership, and/or other decision-makers before the issuance of a complaint or Statement of Objections, and require that the agencies take into consideration the parties' evidence and arguments.

Second, many agencies' internal processes and rules promote fairness in the investigations and soundness of decisions. For example, many agencies may provide ongoing internal review of investigatory decisions and ensure leadership involvement in decision-making. These agencies make use of procedures to ensure sound outcomes, whether devil's advocate review, separate review by teams of specialized economists, or through the use of additional experts in analysis. Several agencies employ internal manuals of procedures when conducting their investigations and many commit to time limits on the duration of investigations. Agencies also respect the right to counsel, consistent with their jurisdiction's laws.

Third, most agencies seek to be measured in their requests for information from parties and others, and vigilant in the way they safeguard and provide access to the information in their possession. For example, many agencies generally attempt to minimize the burdens on parties in their requests for information. Some agencies provide opportunities for parties to access the agencies' files, while some other agencies provide the parties with the evidence to be used to prove a violation of the law. Agencies have various methods for assessing parties' claims that materials and information submitted are confidential, as well as rules governing access by a party to confidential material from complainants and other sources. Finally, most agencies have various procedures in place to protect from disclosure confidential evidence submitted by parties. The roundtables revealed important initiatives by agencies in all of these areas.

2.1. Party Involvement in Investigative and Decision-Making Process

As noted above, one of the ways agencies provide for transparency and procedural fairness is to provide for party involvement in the agencies' investigative and decision-making processes. Developments in this area include Canada's new Merger Review Process Guidelines, updated in January 2012,

which encourage parties to contact the Competition Bureau before submitting a pre-merger notification filing, or as soon as possible after, to provide the Bureau with the appropriate context and information and to assist in identifying issues requiring further examination. Similarly, the JFTC recently amended its rules, including providing for enhanced communication between the agency and the parties in merger investigations. (The JFTC will provide more explanation in its requests for information, and the parties may submit opinions or relevant documents to the JFTC during the review period.) Bulgaria's new antitrust law went into effect in 2008; it introduced, for the first time, the use of a Statement of Objections, which must be sufficiently clear so that parties can defend themselves against the allegations, and provides a right to respond to the Statement of Objections in writing within 30 days. The OFT, in its 2011 Procedures Guidance, provides for informal pre-complaint discussions to help potential complainants evaluate whether the OFT is likely to investigate, and a commitment to send a case initiation letter to targets with details of the conduct under investigation, the relevant legislation and indicative timescale, and staff contact and decision-maker information. The OFT further plans routinely to offer more state of play meetings in order to update parties on the OFT's progress in an investigation, to give them the opportunity to make their points of view known throughout the proceedings, and to provide an opportunity for case teams to share emerging thinking on certain issues, where appropriate. It also proposes to provide for a new ability for parties to make representations on key elements of draft penalty calculations and provide for enhanced oral hearings. Similarly, as discussed above, the EC's new Antitrust Best Practices enhance the opportunities for parties to interact with the Competition Directorate, including State of Play meetings at key points in the proceedings. In addition to the rights the parties already had regarding access to file, the Best Practices now allow them to review and comment on key submissions by third parties, starting from the early stages of the investigation.

2.2. Internal Agency Procedures to Ensure Fairness and Soundness of Decisions

As noted above, most, if not all, agencies are taking steps to improve their internal processes, whether by adopting new processes to ensure sound outcomes, committing to time limits on their investigations, or undergoing internal assessments and reorganizations.

Numerous agencies have recently introduced new processes to promote sound outcomes. In Bulgaria, the competition agency has recently created a special unit to provide independent legal assessments for case-handling teams

and commissioners; the unit can be consulted at any point in an investigation, and must be consulted at certain key stages. The agency has also created a task force of economists to play a similar role, and the new law provides for appointment, at the request of the parties or by the agency, of an independent expert to produce an independent report in the case. In like manner, Mexico's CFC now provides for an internal peer review before issuance of a Statement of Objections.

Some agencies have made commitments to speed up their investigations. For example, the OFT's 2011 Procedures Guidance commits the agency to deciding whether to formally open an investigation within four months of receiving a complaint. The Netherlands reported that, since July 1, 2009, in cases involving a violation of the Netherlands' prohibition of cartels or an abuse of a dominant position, the Board of the competition authority (known as the "NMa") is required to give a decision within eight months after a report has been submitted to the parties. In 2009, the FTC finalized rules to expedite the prehearing, hearing, and appeal phases of its adjudications and streamline discovery and motion practice to avoid unnecessary delay in the determination of respondents' rights and responsibilities, followed by further modifications in 2011 to streamline deadlines for oral arguments. Greece's 2011 Competition Act introduced a limitation period of five years for the imposition of sanctions by the HCC. In March 2011, the JFTC published and requested public comments on amendments to its rules intended to improve the "swiftness, transparency, and predictability" of merger investigations; the JFTC subsequently amended its rules, which went into effect in July 2011.

Numerous agencies have undergone internal assessments and, as a result, have committed to changes to make their investigations more efficient and their internal procedures more up to date. For example, in 2010, Brazil's CADE undertook a number of measures, including new internal regulations and "elimination of redundant and bureaucratic stages." Under new legislation in 2011, Brazil has combined its three competition authorities into one agency, the new CADE, and expects to make its investigations more efficient and effective; CADE has also established an Ombudsman, whose responsibilities include receiving, assigning priority to, and investigating complaints and requests. Slovenia is undergoing changes to make its competition agency more independent; the Competition Protection Office has recently been transformed into an independent agency, and a new Competition Protection Commission, charged with deciding competition cases and staffed with competition experts, is being created. Likewise, Greece's HCC launched in 2010 an in-depth review

of its substantive and procedural law framework, taking into account developments in other countries.

2.3. *Access to and Protection of Investigative Information*

As noted above, many agencies attempt to be fair in their requests for information from parties and others, and in the way they safeguard and provide access to the information in their possession. With regard to access to information, jurisdictions offer varying degrees of access to the file to investigated parties and interested third parties in merger and non-merger investigations; this is another area where agencies are experimenting as they strive for “constant improvement.” The EC’s recently published Best Practices introduced two new procedures through which interested parties may access file information, a “negotiated disclosure” procedure and a “data room” procedure, used primarily for the verification of economic data. Sweden also reported that the competition authority is considering use of a data room for economic evidence, accessible to the parties’ legal and economic counsel. Mexico’s CFC recently implemented an electronic filing system that allows full simultaneous access to all information included in a case file. Australia’s Competition and Consumer Act of 2010 grants respondents to pecuniary penalty proceedings the right to request disclosure of documents obtained by the ACCC that tend to establish the parties’ case. Bulgaria’s 2008 competition law provides that parties have access to their case file, with the exception of documents that contain trade or business secrets and any internal documents belonging to the authority.

With regard to the protection of confidential information in their possession, jurisdictions are continuing to refine their rules regarding confidentiality, both in relation to the rights of the parties of investigation and to third parties and the public to access information in the agencies’ files. For example, Turkey’s Competition Authority recently published a communiqué on the right to access the file and the protection of trade secrets; the agency is required to balance the need to use evidence to prove its case against legitimate confidentiality claims. Chile’s Transparency Act allows any person to request any specific document or more general information from the FNE, but provides justifications for FNE to deny such requests in order to protect the confidentiality of business secrets. The Czech Republic enhanced its rules in 2009 regarding protection of business secrets. The EC’s new Best Practices for Antitrust Proceedings clarify that the Commission will protect the confidentiality (and sometimes identity) of complainants and information

providers in order to protect those third parties' legitimate interests and to avoid discouraging them from providing information to the Commission.

3. Final Decision-Making Stage

The procedural differences between administrative and prosecutorial enforcement systems are most apparent at the final decision-making stage, but there are also numerous common transparency and procedural fairness themes for both systems, which were explored in the roundtables. First, most agencies provide parties the right to a hearing, and set out specific rules governing the hearings, including independence of the hearing officer. Such agencies typically require that an agency decision: (a) is provided in writing; (b) in sufficient detail so as to identify the basis and rationale for the decision, including consideration of the parties' contentions, and exculpatory and inculpatory evidence; and (c) is provided to the parties prior to publication of the final decision. Second, most agencies also provide for settlement procedures and discussion of possible remedies. Again, the roundtables revealed an impressive number of examples of agencies constantly striving to improve their procedures in this regard.

3.1. Administrative Hearings

In the area of administrative hearings, recent amendments to Mexico's Federal Law of Economic Competition now grant parties the right to oral hearings in order to make clarifications to the arguments, evidence, and allegations presented in writing to the CFC and to documents included in the case file. Bulgaria's new competition law gives parties the right to be heard by the decision-making body at an oral hearing prior to the adoption of the decision. In October 2011, the EC revised the mandate of the hearing officers in EC competition proceedings, including expanding their role to encompass the effective exercise of procedural rights throughout proceedings, reinforcing and bolstering their independence from the Competition Directorate, and increasing opportunities for the parties to go to the hearing officer as an independent arbiter during the investigation. The OFT began a one-year trial in March 2011 of a new position of Procedural Adjudicator, intended to "provide a swift, efficient, and cost-effective mechanism for resolving disputes between parties and the case teams," relating to confidentiality issues, deadlines for responding to information requests, and other procedural issues. The OFT has decided to extend the trial for a further year until March 21, 2013.

3.2. *Settlement Procedures*

Spain recently took action to ensure greater transparency and predictability in its commitments procedures, which were rarely used because of uncertainty over their application until the 2007 Competition Law simplified the procedure. To ensure greater transparency and predictability, the CNC issued commitment guidelines in 2011. The EC introduced settlement procedures for cartels in 2008, and Chile introduced a new rule in 2009 that allows any party to reach a settlement with the FNE, subject to approval of the Tribunal. In Spain, settlements in which a party acknowledges a violation and seeks a reduction in fine are not allowed under the 2007 Competition Act, but the Spanish submission for the October 2011 roundtable suggests that reform in this area might be desirable.

Similarly, in Korea, the KFTC does not have a system through which the agency can enter into a consent decree, and noted that a consent order system would be efficient and mutually beneficial for parties and the agency, and that it is therefore considering the introduction of such a system. On the other hand, Finland explored the possibility of adopting settlement procedures in 2009, but determined that such procedures were not necessary and that implementation of settlement procedures might conflict with its general procedural laws.

4. *Judicial Review*

In our roundtable discussions on the role of the courts and judicial review, there were important differences noted between administrative and judicial enforcement regimes, but a number of topics raised common issues of transparency and procedural fairness. Topics included the standard of review and the timing of a court's proceedings and decision. Members also noted the importance of an independent court, and of written, public decisions, explaining the court's analysis. Another topic of interest was the right to request interim relief while a case is pending before the court. Although the role a court plays in competition enforcement is for the most part outside the control of a competition agency, the discussions revealed that a few jurisdictions are taking actions to enhance or improve the role of courts in competition cases.

For example, in Mexico, last year's amendments to the Federal Law of Economic Competition have changed the way in which competition matters are reviewed. Under the new procedure, CFC decisions will be reviewed by a new administrative court with judges expert in the field of competition. In Japan, a bill is pending in the Diet that would redirect appeals of JFTC administrative

measures to the Tokyo District Court; at present, a person dissatisfied with JFTC administrative measures can request that the JFTC first hold a hearing on the measures, conducted by the JFTC, and only after that review can a case be appealed to the courts¹. There has also been a new development in the relationship between courts and the competition authority in the Netherlands. Since January 2010, the Appeals Tribunal and the Rotterdam Court may grant NMa an interlocutory judgment, allowing it to correct a mistake in its decisions, meaning that NMa no longer must complete the prior process of formally annulling a decision and issuing a revised decision; the change has helped to expedite the appeal procedure. The 2011 amendments to Greece's competition law introduced the possibility to establish a specialized competition chamber in the Athens Administrative Court of Appeal.

In addition, several submissions noted that courts have become more attentive to transparency and procedural fairness concerns. In Germany, for example, with higher fines in recent years, courts have been "more and more stringent" in applying transparency and procedural fairness provisions. In South Africa, appellate courts in a series of recent prominent decisions have "strongly re-asserted the principles of legality and rationality in examining the requirements and the limits applicable" to the Competition Commission's investigative powers and the Tribunal's jurisdiction.

5. Conclusion

This brief review of recent developments relating to transparency and procedural fairness in competition law enforcement shows that this is a dynamic and constantly evolving area of law. This summary, derived from the written submissions and oral interventions at the roundtables, does not exhaust the rich body of material that was shared in the course of our meetings; among other things, there have been developments that did not make it into our discussions, and other developments after our October 2011 roundtable.

As our lively discussions and many submissions demonstrated, agencies should take pride in their common commitment to transparent and fair procedures, and continue to strive for further improvement in this area of fundamental interest for all participants in the global antitrust or competition community. With this work as an important foundation, the Competition

¹ The JFTC reports that the pending bill may be debated and adopted in the near future, so developments need to be kept under review.

Committee can continue to ensure that attention to this important topic and further dialogue about it continue.

**EXECUTIVE SUMMARY OF THE TWO WP3 ROUNDTABLES HELD
IN FEBRUARY AND JUNE 2010¹**

By the Secretariat

- (1) *The roundtable discussions highlighted the importance of transparency and procedural fairness for the parties involved in competition proceedings, as well as for efficient and effective case management by the competition authority. Delegates observed that an established and predictable decision-making process benefits from procedural transparency and fairness.*

It is widely recognised that in order to ensure citizens' confidence and belief in a fair legal system and in those applying the law, it is important that procedures regulating the relationship between the public sector and citizens are, and are generally perceived as, fair and transparent. The concepts of transparency and fairness have been identified as part of the basis of sound public administration both at national and international level.

Fairness and transparency are essential for the success of antitrust enforcement, and regardless of the substantive outcome of a government investigation it is fundamental that the parties involved know that the process used to reach a competition decision was just. Many delegations agreed that transparency and fairness are not only essential requirements for the parties involved in a competition proceeding, but are also a key part of efficient and effective case management by the competition authority.

Transparency and fairness ensure a better understanding of the facts underpinning the investigation and help improve the quality of evidence and reasoning on which the agency bases its enforcement actions. They also assist

¹ The February 2010 roundtable was on "Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings".
The June 2010 roundtable was on "Procedural Fairness Issues in Civil and Administrative Enforcement Proceedings".

agencies in allocating their resources more efficiently, focussing on cases really worth pursuing. Consistency, predictability, and fairness in decision-making processes, can be fostered by transparency with respect to: the substantive legal standards; agency policies, practices, and procedures; the identity of and form of access to the agency decision-maker(s); the order and likely timetable of key proceedings; and the judicial review process.

- (2) *Many agencies consider it valuable to hold meetings with subjects of competition enforcement proceedings at key points in the investigation, at both the staff and decision-maker levels. Meaningful communication with subjects to enforcement proceedings may be enhanced by parties' submissions and other substantive written materials, and participation when appropriate of knowledgeable experts and business executives.*

Many agencies consider a dialogue with the parties to a proceeding as enhancing the knowledge of the facts underpinning the investigation and as offering opportunities for the parties to present arguments and new facts. However, the degree to which agencies allow interaction with the parties during the proceeding varies across countries. In some countries there are formal proceedings in place for meeting with officials, such as state of play meetings, which allow for parties to meet with the case team and senior managers within the competition agency at predetermined moments of the procedure. In other jurisdictions, informal meetings are a key tool in the investigation. A number of jurisdictions agreed the use of discretionary powers and a flexible approach by competition agencies was important to encourage an ongoing dialogue with the parties.

The business community also encouraged the use of discretionary powers to ensure early engagement with parties, as formal charges may come at a late stage of the process. However, safeguards are important to ensure there is no perceived lack of proper accountability and transparency vis-à-vis third parties, or allegations of bias, discrimination and favouritism. While informal contacts may work in some countries, this could be part of the transparency problem in others.

- (3) *In a number of jurisdictions, the subjects of competition enforcement proceedings are informed of the allegations against them through a written document. This document serves as a procedural instrument aimed at protecting the parties' rights of defence.*

The business community emphasised that it is important for subjects of enforcement proceedings to have reasonable and timely notice of the factual basis for decisions, the relevant economic theory of harm and evidence related to that theory, and applicable legal doctrines related to the investigation. In some jurisdictions, the importance of informing the parties of the allegations against them takes the form of a legal obligation under national competition law to communicate the facts of the case to the parties concerned. One commonly adopted method is the use of a written document such as a Statement of Objections, Statement of Issues, an Examination Report or a Complaint.

In a number of jurisdictions this written document is the official correspondence from the agency informing subjects of the allegations against them, and in theory details of the case would not be revealed during the earlier investigation phase. However, in practice subjects may be informed of the alleged act of infringement and the relevant legal provisions earlier as a result of onsite inspections or information requests.

- (4) *Many agencies offer the parties an opportunity to examine the evidence—subject to legitimate confidentiality concerns—forming the basis for the agency's conclusion that a violation of the competition laws has occurred. This is particularly the case where sanctions or remedies may be imposed.*

Once subjects have been informed of the allegations against them, many agencies offer the parties under investigation an opportunity to examine the case file and the evidence contained within it, subject to confidentiality concerns. In many jurisdictions, competition authorities have an obligation to act fairly in the collection and disclosure of relevant evidence, including exculpatory evidence.

A right to access the evidence used to support the allegations against them ensures that parties to an antitrust proceeding have full knowledge of the case and details concerning the alleged violations against them, allowing them to substantially respond before a decision is taken. The points at which subjects can access these files vary. Some jurisdictions allow access throughout the investigation stage, i.e. after the formal opening of an antitrust procedure. In other jurisdictions access rights are triggered only after a certain stage in

proceedings. This is commonly after the main investigation has taken place and the written document setting out the allegations has been issued.

- (5) *Jurisdictions reported allowing the subjects of competition enforcement proceedings to respond orally or in writing to the allegations against them before a decision is taken. These opportunities allow the subjects of the proceeding to present evidence and rebut opposing claims and arguments.*

Once competition agencies have notified subjects of enforcement proceedings of the relevant economic and legal theories of harm and related evidence, the parties are usually given an opportunity to respond within a reasonable timeframe to the concerns identified by the agency and to submit exculpatory evidence. The majority of jurisdictions allow the parties to submit written responses to the written document setting out the allegations against them. Some jurisdictions also allow parties to review and comment on key submissions by third parties contained in the case file, or submit memoranda or observations at any point during the investigation stage.

Parties suspected of infringing competition law are often granted a right to be heard and an oral hearing usually forms part of the proceedings. Any hearing provided by the competition agency as part of an enforcement proceeding is often conducted by a qualified hearing officer independent of the investigative process and pursuant to established rules and procedures. A number of jurisdictions also use formal oral hearings, presided over by a hearing officer, as part of the initial investigation process. Some jurisdictions allow parties to submit counter evidence and question any witnesses that have been called. Where oral hearings are not mandatory, other procedures are put in place to ensure the parties rights of defence are respected i.e. through the use of written responses, or more informal discussions between the parties and the agency.

- (6) *Some jurisdictions have statutory deadlines setting out the timeframe within which an investigation should be concluded. Others reported the use of rules, guidance or best practices to indicate the expected length. Jurisdictions emphasised the importance of having enough time to carry out a full and thorough investigation, while preserving the parties' interest in a speedy resolution of the case.*

To ensure that investigations are conducted within a reasonable time, some jurisdictions have statutory deadlines setting out the duration and timing of the entire investigation, or some of its phases. This is particularly the case in merger

control where timing and extensions are strictly regulated. In non-merger proceedings agencies are often afforded a relatively wide discretion as to how to organise the proceeding and its duration. However, in the interests of fairness for the parties and efficient use of competition agency resources, the discussion emphasised that investigations should not last for an unreasonable length of time. Therefore agencies will commonly publish rules, guidance or best practices setting out the expected length of proceedings. Those countries without any express rules on length of investigations may still make allowances for parties to challenge the length of the administrative enforcement before a competent court.

Ensuring a relative degree of certainty in the time scale reassures parties that the investigation will be concluded within a certain time frame, while also allowing companies to manage their internal resources efficiently. A transparent timeframe also benefits enforcement actions as it helps the agency to focus its resources and conclude the investigation in a timely fashion. However, where a case is particularly difficult, involves a large number of parties, spans a number of years, or requires complex legal or economic assessment, competition agencies should be afforded sufficient time to fully develop and investigate the case, before reaching a decision. The degree of cooperation that the agency receives from the parties to the investigation and from third parties also effects the duration of the investigation.

- (7) *While there is no accepted statutory definition of confidential information, business secrets, trade secrets and sensitive personal information are commonly classified as confidential in most jurisdictions. The business community emphasised that the protection of confidential information needs to be balanced against the rights of defence of parties under investigation.*

Competition agencies need to foster a reputation for respecting confidentiality to ensure the continued supply of information from parties to antitrust proceedings and third parties. At the same time the discussion emphasised the importance of a defendant being able to access all the evidence gathered against it. A fine balance must therefore be struck in which competing interests are carefully weighed up against each other to arrive at a workable solution. Few jurisdictions have a clear statutory definition of ‘confidential information’ and the concept has been given meaning through agency practice and case law. Business secrets, trade secrets or commercially sensitive information are universally recognised by competition agencies as constituting confidential information. This will generally cover price information,

commercial know-how, production quantities, market shares and commercial strategies of undertakings. Other types of recognised confidential information include sensitive personal information, such as private telephone numbers and addresses, medical or employment records, or information that would place the provider under considerable economic or commercial pressure from competitors.

The risk of parties submitting over inclusive confidentiality claims can be prevented through earlier bilateral discussions at a senior level, both within the agency and company, and through a quicker agreement on what is genuinely confidential. Informal mechanisms for resolving disputes regarding confidential information, for example telephone calls and emails with agency staff, have been found to be effective as they often result in a quicker decision.

Different jurisdictions adopt different techniques and in some situations this may include disclosing highly confidential information in order to verify the true facts of a case.

- (8) *A number of methods are adopted by competition agencies to provide evidence containing confidential information to parties while respecting confidentiality. These include 'conventional' methods such as redaction or summaries, and 'innovative' methods such as confidentiality rings and data rooms.*

Competition agencies adopt a variety of methods to protect confidential information contained in documents that are provided to parties as evidence. The widely used conventional methods involve removing or redacting the confidential information and/or figures, providing non-confidential summaries or using 'in camera' sessions in court proceedings.

'Innovative' methods include the use of a confidentiality ring, which involves full disclosure of all information but limiting the persons to who it is made available, for example legal and economic advisors. A second innovative method involves the use of data rooms, in which again full disclosure of all information is made, but access is only given to external advisors under limited circumstances, and under the supervision of the agency officials. Both these methods may be employed for the protection of extremely sensitive confidential information, where limiting disclosure to the defendant may be necessary.

However, disclosing documents to a defendant's counsel can only work in those jurisdictions where counsel do not have a duty to disclose all information in their possession to their clients.

- (9) *Competition authorities reported the use of different institutional structures for the internal review of competition cases. The institutional design of competition authorities can be important to ensure the operations and decision making processes are perceived to be transparent by the parties involved in the enforcement proceedings and by the public at large.*

A transparent and fair enforcement process requires a combination of effective institutional design, sound administrative practice and open legal culture. Various procedures have been set up to encourage the interaction between the investigating team, the decision-maker and the parties to an investigation, and there is no uniform structure adopted by competition authorities. A variety of methods are adopted by competition agencies to ensure transparency and fairness in the process, including:

- (i) establishing a clear separation between the role of the investigators and those making enforcement decisions;
 - (ii) the use of independent advisors (e.g. economists, lawyers, business advisors and financial experts) to provide an objective review of the case with 'fresh eyes';
 - (iii) separation of the investigating and legal teams using a 'firewall';
 - (iv) procedures to assess the likely success of an investigation at an early stage;
 - (v) frequent meetings between the parties, case teams and senior decision makers; and
 - (vi) publication of commitments related to transparency in competition enforcement cases.
- (10) *A wide range of practices have been adopted regarding requests for information, with some jurisdictions following very well developed rules and others using a more discretionary approach. In general jurisdictions tend to favour a consultative and flexible approach to*

ensure the information requests contain as much relevant information as possible.

Requests for Information (RFIs) may be informal and voluntary or they may be formal and mandatory. While some jurisdictions have well developed procedures in place for dealing with RFIs, a number of jurisdictions reported the adoption of a more discretionary approach with either no formal rules or a very flexible procedure in place. It is common in many jurisdictions for case handlers to discuss the content of the RFI with the parties, and in some cases discussions may even take place before the RFI has been issued. From the agency side, discussions will be targeted at understanding how a business and market works, what information the company already possesses and the information that can be obtained without any extra burden. From the companies perspective, these opportunities for consultation allow a better understanding of the background, reasoning and context of the RFI. They also provide an opportunity to clarify any technical language, for example in energy and telecoms cases, and ensure the same wording is being used by both parties.

The degree of flexibility given by the competition authority will usually depend on the case, and some jurisdictions will allow initial RFI deadlines to be extended where necessary. Measures may also be put in place to allow the parties to contest the RFIs, although strong justifications for non-compliance are usually required. Parties tend to have a stronger incentive to comply with RFIs in merger cases, where they have a vested interest in the merger being cleared quickly, than in abuse of dominance or cartel cases.

- (11) *All jurisdictions allow for competition authority decisions to be reviewed by an independent judicial body. The review may consider issues such as adherence to procedural rules, misuse of power, and factual, legal and economic assessment. Some jurisdictions will accord deference to competition authority decisions due to the 'expert skills' required in the consideration of competition law cases.*

In addition to the procedures put in place internally to ensure procedural fairness, decisions by competition agencies are usually subject to review by an independent judicial body. This is particularly important when competition agencies are an administrative body. Judicial review serves as a comprehensive assessment of whether or not the conditions for the application of the competition rules are met. In some jurisdictions specialist competition tribunals exist to review the competition agency's decision. In other jurisdictions the review is carried out by an ordinary court. The judicial body will decide if the

relevant procedural rules have been adhered to, whether the facts have been accurately found and whether there is any evidence of misuse of powers, or manifest error of assessment. Impartial judges should then come to their own appraisal of the law and facts, including the appropriateness of the imposed penalty or remedy. In certain jurisdictions, where the competition agency itself has no power to make binding factual and legal decisions, it is the independent judicial body which has the power to grant the relief.

In some jurisdictions the judicial body may accord a certain degree of deference towards the competition agency's decision, to reflect the 'expert skills' required for the complex legal and economic analysis involved in competition cases. However, in other countries the scope and focus of the judicial review may be wider and therefore encompass a careful review of the economic and legal assessment carried out by the competition authority. In addition to judicial review, parties in some jurisdictions can apply for interim relief, i.e. measures suspending the operation of an agency decision pending an appeal.

- (12) *Some jurisdictions publish details and justifications when a case is closed or a resolution/settlement is reached. These communications, especially when prepared in plain non-technical language, advance the advocacy efforts of the agency by educating the public, the business community and its advisors.*

There are benefits to final agency enforcement decisions to be made public. Some investigations are closed without an enforcement action or by means of an agreed resolution. Agreed resolutions of enforcement proceedings, also referred to as settlements or consent decrees, occur when parties to an antitrust investigation cooperate with investigating authorities by admitting their participation in the competition violation of which they are suspected. Resolving the case in this way frees up resources to concentrate on other cases, in addition to simplifying the agency's administrative procedure. However, concerns have been raised regarding the lack of transparency in and guidelines about the settlement process.

Some jurisdictions do publish details of all decisions regarding closure of investigations and settlements reached, including those with third parties. This is commonly done via a short press release and may refer to decisions bought by the competition agency on the substance of a case, or other decisions closing a case, for example commitment decisions or orders terminating the proceedings. In some cases a full press release with more detailed justifications

for the closure or settlement are released. Other jurisdictions do not currently, or publish very few, press releases when a case is closed or settled but have put in place measures to provide additional information to the public about the competition agency actions and decisions, such as statutory and voluntary public registers. Some jurisdictions indicated that using more closing statements would be a useful tool in educating third parties and others as to how the agency carries out its work. However, the discussion emphasised the need to strike a careful balance between providing more insight into how agencies evaluate evidence and make decisions, while at the same time ensuring the protection of internal decision making processes, trade secrets and confidentiality.

More generally, transparency can be enhanced through the publication of guidelines, regulations, and practice manuals; speeches, articles and publications; amicus curiae briefs and advocacy filings; substantive agency opinions and court jurisprudence; and adherence to antitrust best practices of multilateral bodies (i.e., OECD, ICN).

**EXECUTIVE SUMMARY OF THE WP3 ROUNDTABLE HELD IN
OCTOBER 2011¹**

By the Secretariat

- (1) *National courts play a significant role within the process of competition law enforcement. The precise responsibilities of courts vary from jurisdiction to jurisdiction. Within certain systems, the competition authority brings enforcement actions before the court, which acts as final decision-maker with respect to alleged breaches of the competition rules. In other systems, the competition authority itself is empowered to take infringement decisions, and the courts provide an appeal mechanism or review function for such administrative decisions.*

National courts comprise an integral element of competition law enforcement systems in all OECD member countries. In some jurisdictions, the national court is the decision-maker at first instance for both public and private enforcement, determining whether the competition provisions have been breached by the defendant on the facts. In other systems, the competition authority makes administrative decisions regarding competition cases, which are then subject to higher level review by the courts. Within some systems, there may be a specialised judicial body for determination of competition law enforcement cases, distinct from the general national court system. Moreover, within a single system, there may be several channels for competition law enforcement. For example, criminal enforcement proceedings generally take place before a court, whereas within some systems, administrative decisions regarding violations of the law are taken by the competition authority.

¹ This WP3 roundtable was on “Institutional and Procedural Aspects of the Relationship between Competition Authorities and Courts, and Update on Developments in Procedural Fairness and Transparency”.

Country experiences show a wide variation in judicial institutional arrangements among countries for review of competition decisions, in particular the question of whether such cases should be heard within the general civil courts, the administrative courts, or by a specialised competition tribunal. A number of competition systems utilise the competition authority itself as the first stage of review, by requiring the public agency to reconsider any disputed decision, with the possibility of further appeal to the courts. More generally, the discussion confirmed that courts perform an important supervisory function within competition law systems, ensuring that the rule of law is upheld throughout the enforcement process.

- (2) *The standard of review applied by the courts in competition cases varies between jurisdictions, and may also depend upon the particular administrative or judicial act under review. In some jurisdictions, judicial review is of the legality of the administrative decision of the competition authority; in other jurisdictions, courts can engage in a review on the merits of the case, i.e., the court essentially considers the competition issues de novo. Certain acts of competition authorities are not amenable to judicial review: in particular, in some jurisdictions the decision to discontinue a competition investigation.*

Whether there will be any significant difference between a review of legality and a de novo review on the merits will depend on the intensity of the review of legality; in some member countries a review of legality may involve a very detailed examination of the facts and evidence relied on. Judicial review of the legality of a competition decision involves scrutiny of the process of competition law decision-making, to determine whether a decision is based on accurate and reliable evidence, does not exceed the limits of the authority's discretion and no error of law has been made. Hence a legality review can involve a detailed review of evidence. Under a de novo review on the merits, the court may exercise all the powers conferred on the original decision-maker. The standard of review utilised in competition cases varies throughout the member countries. Members of the business community typically are in favour of rigorous standards of review, thus permitting the reviewing court to assess whether the decision is substantively correct on the facts as well as being procedurally sound.

Certain decisions taken by competition authorities may have indirect effects on third parties that are not subject to judicial review. In particular, the decision by a competition authority to close a competition investigation without

taking an action or making a finding as to whether there was an infringement cannot, in many competition systems, be challenged before the courts.

- (3) *In view of the specialised nature of competition law, the quality of judicial decision-making in competition cases can benefit from the provision of training in competition law for judges, as well as the use of experts to assist non-specialised judges. In some member countries, specialised competition law tribunals are employed, and/or competition review cases are concentrated within a single court of general jurisdiction, thereby allowing for the development of particular expertise in such courts. In cases in which it is not a party, the competition authority may choose or be obliged to provide the court with an expert opinion on the relevant law and facts, acting as amicus curiae.*

When competition law is enforced or reviewed through the ordinary court structure, there is a possibility that generalist courts will incorrectly apply its provisions, particularly when complex economic theories and tools ought to be applied. The provision of judicial training in competition law is therefore viewed as a key mechanism to improve the quality of decision-making in competition cases before the courts. National competition authorities in some jurisdictions may have a role to play in the provision of such training, in addition to any professional or regulatory body with responsibility for judicial training. In some jurisdictions, further assistance to judges can be provided through use of expert judicial advisors in competition cases, or the temporary appointment of competition experts as judges.

In some competition systems, there are specialised courts in place to hear appeals or review competition decisions. Such an arrangement may require the formal establishment of a distinct competition tribunal, or of a separate competition chamber within a general court system. Alternatively, a single court of general jurisdiction may be designated as the regular forum for review of competition decisions, facilitating the accumulation of competition law knowledge and expertise within that particular court.

The competition authority may choose, or be required under national legislation, to provide expert advice to the court in competition cases, acting as *amicus curiae*. This approach may be particularly useful in order to ensure consistency between public and private enforcement of competition law. In those systems that report use of the *amicus curiae* procedure, typically the

competition authority's opinion is not dispositive of the legal issues, but will generally be afforded considerable weight by the court.

- (4) *In addition to deciding and/or reviewing administrative decisions in competition cases, the court may have additional roles. For example, the competition authority may need authorisation from the court to conduct dawn raids at business premises or private homes. Courts also may be involved in resolving disputes that arise during the course of an investigation, for example concerning claims of legal professional privilege. In some competition systems, alternative dispute resolution mechanisms have been established, in order to avoid the need for resort to judicial intervention in some such cases.*

Typically, the role of the courts in competition proceedings goes beyond mere assessment of the legality or correctness of infringement decisions. In particular, the court may play a role in supervising the conduct of the competition authority's investigation. In many systems, the competition authority is obliged to secure authorisation from a court in order to exercise certain investigative powers, for example, operating wire taps or conducting inspections or dawn raids at business premises. The court may also be required to resolve disputes that arise between the public enforcement agency and the private firm(s) during the course of an investigation. For example, the court may be required to rule on whether disputed claims of legal professional privilege are valid, which could result in the exclusion of certain evidence from the case file.

Given the considerable costs, in terms of both time and expense, of litigating such procedural disputes, some competition systems have sought to develop alternative dispute resolution mechanisms in order to provide more efficient solutions to these problems. In the European Union, for example, competition investigations are supervised by an independent Hearing Officer, who now acts, *inter alia*, as an impartial arbiter in disputes concerning legal professional privilege, the right against self-incrimination and deadlines for submission of documents. The Office of Fair Trading in the United Kingdom is similarly experimenting with the use of a neutral Procedural Adjudicator, to resolve disputes involving deadlines, access to file and requests for confidentiality redactions.

- (5) *In general, the courts play a central role in the private enforcement of competition law. In many member country legal systems, actions for damages for losses incurred as a result of competition law violations*

may be brought by private individuals before the national courts. There is considerable variation among national systems with respect to private enforcement, for example, regarding the viability of class actions suits, the availability of exemplary damages and the status of follow-on actions.

Private enforcement of competition law generally involves damages actions brought by private individuals before the ordinary courts, seeking compensation for losses incurred as a result of breaches of competition law. National courts therefore play a central role in private enforcement in most competition systems. A key concern with respect to private enforcement is the question of consistency with public enforcement activity, in particular where decisions on public and private enforcement are taken and reviewed by wholly separate administrative and/or judicial bodies.

Although private damages actions in competition cases are permitted in many member countries, considerable variations exist with respect to the conditions under which such actions are permitted. For example, there are differences in relation to the admissibility of class action suits or representative actions brought by consumer groups; the availability of exemplary or punitive damages in addition to recovery for actual losses; and the extent to which a prior finding of violation by the competition authority constitutes a necessary precondition for private enforcement.

- (6) *The protection of confidential business information is a significant concern when competition cases reach the courts, as it is throughout the process of competition enforcement. Such information may be liable to disclosure under freedom of information requirements, court-ordered discovery or other transparency provisions. Protection of information pertaining to leniency applications in cartel cases is a particular concern, which requires a balancing of the interests of private litigants in follow-on damages actions against the need to protect the integrity of a competition authority's leniency programme.*

The protection of confidential business information gathered during the course of a competition investigation is a recurring concern throughout the process of competition law enforcement. Such information may be disclosed pursuant to freedom of information provisions, court-mandated discovery or general rules on access to file for litigants. In many member country legal systems, there are exceptions to the disclosure requirements that can be invoked

in order to protect confidential information contained in the agencies' case files. Nonetheless, in certain circumstances the public interest may favour disclosure.

The question of disclosure of information provided pursuant to a leniency application requires a particularly sensitive balancing of the need to encourage and facilitate private enforcement in competition cases and the need to protect the integrity and attraction of a competition authority's leniency programme, in order to safeguard its public enforcement function. Our roundtable discussion highlighted the desirability of having in place a legislative framework to make express statutory provision for the performance of this balancing exercise by the courts.

- (7) *The roundtable discussion emphasised the need for constant scrutiny and reappraisal of competition enforcement procedures, and in particular, the possible scope for further improvement of the existing framework. The discussion and submissions illustrated a variety of recent changes and innovations in competition law structures within member countries, which are of a substantive, procedural and/or institutional nature.*

The roundtable also provided an opportunity for member countries to report on updates with respect to procedural fairness and transparency within their jurisdictions. Even within the context of well-developed competition systems, there is a consensus regarding the necessity and appropriateness of regular review of existing rules and procedures, in order to identify opportunities for improvement.

The submissions and roundtable discussion analysed a broad range of recent or on-going developments within national and supra-national competition law systems. These changes relate to, *inter alia*, the status of the competition authority as an independent agency (e.g., Slovenia), the comprehensive overhaul of the substantive and procedural provisions of the national competition legislation (e.g., Greece), the strengthening of the enforcement powers of a competition authority, coupled with a more demanding standard for judicial review of competition decisions (e.g., Mexico), the reform of antitrust procedures and expansion of the role of the hearing officer (e.g., European Commission), as well as changes to the general civil procedure framework that may have a particular impact on competition litigation (e.g., Poland, Romania).

While many of these developments will have a positive effect on the competition enforcement framework, a number of submissions identified recent

changes that may have a more ambiguous impact on the functioning of the competition system. In particular, interpretations of the ambit of the substantive or procedural competition rules by the courts may have the effect of limiting the scope for public enforcement by the competition authority.

- (8) *The discussion and submissions further highlighted the importance of transparency within competition law enforcement structures. Particular emphasis was placed on the desirability of making available within the public domain sufficient information regarding the enforcement objectives and procedures of the competition authority, in addition to its decisional practice. In formulating such policy documents, seeking input from stakeholders through a public consultation may significantly improve the coherency and completeness of the final document.*

The submissions and roundtable discussion emphasised the importance of transparency for the purposes of protecting the fairness, consistency and legitimacy of the competition enforcement process. In particular, many delegations reported recent publication of materials outlining the enforcement objectives and procedures of their respective competition authorities. Additionally, dissemination of information regarding the decisional practice of the authority, including decisions to close major investigations without any finding as to whether there was an infringement, leads to increased certainty for businesses.

Numerous submissions identified the beneficial impact of public consultations for the process of developing policy guidelines for publication, which can, moreover, function to guide the work of the competition authority going forward. Public consultations allow for stakeholder involvement in the drafting process, thereby providing opportunities to test the soundness and workability of the proposed rules and procedures, and to identify gaps and ambiguities within the intended framework.

SUMMARY OF DISCUSSION OF THE WP3 ROUNDTABLE
HELD IN FEBRUARY 2010
ON “PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL
AND ADMINISTRATIVE ENFORCEMENT PROCEEDINGS”

The Chair opened the roundtable and noted that the topic had generated significant interest among the delegations, as indicated by the thirty country contributions received by the Secretariat. The purpose of the roundtable was to consider transparency issues in civil and administrative enforcement proceedings, related to both merger review and other antitrust proceedings. The Chair noted that in many countries well established and transparent procedures for merger review already exist, accompanied by detailed guidelines and statutory timelines for the different phases of the review. However, beyond merger review there are a number of questions and issues concerning procedural fairness and transparency which the roundtable would discuss.

The Chair suggested structuring the discussion around six main topics:

- General transparency with respect to law, procedures, decision makers and timetables for proceedings.
- When and how the parties are informed of the allegations against them.
- Opportunities for the parties to respond and present evidence, and the role of hearings and hearing officers.
- Opportunities for the parties to meet with agency officials including decision makers.
- Rules on the length of investigations, publication of adverse decisions and consideration of evidence offered by the subjects or parties of the investigation.

- Procedures for announcing when an investigation is closed or a settlement is reached.

In order to identify the key issues in each of these areas, the Secretariat invited six delegations to make initial presentations.

1. General transparency with respect to law, procedures, decision makers and timetables for proceedings

To introduce the first topic for discussion, the **Chair** invited the delegation from the United Kingdom to take the floor.

The delegation from the United Kingdom (“UK”) outlined the recent work carried out by the Office of Fair Trading (OFT) as part of the Transparency Project (The Project). The Project concerns how the OFT, as a competition authority, provides information to the parties concerned, to interested third parties and to the public at large on pending and completed cases and projects. The information is about how the casework is carried out, what is done and why the OFT is doing it. The Project also covers the culture of the organisation when it engages with the parties under investigation, interested third parties and with the public; it deals with the values and attitudes that they can expect when dealing with the OFT on a day-to-day basis.

The UK delegation noted that transparency *vis-à-vis* the parties in cases and projects (i.e. the main focus of the roundtable) is only one part of the project. The Project is also concerned more broadly with the OFT’s interaction with a wider range of people, i.e. those with interest in a specific case, complainants or other players in the sector as well as suppliers and customers. As a public body, the OFT is also concerned with transparency *vis-à-vis* those referred to in the UK as ‘stakeholders’. The OFT may be formally accountable to some stakeholders, whereas there are many others who simply have a keen interest in what the OFT does. These informal stakeholders may feel that the OFT is not sufficiently open, or less open than some other public bodies in the UK with similar functions, which is essentially a question of good administration.

Transparency matters for a number of reasons:

- It leads to faster, better informed and more robust casework and decision making by following processes that are more consistently applied and better understood by all those that are participating.

- It drives efficiency in casework and decision making, and it forces discipline around deadlines allowing cost savings for the agency and for the parties. It supports the fundamental rights of due process and fair treatment to the parties involved and provides them with certainty and predictability.
- It provides better outcomes in casework, leading to better respect for decisions that are taken and greater understanding of the work of a competition agency and the benefits of a competition regime, including in particular the promotion and understanding of what is meant by a competition culture.

During the Project, the OFT consulted on a number of proposals, including (i) when the opening of a case should be announced and what detail should be announced both to the parties and to the public, (ii) the extent to which draft formal requests for information should be shared during the investigation, and whether advance notice should be given for intended information requests as well as indicative timetables for key stages, (iii) provision of updates at key stages and the holding of state of play meetings, (iv) the way in which provisional thinking on a case is shared with the parties as that thinking develops, (v) engagement with the parties around preparations for the public announcement of the decision, (vi) the publication of performance data on closed cases and the provision of more information on OFT governance structure and decision taking as well as on the different roles that people perform within the case team.

During the consultation, one very sensitive subject concerned the announcement of the opening of a case. The OFT currently issues a brief announcement either at the same time a statement of objections is issued, or when a case is resolved through either early resolution or settlement. Unless there has been some publicity around the case at an earlier stage, e.g. as a result of inspections that have been carried out, the brief announcement will usually represent the first time the public hears about a case. Law firms which responded to the consultation adamantly opposed any earlier announcement or publication of information about a case on, for example, the OFT website, even though the publication would clearly state that the investigation was at an early stage and the OFT had an open mind on the issue of infringement. Businesses considered that earlier publication would damage the reputation and goodwill of the companies involved. One of the main reasons for avoiding early announcements was the greater attention of the media who, it was claimed, may

not fully understand or at least may not explain effectively the processes involved in competition proceedings.

The OFT informed the Working Party that further reflection was planned on the outcome of the consultation before any general principles were published. Greater transparency does not mean that the OFT would contemplate the release of any information. There are strict statutory obligations concerning confidential information which are supported by sanctions against individuals. The purpose of the Project is not to hamper the OFT's ability to run investigations in a sensible way or to make open-ended promises about procedural reforms that would commit the OFT to change its way of operating, or to enable parties to use process issues inappropriately to prolong cases. The 'one size fits all' approach may not be appropriate and some flexibility and discretion will always be required. Further work on transparency will be done in the second stage of the project including better information on governance and decision making, publication of more information gathered during the course of the OFT's work and better information on how and when the OFT will formally and informally consult.

The Chair thanked the UK delegation for their presentation and called upon the delegation from the Netherlands to discuss the functioning of the internal firewall between the investigating arm and the prosecuting arm of the competition authority (NMa).

The delegation from the Netherlands confirmed that there is a firewall in place between the NMa's investigating and prosecuting teams. For all enforcement cases that may lead to fines, the competition department and the legal department have very distinctive tasks and do not overlap or confer. The firewall was developed to protect the integrity of case handling by the agency. The legal department, which sits on the other side of the firewall, revisits the cases with a fresh pair of eyes and prevents the investigators from adopting a self-serving or biased vision of the case.

In practice, this means that the competition department carries out the investigation of cases, including dawn raids, interviews with the parties and market researches. If the result of this investigation leads to a suspicion of an infringement, the competition department may draft a report or a statement of objection. The director of the competition department leads the investigation and signs the draft report. The Board of Directors of the NMa is not involved at this stage of the procedure. Once the report is drafted by the competition department, it is handed over to the legal department. The legal department,

which is responsible for prosecuting cases, only becomes involved in a case once the competition department has closed the investigation. The legal department then makes an independent assessment of the merits of the case. It reviews the file and it may ask the parties to submit written observations and to attend an oral hearing. After the oral hearing the legal department drafts a decision which is then submitted to the Board of Directors of the NMa. The legal department discusses the draft with the Board of Directors only, and the competition department is not involved.

When the legal department declines to pursue a case, the case is simply closed and the Board of Directors of the NMa is not involved. These cases can lead to some tension within the institution. However, they have also acted as an incentive for the case handlers to ensure that each and every case is properly investigated before being brought to the legal department. Recent case law has indicated that the courts take a strict view when it comes to compliance with the firewall provisions, which provides parties with more confidence in the system and awards the NMa more credibility as a public institution. However, there has been some scepticism about the separation of staff in the NMa, as both the competition and legal departments still work under the same Board of Directors.

The introduction of the firewall stems from the legislature's decision to protect the integrity of case handling by separating the investigation and the drafting of the final decision. There was a concern that the case handlers and investigators might become biased during the course of the investigation, and therefore they should not be involved in determining the level of fine. From a cost perspective, the system may arguably be inefficient since two separate departments within one institution both deal with the same case. However, after ten years of experience, firewalls have proved very effective in strengthening cases and helping to build a credible institution. The benefits of "double" case handling therefore have outweighed the costs.

As noted, there have been instances where the legal department declined to bring a case where the competition department had recommended it. However, there are different forms in which this can happen and it is hard to provide statistics. For example, an infringement case was brought by the competition department concerning at the same time a cartel and an abuse of a dominant position. The legal department concluded that the cartel case was sound but decided to drop the part of the case on the alleged abuse of dominance. In another example, the competition department believed that an infringement it had investigated lasted over five years, whereas the legal department thought that the evidence only showed a three year infringement. Cases, such as these

ones, where the legal department takes a stricter approach amount to approximately 10% of the total number of cases investigated by the competition department.

The Chair thanked the Dutch delegation and turned to the Belgian contribution, which explained that information regarding the procedure and investigation of a case is published in the three official languages of Belgium (i.e. Flemish, French and German). However, according to the Belgian submission, the final decision is only published in the language of the case. The Chair asked how this worked in practice and how transparency is achieved in a system with multiple official languages.

The delegation from Belgium explained that because of the three language communities the government is obliged to use the relevant language for the region when communicating with its citizens. There is one competition agency in Belgium, but consisting of three different entities. These entities include (i) the Competition Council which is an administrative tribunal and makes decisions according to judicial procedures, (ii) the College of Competition Prosecutors who conduct and lead the investigation and are supported by (iii) the agents of the Directorate General for Competition (DG Comp), which is part of the Ministry for the Economy.

During an investigation the agents of DG Comp must respect the law on the use of languages in administrative matters and are obliged to use the language of the region where the firm subject to the investigation is based for official purposes. Therefore, an undertaking in the Walloon region will receive written communications drafted in French, and a firm based in Flanders will receive communications in Flemish. However, the Competition Act provides for the application of the law on the use of languages in judicial affairs. Therefore, a defendant can always request the use of a language of his or her choice. Where there are multiple defendants, then the language of the majority is used. Therefore, during an investigation multiple languages may be used, but the report by the competition prosecutor will be drafted in the language chosen by the defendant.

After the report of the prosecutor, the Competition Council will take the final decision according to the rules applicable to judicial procedures, i.e. the parties can be heard and can submit observations. The law in this area was previously not very clear, but in January 2010 a decision of the Brussels Court of Appeal stated that the observations by the parties can be in the official language of the procedure, but the defendant can ask for a translation at the

judge's discretion. The final decision of the Competition Council will be in one language, but the procedure can be conducted in different languages. In general the approach adopted is very pragmatic, with the defendant usually having the final word on language. For example, in merger cases, while the merger notification must be in one of the three official languages, the annexes to the merger notification can be in English. To sum up, a competition investigation can be run in different languages, and the language can even change during the investigation, but in the end the final report and the decision by the Competition Council will be drafted in only one language.

The Chair then asked the South African delegation about a recent decision of the Court of Appeal which held that competition law must be enforced with fairness but expeditiously, and asked whether it is possible to be fast and fair at the same time.

The delegation from South Africa explained that the South African system does not consider fairness and expeditiousness to be mutually exclusive. In South Africa, fairness in administrative action is a constitutional right and as such it is given effect in the Competition Act. Fairness is also the basis for the structural separation of the Commission's investigative and prosecutorial function from the adjudicative function of the Competition Tribunal (the "Tribunal"). Expedition was given effect in the Competition Law in two ways: (i) timelines stipulating deadlines for completion of merger transactions, the filing of pleadings and the investigation for prohibited practices, and (ii) a specialist judicial system for the adjudication of competition cases by the Tribunal. Decisions of the Tribunal can be then appealed to the Competition Appeal Court (the "Appeal Court"), and then to the Supreme Court of Appeal (the "Supreme Court").

The supervisory roles of the Tribunal, the Appeal Court and the Supreme Court have ensured independence, transparency and accountability in decision making. During the drafting of the Competition Act and the establishment of the institutions responsible for competition enforcement, concerns were expressed by the business community regarding possible over-regulation. The competition regime as it has been developed has gone a long way to allay these concerns of over regulation, while at the same time ensuring competitive markets. However, the Appeal Court and the Tribunal have expressed concerns that parties to competition proceedings may abuse the system, which is designed to ensure fairness and expediency, by making interlocutory appeals to frustrate and delay the hearing of cases on the merits. For example, in the twelve months prior to this roundtable, the Appeal Court heard four applications for leave to appeal but

declined all four of them. In another case concerning a cartel in the milk industry, two initial interlocutory applications have themselves, over the three years since the matter was referred, given rise to seven separate applications. Defending its right to prosecute the cartel in this intensive and extensive litigation has therefore taken up valuable time of the Competition Commission.

In one of the interlocutory applications, a leniency applicant sought to release himself from the leniency agreement on the basis that the obligation to cooperate would conflict with his right to defend himself from the allegations the Commission was bringing. Having heard the application and the various matters raised by the applicant, the Appeal Court observed that competition law must be prosecuted with fairness, but also with expedition. Legal representatives appearing before the Appeal Court and the Tribunal have duties towards their clients, but as officers of the court they also owe a duty to the integrity of the legal system. Therefore, the expedient resolution of competition cases is as much an integral and fundamental part of the system as is the respondent's right to an administrative action that is lawful, reasonable and procedurally fair. It is hoped that, as the jurisprudence develops and settles some of the technical challenges that have been raised by parties, a balance between fairness and expediency will be struck.

2. When and how subjects are informed of allegations against them

The Chair then moved to the second topic for discussion, i.e. how and when agencies inform the parties of the allegations raised against them, and gave the floor to the Japanese delegation for its opening presentation.

The delegation from Japan explained that under the Antimonopoly Act (AMA) there are two opportunities for subjects of an administrative investigation to meet with agency officials: (i) during the initial on-site inspections and (ii) after the inspection when the JFTC provides the subjects of the investigation with an opportunity to express their opinion or submit evidence before issuing an administrative order.

In Japan, almost all case investigations start with on-site inspections rather than through a discovery process or written request orders. The decision to conduct such an inspection is made by the Japan Fair Trade Commission (JFTC) and there is no need to seek court approval. At the first opportunity during the on-site inspection, the subjects of the investigation are informed of the facts alleged against them. Historically, this was carried out orally, but under the new Rules on Administrative Investigations (the "Rules") introduced

in 2005 to improve fairness this must now be done in writing. Section 20 of the Rules stipulates that when carrying out an on-site inspection the investigator must provide the subjects with a document stating: (i) the title of the case (i.e. the type of business and the goods or services concerned); (ii) the facts which indicate a violation of the AMA; and (iii) the applicable provisions of the AMA. If evidence relating to another infringement is found during the on-site inspection, this may also be collected and possibly used against the subject. Following the on-site inspection, the JFTC analyses the written evidence collected and takes depositions from the employees of the company under investigation. The JFTC then examines the facts that have been found in detail, and considers if these are sufficient to issue an order.

The second opportunity to meet with agency officials is at the final stage of the investigation. Article 49(3) of the AMA stipulates that “*the Fair Trade Commission shall, where it intends to issue a cease and desist order, give in advance to a person who is to be the addressee of the cease and desist order an opportunity to express his or her opinions and to submit evidences.*” Article 49(5) of the AMA states that the JFTC must inform the addressee in writing of the following issues: (i) the expected content of the cease and desist order, (ii) the facts found by the JFTC, and the relevant laws and regulations, and (iii) that the parties have the opportunity to express their views on the case and to submit evidence, and the deadline within which they can do so. Under Section 25 of the Rules if, following the written notice, the addressee is dissatisfied, the Chief Investigator shall explain orally the evidence necessary for establishing the foundation for the fact finding of the JFTC. After the explanation of the evidence (normally within 2 weeks from the notification of the expected order to the subjects of the investigation), the company can express its views on the case or submit evidence. Apart from the two specific opportunities referred to above, the subjects of the investigation can express opinions, submit evidence and provide written statements for their counterargument to the JFTC throughout the investigation process.

The Chair thanked the Japanese delegation for their presentation, and turned to the Korean contribution, which stated that the specific alleged violations, the level of evidence and other details are not revealed to the defendant during the investigation, but only when the examination report is served. The Chair asked Korea to explain how this works and whether there are any advantages or disadvantages to disclosing the alleged violations only later in the process.

The delegation from Korea clarified that while the specific violation is not formally revealed, the information is disclosed unofficially. Under the Korean Monopoly Regulation & Fair Trade Act (the “Act”), when an investigator carries out the investigation, especially during on-site inspections, the company under investigation shall be notified in writing of the alleged infringement and of the relevant provisions in the Act. As the investigation continues, the investigator and the subjects of the investigation have continuous contacts and communications. In response to the investigator’s requests for statements, responses to enquiries and material necessary for the investigation, the subject of the investigation can always dispute the allegations and submit materials in support of its position. There is no regulation that prevents the parties from contacting the investigator or presenting arguments during the investigation.

Contacts between the investigator and the subjects of investigation are usually carried out in the offices of the KFTC, and through such contact the subjects of the investigation can identify the violations in question and the issues at stake. The detailed results of the investigation, including the specific infringements and the evidence used to prove them are disclosed to the defendant officially through the examination report. This process allows the KFTC to provide sufficient opportunities for the parties to express their views on the case. In addition, during the hearing process the KFTC ensures the rights of defence of the parties in various ways, such as preliminary hearing procedures or by extending hearings to accommodate the parties’ need to present their case.

The Chair noted that the Korean system therefore does not require a written documentation at the front end like in Japan, but allows for dialogue all the way through. The Chair then asked the Swedish delegation to comment on the advantages and disadvantages of their system which provides access to the case files at a certain point in the procedure.

The delegation from Sweden clarified that there are two prongs to the Swedish system under the Administrative Act (the “Act”), which ensure transparency of competition cases. The first is the parties’ right to access the case file, which requires the party to be proactive in requesting the access itself. There are special access rules which apply to the parties in the investigation and which are more liberal than those granting access to third parties. The parties can, and generally do, ask for access to files the day after the dawn raids have been carried out. In a merger filing, the parties will ask for, and be given, access very early. If there are confidentiality rules which prevent access, then general information about which documents are in the file and what information they

contain may be disclosed (for example, that a document is a market survey). However, in cartel or abuse of dominance cases, access to file is granted in a much more restrictive way.

The second prong is an obligation on the competition agency to communicate to the parties its views about the facts of the case. While there is no statement in the Act concerning when this should be done, the courts have made clear that this should happen at the latest during the statement of objection stage. Therefore, it may be carried out earlier. However, in a recent case a party requested access to the file a few weeks after a large dawn raid and access was denied at that time on grounds that the case was still in the investigation phase. The denial was upheld by the court. To date, the Swedish Competition Authority has won all access to file appeal cases brought to court, although this system has not been tested with a case involving a third party yet. In some cases, especially those involving mergers, giving the parties early access to the facts can be advantageous for the agency, as the merging parties tend to be more proactive in the investigation and this leads to a smoother investigation phase in general. However, assessing each request individually does generate a substantial work load for the authority. In terms of the content of the case file, the Act specifies what constitutes an official document, and agency working papers such as internal notes and memos are not within the definition of which documents can be requested.

The Chair next asked Bulgaria to comment on its first experiences after the introduction in 2008 of the statement of objections, along the example of the EU, and how this has changed the investigative techniques and methodologies of the agency.

The delegation from Bulgaria responded that in December 2008 a new law on the protection of competition entered into force in Bulgaria. The law substantially amended the procedure and the framework of competition proceedings before the national competition authority in order to ensure that the parties' due process rights were fully respected. The law introduced for the first time the use of a statement of objection ('SO'), i.e. a document describing the infringement, its characteristics, its participants, its duration and the economic and legal theories underpinning the allegations against the parties. The SO was introduced to mirror the process adopted by the EC under Articles 101 and 102 TFEU. The Bulgarian authority is therefore now fully compliant with the principles of due process established in the EC. The SO should be sufficiently clear to enable the parties to defend themselves against the objections raised by the competition agency. The addressees of the SO have the right to submit a

written response to the SO (the ‘RSO’) within a period which should be no less than thirty days from the day the SO is served. The RSO must include all supporting evidence. The RSO constitutes part of the defendant’s right of defence and it is the defendant’s choice whether to exercise it or not. In order to guarantee the parties’ rights of defence, the SO contains explicit provisions informing the parties that they have the right to access the case file, and the right to be heard by the decision making body at an oral hearing, prior to the adoption of the decision. The parties are given access to the whole case file with the exception of documents that contain trade or business secrets and any internal documents belonging to the authority.

Given that the new law entered into force only a year ago, the Bulgarian authorities could not report any specific experience with the issuance of SOs as yet. However, the Bulgarian delegation noted an interesting correlation between the use of the SO and other procedural instruments available to the competition authority, e.g. the power to approve commitments proposed by the parties. Following the decision to start issuing SOs, in a number of cases the parties started to offer commitments to the authority. In these cases, the companies admitted the allegations brought against them and proposed specific commitments to terminate the anti-competitive behaviour. The Bulgarian competition authority is therefore currently drafting guidelines on commitment decisions to ensure parties’ rights are fully respected.

3. Opportunities to respond and present evidence; role of hearings and hearing officer

Moving to the third topic for discussion, the **Chair** noted that it is important to discuss how hearings are effective in protecting and promoting the rights of the parties prior to a decision. The Chair asked the EU delegation to explain how the hearing system works in Europe.

The delegation from the EU quoted from a speech given by the Chair at a conference in Fiesole (Italy) last year, in which she said that different legal traditions may well entail different processes yet still provide due process for the parties. The EU delegate agreed with the statement, but added that administrative enforcement systems in recent times have been questioned when it comes to transparency and fairness. While it is important to ensure compliance with due process, there must be a serious debate on how more fairness and transparency can be achieved in such systems. This is what recently happened in the EU with the publication of Best Practice Guidelines. The guidelines attempt to address the specific procedural issues in antitrust

proceedings, introducing additional transparency measures to ensure both procedural fairness and more effective investigations by explaining how procedures function on a day-to-day basis. At the same time, the guidelines complement the existing legal framework and the best practices for merger investigations that were adopted by the European Commission in 2004. This ensures that the parties fully understand what to expect when they are faced with a Commission investigation. Best practice guidelines are useful to ensure a uniform treatment of antitrust and merger procedures across sectors, but also provide more flexibility than case law, as new approaches to the best practices can be proposed.

The European legal framework considers the parties' right to be heard as a basic element of the right of defence. This can be divided into four major components:

- The right of the parties to receive a statement of objections
- The right of access to the Commission's investigation file
- The right to submit comments in writing
- The right to a formal oral hearing

All these rights of defence are guaranteed by Hearing Officers, who are officials of the Commission but, once they are appointed, they are entrusted with a certain degree of independence. Independence is guaranteed by the fact that Hearing Officers do not report to the services of DG Comp but they report directly to the Competition Commissioner. From this point of view they are fully independent. Although they do not adjudicate on substance, they report to the Commissioner on whether the rights of defence have been fully respected and provide a full report on the Oral Hearing. The main role of the Hearing Officers is therefore to observe the procedure, to protect the rights of defence of the parties and to organise and chair the Oral Hearing. This involves balancing the defendants' right to present their arguments against the right of the Commission and interested parties to present an opposing view. Hearing Officers also have the power to admit certain third parties and witnesses, to accept the presentation of evidence at the Oral Hearing, and to ask questions to everyone present. They may also be called upon to adjudicate disputes between the Commission and the parties on issues such as timing for response to a Statement of Objections, confidentiality issues and access to file. The substantive decision making will then be carried out by the full College of

Commissioners and once a final decision is adopted it is appealable before the European courts.

Beyond the role of the Oral Hearing and the Hearing Officers, some of the additional transparency measures included in the set of Best Practices issued for public consultation are:

- The *formal opening of an antitrust procedure* will be carried out at the early stages of the investigation and will be announced publicly. This is already the practice in mergers and avoids cases being started and remaining in limbo. After an investigation is opened, the parties will therefore have the right to know whether the case is proceeding into a second phase, or whether the case is being abandoned.
- In addition to the rights that the parties already have regarding access to file, they will also be permitted to *review and comment on key submissions* by third parties, e.g. non-confidential versions of complaints or other substantive documents, and this right will accrue from the early stages of the procedure.
- *State of play meetings* (which are already used in merger proceedings) will allow the parties at predetermined moments of the procedure to meet with the case team and the senior managers of DG Comp and to be informed of the progress made in the investigation and to have an opportunity to discuss the theories of harm. This is for the benefit of transparency and fairness but also in the interest of efficiencies, as discussing the theory of harm with the parties at an early stage allows the authority to discard weaker arguments and focus on those worth pursuing.
- The introduction of transparency measures in *commitment procedures* and in particular on the *results of the market test*.

The Chair then asked Finland to elaborate on the procedures it uses as a substitute for an oral hearing and how these work in practice.

The delegation from Finland explained that in the Finnish system the Finnish Competition Authority (FCA) investigates cases and brings them to court and the court acts as the decision making body. Proceedings are written, and an important element of transparency and the rights of defendants and third parties is the right to access the documents in the case file. The FCA is obliged

to publish a document stating its case and the process is therefore similar to that used in the EU with the statement of objections. The parties can then comment on this document. There is therefore no institutionalised oral hearing at the FCA level, but it is possible to hear parties orally if they wish. However, once the investigation moves to the court proceedings stage, oral hearings are used. Court sessions are public and include the hearing of witnesses, third parties and other interested parties. Therefore, oral hearings are part of the Finnish system, but only once the case is tried before a court (including at the level of the Supreme Administrative Court).

The Chair next asked Germany to explain under what circumstances the Bundeskartellamt decides to hold a hearing, given that they are not mandatory, and how hearings are organised.

The delegation from Germany responded that procedural fairness is a fundamental principle in the German constitution, and the right to be heard is a key component of this fundamental principle. This is explicitly reiterated in the Competition Act. The right to be heard comes into play more decisively before an adverse decision is taken by the competition authority. The Bundeskartellamt must present its facts and preliminary conclusions to the parties and provide the parties with the opportunity to present their views on the case and on the Bundeskartellamt's preliminary conclusions. This is standard procedure in the case of any adverse decision, i.e., a prohibition decision or decisionsdecision to impose fines in cartel or abuse of dominance cases, or in merger cases, where the Bundeskartellamt is considering whether to issue a prohibition decision or to require the imposition of remedies. This also applies to cases where third parties are admitted to the proceedings and the decision is contrary to the third parties' interest.

Under German procedural law there are no strict formalities regarding a party's right to be heard, and the procedure may be carried out in writing or orally in discussions between the parties and the Bundeskartellamt. The scope of the hearing depends on the complexity of the case, and the decision must take into consideration all the previous interactions between the Bundeskartellamt and the parties. A hearing may be more extensive if there has been little interaction between the parties, whereas less time will be needed if numerous exchanges and meetings have taken place, and all the relevant issues have already been discussed. Complex cases will usually warrant an oral hearing, and the lack of a rigid framework for conducting the process allows flexibility in the system to adapt it to the needs of the relevant proceeding. Hearings are between the case team and the parties and therefore not open to the public, although on

rare occasions the parties may request a public hearing or the agency may hold a public hearing *ex-officio*. To ensure that the parties' rights are fully protected, a strict review of both the decision and the proceedings is carried out by the courts.

The Chair turned to the Swiss contribution and asked Switzerland to explain in more detail how their hearing process works, with a particular focus on the examination of witnesses by the parties.

The delegation from Switzerland explained that in Switzerland there is no specific regulation on cartel procedures, and therefore the general Administrative Procedural Act applies to all the proceedings under the Cartel Act. One provision allows for parties to attend hearings of witnesses and third parties and to ask additional questions. Parties are permitted to submit counter-evidence where appropriate. Witnesses can be invited *ex-officio* by the agency and also by the parties. In both cases the parties are permitted to ask additional questions. The parties will be informed of the hearing within at least a 30 day notice period. The invitation will inform them of the objective and timeframe of the hearing, and of their right to ask additional questions within the scope of the hearing.

The Chair asked Greece about the right of parties to present exculpatory evidence and data during and prior to the statement of objections phase.

The delegation from Greece explained that the Greek system, which is similar to many others in continental Europe, makes a distinction between the investigation (which is done by the Directorate General) and the decision (which is taken by the Board of the Competition Commission). The Board operates in many respects like a court. In the Greek system, the defendant is given access to the complaint very early in the investigation stage and well before the statement of objections. However, the parties are not permitted access to all other elements of the file. Parties also have the opportunity to discuss the case with the agency in informal meetings, and they have the right to submit memoranda or observations at any point during the investigation. Once the statement of objections is issued, usually two to three months before the hearing occurs, the parties have the right to submit a written reply to the statement of objections, usually within thirty days from the hearing. A distinctive feature of the Greek system is that during the hearing, the parties are permitted to cross-examine each other, as well as the witnesses and experts of the other parties. This technique has worked well, and has assisted the Board in reaching its decision in a number of cases. The parties are then entitled to

submit post-hearing submissions, within fifteen days of the hearing itself. Combined with the earlier open discussions this further assists the authority in testing the theories of harm.

Parties to an investigation will be alerted of a case against them through, for example, a request for information (RFI) which will refer to the subject matter, the legal basis of the claim and whether it is an *ex-officio* matter or following a complaint. The party then has the right to access the complaint. One shortcoming of the Greek system is that the law does not make any distinction between the complaint itself and the right to access the complaint. Therefore, in theory the defendant party could seek access to the complaint a day after it has been filed. However, in practice the authority is likely to allow access only once the investigation has started.

The Chair noted that, regardless of whether jurisdictions have formal requirements for a hearing, there are often opportunities for parties to be heard formally or informally. There is a range of opportunities for interactions between agencies and parties, and a number of jurisdictions use state of play meetings as well as official hearings.

4. Opportunities to meet with agency officials, including decision makers

The Chair then asked the delegation from Canada to make an opening presentation on the opportunities that parties have in Canada to meet with agency officials handling the case and with the decision making body.

The delegation from Canada emphasised that procedural fairness and transparency are key priorities for the Competition Bureau (the “Bureau”). The Bureau enforces the criminal and the civil provisions of the Competition Act (the “Act”). The Bureau is headed by a Competition Commissioner, who has the power to carry out investigations but not to take decisions. If a violation of the Act is established, the Bureau files a case with the courts.

In criminal matters, the Bureau works very closely with the Director of Public Prosecutions. Criminal charges are referred to the criminal prosecutors, who bring cases before the courts. In court, the constitutional due process protections apply to the highest level. Under section 29 of the Competition Act there is a strict provision on the disclosure of confidential information, which restricts the Bureau’s ability to share the information it possesses. However, the Bureau is mindful of the balance to be struck between transparency and the

protection of any competitively sensitive and confidential information it may have. Therefore, while there are no mandated rules on this balance, the Bureau makes significant efforts to be transparent, through engaging, listening, responding and debating the issues with the parties at every possible opportunity throughout the process.

The use of Guidelines is the principal way in which substantive standards are articulated. Comprehensive guidelines cover all the major areas of the Bureau's work, most notably in the field of mergers as well as competitors' competitors collaboration. The Bureau consults extensively about these guidelines, and is always open to amending them if ever there are areas that need to be revisited.

It is in the informal aspects of the Bureau's competition procedure where the most progress can be made. Informal meetings are held from the outset of the investigation, especially in the merger context. There is also a strong tradition of parties approaching the Bureau before filing a merger notification, which is a good example of the Bureau's reputation when it comes to safeguarding confidential information. Early contacts enable the Bureau to obtain an understanding of the issues from the outset, and to make decisions regarding where limited resources should be targeted, in addition to providing the parties with a better understanding of the issues on which the Bureau is focussing. The new two-stage merger review process, which came into force in 2009, is a good example of this. The process is formally explained in guidelines, which encourage parties to contact the Bureau before filing a transaction and even before a request for information is sent, in order to identify the key issues and front-end load any production requests.

The main responsibility of the head of an enforcement agency is to ensure her engagement in the matter, and that may include appearing at key milestone events during the process. This allows meaningful opportunities for the parties to dialogue with the Commissioner, who should attend these meetings with an open mind. The Bureau is focussing on two areas for improvements. The first is closing statements or 'technical backgrounders'. The Bureau uses closing statements, but not extensively. Although there is always a balance to be struck with confidentiality issues, these types of statements offer an important way of educating third parties on how the Bureau carries out its work. The second area for improvement concerns the review of consent agreements. Historically, a more formal type of process was used including a full hearing, which tended to become very lengthy and in some cases lasted for years. Therefore, when the Commissioner and the parties agreed to a resolution that would resolve the

competition problem, the transaction was still held up for a significant amount of time before being able to implement the agreed resolution. In addition, Bureau resources were being exhausted. In light of these problems, an amendment to the Act was passed to allow for registering of a consent agreement, and in order to mitigate against any perceived concerns by third parties it was decided that confidential information should be kept to a minimum. Third parties have the right to challenge consent agreements, but they need to know if they are affected by the agreement.

In summary, transparency and procedural fairness are both Bureau priorities. There is a natural tension between transparency on the one hand and confidentiality on the other, but the Bureau is working hard, particularly in the mergers context, to clarify how its processes work. The key element is the willingness to commit to a dialogue, as this is what will improve the efficiency, effectiveness and credibility of the Bureau's decisions.

The Chair thanked the Canadian delegation for its presentation and commented that most authorities engage with the parties to understand the strengths and weaknesses of the parties' positions. However, there is still some scepticism in the business community about a 'real' commitment to dialogue by many agencies, and a feeling that while a discussion may take place, what the parties say often does not make a difference. On this specific point, the Chair invited BIAC to take the floor.

The delegation from BIAC opened its remarks by commending the Working Party for the discussion on procedural fairness, and emphasising the importance of the topic. Much of the roundtable discussion had been reassuring in demonstrating an agreement on the part of the agencies that procedural fairness secures better decisions and a smoother process. BIAC noted the recent improvements in a number of jurisdictions, and in particular the openness expressed by a number of the agencies to go beyond legal guarantees and use their discretionary authority to seek to improve the fairness of the process. However, it is felt that there is further work to be done and further progress to be made. All parties involved should be striving towards minimum standards for a truly fair process, and the agencies should be using their discretionary authority to achieve a fair process even when it is not mandated by law. According to BIAC, transparency should be a key component of minimum standards for good administration. But BIAC also stressed that transparency has different facets. Transparency towards defendants is very different from transparency required *vis-à-vis* other stakeholders. BIAC noted that in some of the contributions to the roundtable there was an inadequate recognition of the

extent to which the different interests of the defendants or the parties should give rise to a different outcome in relation to transparency. That is not to say that the rights of third parties and of the public should not be recognised, but there are different interests to be protected.

A key topic, which raised a number of very interesting comments, is the degree of the agency's engagement with the parties as a way to ensure that the parties are well aware of the objections that the agencies are raising against them. Different agencies have adopted different processes offering the parties the right to know what the basis of the investigation is, and providing a right to reply. The most important comment on this issue is to stress the importance of early engagement. A number of authorities have explained how they offer parties a right to respond to their formal statement of charges, whether through the notice of proposed order in Japan, the statement of objections in the EC or the investigation report in Korea. However, in the practical experience of businesses there are concerns that these formal charges come at a very late stage in the process, when the minds of the investigators are more or less made up. Investigators have found the facts to their satisfaction and allow the defendants to respond to formal charges almost as a matter of formality.

BIAC would therefore encourage the use of discretionary powers where appropriate to ensure a high level of involvement earlier in the process. Encouraging comments in this regard were heard from the Swedish delegation indicating they provide that involvement at an early stage, and from the Greek delegation in relation to early access to complaints. However, there should be more comprehensive recognition that the parties should not only be provided with a description of the allegations, but that they should be also given access to the actual evidence underpinning these allegations before any preliminary concerns become fixed. This will enable agencies to focus on the right issues, make better decisions and secure better outcomes for business. As regards hearings, there has been a development from the situation where parties were merely 'heard' by virtue of being in the same room as the investigators. However, the bar for hearings needs to be raised further, starting with an agreement on what the perceived purpose for a hearing is. In BIAC's view, the purpose should be to give the decision maker, or at the very least someone acting on their behalf, the opportunity to evaluate the evidence and therefore permit a very thorough process. It has also been encouraging to hear expressions of increased openness to the examination of witnesses in jurisdictions which have not previously had a cross-examination process as part of their normal policy. The need is for a real and effective hearing, where the evidence is tested with the purpose of establishing what the facts are and

whether the allegations are supported by the evidence. This should not be seen as a threat to agencies or the enforcement of competition law, but a means to ensuring proper enforcement.

The Chair opened the floor for the general discussion.

The delegation from the UK commented that the UK Competition Commission is in a slightly different category from some other agencies as it does not prosecute infringements, and instead investigates whether markets are working well or whether a merger substantially lessens competition. However, the basic tenets of fair procedure apply just as much in these contexts. The need for procedural rules is based on the proposition that a decision arrived at by a fair process is likely to be a better decision. There are paradoxes, however, and given the different authorities and systems around the world, fairness can mean different things in different contexts. It is entirely fair to separate investigation and prosecution from decision making, and in the context of Competition Commission investigations panels of part-time Commissioners are used, supported by staff and with a full time Chairman. However, the Commissioners are involved in the investigation, the fact finding and the issue identification right from the beginning. They maintain contact, oversee and take part in the hearings that take place during the investigation. Commissioners should not be kept separate from the investigation and only come in at the end to take the decision. Indeed many parties express concern that they have been not given sufficient access to the body of decision makers during the course of the investigation.

This is the situation in the context of the Competition Commission, but the concept of fairness can differ across agencies. However, jurisdictions should not approach these rules with the intention of engaging in the minimum process to avoid their decisions being appealed. It is not simply a case of operating a fair procedure; the agency also has to be fair and the decision makers must listen to what the parties say. Investigators may, and frequently do, hear arguments that trigger a realisation that the current line of argument is wrong, and that the agency's thinking should be changed and adapted. If an agency does amend its view in this way, this encourages parties to believe that a process involving the decision makers in fact finding is nonetheless fair.

The delegation from Hungary took the floor to comment on the use of informal meetings with parties. This is not a straightforward issue in practice and there are two reasons for this. The first is the cultural preference in Hungary for a more traditional procedural rigidity, and the use of formal rather than

informal solutions in public administration. The use of discretion is not as well accepted under Hungarian legal traditions as in other jurisdictions. The second reason is that informal meetings may raise concerns of corruption. Corruption is a real problem in Hungary and it is insufficient that the agency is not actually corrupted; an agency must also give the appearance of being 'clean'. Therefore, the use of informal contacts with parties in a competition investigation may raise concerns related to the lack of transparency for third parties who were not involved in the informal contact. Despite these accountability concerns, Hungary has made significant progress in informal settings, especially in the pre-notification stage of mergers. However, there is always pressure to resist engaging in these types of informal contacts.

The Chair responded that concerns about impropriety are not specific to Hungary, and asked Canada to comment on the issue that while informal contacts may work in some countries, in others it could be perceived as part of a broader problem.

Canada responded that there is a general scepticism from third parties with regard to informal contacts, and the drive for agencies should be towards a process which does not just appear to be fair, but is fair in the relevant context. Historically hearings were used relatively early in the Canadian merger review process, because if an injunction was not obtained within 42 days, parties had the right to close the transaction. However, this resulted in the agency and the parties hardening into litigation mode, which distorted the process and took the focus away from the dialogue 'on the merits' at a very early stage. The rationale for introducing the two-stage merger process was the commitment to early and continuous dialogue with the parties. Hearings are to be called for in some contexts, but the value of formal hearings can be questioned with respect to the investigative stage of a merger, i.e. prior to the decision, in a context where a decision to file or not is being made.

The US delegation took the floor and referred to the point made by the EU that different systems can accommodate appropriate protections of procedural fairness and provide for transparency. In the US, the Federal Trade Commission (FTC) has an administrative system, with elaborate rules to ensure protection rights just as the Department of Justice has its own set of procedural protections that apply in a judicial context. In echoing the points made by the Chair, Canada and the UK, the US emphasised that the key consideration is the spirit in which rules and practices are administered. Therefore, the agencies should keep an open mind, and approach the process in a spirit of give-and-take and be open to shaping and changing their minds along the way. This benefits not only the

parties, who have an opportunity to explain their position, but also allows the agencies to sharpen the focus of their investigations and improve their decision-making procedures. At the FTC, there are multiple and continuous opportunities for the parties to interact with the staff, the management and the Commissioners at successive levels of the investigation. Parties are encouraged to take advantage of those opportunities and they do so.

FTC investigations typically begin with an initial phase during which the staff enquires as to whether there is sufficient evidence of a legal violation to pursue the investigation. The prospective party is often contacted at this stage and is welcome to meet with the staff to explain their position, and try to dissuade the staff of the need to continue an investigation or the need to issue compulsory process at that stage. Many investigations are closed at that point, but if the investigation proceeds, the parties may come in again, in some cases numerous times, to meet with the investigative staff. This will include both the attorneys and the economists involved in the investigation. It can be particularly valuable to establish a dialogue between the parties and the economists as it may shape the nature and the analysis of the data collected by the economists in the investigation. For example, if the parties have an economic model that predicts no competitive harm from the practice under investigation, it is very valuable to be able to test that model at this early stage of the investigation. The result could be a modification of the agency's theory of harm and the remedies that may be desired at the end stage of the investigation.

If at that stage the investigation still appears worthy of continuing, the staff will recommend to the Bureau of Competition that the case be pursued. The parties are again invited to come in at this stage and meet with the Director of the Bureau of Competition and the Director of the Bureau of Economics to argue that their case should not proceed to the Commission level. Nonetheless, if the Director of the Bureau feels that the case should proceed to a recommendation that the Commission take law enforcement action, the parties may come in and meet with the Commissioners. This is often done via individual meetings with each Commissioner, including the Chairman. The parties are typically represented by their counsel, and may be accompanied by company officials. Parties may also, and often do, bring in economic and industry experts to support their position and answer questions at every stage.

According to FTC rules, the Commission has to inform investigative targets of the purpose and scope of the investigation, the nature of the conduct that may constitute a violation, and the applicable provision of the law. Parties can and typically do provide a summary of their case in a document known as a

White Paper that sets out their view of the facts, the legal arguments and the economic arguments involved in the investigation. The parties may argue that the Commission should not bring a case or they may advocate a settlement with specified relief. They may persuade the staff to drop all or part of their case in light of deficiencies in facts or theory. Even if they do not succeed in persuading the staff, the parties can learn about the particular interests of the agency and therefore better hone their arguments.

Alternatively, in the course of these meetings, the staff may persuade the parties of the seriousness and the strength of their arguments on a particular aspect of the case and may then persuade the parties of the need and benefit to settle rather than pursue lengthy and expensive litigation. The opportunity to exchange ideas and information is not a favour bestowed by the agencies, but is a tool that helps focus the investigation on a real dispute and also may help the agencies make the right decision.

5. Rules on the length of investigations, publication of adverse decisions and consideration of evidence offered by the subjects or parties of the investigation

Moving to the next topic, the Chair asked the Polish delegation to address in their presentation issues such as the length of investigations and the publication of adverse decisions.

The delegation from Poland explained that their procedural model for antitrust enforcement is administrative. There is one authority, the Office for Competition and Consumer Protection, (the “Office”) responsible for the investigations, the adoption of decisions and the imposition of financial penalties. The legal basis for the Office’s functions is the Act on Competition and Consumer Protection (the “Act”). Every antitrust proceeding is opened by the President of the Office, and complaints are treated only as a basis for analysis.

The length of investigations is provided for in the Act. There are usually two investigation phases: (i) *explanatory phase*, lasting between 30 and 60 days; and (ii) *antimonopoly phase*, which takes place after the objections are presented to the parties and which can last up to five months. However, the legislation allows for extensions of these deadlines if necessary for a full development of the case. The majority of merger cases are cleared within two months, and a recent calculation showed the average length of a merger examination in Poland is 67 days. However, if additional information is

required the time period can be extended. Parties actively participate in the proceedings; they have access to file at each stage of the investigation and also have the possibility to request informal meetings with the agency's officials. These meetings can be organised at every stage of the investigation. The parties can also request to be heard in formal hearings. However, a written procedure is generally preferred by the parties. If documents are provided in a foreign language, they must be translated into Polish, and certified by a sworn translator. This is to facilitate judicial review of the Office's decision.

Transparency is key to the procedure and every effort is made to ensure that the principle of transparency covers all aspects of the Office's activities. For example, guidelines have been adopted on how the Office sets fines and on the leniency program. A special help line was also opened last year to allow firms to call and ask questions about the leniency program. Every three years the Office prepares a competition policy strategy document which is later approved by the government. This document is publicly available and includes the goals and the enforcement priorities for the following years. Prior to the introduction of any new soft law, public consultations and meetings are organised.

The publication of decisions is strongly connected to transparency. The majority of decisions are published in the Office's Official Journal which is available on the Office's website. Since 2009, an updated version of the decisions database has been available. The consistency and coherence of decisions are also key to procedural fairness. The structure of the Office differs from other European countries as it is decentralised; the headquarters are in Warsaw and there are nine regional branches around Poland. The divisions in Warsaw are responsible for the protection of competition on the national market, while the branches are responsible for local and regional markets. The review of decisions for consistency is therefore important; for this reason, every draft decision issued by the case handlers, both in the headquarters and the branches, is examined by the legal department and the Chief Economist's team. It is important that the assessment is made by lawyers and economists not engaged in the proceedings.

Poland concluded that procedural fairness is a cornerstone for competition enforcement and a guarantee of effectiveness. The Office will continue to enhance its effectiveness without detriment to parties' rights. International cooperation, sharing best practices and experiences as well as learning from each other's successful solutions can be extremely valuable in this respect.

6. The rules on announcements when an investigation is closed or a settlement is reached

The Chair then moved to the last part of the roundtable and asked the delegation from Chile to make a presentation on the announcements that agencies make when closing an investigation or when reaching a settlement with the parties.

The delegation from Chile explained that there are two competition authorities in Chile: (i) the Competition Tribunal, which is a judicial body with adjudicative powers on competition matters, and (ii) the Fiscalía Nacional Económica (“FNE”) which is the competition agency. Each body has similar rules and practices regarding announcements when a case is closed or settled. FNE now publishes on its website all decisions regarding the closing of an investigation, the settlements reached with parties and the filing of charges before the tribunal. Until mid-2008 the publication of these decisions was only a practice. There was no legal rule requiring the agency to publish this information as the constitutional provision on transparency, introduced by amendment in 2005, was not yet directly enforceable. The content of the document made public may differ in each case. When FNE closes an investigation and decides to bring a case to the Competition Tribunal, it published a summary of the grounds for filing the case. In the case of a settlement, it is common to issue a short press release, but not to disclose the full content of the settlement before this is approved by the Competition Tribunal. When important companies are involved, the close of an investigation or a settlement is commonly reported by the press. These procedures may in addition justify a full press release by the FNE.

In August 2008, Chile passed the Transparency Act. The Act regulates the transparency of government and other public bodies’ activities, actions and acts. Under this legislation, a new transparency council was established and all activities of the government were required to be made public, with few exceptions. This included active transparency duties such as the requirement that certain information should be available to the public at all times on the relevant websites. The act also provides for an active transparency duty with regard to “*all acts and resolutions which affect third parties*”. This provision therefore obliges the competition agency to publish all acts and resolutions which meet the above standard, such as the closing of an investigation or the settlement of a case. The Competition Tribunal publishes on its website, among other rulings and resolutions, all settlement approvals and other decisions which may end a dispute (for example inadmissible claims). In general, almost all

records and interim decisions of a case are available on the Competition Tribunal website.

From its establishment in 2004, until mid-2008, the Competition Tribunal also adopted the practice of publishing its main resolutions (in full and in abstract) on its web site. In 2005, when the constitutional provision on transparency and publicity was introduced, it broadened the scope of publicised documents. Since the enactment of the 2008 Transparency Act, the Competition Tribunal, like the FNE, is now required to publish certain acts and resolutions in accordance with the Act. The Competition Tribunal's website also has a press room link where relevant procedures regarding important cases are reported.

The Chair thanked Chile for its presentation and opened the floor to any closing comments or observations on procedural fairness.

Brazil took the floor and referred to the concerns raised by Hungary regarding informal meetings. It is generally agreed that informal meetings have a paramount importance for merger analysis because they provide a deeper comprehension of the facts of the case. In order to minimise concerns related to these informal meetings, Brazil adopts three safeguards: (i) informal meetings are held by at least two officials, (ii) a party wishing to hold a meeting must apply for it in a formal way so that there is a record of it, and (iii) the schedule of all Commissioners is publicly available on the internet.

BIAC emphasised that its suggestion to have minimum standards across jurisdictions did not envisage a "one size fits all" checklist. The way in which agencies achieve minimum standards should be organised in light of their particular system and the ultimate goal of fair process. It is, however, clear that there should be minimum standards if agencies are to avoid actual or perceived prosecutorial bias based on investigators becoming convinced by a case before they hear the parties and then proceeding to make a decision. Some concern was expressed that hearings may lead to a more litigation-minded framework at an early stage and this is not to be encouraged. A proper oral hearing should be in addition to and not instead of an early and engaged process. As for meetings in informal settings, BIAC echoed the view that this is a real issue and not unique to the Hungarian system. An advisable approach, which a number of agencies have adopted, is to ensure a rigorous gathering and recording of all evidence and information, including evidence gathered in an informal context. Noting that the Polish delegation mentioned their new and transparent leniency helpline, BIAC expressed its support for agencies operating an appropriate leniency policy. Studies should also be encouraged on how to converge leniency

processes so they operate together in a fairer way. There have been situations in which a business has come forward and made a full and frank admission, but been denied the full benefit of leniency due to inconsistent and difficult processes. The jurisdictions represented in the Working Party have the fundamental objective of ensuring competitive markets and protecting competition for the benefit of consumers and market players. It should be stressed that many businesses invest a great deal in doing their very best to comply with competition law. This should be taken into account and fair credit be given to parties making those efforts.

The delegation from Greece returned to the Hungarian comment on corruption, and emphasised that while there may be concerns related to informal contacts, the benefits outweigh the negatives. Informal meetings are very important tools, not only as they are in accordance with the parties' right to be heard, but they also enable the authority to form a clearer and more objective view of the case. However, safeguards should be put in place and officials should do the best they can not to raise concerns. The process adopted in Greece is similar to that of Brazil, with informal meetings being conducted by at least two officials. The parties are also invited to substantiate their statements or presentations in writing, within a certain time after the meeting. These documents later form part of the case file.

Hungary noted that the comments of other delegates aligned with Hungary's approach. The situation in Hungary is not that informal contacts are a problem as such, but that they could be perceived as being a problem. The agency is not involved in any sort of unethical practices, but there are corruption cases in other parts of the administration and those scandals taint the work of all agencies, including the competition agency. Informal contacts are clearly advantageous in competition investigations, but it can be difficult to demonstrate the merit of these contacts against the backdrop of corruption investigations in other areas. The solution is to provide an element of transparency or formality to the situation, but this may lead to the question of whether it is not only 'fairness' which has a different meaning across jurisdictions, but the notion of 'formal' or 'informal' may also have different meanings in different countries.

The delegation from Ireland made suggestions about how best to make sense of the variety of different experiences around the world. Procedural fairness may apply to three areas: (i) investigation, (ii) decision making and (iii) judicial review.

- *Investigation phase:* Virtually all jurisdictions have an investigative process which is essentially administrative. The terminology differs from country to country, with some using Phase I and Phase II, and others using preliminary and final, but the fact remains that at some point the parties have a right to be told that they are being investigated. What is unclear is at what stage this should take place, given that the investigative agencies need time to review the evidence they have. There are also issues concerning the compulsion part of the investigative process. Some countries require court orders for search warrants and in others the competition agencies are able to issue administrative requests for information. In addition, there will also be constitutional rights to consider, e.g. rights against self-incrimination.
- *Decision phase:* This is the phase where most issues occur as there are two fundamental enforcement systems around the world: one administrative and one judicial. The first issue, common to all systems, is that the party must have the right to know the case against it, so that it can respond fully before a decision is taken. Disclosure, access to file and state of play meetings are all relevant here. The next issue concerns the fairness of the decision-making process. If the jurisdiction has a judicial decision-making system, such as the US, Ireland and Canada, disclosure and procedure in general is governed by the courts. However, this is not the case in administrative systems, and consequently issues related to procedural fairness have been raised. However, even in an administrative context the investigating part of the administrative agency is not necessarily connected to the decision-making part. In Europe, for example, the French Autorité de le Concurrence has an investigative arm which works entirely separately from the chamber that decides the case. The Netherlands has a similar separation. A different model is that used in the EU, which is followed by many of its member states, in which the investigation and decision making is carried out by the same entity. This system has raised substantial debate in Europe.
- *Judicial phase:* Which ever investigation and decision-making system is adopted, all jurisdictions have a court review built into the process. Therefore, in the end competition issues will always be governed by the rules of the courts, and the courts have their own systems, which do not usually treat competition cases differently from other cases.

In conclusion, whether the process is administrative or judicial, or a mixture of both, competition law is not given any special dispensation and it will always need to fit within the legal framework. Therefore, any changes proposed in one system must have regard for the legal system in general, as competition decision making will not usually be given a unique place in legal culture.

The Chair thanked all the delegation for a very interesting and stimulating discussion and concluded the roundtable discussion.

SUMMARY OF DISCUSSION OF THE WP3 ROUNDTABLE
HELD IN JUNE 2010
ON “PROCEDURAL FAIRNESS ISSUES IN CIVIL AND
ADMINISTRATIVE ENFORCEMENT PROCEEDINGS”

The Chair opened the roundtable and reminded the delegates that the roundtable was a continuation of the discussion on procedural fairness which was started in February 2010. The purpose of the roundtable was to discuss the balance between transparency and confidentiality, the availability of settlement procedures and judicial review.

To start the roundtable, the Chair introduced Mr. Götz Drauz, who would provide an opening presentation on confidentiality issues in administrative antitrust procedures.

1. Confidentiality issues

Mr. Götz Drauz started by outlining the tension between respecting the rights of defence of the parties while at the same time respecting the confidentiality of those providing information to competition authorities. These two legitimate and competing interests must be reconciled to enable parties to properly understand the case against them without causing disproportionate damage to information providers. Competition authorities need to foster a reputation for respecting confidentiality to ensure the continued supply of information in ongoing investigations, while simultaneously using all relevant evidence in their possession to establish if there has been an infringement of competition law. A fine balance must be struck, in which competing interests are carefully weighed against each other to arrive at a workable solution. Different agencies operate in different legal and cultural contexts, and there is no ‘one size fits all’ approach. However, active and good faith engagement of all interested parties can go some way to resolve the matter.

When assessing allegedly confidential information, there is a two-step process that agencies typically follow. First it must be established if the

information in question is confidential under the applicable law and second whether, on balance, disclosure to a party other than the provider should nevertheless be made. Regarding the first limb of this test, there are different types of confidentiality that may be recognised in antitrust proceedings. The most important category is that of business secrets, trade secrets or commercially sensitive information. This appears to be an almost universally recognised class of confidentiality amongst antitrust agencies. Whilst the precise definition will vary from jurisdiction to jurisdiction, it generally covers costs and price information, commercial know-how, production and supply information, market shares and commercial strategies. This is the type of information that competition law seeks to prevent competitors from exchanging amongst themselves. Other types of confidential information recognised in many jurisdictions include sensitive personal information such as private telephone numbers and addresses, medical records or employment records of individuals. In many jurisdictions general data protection rules regarding the disclosure of this type of information already exist.

Protecting confidential information that would place the provider under considerable economic or commercial pressure from competitors or trading partners if it were revealed avoids a conflict between the private economic interest of the information provider and the broader public benefits of effective application of the competition rules. Often it is not the information itself that requires protection but the identity of the information provider. Finally, confidentiality is often recognized where disclosure would be against the public interest; for example, if it were to put national security interests at stake.

If the information in question does qualify as confidential, a balance needs to be struck between the protection of confidentiality and the interests in disclosing the information. A number of different factors need to be considered by antitrust agencies, including:

- *the degree of harm* that could be caused to the information provider and the person to which the information relates;
- *the value* as a matter of inculpatory or exculpatory evidence;
- *the availability of alternative non-confidential documents* that can be used to prove or disprove the alleged infringement;
- *the availability of methods to desensitise information* without undermining its value, *e.g.*, non-confidential summaries;

- *policy considerations, e.g., the agencies' ability to protect confidential information.*

The key factor in most jurisdictions is the administration of justice, *i.e.*, the ability of agencies to prosecute and the ability of the accused to defend themselves. In terms of procedure, in most jurisdictions those providing information will need to identify it as confidential and provide non-confidential versions. However, in some instances the agency may also carry out its own initial assessment of the confidentiality of the information.

Once a confidentiality claim has been made, it is often those agency officials involved in managing the case who decide whether the information should be disclosed. In some jurisdictions, there is a separate decision maker, albeit within the administrative agency. For example, the Hearing Officer in the EU is formally part of the European Commission, but able to resolve most confidentiality disputes. In many jurisdictions, the information provider is formally consulted or informally offered the possibility to challenge the disclosure decision before the information is disclosed. Parties to an investigation may also have the right to challenge the agency decision to disclose or not before a judge with a possibility of obtaining interim measures, or they may have to bring an appeal against the main decision.

It is fundamentally important that parties under investigation are able to understand the nature of the case against them, and the evidence used to establish the case. A rigorous assessment of confidentiality claims should be conducted and mechanisms to make the relevant information available without violating confidentiality must be fully explored. If incriminating or inculpatory evidence is deemed to be confidential, the balance of interest may dictate that disclosure should not be made. Furthermore, under the principle of respect of the rights of defence, any information to which a party has not had access should not be used as evidence against it.

There are a number of methods antitrust agencies can employ to provide evidence containing confidential information to the parties whilst respecting confidentiality. The widely used 'conventional methods' involve redacting the confidential information and providing non-confidential summaries, redacting confidential figures, or using 'in camera' sessions in court or administrative proceedings. There are also two less common 'innovative' methods. The first involves making full disclosure of all evidence, including any confidential information, but limiting the persons to whom this information is made available. Such a 'confidentiality ring' will usually consist of external legal and

economic advisors. The second method involves limiting the circumstances in which the information is available by placing documents in a data room on the agency's premises. Access is then granted to external advisors under the supervision of agency officials, provided the advisors agree not to disclose the confidential information to their client.

Sufficient information should be provided to allow third parties to contribute usefully to on-going proceedings; their involvement should promote the public interest in effective enforcement of competition rules rather than serve individual commercial interests. There is an extra layer of consideration when courts are involved in the process, either as the decision maker or as an appeal body, as the information will then normally be disclosed to the general public. In many judicial proceedings, the principles of open justice and legal requirements for procedural fairness often provide a powerful argument in favour of disclosure.

Competition agency officials should carry out a critical and thorough assessment of confidentiality claims, which can often be very broad. More experienced (rather than junior) members of the case team should therefore work with the information providers to seek justification for, and identify the, key pieces of confidential information. An open and honest dialogue between the case team and the parties should be encouraged, including informal discussion, and confidentiality issues should be resolved as early as possible in the procedure to allow agency officials to focus on the substance of the case. The publication of guidelines by antitrust agencies governing the treatment of confidential information should also be encouraged. Internal decision-making and dispute resolution mechanisms, for example through the use of hearing officers, can also play a useful role, even if the hearing officers form part of the same organization as the prosecuting authority.

The Chair thanked Mr. Drauz for his presentation and opened the proceedings for discussion. First, she asked the delegation from Germany to explain how they determine what information is confidential, and how it is treated.

The delegation from Germany explained that while no clear statutory definition of 'confidential information' exists in Germany, the term has been defined in the practice of the competition agency and in the case law. Some central elements can be identified, including that the confidential information; (i) must be linked to a business or company; (ii) must not be available to third parties; (iii) must be relevant to the competitiveness of the business or company

and; (iv) must be intended to be kept secret by the owner of the business or company. If the information is established as confidential, the Bundeskartellamt cannot base its decision on that piece of evidence. Similarly, while the courts have full access to agency files, confidential information cannot be revealed in an open court case and judgements ordinarily cannot be based on any information deemed confidential. However, a court may refer openly to the confidential information if the holder uses it as part of the oral or written pleadings in court, or if, on balance, the significance of the competitive concern overrules the confidentiality claim. The Bundeskartellamt is keen to protect confidential information in order to foster a trustworthy reputation, and to encourage cooperation and dialogue with the parties. A careful balance is therefore required between the interests of the parties submitting the confidential information, and the interests of the competition investigation.

The Chair next asked Switzerland to comment on how confidential information is defined by the competition agency in its practice.

Switzerland responded that the concept of a business secret is contained in Article 162 of the Swiss Criminal Code. The three conditions necessary for information to constitute a business secret have been established by Federal Supreme Court case law and they include; (i) the information should not be publicly available; (ii) the party has a subjective interest in keeping the information secret and; (iii) there is an objective interest in keeping the information secret, which is assessed on a case by case basis. In the case of any doubt, the secretariat of the Competition Commission will make the final decision on whether the information constitutes a business secret. This decision is then subject to routine appellate procedures.

The Chair then asked Australia to discuss its new rules in force on protected information gathered in cartel investigations.

The delegation from Australia explained that parties can receive the same protection afforded to immunity applicants if they provide information relating to a potential or actual cartel offence. The Australian Competition and Consumer Commission (the ACCC) will only disclose this protected information for the purpose of court proceedings, after considering the public interest in doing so. A limited list of factors are taken into consideration including (i) the fact the protected information was given in confidence; (ii) how disclosure may affect relations with other countries, and (iii) the need to avoid any disruption to national or international efforts relating to law enforcement, criminal intelligence, or criminal investigation. If, after weighing

up these factors, a court decides disclosure is warranted, the circumstances in which the information can be used are then limited.

The Chair next turned to Greece.

The delegation from Greece explained how confidentiality issues are addressed in the various stages of Greek competition proceedings. First, in the investigation phase, the Director General for competition is responsible for gathering all the relevant evidence. Confidentiality issues are decided separately by the President of the Board. Second is the intermediate stage, in which the President decides either to reject the complaint or to recommend that the four Commissioners sign the Statement of Objections. Third is the decision making stage, in which the Board takes into account all the evidence before coming to a conclusion. If, at this stage, there is an issue relating to confidentiality, the Board may exercise its discretion favourably towards the rights of the defence.

The Chair then asked the Slovak Republic for its views on how issues of transparency and confidentiality should be balanced.

The delegation from the Slovak Republic responded that balancing parties' rights to defend themselves and the protection of business secrets is assessed on a case by case basis. Factors taken into account include: (i) the evidentiary significance of the information; (ii) the sensitivity of the information; (iii) the extent to which disclosure may cause harm to the company providing the information; and (iv) the seriousness of the infringement under investigation. In a case where disclosure of confidential information is required, the agency would seek the agreement of the interested party to allow disclosure of the information to the other parties' legal representatives.

The Chair next asked the EU to discuss the use of negotiated disclosure and data rooms.

The delegation from the EU first reiterated that the principles of access to the Commission file are laid down in the Commission Notice on access to the file. If a disagreement arises between DG Competition and a party to the procedure, it may be referred to the Hearing officers for independent review. Two additional procedures have been recently introduced that apply when only a limited number of parties are involved in the case, so that the need for redaction of confidential information is reduced. First, under the 'negotiated disclosure' procedure, the party being investigated carries out bilateral negotiations with interested third parties to access the entire file, but with access

restricted to a limited number of people, who are designated on a case by case basis. This procedure was used in the recent *Intel* case. Second, under the ‘data room’ procedure, which is primarily used for the verification of economic data, the file and any confidential information is kept in a physical data room. Access is then given to a restricted group of people, which usually includes legal and economic advisors, who can take copies of documents but cannot disclose the confidential information to their client. These two procedures were formally introduced in non-merger proceedings following the publication of the (Draft) Best Practices for antitrust proceedings published in January 2010. They have been used in five cases so far.

The Chair then turned to Canada for a discussion of how confidential information is shared with other law enforcement agencies.

The delegation from Canada explained that information relating to competition investigations, and the identity of the informant, are kept confidential, with only limited exceptions. One such exception is the ability of the Bureau, under certain circumstances, to disclose confidential information to another Canadian law enforcement agency. This could be any provincial or federal body that has the power under its legislation to enforce criminal or civil provisions. The Bureau’s decision to disclose information is entirely discretionary and depends on a number of circumstances including; (i) a potential criminal offence or a threat to public safety or security; (ii) the need to secure a search warrant or wire tap; (iii) an express request from a law enforcement agency or; (iv) a situation involving deceptive marketing practices or mass marketing fraud. In the last case, this may include involvement with international enforcement bodies. If the Bureau is not confident that the reasons for requesting the information are appropriate or suspects appropriate safeguards are not in place, the foreign enforcement agency may be required to submit a request to the Government of Canada under a Mutual Legal Assistance in Criminal Matters treaty to obtain the information in question.. Although it may be necessary in some circumstances to share information, as a general rule the Bureau aims to minimise the extent of the confidential information disclosed. Maintaining confidentiality and ensuring the confidence of parties involved in competition investigations is fundamental to pursuing the Bureau’s mandate, and maintaining credibility as a law enforcement agency.

The Chair asked South Africa to clarify how confidentiality rules apply there.

The delegation from South Africa outlined the definition of confidential information, as stated in the Competition Act, as “trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others”. Any claim for confidentiality that does not comply with this definition is deemed invalid. During the investigative stage of the procedure information may also be categorised as ‘restricted’. This covers all information that is acquired by the Competition Commission of South Africa (the Commission) in the course of its investigation, and includes the identity of information sources and internal Commission notes and research. If a case is not referred to the Competition Tribunal for adjudication, this restricted information remains confidential and third parties cannot access it without a court order or the express consent of the parties who provided it. If a case is referred, the Tribunal rules require this information to be made available to third parties via their legal representatives. The documents must be viewed at the offices of the Commission, and no copies can be made. The legal representatives must sign a confidentiality agreement that they will not disclose the information to their clients until the Tribunal has made a determination. In deciding the case, the Tribunal may use any information that has been declared confidential in its decision making. However, as all Tribunal decisions have to be justified in a public document, two versions of the report are created, an internal confidential version and a public non-confidential version.

The Chair then turned to Turkey for an update on its recently released communiqué on the right to access the file and the protection of trade secrets.

The delegation from Turkey explained that the communiqué was published by the Turkish Competition Authority (the Authority) and set out new rules on confidentiality issues and the rights of access to file. A definition is given for ‘trade secrets’ and this is used as a proxy for the more general term of confidentiality. It is the parties’ responsibility to notify the Authority of any trade secrets in the documents, and provide justifications. The Authority may then carry out an additional ex officio assessment. Under the communiqué, once information is defined as containing trade secrets it cannot be disclosed either to the public or to third parties. The exceptions to this rule include; (i) information that is publicly available; (ii) information over five years old (deemed as having limited trade value) and; (iii) information relating to a violation of the Competition Act. However, the Authority should not disclose any trade secrets solely to strengthen a point made in its decision.

The Chair then asked Mr. Drauz if he wished to comment on the members’ interventions. Mr. Drauz commented that transparency remains the main

concern for practitioners, in particular transparency as to what issues are most important for the investigating agencies. This can be seen as problematic by some agency officials who may feel they are weakening their position by revealing all the issues under consideration. However, encouraging a dialogue between the agency, defendants and third parties facilitates a better understanding of the key issues and can reduce the length of proceedings. In terms of confidential information, parties have a natural tendency to submit over-inclusive confidentiality claims, and early bilateral discussions between the providers of the information and the agency officials enable a quicker agreement on what claims are genuine.

The Chair then asked BIAC and Ireland for their views on confidentiality issues. The delegation from BIAC emphasised the importance of business involvement in every aspect of the confidentiality debate. There is a hierarchy of confidential information and levels of protection necessary, and balancing this may lead to different outcomes depending on the disclosure required. There are two rules to be considered. First, from the defendant's viewpoint, competition enforcement is not a suitable area for secret trials. Although some competition authorities are required to present their case in court, others are able to make administrative decisions which impose quasi-criminal sanctions on companies. In this context, it is fundamental for procedural fairness that the defendant has access to all the evidence. Second, it is critical that there be protection against the use of non-public information outside the scope of the investigation for which it was produced. This includes use by the defendant as well as by third parties or the authorities. A reasonable protection of confidential information can be achieved through redaction, blurring and the use of ranges. For the protection of extremely sensitive confidential information, limiting disclosure even vis-à-vis the defendant may be necessary. This can be done via the use of special procedures, for example specific access agreements and/or limiting the range of people who have access to the information. However, these special procedures should not be used in place of a careful assessment of what is confidential. In addition, limiting access only to external legal advisors may not be sufficient; senior managers not involved with everyday commercial interactions should also be involved in the disclosure. Also, historic data may not need to be categorized as confidential, taking account of the time which has passed since it was collected. Informal mechanisms for resolving disputes between parties and agencies regarding confidential information can also be extremely useful, as they result in a quicker decision, and therefore reduce the time needed for consideration of the case.

The delegation from Ireland commented that, in the context of court reviews or appeals generally, there is a body of rules and established practices which deal with confidentiality and business secrets. Therefore techniques such as limiting access to external counsel, or limiting the circle of corporate officials with access, are already employed in a number of fields outside of competition law. The decision on disclosure of confidential information is dependent on which point in the procedure it becomes necessary. In mergers, for example, decisions clearing or blocking a merger need to be intelligible and publicly justified by the agency, and this is the motivation for deciding if confidential information should be included in the decision. In contrast, when faced with a disclosure decision concerning a third party, the questions to be considered are: (i) why is disclosure problematic? and (ii) what is the competition issue? It is therefore key to establish what the purpose of disclosure is for each stage of the proceedings, and each separate issue. This ensures that disclosure is made only when it is really needed. Different jurisdictions adopt different techniques which all have their place in the procedure; and in some cases these techniques may include disclosing highly confidential information in order to verify the true facts of the case.

The delegation from the UK made four final observations on confidentiality. First, while confidentiality rings may work in certain cases at the appeal stage, it may be difficult for them to work at the administrative stage and particularly during the initial investigation. Second, disclosing documents only to lawyers can only work in certain jurisdictions, as in some countries, lawyers have a duty to their clients to disclose all information in their possession regardless of what undertakings are given to third parties or to the court. Third, in terms of the breadth of confidentiality claims, in many cases, agencies have been unwilling to challenge claims sufficiently early and ensure that these claims have been consistently made. Fourth, there is a need for decisions about confidentiality claims to be taken at a senior level not just within the agency, but also within companies, as otherwise junior employees may claim confidentiality for a huge range of issues that later on prove not to be valid.

2. Decision-making

The Chair commented that convergence on the institutional design of antitrust enforcement agencies is often considered less important than convergence on the analysis of substantive policy issues. However, institutional design does matter when it comes to ensuring that an agency's operations and decision-making processes are perceived to be transparent by the parties

involved in the enforcement proceedings, and by the public at large. The Chair then called on the Czech Republic to describe the structure in place in that country and how it improves the objectivity and impartiality of the decision making process.

The delegation from the Czech Republic responded that in general any decision of a Czech administrative body can be reviewed by a higher administrative authority before it is appealed to a court. For example, the decision of a municipality would be reviewed by a region. In the case of central bodies with no higher authority, such as the Competition Office (Office), the Chairman will review the decision. In order to enhance the objectivity of the review, the Chairman will be advised by a group of thirteen independent advisors. Only two of these advisors are employees of the Office. The remaining eleven are unconnected with the Office but are very knowledgeable in the field of competition law; for example, they are chosen among professors, economists and other competition experts. The advisors are given the case file prepared by the Office, and although they do not have access to all the original evidence, a completely objective review is carried out by fresh eyes not previously involved in the investigation or decision making. The Chairman is not bound by any recommendation made by the advisory group, but, in the last eight years, the Chairman's opinion has not differed from that of the advisors.

The Chair next asked the Dutch delegation to expand upon the 'toll gate procedure' which monitors the progress of a case during different moments of the investigation.

The delegation from the Netherlands explained the four stages of the cartel proceedings. The first stage is the investigative stage which is carried out by the Competition Department. Using the 'toll gate procedure', the case team and chief economist of the competition agency (the NMa) will discuss the likely success of an investigation on the basis of a 'go' and 'no go' decision. These are internal decisions taken by case handlers at internal meetings, and at this stage the parties are not informed of when, or what, issues are discussed. The opinions are then submitted to the Director of the Competition Department and his management team, and, in larger cases, an expert unit may also be involved to provide further internal review. Since the introduction of the toll gate procedure four years ago, cases which are unlikely to be successful are now terminated at an early stage. Companies involved in the procedure are informed of the case closure promptly. If the Competition Department decides to continue with a case, the toll gate procedure ends and a statement of objections is drafted, signed by the Director and sent to the parties. The second stage relates to the

setting of the sanction and is carried out by the Legal Department, which is separated from the investigating case handlers by a 'firewall'. The Legal Department will re-examine the case and decide whether an infringement can be established, and if so what type of fine to impose. Oral hearings are carried out and the legal team presents a draft decision to the Board of Directors of the NMa, which then makes the final decision.

Once the final decision has been issued, the parties may file an administrative appeal, which is the third stage of proceedings. The parties can request the NMa or the Board of Directors to carry out a full review of the case again, and an independent committee will advise the NMa on whether to uphold the decision or review it. This committee consists of experts, such as economists, lawyers, former judges and university professors who are not employed by the NMa. Of the last twenty cases that reached the administrative appeal stage, two were completely reviewed with the original decision on the fine withdrawn. In all the other cases, the decision was mainly upheld, although the reasoning was elaborated. When the revised second decision is issued, the opinion of the expert committee is also published to ensure complete transparency. The fourth stage of proceedings is judicial review; and the NMa has a relatively good track record before the courts. This can be, in part, attributed to the fact that the NMa's decision is defended in court by the Legal Department, and, once a court judgement is given, it is carefully analysed by the Legal Department for reference in future cases.

The Chair next asked the Bulgarian delegation to describe a recent institutional reform which resulted in the creation of a specialist advisory unit.

The delegation from Bulgaria explained that, at the beginning of 2010, the legal service and the competition unit were joined together in one directorate responsible for providing legal advice to the Commission on the Protection of Competition (the Commission). The former legal service unit consisted of lawyers with significant experience in defending the Commission decisions in court, and a sound understanding of Bulgarian competition law jurisprudence. In contrast, the competition unit consists of policy experts who closely follow EU case law and deal with competition advocacy cases in Bulgaria. Combining these two units provides an opportunity for the Commission to streamline its internal investigation and decision making process, in addition to applying a more consistent approach to the legal assessment of the case facts. Under the new structure, the combined unit is responsible for providing formal and informal advice to case handlers during an investigation. If the unit is consulted formally, then a memo or report will be issued which then becomes part of the

case file, and is given to the Commissioners who decide the case. However, this document is classified as internal and therefore will not be accessible by the parties. There are three occasions when the unit will be consulted on a mandatory basis; (i) before the Commission takes a decision for initiating ex officio proceedings; (ii) following an assessment of the effect on trade between EU member states in order to decide if the Commission should apply the EU competition rules in parallel and; (iii) when the Commission is applying the referral mechanism under the EC Merger Regulation. The unit may also, either on its own initiative or at the Commissioner's request, carry out a legal analysis on specific topics which are of concern to the Commission's work.

The Chair next turned to the US contribution, which stressed the importance of frequent agency meetings with the parties, and asked how these meetings fit into the overall decision making process of the two US agencies.

The delegation from the US responded that the Antitrust Division of the Department of Justice (DOJ) encourages informed and substantive input from the parties at all stages of the investigation. This input relates to the facts, the economic evidence and the theories of harm relevant to the case. It is relayed orally via informal meetings between the parties and their legal and economic advisors and the DOJ, and also through formal written submissions from the parties, or 'White Papers' and other documents. This interaction facilitates openness and transparency, and allows DOJ to inform the parties about the course of the investigation and the key milestones in the investigation process. The process also provides the parties with an opportunity to interact with both staff and senior officials at DOJ to discuss their thinking on the case. Prior to filing any case against the parties in court, senior officials from DOJ, including often the Assistant Attorney General, will meet with the parties and their advisors to explain their concerns, and provide the parties with an opportunity to explain their arguments. DOJ may refine its thinking following such a meeting. The interactive procedure used by DOJ has three aims; (i) to focus on the key aspects of the investigation, both in terms of agency proceedings and the court process; (ii) to ensure better enforcement decisions and; (iii) to facilitate transparency and ensure there are no surprises for either the parties or the agency.

The Federal Trade Commission (the FTC) also views meeting the parties as an integral part of the administrative process. This process is split into four stages; (i) the initial enquiry; (ii) the part II proceedings; (iii) the investigatory stage and; (iv) the part III formal internal hearing. Under each of these stages there are opportunities for informal dialogue, presentation of evidence and

expert opinion. Early interaction with the parties is particularly important. In the initial enquiry stage a decision is taken whether an investigation should proceed, and the legal and economic teams will advise on the approach that should be adopted. When a recommendation is made to the Bureau Directors, parties are invited to explain their views on the legal theories that have been put forward. If the Bureau Directors decide to recommend a complaint to the Commission, the parties have the opportunity to meet with the Chairman and the Commissioners before a final decision is taken. This continued dialogue ensures not only procedural fairness, but also strengthens the decisions made and allows cases to be resolved more effectively and efficiently.

The Chair next asked Russia to discuss its use of external experts.

The delegation from Russia explained that both permanent government experts and independent experts may act as advisors when examining a case. The permanent experts may be from sector regulators or other executive authorities, and can constitute up to half of the Federal Antimonopoly Service (the FAS) members on a case. Their role is to ensure that the specific characteristics of the sector are taken into consideration alongside competition issues. Independent experts can also be engaged and they are not employed by, or members of, the FAS. The independent experts are often from research institutions with specialist economic or technical knowledge, and are engaged for a research project on a particular subject. Expert Councils are also used. These Councils advise on competition developments in specific industries from tourism to defence, in addition to legal proposals put forward by either the FAS or other government authorities.

The Chair next asked the UK to discuss the independence of decision makers, in addition to an update on its recent transparency project.

The delegation from the UK explained that the Competition Commission (the Commission) does not choose its own cases, as they are referred to it either by the Office of Fair Trading (the OFT) or by market or sector regulators or as a result of an appeal from a decision of one of the sector regulators. The Commission is a decision-making body, whose role is to carry out an in-depth Phase II investigation. There is no policy agenda regarding investigatory priorities, and there are no pre-conceived ideas of outcome, as Phase I is carried out by the referring entity. Commission decisions are made by members, who are an external pool of independent experts, not permanent employees of the Commission, on whom the Commission can draw to make up panels to conduct particular enquiries. There are currently more than forty members, up to five of

whom will be selected to conduct a particular investigation. The members are responsible for the strategic direction of the enquiry, and the weighing up of the evidence but not for its conduct or the day to day case management, which is carried out by staff teams. Both the members and the staff teams are multidisciplinary and include economists, lawyers, business advisors and financial experts, with each discipline carrying equal weight in the decision making process. In order to ensure transparency, the Commission has published guidance on substantive analysis in addition to the procedures for mergers and market investigations. As a matter of law, the Commission must consult publicly on its proposed decisions relating to both the competition assessment and remedies. The decisions are also subject to judicial review before the Competition Appeal Tribunal, which is a specialist competition court. The process therefore involves independent decision makers to whom parties have direct access, multiple hearings to allow for oral testimony during the course of the enquiry, a highly transparent process with formal consultations at key stages of the enquiry, and the opportunity for judicial review.

In May 2010, the OFT published a transparency statement setting out several commitments relating to competition enforcement cases. This included commitments to provide information to parties at the start of an investigation, including the identity of the OFT investigation team, contact details and expected time frame of the investigation. In appropriate cases, advance notice for information requests will be given, particularly to recipients of significant information requests. Also, where it is practical and appropriate to do so, particularly where legal rules do not lay down a different procedure, OFT will provide formal information requests in draft. Parties will be provided with regular updates on the case status, and if the time frame is deviated from, explanations will be given. Advance notice of any public announcements will also be provided, with copies provided where practicable. As part of the OFT's consultation on transparency, views were sought on the sharing of the OFT's provisional thinking in competition enforcement cases. However, in contrast to the Commission, which typically shares its provisional thinking at the Phase II stage, it was felt by some that the Phase I stage was too early for this to be consistent with the OFT's role. The OFT acknowledges the difficulties in this area but will keep an open mind about when and how to share its provisional thinking and case teams will consider any requests from parties. Greater transparency should be welcomed by all, but there is a balance to be struck between the speed of the investigation and the decision taking whilst allowing parties proper and transparent proceedings and respecting the rights of the defence. The OFT has experienced challenges in procedural terms through, for example, very protracted disputes over confidentiality and redactions in

documents. This has the effect of slowing down the case as resources are diverted to dealing with those issues rather than the broader work of the OFT.

3. Requests for information

The Chair commented that different jurisdictions adopt a wide range of practices regarding requests for information, with some following well developed rules and others using a more discretionary approach. The Chair then asked Finland to discuss how information is sought from parties there.

The delegation from Finland responded that the Finnish Competition Authority (the FCA) has relatively wide discretionary powers when asking for information from companies. In significant cases a discussion will be held with the parties before sending them formal requests for information. These discussions are targeted to understand how the business works, how the market works, what kind of information the company already possesses and the information that the parties can provide without any extra undue burden. It is also an opportunity to clarify that the same language is being used by all parties, and to define any technical wording, for example in energy and telecoms cases, to ensure there is no misunderstanding on either side. Further discussions are also carried out with the parties before the statement of objections is sent, with the aim of clarifying the agreed facts of the case and establishing where any disagreements might be. These further discussions are carried out at a late stage of the proceedings to ensure that a robust statement of objections is produced, which can then be justified before the court if necessary. The FCA has also adopted a practice in order to lessen the administrative burden of dealing with the hundreds of documents collected during the investigation period. Before finalising the statement of objections and going to court, the documents that are not needed for the court proceedings are returned to the companies from which they came. There has been some criticism that these documents may be needed for future litigation. However, the FCA will continue to use this method as it avoids some of the time consuming issues related to access to file where there are documents that are not necessary for the investigation itself.

The Chair next turned to Mexico to explain how information is requested there.

The delegation from Mexico responded that, as there is no formal procedure under the competition law for information requests, the practice of the Federal Competition Commission (the Comision Federal de Competencia or “CFC”) is relatively flexible. It is common practice for the case handler to

discuss the content of the information request with the parties both before and after the request is issued. This ensures that the necessary information is obtained, while minimising the burden on the parties to comply with the requests. The degree of flexibility will depend on the case. Parties tend to have a stronger incentive to comply with information requests in merger cases than in abuse of dominance or cartel cases and the CFC's procedures are more flexible when parties are not confrontational.

The Chair next asked Chile to explain how parties are able to contest information requests.

The delegation from Chile explained that in Chile a dual enforcement system is in place, with the competition agency (the FNE) investigating the case and a Competition Tribunal acting as the decision making body. The FNE has powers to request information when it starts the investigation, and the parties can challenge these requests in two ways: either asking the FNE for a reconsideration or filing a special motion with them. The motion will then be submitted to the tribunal, with an opinion from the FNE on the arguments put forward by the parties. The Tribunal will commonly deny the parties' request on the grounds that the arguments used are too broad and there is insufficient justification as to what the risks are. In addition, the FNE is bound by extremely strict rules on maintaining confidentiality, and if any officer breaches this rule, he/she can be criminally sanctioned. Therefore any information collected from information requests will be well protected from third parties and/or competitors. The Tribunal also has tight rules in place on handling confidential information, but if a piece of information is essential for the case the tribunal may decide, in exceptional circumstances, to lift the confidentiality veil.

The Chair next asked Hungary to discuss how parties are consulted on requests for information there.

The delegation from Hungary responded that, when an information request is issued, the parties will be informed either by the request itself, or verbally by a case handler who compiled the request, about the opportunity for a consultation with the agency. This is an opportunity for the parties to understand the background, reason and context of the request. The aim is not for the parties to negotiate or change the request, but for the competition agency (the GVH) to explain exactly what data is needed and why. There may be an opportunity to refine the original request in terms of aggregation of data, substitution of unavailable data, or the timeframe for responding. In around 5 to 10 % of cases, serious reconsideration of the request may be needed. This may

occur, for example, where there are issues concerning industry standards in producing and storing of data, or information asymmetry. The information request consultation is a useful tool, and will often play a larger role in cases involving industries which the GVH is not familiar with.

4. Settlements

The Chair commented that while agencies make efforts to ensure transparency during litigation, this might not always be the case for settlements. In most cases, interested third parties have limited access to the evidence that motivated the case settlement. A careful balance needs to be struck between providing more insight into how agencies evaluate evidence and make decisions, while at the same time protecting trade secrets and confidentiality. The Chair then asked Korea to explain its practices in agreed settlements.

The delegation from Korea explained the three ways in which antitrust cases can be closed or settled. First is the ‘recommendation of correction’ process. This involves closing the case without an official decision-making process, but with the parties agreeing simply to correct certain practices. This process may be adopted in the following circumstances; (i) there is insufficient time to correct the anti-competitive behaviour through the official procedures; (ii) the harm is expected to increase over time; or (iii) the violator admits the competition law breach and has a clear intention to correct the practice immediately. The second process is the ‘simplified procedure’. This involves the official decision making process being conducted, but if the party admits the violation and agrees to follow the corrective measures, the case can continue as a written procedure and the party does not need to be present at any hearings. Third is the ‘consent order’ system, a proposal for which is currently under consideration by the KFTC. If this is introduced it will lead to determination of cases without a legal decision, but instead with an agreement between the competition authority and the parties on measures as to how best correct the anti-competitive practices.

The Chair then asked Brazil to describe its procedures for early resolution of a case.

The delegation from Brazil explained that three tools are used by the Brazilian Competition Authority (CADE) to resolve complicated cases early, two for mergers and one for cartels. The first is an agreement to preserve the reversibility of a transaction (called an ‘APROT’), which freezes a proposed acquisition and allows the CADE sufficient time to study the case. The second

is a post-merger order agreement proposed by the Commissioner (called a 'TCD'), in which the CADE permits the acquisition to proceed but requires either behavioural or structural remedies. The third is a conduct agreement used in cartel cases (called a 'TCC') and is proposed by the parties, and then analysed by the Commissioner. The authority has 60 days to improve the first draft of the agreement proposed by the parties, and a final version is then agreed upon.

The Chair next asked Chinese Taipei what conditions would be considered to terminate a case.

The delegation from Chinese Taipei responded that in some cases it is possible for the Fair Trade Commission (the CTFTC) to enter into a settlement agreement imposing administrative sanctions. Under the administrative settlement guidelines, the CTFTC must satisfy three conditions prior to proceeding with negotiations; (i) the settlement must be lawful; (ii) the settlement must be in the public interest; and (iii) potential damage to any third party as a result of the settlement must be ascertained. The need to satisfy these conditions has meant very few cases have been settled by the CTFTC using this type of administrative contract.

5. Judicial review

The Chair asked Japan to discuss the proposed amendment to the Antimonopoly act that will change the way in which hearings are conducted.

The delegation from Japan replied that under the current competition law when parties are not satisfied with orders given by the Japan Fair Trade Commission (the JFTC) a complaint can be lodged, but the JFTC hears the appeal first. If the parties still object to the JFTC's decision, the case is then brought to the Tokyo High Court. However, this hearing procedure has raised concerns amongst the business community for lacking fairness because the organisation that issues the order is to determine the appropriateness of the order itself. In response to the criticism, an amendment bill was submitted to the Diet. The bill contains provisions which abolish the current JFTC first appeal hearing procedure and instead, the Tokyo District Court will hear, at first instance, any appeals against an order made by the JFTC. The JFTC will hear opinions and complaints of parties before the initial issuing of the order. The bill is expected to be made into law at the next session of the Diet.

The Chair next asked Lithuania to discuss the standard of review used by the court there.

The delegation from Lithuania responded that under national law the court has the right to amend or revoke any decision of the Lithuanian Competition Council (the Council). However, where complex economic reasoning is used, the judicial decision is usually limited to a legal assessment of the case, *i.e.*, whether the infringement has been properly established and if the evidential thresholds were met. Economic assessments related to, for example, the definition of the relevant market or the establishment of a dominant position are generally considered to be outside the ambit of the court. A level of deference will therefore be given to the Council in its decision making on these matters.

The Chairman next turned to Israel.

The delegation from Israel explained the different standards of judicial review that may be applied. The general standard, under administrative law, applies to almost all judicial review concerning government agencies. Under this standard, the court will not intervene in a decision unless it is “manifestly unreasonable”. However, decisions taken by the Israel Antitrust Authority (the IAA) have to satisfy higher standards. Under the Civil Enforcement Act, there are two standards which can apply, depending on whether the IAA makes the decision, or whether it is the specialist Antitrust Tribunal. The first standard is used if the IAA makes a formal decision, such as blocking a merger or declaring an abuse of dominance. The parties can appeal to the Antitrust Tribunal which will review the decision using the ‘mistakes’ standard. The Tribunal has a number of institutional tools at its disposal, including the hearing and examination of witnesses, and should give sufficient weight to the fact that a prior IAA decision has been taken. The second standard is adopted in procedures in which the IAA has no authority to make its own decision and must request remedies from the Tribunal, for example, an order to undo a merger. In these cases, the standard is the ‘balance of evidence’, and the IAA carries the burden of proof to convince the Tribunal that the balance of evidence is in the authorities favour.

The delegation from BIAC provided some final comments on the discussion from the viewpoint of the business community. It agreed that the central principle for agencies is to establish an accurate factual record. However, agencies have an obligation to act fairly in collecting all the relevant evidence, including exculpatory evidence. The facts and the legal and economic theories of the case should be disclosed at as early a stage as practicable.

Minimum standards for transparency and engagement should be established which fit the range of institutional and practical procedures adopted by different agencies. There should be a full hearing in addition to a written procedure, and a clear separation between the role of the investigators and those making enforcement decisions. “Devil’s advocate” panels are useful, but to increase the effectiveness of this type of internal review, the panels should have the ability to put questions to the parties. In terms of requests for information, prior consultation can be useful to ensure that companies respond as effectively as possible, and the time given for responding should be reasonable. Proportionality should be adopted in the use of investigative tools, and the most invasive measures, *e.g.*, surveillance, on the spot investigations at domestic premises, imaging data on computer systems, etc. should be limited to cases of the most hardcore suspected violation. To ensure full transparency, both for public consumption and advocacy purposes, both adverse decisions and court judgments should be published with their reasoning. Businesses welcome the opportunity to resolve issues at an early stage and with the flexibility offered by settlement agreements. However, where appropriate, parties should be able to settle a case without having to admit liability. Judicial review is essential, but it should be in addition to, and not a substitute for, fair procedures at the initial agency stage.

The delegation from Canada commented on the importance of separating two issues related to this area, which are sometimes merged. On the one hand, there is the broad public interest in transparency, and the desire for predictability on how cases are decided, and how evidence is collected and used. Transparency is a shared value that benefits not only third parties and the public, but also the agencies who gain credibility from being transparent and from making better decisions. On the other hand, there is the very specific and immediate interest of the defendants in knowing the nature of the case developing against them, which allows them to relate and respond. These two issues do not conflict, but the satisfaction of one does not necessarily lead to the satisfaction of the other. Historically there has been a natural inclination on the part of agencies to safeguard certain information, and an unwillingness to share everything with the parties being investigated. Although many agencies have now committed themselves to be more open with the parties, it does require good judgment and foresight to do so. In some cases, it may not be appropriate for junior staff members to make these decisions without supervision from more experienced colleagues. It is thus incumbent on the agencies to find suitable ways to balance the competing interests, and this will need to be assessed on a case by case basis.

The Chair concluded the Roundtable by thanking all the contributors and intervenors and drew the Roundtable to a close.

SUMMARY OF DISCUSSION OF THE WP3 ROUNDTABLE

HELD IN OCTOBER 2011

**ON “INSTITUTIONAL AND PROCEDURAL ASPECTS OF THE
RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND
COURTS, AND UPDATE ON DEVELOPMENTS IN PROCEDURAL
FAIRNESS AND TRANSPARENCY”**

The Chair opened the Roundtable discussion by noting that it would be the third and final Roundtable in a series addressing the issues of procedural fairness and transparency in competition enforcement. Specifically, this Roundtable would address:

- The institutional relationship between competition authorities and the courts; *and*
- An update on developments in procedural fairness and transparency in member countries.

After thanking the delegations for their submissions to the Roundtable, the Chair asked the delegate from Mexico to discuss recent changes with respect to judicial review of competition cases within that jurisdiction. The delegate began by outlining these changes, enacted in May 2011 and due to enter into force in November 2011, which balanced a stronger enforcement framework against more intensive judicial review. On the one hand, the competition authority will have the power to conduct dawn raids, and impose higher fines and criminal sanctions. On the other, there will be an enhanced mechanism for judicial review in competition cases, involving specialised competition courts, the possibility for a full substantive review, and an option to go directly to judicial review rather than requiring an intermediate administrative review stage.

The delegate emphasized that three principal objectives should underpin these changes to the judicial process: *first*, efficiency; *second*, equality of access to review mechanisms for both private parties and the public enforcement

agency; and *third*, a substantive review process that respects the division of powers, giving due deference to the agency's decision. Currently, competition appeals are heard under the *amparo* system, which will remain available to applicants for review, and there will be a need to ensure consistency between these review systems. The new additional process will involve first instance review before a specialised judge, with the possibility of appeal to a specialised tribunal. The revisions to the judicial review process create the opportunity for efficiency improvements, but also certain risks. Specialisation of the judiciary allows for more nuanced review of competition decisions, yet the system will take time to implement, and there is a risk of capture. Specialised procedural rules provide clarity, yet there is a risk of delay if cases are subject to multiple instances of review. Substantive review will shift the appeals process from legal formalism to a merits-focused approach. At the implementation stage for the new system, the delegate noted that the current danger is that lobbying by vested interests will seek to shift the balance in favour of private parties in the review process.

In response to a question from the Chair, the delegate from Mexico clarified that the new system was due to enter into force on 11 November 2011. However, in the event that the new framework for review was not in place by that time, the existing judicial *amparo* system would continue to govern competition reviews. The delegate from the US asked whether the Mexican competition authority had sought the new reforms and if so, the extent to which the legislative changes reflected its proposals; and whether international experiences had played a role in shaping the Mexican reforms. The delegate from Mexico acknowledged the key role played by the work of the OECD, in particular the 2004 *Competition Law and Policy in Mexico* peer review, in identifying shortcomings in the existing system and providing the impetus for reform. Mexico also consulted with experts from other competition jurisdictions, including the US and EU, in drafting the reforms. The final package of amendments enacted in May 2011 largely reflects the preferred outcome of the competition authority, insofar as it balances stronger powers of dissuasion with a more in-depth review of decision-making. The delegate noted the particular hostility of the private sector in Mexico towards the competition system, and the risks that this posed for the reform process. Although reliance on international experience may allow Mexico to avoid some of the pitfalls in this area, to a certain extent every institutional set-up is unique to its national or supra-national context. The Chair asked about the selection process for judges at the specialised tribunals. The delegate from Mexico explained that the process of selecting specialist judges will be the sole responsibility of the *Consejo de la Judicatura*, the administrative body of the judiciary, although the

Mexican competition authority has liaised with this body in order to assist it with its task. The delegate explained that there is no definite answer in Mexican law to the question of how much deference the new court should give to the technical assessment of the competition authority, but the clear intention of these reforms is to go beyond the usual remit of courts in Mexico. While efforts have been made to ensure that a robust and transparent principle of deference is enshrined within the law, this is one of the most contentious questions in the reform. The delegate from Mexico added that certain private interests in Mexico were keen to ensure that the courts' powers of review are as comprehensive as possible, so that in essence the competition assessment will begin again entirely before the judiciary, which is a major issue.

The Chair asked the delegate from Australia to elaborate on the distinction between "judicial" review and "merits" review that is found in the Australian system. The delegate explained that, as part of the executive government, the Australian Competition & Consumer Commission (ACCC) exercises administrative powers when it makes decisions or takes enforcement action before the courts. In general, decisions regarding enforcement action are not reviewable, but some of the ACCC's powers of investigation can be reviewed. Such cases involve judicial review, which focuses on whether the decision-making process was lawful. Essentially, the court is concerned with whether the decision was made correctly, rather than whether it was the correct decision on the facts. Under a merits review, which generally concerns regulatory-type decisions, the decision of the ACCC can be entirely revised on appeal, where it is found to be incorrect on the facts. Merits reviews typically take place before the Australian Competition Tribunal or other tribunal.

The Chair then turned to the submission from Korea, which discussed the ability of complainants in that jurisdiction to appeal decisions of the competition authority not to investigate a complaint or to close a case. The delegate from Korea explained that such decisions are amenable to judicial review before the Constitutional Court, which assesses cases involving the exercise of public powers with a constitutional dimension. The delegate also clarified that the competition authority issues a written statement when it declines to investigate or closes a case, which provides the basis for the judicial review challenge.

The Chair asked the delegate from the Netherlands to discuss the benefits and disadvantages of reviewing all competition appeal cases in a single court. The Dutch delegation explained that, although there are 19 different district courts in the Netherlands, all appeals against decisions of the competition

authority are brought before a single court, the Rotterdam District Court, in order to concentrate competition law knowledge and economic expertise within a single tribunal. The Rotterdam District Court also houses a specialised centre for competition law, which provides training for civil judges throughout the Netherlands. In contrast to administrative cases, civil cases involving competition law issues are not necessarily brought before the Rotterdam court, and so it is necessary for all civil judges to have some understanding of competition issues. In such cases, civil judges can obtain assistance from part-time specialist competition law judges. The Chair remarked on the parallels between the Dutch system and efforts to introduce a specialised competition court system in Mexico, and asked whether specialised judges in the Netherlands receive formal training or merely learn through experience. The delegate from the Netherlands answered that expertise was developed both through practice, insofar as all administrative competition appeals are heard before the same court, as well as via formal training for judges and their assistants.

The submission from the Slovak Republic detailed the relationship between the courts and the Antimonopoly Office. The Chair asked the Slovak delegate to discuss the efforts of the agency to improve this relationship. The delegate from the Slovak Republic emphasised that the Antimonopoly Office respects the independence of the judiciary, and that both courts and competition authority pursue consumer welfare objectives. In practice, however, the Office has seen the annulment of many of its decisions that involve high fines, without further guidance from the courts regarding improvements for the future. The Office has therefore sought to engage with the judiciary and the Ministry for Justice, with a view towards the development of a specialist competition court, as well as competition training for judges.

The submission of Sweden concerned an issue of increasing relevance for competition authorities: the treatment of confidential information and business secrets presented in court during merger cases. The delegate from Sweden explained that the Swedish Constitution grants an extensive right of access to official documents, a right which is complemented by a specific right of access to file for parties in court proceedings. However, there is a tension here with the need to protect confidential information. This can be a particular problem in merger cases, where the merging parties and sometimes other firms are required to submit sensitive economic data and business secrets to the competition authority. The competition authority itself can, to an extent, keep this information secret during its investigations. In order to prohibit a concentration, however, in Sweden the competition authority is required to bring the case to

court, and once in court there is an absolute right of access by the parties to documents that are reasonably relevant to the court's ruling. Historically, the court has granted access to the material where requested, but made its use subject to reservations, so, for example, only legal counsel can view the material and it must be destroyed when the case is settled. Violations of these reservations are subject to fines. It is a controversial question, however, as to whether these restrictions are compatible with Swedish law. In order to deal with the problem of confidential information, the Swedish competition authority is considering the use of a data room for economic evidence, accessible to the parties' legal and economic counsel. The competition authority would then present only its analysis in court, rather than the underlying material, thus protecting confidential information from being released. In cases where the parties challenge the underlying data, however, it is likely that the material will still need to be released to the court.

The Chair asked the delegate from Brazil to discuss the work of ProCADE, the legal department of the competition authority, CADE. ProCADE is staffed by 10 career public attorneys, the delegate explained, and headed by a General Counsel appointed by the Minister for Justice. The main duties of the department are to defend CADE's decisions in court and to monitor the correct implementation of CADE's decisions. ProCADE also negotiates judicial settlements, a key task, although it needs the approval of the board of CADE to conclude any settlement. Further activities of the department include the issuance of legal opinions in competition cases and in internal administrative matters, and the preparation of responses for parliamentary inquiries. The delegate confirmed that opinions issued by CADE are publicly available.

The Chair then gave the floor to the delegate from the European Union, to discuss the impact of the recent *Menarini* decision of the European Court of Human Rights,¹ and its implications for competition proceedings in Europe. The delegate explained that, in that case, the Strasbourg court held that the competition enforcement system in Italy was compatible with the European Convention on Human Rights insofar as it guaranteed the right to a fair trial. In Italy, fines for competition law violations are imposed by the national competition authority, with the possibility of appeal to the administrative court which carries out a full merits review. The case is of interest from an EU competition law perspective because the Italian system is very similar to the

¹ Judgment of the ECtHR of 27 September 2011, *A. Menarini Diagnostics S.R.L. v. Italy*, Application No. 43509/08.

enforcement regime in the EU. It therefore confirms that when the EU accedes to the Convention, the EU system should be compatible with fundamental human rights.

The Chair opened the discussion to questions from the floor. The delegate from the US asked the Netherlands about its administrative appeal procedure, which consists of a reassessment of the case by another case team in the competition authority. The delegate from the Netherlands explained that the possibility is available only in cartel cases, and not in merger decisions, which are reviewed directly by the district court. In cartel cases, the agency rarely reverses its initial decision, but the parties still retain the ability to further appeal the decision before the district court. The delegate from Sweden asked for clarification on the competition law training for judges in the Netherlands. The delegate from the Netherlands explained that civil judges are trained by competition specialists based in the Rotterdam District Court. Furthermore, the competition authority was asked to give a presentation on competition law in a conference for civil judges this year.

Next, the Chair asked the delegate from Bulgaria to discuss the criteria applied by Bulgarian courts when granting authorisation for inspections or dawn raids. The delegate explained that such requests are submitted by the Chairman of the competition authority to the Sofia City Court, and are assessed on the basis of three necessary elements: *(i)* an indication of the suspected breach of competition law; *(ii)* the reasons why the raid is necessary; and *(iii)* the purpose of the inspection, meaning the evidence to be collected. A request can also be made in order to assist the European Commission in its activities. Where these three conditions are satisfied, the court must grant the request. With one exception, the court has always granted authorisation requests submitted by the competition authority. The delegate clarified that court authorisation is required for all inspections and dawn raids, including in urgent cases, but that authorisation can be obtained at short notice where necessary.

The delegate from Chile added that the Chilean competition authority has recently acquired new powers to conduct dawn raids and wire taps, but it has found the process of obtaining judicial authorisation for use of these powers somewhat time-consuming. It is therefore working with the judiciary in an attempt to put in place a more expeditious procedure. The Chair noted that, in the US, a big concern is to ensure that the parties under investigation do not learn of the impending raid beforehand, and she asked whether this is also an issue in Chile. The delegate from Chile responded that maintaining confidentiality had not been a problem, but delay nonetheless remains an issue.

The delegate from Australia explained that, in that jurisdiction, it is necessary to obtain a search warrant from a magistrate to conduct a dawn raid. The ACCC has recently acquired a new power to seek “stored communications” held by telecommunications companies, which allows the agency to access electronic communications, and use of this power also requires authorisation from a magistrate. The legal standard for access to “stored communications” is lower than for the granting of a search warrant, but the ACCC is still required to establish a legitimate basis for seeking the material. Moreover, use of the power is subject to annual audits by the Ombudsman.

In Lithuania, the Competition Council has the power to file legal challenges against laws and decisions of public bodies that restrict or distort competition. The delegate from Lithuania explained that national competition law prohibits public entities, apart from the Parliament and the Cabinet Ministries, from creating unequal conditions for competition. The Competition Council has the power to investigate these cases like any other competition cases, although dawn raids cannot be carried out. Where a violation is established it can issue a cease and desist order. Such orders can be appealed to the administrative court, and if upheld, are binding on the public body. Examples of cases that have been taken under this provision include the failure of a municipality to engage in competitive tendering for transport services; government restrictions regarding the storage of energy reserves; the provision of commercial services by a branch of the police department; and a cartel of orthopaedic device manufacturers that was administered by the national health insurance fund. The Chair asked whether public authorities consult with the Competition Council in advance, and the delegate explained that advocacy is the Competition Council’s preferred response, and use of this power is a last resort.

The Chair asked the delegate from Romania to describe the Competition Council’s role as *amicus curiae* in public and private competition proceedings. The delegate explained that the formal legislative authority to act as *amicus curiae* will be included in the new Romanian Code of Civil Procedure, but the Competition Council has played such a role informally for many years. The Council provides non-binding opinions on competition matters to courts, and it also provides training for judges, in order to ensure that the judiciary has a fuller understanding of the competition rules. The Council’s new formalised role will relate to private damages actions in competition cases. Romania has implemented to a large extent the European Commission’s White Paper on damages, and wants to provide pro-active support for the development of private competition enforcement, although the ultimate success or failure of

these endeavours remains unknown. The Chair asked about the criteria for choosing cases for intervention, and the delegate confirmed that the Council retains the choice of whether or not to intervene in private actions. In public actions, the Council is automatically a party to the proceedings.

In Turkey, the jurisdiction of the Turkish Competition Authority (TCA) over the regulations of professional associations has been a particularly contentious issue. The delegate from Turkey explained that the TCA had imposed sanctions on certain professional organisations for their anticompetitive by-laws and regulations. Those decisions were subsequently annulled by the Council of State, the highest administrative court, on the basis that determination of the legality of such measures was a question for the court rather than the TCA. When the TCA then filed actions for annulment of the professional regulations in court, the Council of State rejected these cases on the basis that the TCA does not have capacity to sue with respect to such regulations. The TCA takes the view that it has capacity in this regard under the existing competition rules; nonetheless, the TCA is advocating for a formal amendment of the act, to provide it with express powers in this area.

The Chair then invited the delegate from Chinese Taipei to share its experiences with private litigation in competition cases, including the role of the Fair Trade Commission (FTC). The delegate began by explaining that, in Chinese Taipei, private parties can apply for civil compensation, including treble damages, for competition law violations, although in practice treble damages are never awarded. The FTC can play two roles in private litigation. *First*, it acts as an expert witness, advising the court as to the requirements of competition law, although it does not act as final decision-maker in such cases. *Second*, private actions for damages may take the form of follow-on actions, premised on a prior finding of breach by the FTC, an approach which makes the private litigation itself quicker and easier to conclude successfully. In response to a question from the Chair, the delegate explained that, to date, the expert opinions provided by the FTC to the court have been respected in the proceedings.

The Chair then opened the floor to further questions and comments. The delegate from Spain drew parallels between the Lithuanian and Spanish experiences in applying competition law to the acts of public bodies. In Spain, where public bodies operate as economic actors, they are subject to the normal competition rules, including, at least in theory, dawn raids. In the case of anticompetitive regulations below the level of primary legislation, the competition authority now has the power to challenge such measures before the

administrative courts. It is currently pursuing two such cases against regional authorities that extended transport concessions without conducting a public tender. The delegate from South Africa noted that, in contrast to Chinese Taipei, where private actions can be brought without any finding of breach by the competition authority, in South Africa, any action for damages requires such a prior determination. Until the recent bread cartel case, no private damages action had been pursued in South Africa. The South African competition authority is concerned that the criteria for certifying class actions specified by the court in that case were set at an unduly high level, which may prevent many such actions going forward.

The delegate from the US asked Turkey about the circumstances in which the burden of proof might be shifted from the claimant to the defendant in private litigation. The delegate from Turkey explained that private plaintiffs are required to establish, generally through economic evidence, that the restrictions to competition are not an inherent feature of the market itself. The burden of proof then shifts to the defendant, which is an unusual but not unduly onerous feature of private competition litigation in Turkey, and which of course facilitates private enforcement. In practice, the TCA does not rely on the reversed burden of proof in its decision-making, but instead endeavours to produce sufficient robust evidence of anticompetitive conduct by the defendant firm. The delegate from Australia noted the significant, and unresolved, tension in Australia between public enforcement and private damages in cartel cases, in particular in relation to material provided in leniency applications. In Australia, the courts have the power to make “findings of fact” in competition enforcement cases, which can then be used by private parties as a basis for follow-on litigation. However, this provision has proven entirely ineffective in practice, and so Australia is looking at alternative mechanisms to support private enforcement.

The Chair then gave the floor to BIAC, whose submission focused on appeals against administrative decisions of competition authorities. BIAC emphasised, first and foremost, the need for judicial training, and in appropriate cases, a specialised court system or judiciary, insofar as competition law falls outside the typical knowledge of generalist judges. Timeliness of process is another key feature of an effective appeals mechanism. Moreover, the parties’ rights must be safeguarded during the appeals process. Finally, courts must have the power to conduct a full and independent review of administrative decisions, in accordance with the *Menarini* judgment.

The focus of the Roundtable then moved on to the consideration of recent developments relating to transparency and procedural fairness in member and non-member countries. The delegate from the European Union introduced the recent changes to the Commission's internal enforcement practices, involving the adoption of best practices for antitrust proceedings, guidance on the submission of economic evidence and a revised mandate for the hearing officer. Within DG Competition, there are already an extensive system of internal checks and balances in place, involving review and/or supervision of competition cases by, *inter alia*, the case support team and divisional hierarchy, peer review panels, the Chief Economist, the Commissioner for Competition, the legal service, the Member State's competition experts in the Advisory Committee, other Commission departments responsible for economic policy and the relevant sector at issue and the Commission itself. Moreover, built into the legislative framework are a series of rights of defence and procedural guarantees for defendants, which are safeguarded by the Hearing Officer. These recent changes are, nonetheless, intended to enhance the fact-finding ability of the Commission, to prevent errors, to increase accountability, and to generate greater support for competition enforcement efforts amongst stakeholders and the general public, by enhancing their legitimacy. At the same time, it is important to ensure that greater procedural fairness and transparency not come at the expense of efficiency in enforcement proceedings.

First, a draft set of best practices for antitrust proceedings was adopted and provisionally implemented in January 2010, and at the same time, was subject to a public consultation. The revised best practices introduce enhanced transparency of process for parties, including:

- Provision of a complete overview of the Commission's antitrust enforcement procedures;
- Enhanced transparency for stakeholders, in particular public announcements at key investigative stages;
- Enhanced interaction, including more frequent state of play meetings and earlier access to key submissions;
- Inclusion in the Statement of Objections of information about the parameters for the possible imposition of fines, including the value of sales affected by the infringement, as well as the period that the EC intends to consider for determining the value of such sales); *and*

- Guidance on when claims of inability to pay fines should be made and how the Commission will assess them.

Second, the submission of economic evidence in enforcement cases has become more frequent and significant, and so the Commission has issued guidance on the requirements for economic, and particularly econometric, evidence submitted by parties. This guidance covers, *inter alia*, acceptable formats for data submitted, as well as the Commission's procedures for dealing with sound but imperfect economic evidence.

Third, the Terms of Reference of the hearing officer has been consolidated and expanded. In particular, the hearing officer now plays a role from the very beginning of the enforcement process, including functioning as legal arbiter in disputes relating to legal professional privilege, the right against self-incrimination and deadlines imposed by the Commission.

The role of the hearing officer has also been extended to include:

- Reporting on the upholding of procedural rights throughout enforcement proceedings;
- An increased role in commitment decision procedures; *and*
- Greater ability for the hearing officer to structure the oral hearing so as to ensure the most effective assessment of all elements of the case.

Within the European Union, the delegate concluded, the procedures for competition enforcement are constantly being improved, in consultation with stakeholders. Transparent and fair procedures benefit not just the parties to an investigation but also the credibility of the enforcement system as a whole, which is a key driver of this constant process of improvement. The EU delegation also noted that the key change in practice with regard to the implementation of the provisionally applicable Best Practices was the state of play meetings. As has been seen in merger cases where state of play meetings were introduced in the Merger Best Practices of 2004, they can lead to an improvement in the quality of evidence. The increased role for the hearing officer emerged from the best practices consultation and has been well-received by stakeholders.

The Chair then recognized the delegate from Canada, where recent efforts have been made to increase the transparency of the Competition Bureau's

activities. The delegate explained that transparency is one of the Bureau's five operating principles, and so the Bureau's practices and procedures are actively and continuously self-assessed, in order to identify opportunities for enhanced transparency. The Bureau regularly publishes updated enforcement guidelines outlining its enforcement policy and approach. For example, it recently published final merger enforcement guidelines, following an internal review process and consultations with stakeholders and other national competition authorities. Indeed, transparency is a particularly relevant issue in the mergers context, and so the Bureau also publishes position statements describing its analysis of complex merger cases, and plans to establish a public registry of all concluded merger reviews.

The submission of Germany considered the issue of access to documents provided in a leniency application for plaintiffs in follow-on private litigation, in light of the Court of Justice of the European Union's decision in the *Pfleiderer* case.² The delegate from Germany began by outlining the background to the *Pfleiderer* judgment. The case had its origins in a cartel decision taken by the Bundeskartellamt in the décor paper sector, which began on the basis of a leniency application. In a follow-on private action for damages, the plaintiffs sought access to the Bundeskartellamt's case file, which was granted except for the material provided in the leniency application. On appeal to the Amtsgericht Bonn, the judge considered it necessary to make a reference to the Court of Justice to clarify the EU law in this area. In the referred proceeding, the Court of Justice held that EU law does not prohibit access to leniency documents by third parties, but that it is for the national court of each Member State to determine, whether to permit access to documents in a particular instance. The delegate highlighted the particular difficulty for second-in-line leniency applicants in Germany, who receive only a 50% reduction in fine imposed by the Bundeskartellamt, yet are required to provide extensive evidence of the violation, rendering them particularly vulnerable to access to information requests. Going forward, it will probably be necessary to amend the existing German law with respect to access to leniency material. Moreover, the delegate concluded, there is also a need for legislation on this issue at an EU level, perhaps in the form of revisions to Regulation 1/2003, which ideally would address the issues of access to file, leniency in general and the setting of fines.

² C-360/09 *Pfleiderer AG v Bundeskartellamt*, judgment of the Court of Justice of 14 June 2011.

The Chair then opened the discussion to the floor, for questions and comments on the issue of access to leniency documents. The delegate from Australia noted that two cases similar to the *Pfleiderer* decision had arisen within its system, which had resulted in legislative changes in order to strengthen and clarify the law. The new legislation allows the ACCC to deny access to confidential cartel information, although access can subsequently be ordered by the court where, having weighed the competing interests, the balance lies in favour of disclosure. The delegate from the European Union agreed with the view of the delegate from Germany that EU-level legislation on this issue is needed. This lacuna in EU law was implicitly criticised by the Court of Justice in *Pfleiderer*, and the absence of a definite EU legal norm may explain why the Court of Justice, in essence, left the question to be decided by national courts on a case by case basis. The delegate distilled two broad rules of thumb: *first*, that the corporate statement in the leniency submission should always be protected, while pre-existing documents might be released; and *second*, there is a particular need to balance the interests of leniency applications with those of private follow-on plaintiffs, because without the former there will never be the latter.

Regarding the shape that any new legislation on leniency should take, the delegate from Germany stated that the exact components of the proposed legislation have not been determined, but that the aim is to both encourage leniency applications and support private actions to the greatest extent possible. In terms of German law, the *Pfleiderer* approach represents a progressive development, insofar as it establishes that access to leniency material can be restricted in some circumstances, rather than an absolute rule permitting access. The delegate from the European Union agreed that there is a need to find the dividing line between these competing interests, in order to preserve incentives for both leniency applications and private actions. The delegate from the UK asked Germany whether new legislation that impedes the right to access might run into constitutional law difficulties. In response, the delegate from Germany explained that an absolute ban on access would likely violate the Constitution, but that mere limitations on access should be acceptable, given that there is scope within the Constitution itself for the balancing of competing rights and interests.

The Chair then introduced Japan's submission, which described the 2011 amendments to the JFTC's procedural rules, which are designed to improve transparency and fairness in merger control proceedings. The delegate from Japan described the three main components of the reforms. *First*, the prior consultation process has been abolished, so that the JFTC's investigations now

only begin at the notification stage. Formerly, firms considering a merger would consult with the JFTC beforehand on an informal basis, to determine whether the planned transaction would raise competition concerns. The delegate from Japan stated that the previous informal procedure has been abandoned in the reform to enhance transparency. *Second*, the JFTC has improved its communication with the notifying companies, for example, concerning the issues in on-going merger investigations. Although such information was previously available, the communication processes between the JFTC and notifying companies have now been codified in the JFTC's new merger procedural guidelines. *Third*, at the end of the merger review procedure, written findings will be issued, including circumstances where the transaction is cleared unequivocally, in an effort to improve both the transparency and the predictability of the JFTC's decision-making processes. The Chair asked whether the reform has proven successful to date, and the delegate explained that some of the on-going merger investigations, which started before the amended merger regulation had been put into effect, are conducted without the informal prior consultation under the previous system in order to pre-empt the reform. While informal consultations with the JFTC regarding how to make entries on the notification form, etc. remains a possibility even after the recent reform, no definitive decisions will be taken during the informal consultation stage in the future. The Japanese delegate also noted that the mechanisms employed by the JFTC for communicating with parties are similar to the state of play meetings held by the European Commission in competition cases.

The Chair invited the delegate from Greece to speak about revisions to the country's competition system following enactment of Law 3959/2011, which makes significant substantive and procedural changes while keeping intact the core of the existing competition prohibitions. In particular, the enforcement powers of the Hellenic Competition Commission (HCC) have been strengthened or reformed, including:

- Discretion to select its own case-load, in accordance with HCC enforcement priorities as set out in recently-issued guidelines;
- The power to impose fines on natural persons;
- Strengthening of the leniency programme;
- A five-year statute of limitations for imposition of sanctions for competition law breaches;

- The right to submit comments on draft legislative and regulatory acts with potentially anticompetitive effects;
- The ability to restrict access to confidential information in the competition case file;
- Abolition of post-merger notification and abolition of the power of ministers to approve anticompetitive mergers otherwise prohibited by the HCC; *and*
- Clarification of procedural rights for defendants.

Procedures for appeal against decisions taken by the HCC have not been changed under the new legislation: such decisions are administrative acts, which can be appealed on a full merits review basis before the Administrative Court of Appeals, and decisions of the latter can be challenged subsequently on a judicial review basis before the Council of State. However, the new law makes provision for the establishment of a specialised competition chamber in the Athens Administrative Court of Appeals. Within the Greek competition system, historically procedural fairness and transparency have been prioritised over the efficiency of the procedure. Now that the HCC has the power to prioritise and select its own case-load, however, it is expected that the speed and efficiency of proceedings will improve significantly.

The Chair asked the delegate from Greece to explain the motivation for the reforms, in particular with respect to access to leniency and other confidential material. The delegate acknowledged the need to balance fairness and efficiency, and argued that a formalised framework for disclosure is necessary, in order to protect the HCC from accusations that it has violated rights of defence by denying access. In Greece, the judge gets access to the entire case file, whereas the parties may only be granted access to certain documents. The delegate from Romania asked whether the Greek system is compatible with the principle that all evidence must be made available to all the parties and reviewed in court. The delegate from Greece cautioned that these changes are very recent, and so there is little experience with how the revised system will work in practice. There is a strong respect for the rights of defence within the Greek administrative system, however, and so defendants will continue to have access to sufficient evidence to defend their case. The decision as to what material is to be kept confidential is made by the President of the HCC, and in theory, if the judge disagrees, he or she can order further access.

In Slovenia, plans are underway to transform the Competition Protection Office (CPO), which at present is a part of the Ministry of Economy, into an independent administrative agency. The delegate from Slovenia explained that when the country acceded to the OECD, a key issue identified in its accession review was the absence of an independent competition enforcement agency. Legislative efforts were made during 2010 to reorganise the CPO into an independent body, with the intention that the new agency would operate from 1 January, 2012. However, domestic political difficulties have led to the postponement of these plans. Once in place, key changes to the decision-making processes of the CPO will result in enhanced transparency and due process protection. Currently, decisions are adopted by a panel composed of the Director of the CPO and two employees appointed by the Director for that purpose. Under the new framework, a Competition Protection Commission will be established, which will comprise two outside expert members and three CPO employee members, who will be appointed by the National Assembly. Decisions will instead be taken by a three-person panel of members of this Commission. The reconstituted CPO will also have greater control over its budget, subject to approval by the National Assembly, which will further strengthen agency independence.

The Chair then invited the delegate from Chile to discuss the relationship between the competition authority, the FNE, and the recently-established Transparency Council. The delegate explained that the Transparency Council implements the provisions of the Transparency Act, which is a freedom of information statute, with respect to the FNE but not the Competition Tribunal. The Transparency Council resolves disputes between individuals and government or public bodies, where access to information has been denied. There are two potential issues with respect to the work of the FNE: *first*, only private parties can appeal against a decision of the Transparency Council, whereas public bodies have no right of appeal; and *second*, while the provisions of the Transparency Act do not apply to criminal prosecutions, they are applicable to civil enforcement actions taken by the FNE. Nonetheless, the provisions of the Transparency Act have been applied numerous times against the FNE since it came into force in 2008, without difficulty, and in particular, the Council has never ordered the disclosure of leniency applications or other confidential material. While some defendants have attempted to use the transparency provisions as a quasi-discovery mechanism, in practice the Transparency Council has protected the work of the FNE in its determinations. In response to a question from the Chair regarding the type of information that had been sought from the FNE, the delegate gave as an example two expert reports that had been prepared for litigation proceedings, concerning legal and

economic issues, as well as internal notes and deliberations. In each case, the FNE was entitled to deny access to the information.

The Chair turned to the submission of Spain, which has recently conducted a public consultation on draft guidelines for accepting commitments in infringement proceedings. The delegate from Spain emphasised the essential role of public consultations, insofar as they allow stakeholders to comment and identify gaps and ambiguities in the draft provisions, and therefore increase the certainty and transparency of final guidelines. Under Spanish competition law, express provision is made for termination of competition investigations on the basis of commitment decisions, which do not involve a finding of breach but instead require binding commitments from the defendant(s) to resolve the competition problem. During the public consultation, several respondents requested that the guidelines be extended to cover settlements as well as commitment decisions. However, no provision is made under Spanish competition law for settlements, which involve a guilty plea coupled with a reduced fine. Following the consultation, the competition authority decided to state explicitly within the commitment decision guidelines that settlements are not permitted. Additionally, the consultation process served to clarify the criteria to be used when deciding whether to accept commitments to close a case. Moreover, guidelines, in themselves, are a useful mechanism by which to increase transparency and legal certainty in the work of the competition authority. The delegate also confirmed that, in the view of the Spanish competition authority, legislative change is necessary in order for settlements to be accepted under Spanish law.

In the United Kingdom, the Chair noted, the Office of Fair Trading (OFT) has commenced in March 2011 a one-year trial of a Procedural Adjudicator to resolve procedural disputes that arise during the course of its competition enforcement work. The delegate from the United Kingdom explained that the Procedural Adjudicator position emerged from the need to provide a swift, efficient and cost-effective mechanism to resolve such disputes, where the only existing option was to pursue a time- and resource-consuming judicial review action in the Administrative Court. There is no formal legal basis for the role, and for the purposes of the one-year trial the position has been filled by an OFT official, the Director of Competition Policy, although measures are in place to ensure that she has no conflicts in the role. While the existence of the Procedural Adjudicator does not preclude a judicial review action to resolve procedural disputes, the aim is to remove the need for such review, which will depend in large part on the credibility of the process. Currently, the Procedural Adjudicator can address three main categories of disputes, involving (i)

deadlines for submission of information or written responses to a statement of objections, (ii) requests for confidentiality redactions, and (iii) requests for disclosure or non-disclosure of certain material in a case file. The Procedural Adjudicator can also address issues relating to oral representations meetings, such as the date of the meeting, and other significant procedural issues that may arise during the course of an investigation.

Thus far, there have been two applications to the Procedural Adjudicator for review, one concerning an application for early disclosure of documents, the other a request to prevent disclosure of confidential information. Both issues were resolved within six working days, before the ten working days deadline, and neither case has been judicially reviewed subsequently, which the OFT views very positively. In developing the Procedural Adjudicator role, the questions are, *first*, whether the scope of the role should be extended; *second*, whether the role should be made permanent or subject to a further trial period, and *third*, whether the role should be held by an OFT staff member or an external individual. The Chair asked whether the Procedural Adjudicator tends to mediate disputes, or actually decides on the complaint. The UK delegate replied that the Procedural Adjudicator has the power to determine disputes, but might also choose to mediate where more appropriate, the aim being to find the best way to allow the case to go forward. Over time, it is hoped that both the parties and the case team will modify their behaviour, taking into account the past decisions of the Procedural Adjudicator. Subsequent to the round table, the OFT announced in March 2012 that it would extend the Procedural Adjudicator trial for a further year until 21 March 2013. From 21 March 2012, the Procedural Adjudicator's role has been expanded to include the chairing of oral hearings in non-criminal cases and the reporting to the relevant decision-maker(s) following the oral hearing, on any procedural issues that have been brought to her attention during the investigation as well as on whether the oral hearing was properly conducted.

The Chair then asked the delegate from Poland to discuss recent legislative amendments that impacted on competition enforcement. The delegate began by clarifying that proceedings before the Office of Competition and Consumer Protection (UOKIK) are administrative in nature, where judicial review of UOKIK's decisions is carried out under the Code of Civil Procedure. The Code was amended in September 2011, and in particular, the rules regarding evidence have been significantly relaxed. Substantial discretion to allow new evidence has been given to the judge, which the UOKIK fears might result in more lengthy judicial review proceeding against its judgments. This, in turn, will have a negative impact on enforcement, insofar as it will take longer for the

UOKIK to remedy the harm on competition involved. Moreover, the UOKIK takes the view that it was unnecessary to relax the rules on evidence in the context of review of its decisions. Parties already have broad rights of access to documents during the course of the administrative proceeding itself, and the broad evidence-gathering powers available to the UOKIK mean that all relevant evidence is in the case file. In any event, if new evidence nevertheless emerges during the course of a judicial review action, it would have been possible to admit it under the previous rules of evidence.

The Chair opened the floor again to questions and comments on the interventions made by the delegates so far. The delegate from South Africa noted that the South African competition enforcement system strongly favours the defendant. The Competition Commission investigates complaints and must then prosecute them before an independent tribunal, with the possibility of appeal to the Competition Appeal Court. Although the statute was designed to end the appeals process at that stage, it has been interpreted to mean that further appeals to the Supreme Court of Appeal and ultimately the Constitutional Court are possible. Recently, the higher courts have handed down several extremely restrictive judgments, which make it increasingly difficult for the Competition Commission to investigate complaints. For example, the Supreme Court of Appeal has held that the initiating document prepared when opening an investigation must closely reflect the complaint that is ultimately referred to the Tribunal, and there are conflicting decisions as to whether the initiating document can be amended to reflect the evolving case. The key difficulty here is that the Competition Commission rarely knows at the beginning of an investigation what its outcome will be or what the case eventually referred will cover. Furthermore, the Tribunal can decide the case only on the basis of the material actually referred. To address these problematic interpretations of the law, the Competition Commission has made three applications for direct access to the Constitutional Court, asking the Court to review the current situation, in an effort to secure a more even balance between the rights of defendants and complainants in competition cases, and the need to enforce the law. Two of these cases will be heard in November 2011, and it is hoped that the third will be heard in early 2012.

To conclude, the Chair gave the floor to BIAC, which welcomed the OECD's recognition of the importance of transparency and procedural fairness, and observed that the discussion of developments in furtherance of these objectives had been rather inspiring. What was particularly encouraging was the commitment to continual improvement, whether such developments were dramatic, like Slovenia's plan to transform its competition authority, or more

incremental, like the increased powers of the European Commission's hearing officer. The question of leniency applications in the context of disclosure of documents and follow-on actions remained a difficult and unresolved issue, and there was a need to balance competing legitimate interests in this area. On the issue of transparency, the OECD's work to date on this issue has been both thorough and useful, and the delegate suggested that there might be scope for some further synthesis of the materials collected thus far. The Chair then brought the Roundtable to a conclusion.