European Community Notification Framework for Distribution Agreements

Chapter 14 A. Commentary

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Note: The following commentary, forms and documents are prepared by the above under the laws and practice prevailing as at 1 October 2005. Seldom is a model form or document directly suitable to a transaction without adaptation to the particularities and circumstances of the matter. Readers are invited to contact the contributors regarding any questions concerning the application of the forms and documents.

Introduction

Following the modernization of antitrust enforcement rules and procedures undertaken by the European Commission, companies doing business in the European Union (EU)[1] and/or the European Economic Area (EEA)[2] are now faced with a totally renovated framework when negotiating and concluding contracts. In particular, the treatment of agreements between undertakings, among them "vertical agreements", by EU competition law has been radically re-tailored and a major change affecting them has occurred: the requirement of notification has been abolished.

Vertical restraints consist of agreements or concerted practices entered into between two or more companies, each of which is operating, for the purposes of the agreement, at a different level of the production or distribution chain. The agreements or concerted practices relate, in particular, to the conditions under which the parties may purchase, sell or resell certain goods or services, for example, exclusive or selective distribution, single branding, exclusive customer allocation, selective distribution, franchising, exclusive supply, tying or recommended and maximum resale prices.

In an exclusive distribution agreement, the supplier agrees to sell his products only to one distributor for resale within a particular territory. At the same time, the distributor is usually limited in his active selling in other exclusively allocated territories. The possible competition risks are mainly reduced intra-brand competition and market partitioning, which may, in particular, facilitate price discrimination. When most or all of the suppliers apply exclusive distribution, this may facilitate collusion, both at the suppliers' and the distributors' level.

Selective distribution agreements, like exclusive distribution agreements, restrict the number of authorized distributors, on the one hand, and the possibilities for resale, on the other. The difference *vis-à-vis* exclusive distribution is that the restriction of the number of dealers does not depend upon the number of territories, but on selection criteria linked, in the first place, to the nature of the product. Another difference *vis-à-vis* exclusive distribution is that the restriction on resale is not a restriction on active selling within a territory, but a restriction on any sales to non-authorized distributors, leaving only appointed dealers and final customers as possible buyers. Selective distribution is almost always used to distribute branded final products. The possible competition risks are:

(1) A reduction in intra-brand competition;

1. Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden, the United Kingdom and, since 1 May 2004, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.
2. The European Union plus the European Free Trade Association States: Iceland, Liechtenstein and Norway, but not Switzerland.

(2) Especially in cases of cumulative effect, foreclosure of a certain type or types of distributor; and
(3) Facilitation of collusion between suppliers or buyers.

The modernization of competition policy essentially seeks to achieve a double objective: a uniform application of competition law, in an enlarged Europe. Both goals had the same launch date, that is, 1 May 2004. A summary of each Member State's legal status in relation to distribution agreements is provided below.

Relevant Law

PRIMARY LEGISLATION

The basic competition law provisions in the EU are Articles 81 and 82 of the EU Treaty. They are intended to prevent the distortion of competition in the European Common Market by restrictive practices, on the one hand, or the abuse of a dominant position, on the other hand. They affect any enterprise, wherever established, trading within the European Common Market. Article 81(1) prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market. Article 81(2) provides that all such prohibited agreements and decisions are automatically void.

Article 81(3) states that Article 81(1) may be declared inapplicable where the agreement, decision or practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and does not impose restrictions which are not indispensable to the attainment of these objectives or eliminate competition in respect of a substantial part of the products in question. Under the new competition framework, with the abolition of the notification system, as explained below, Article 81(3) can be directly invoked by undertakings before a national court or national competition authority, that is, a Commission statement is no longer needed to do so.

Article 82 prohibits the abuse of a dominant position by one or more undertakings, which may affect trade between Member States. It is important to note that, since January 1994, the EC competition rules apply equally to the entire EEA.[1]

SECONDARY LEGISLATION: THE "MODERNIZATION PACKAGE"

The Commission, by means of its White Paper in 1999, formally launched the modernization process of the rules implementing Articles 81 and 82 of the EU Treaty. Subsequently, in September 2000, a Proposal for a new Regulation replacing Regulation

1. OJ 1994 L 1/3–36.

Number 17[1] was introduced. After more than two years of intensive work in the Council, this Proposal was adopted on 16 December 2002, as new Regulation 1/2003.[2]

The "Modernization Package", which came into force as a whole on 1 May 2004 — the very same day upon which ten new countries joined the European Union — comprises, *inter alia*:[3]

(1) Three Regulations:[4]
   (a) Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty;[5]
   (b) Commission Regulation 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements;[6] and
   (c) Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty;[7]

(2) Two Communications:
   (a) Communication pursuant to Article 33 of Council Regulation 1/2003 of 16 December 2002 on the implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty;[8]
   (b) Communication from the Commission — Notice — Guidelines on the Application of Article 81(3) of the Treaty;[9] and

(3) Six Commission Notices:
   (a) Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements;[10]
   (b) Commission Notice on cooperation within the Network of Competition Authorities;[11]
   (c) Commission Notice on the Cooperation between the Commission and the Courts of the EU Member States in the application of Articles 81 and 82 of the EC Treaty;[12]

1. OJ 1962 204.
2. OJ 2003 L 1/1–25.
3. The references mentioned above have been selected with regard to their relevance as to distribution agreements.
4. An additional major EC Competition Council Regulation came into force on 1 May 2004: Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004 L 24/1–22. However, it will not be expanded upon at this point since this chapter deals specifically with distribution agreements.
5. OJ 2003 L 1/1–25.
6. OJ 2004 L 123/11–17.
7. OJ 2004 L 123/18–24.
8. OJ 2003 C 243/3–9.
9. OJ 2004 C 101/97–118.
10. OJ 2004 C 101/2–42. The Notice sets out a methodology for the application of Article 81(3). It does not replace but complements the extensive guidance already available in Commission Guidelines on particular types of agreements, in particular, the Guidelines on horizontal cooperation agreements and the Guidelines on vertical restraints.
11. OJ 2004 C 101/43–53.
12. OJ 2004 C 101/.

(d) Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty;[1]
(e) Commission Notice on Informal Guidance relating to Novel Questions concerning Articles 81 and 82 of the EC Treaty that arise in Individual Cases (Guidance Letters);[2] and
(f) Guidelines on the Effect of Trade Concept contained in Articles 81 and 82 of the EC Treaty.[3]

It is important to remember that, pursuant to European secondary legislation, that is, legislation created by the Community institutions on the basis of the treaties, Regulations have immediate and direct effect in all of the twenty-five national legal orders of the EU Member States.

It should be highlighted that, while fifteen Member States have experience in the field of European competition policy enforcement, this is not the case for the ten newly acceded countries, for which it represents a challenge to implement forty years of Community *acquis* in addition to the latest reform, which the "old" Member States had time to anticipate. Nevertheless, the implementation process has been smoothed with the help of PHARE Programs and, furthermore, transitional arrangements, whereby "periods of grace" (usually six months from accession) have been granted in order to provide undertakings with more time and flexibility so that they may amend their agreements in conformity with new EU competition rules.

Policy for Assessment of Vertical Agreements

"Effect on Trade" Concept

Articles 81 and 82 of the Treaty are applicable to horizontal and vertical agreements and practices of undertakings which "may affect trade between Member States".[4] In other words, the "effect on trade" criterion determines the scope of application of Community competition law, in particular, Article 3 of Regulation 1/2003. The latter concerns the relationship between the EC Treaty provisions and national competition laws: competition authorities and courts should apply Articles 81 and 82 of the Treaty as soon as the agreements and practices in question have a minimum cross-border effect on trade within the Community. The concept, which establishes Community jurisdiction, has been clarified by the Community Courts' case law and, more recently, by the Commission's Guidelines, referred to above, and drafted especially for that purpose.[5]

1. OJ 2004 C 101/65–77.
2. OJ 2004 C 101/78–80.
3. OJ 2004 C 101/81–96.
4. Refer also to the Commission Notices published in the *Official Journal* of 27 April 2004 and mentioned above.
5. Guidelines on the Effect of Trade Concept contained in Articles 81 and 82 of the Treaty, OJ 2004 C 101/07, at pp. 81–96.

As an illustration, the Guidelines mention selective distribution agreements, which are based on purely qualitative selection criteria justified by the nature of the products. They do not restrict competition within the meaning of Article 81(1), but nevertheless may affect trade between Member States. On the other hand, the alleged restrictions arising from an agreement may provide a clear indication as to the capacity of the agreement to affect trade between Member States. For instance, a distribution agreement prohibiting exports is, by its very nature, capable of affecting trade between Member States, although not necessarily to an appreciable extent.[1]

CENTRAL ELEMENT OF NEW ENFORCEMENT MECHANISM: ABOLITION OF NOTIFICATION SYSTEM

Prior to the "Modernization Package"

On 6 February 1962, Regulation 17, the "implementing Regulation" for former Articles 85 and 86, now Articles 81 and 82, of the EC Treaty, introduced a system of notification into the administration of EC competition law. The notification procedure and the information to be supplied (Form A/B) were further set out in Commission Regulation 3385/94[2] on the "form, content and other details of applications and notifications provided for in Council Regulation Number 17". Technically, the term "notification" referred to a request for exemption only but, in practice, it was used both for an application for negative clearance and a notification for exemption.

Where an agreement was suspected of contravening Article 81(1) or Article 82 of the EC Treaty, an application would be made for negative clearance, that is, a ruling that the agreement did not fall within the terms of or contravene these Articles and, thus, was not unlawful. Alternatively, or additionally, where an agreement was suspected of contravening Article 81(1), but the parties were arguing that Article 81(1) should be declared inapplicable under Article 81(3), the agreement could be notified for an exemption under Article 81(3). However, no exemption procedure existed for conduct prohibited by Article 82.

Notification under the EC competition rules was made to the Directorate-General for Competition of the European Commission (DG Competition). Only the Commission could grant exemptions under Article 81(3) of the Treaty. An "individual" decision granting an exemption could only be granted if a notification had been made. The Commission published its formal decisions of negative clearance or exemption in the *Official Journal*. This mechanism of notification had the benefit of providing certainty in the form of individual exemptions. However, although an undertaking had no legal obligation to notify an agreement suspected of infringing EC competition law, such notification had one important consequence: immunity from the imposition of fines for the period between the date of notification and the date of the decision removing immunity. Another good reason for notifying was that the undertakings would benefit from a presumption of compliance with EC law.

1. For further details, please refer to the diagram on vertical agreements below. See also the website of the European Commission for additional explanatory information at http://www.europa.eu.int.
2. OJ 1994 L 377/28–58.

Nevertheless, the Commission did not have sufficient resources to cope with granting formal decisions for the vast amount of notifications that were submitted each year. In general, only a few decisions were published in a year and a large number of accumulated cases were awaiting a decision from the DG Competition. Significant efforts to tackle this problem were, therefore, being made by the Commission which, recognizing the impossibility of considering every case in full in a published decision, was using the notification process as a lawmaking tool. The Commission would select those cases which were interesting for the purpose of stating, clarifying or developing the law and would publish a decision in that respect.

Self-Assessment System Introduced by the "Modernization Package"

As a result, on 1 May 2004, Regulation 17 was replaced by Regulation 1/2003 of 16 December 2002[1] on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, thereby abolishing the notification system in its entirety. The notification system for agreements has now been substituted with a system of self-assessment, with powers devolved to national authorities and courts. This will have the benefit of considerably alleviating the amount of paperwork at the Commission. On the other hand, it will lead to a heavier burden on the side of undertakings, which must make sure that their self-assessment methods are scrupulous. Hence, parties will need to exercise greater caution in entering into agreements and they will need to seek legal advice so that a risk assessment can be made. Parties to distribution agreements have, on the whole, been able to be relatively relaxed because of the effect of the Vertical Block Exemption (see below) and the right to apply for Article 81(3) exemption retrospectively.

The abolition of the notification system has, to a certain extent, removed an important obstacle to private enforcement. No prior Commission statement is now required, which means that the EC competition rules may now be invoked by undertakings and citizens directly before national courts, without going through the Commission first. Nevertheless, exceptionally, pursuant to Article 10 of Regulation 1/2003, the Commission may, whenever the European public interest is concerned, make a prior statement on the applicability of Article 81 or 82. Due to the various implementation stages, some Member States have not yet fully integrated their applicable laws and, thus, negative clearance or notification can still be found under some Member States' legal systems.

BLOCK EXEMPTION SYSTEM

In order to efficiently achieve legal certainty, the European Commission, during recent decades, has developed a system of "block exemptions" or exemptions by category.

The "block exemptions" have been implemented "sector-by-sector" through EC Regulations. As a consequence, under the "old system", agreements falling within the scope of

1. OJ 2003 L 1/1–25.

such Regulations needed not to be notified or, even better, individual exemptions that had already been made were, in this way, renewed in blocks by the Commission.

Basic Block Exemption

In that respect, the Commission adopted Regulation 2790/1999/EC on the application of Article 81(3) of the Treaty establishing the European Community to categories of vertical agreements and concerted practices.[1] which effectively exempts certain categories of vertical agreements, in particular, supply and distribution agreements that, under certain conditions, may improve economic efficiency within a production or distribution chain.[2] In principle, this Regulation expires on 31 May 2010.

Regulation 2790/1999 must be read in conjunction with Regulation 19/65,[3] as amended by Regulation 1215/1999,[4] authorizing the Commission, subject to compliance with Article 81(3) of the EC Treaty, to exempt certain categories of vertical agreements. With a view to simplifying the rules applicable to supply and distribution agreements, this single Regulation actually replaces:

(1) Regulation 1983/83 concerning the block exemption for certain exclusive distribution agreements;
(2) Regulation 1984/83 concerning the exemption for certain categories of exclusive purchasing agreements; and
(3) Regulation 4087/88 concerning the exemption for certain categories of franchise agreements.

Notwithstanding the adoption of the "modernization package", the important enforcement tool of EU competition policy, through Regulation 2790/1999, is still in force and remains within the hands of the Commission. Annex 1 summarizes the exemption process as it follows from this Regulation.

Vehicle Sector Block Exemption

In the motor vehicle sector, the Commission adopted a "block exemption" Regulation, Regulation 1400/2002/EC[5] of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector,[6] which exempts, under certain conditions, specific categories of vertical agreements and concerted practices in the motor vehicle sector.

On the basis of its experience with distribution agreements for new motor vehicles, spare parts and after-sales service in the motor vehicle sector, the Commission

1. OJ 1999 L 336/21–25.
2. Commission Notice of 13 October 2000, Guidelines on vertical restraints, COM (2000) C 291/01, OJ 2000 C 291/1–44; Recommendation 96/280/EC concerning agreements between small and medium-sized firms.
3. OJ 1965 P 36/533–535.
4. OJ 1999 L 148/1–4.
5. OJ 2002 L 203/30–41.
6. OJ 2001 L 203/30–41.

concluded that particular attention ought to be given to introducing exemptions in this sector. Although more flexible overall, the present Regulation is stricter than Regulation 1475/95, which has governed the sector until now, and Regulation 790/1999[1] on supply and distribution agreements. The Regulation applies to vertical agreements concluded in the motor vehicle sector at all stages of trade and supply of new vehicles or spare parts, including repair and maintenance services. The products covered by the new Regulation range from passenger cars to light commercial vehicles and from lorries to buses and coaches. In principle, the new Regulation expires on 31 May 2010.

Other Sectors

The Commission has also adopted "block exemption" Regulations in the insurance, transport (road, air and maritime), transfer of technology and licensing sectors.

Administration of the Competition Rules

THE DECENTRALIZATION PROCESS

Prior to the "Modernization Package"

Before the "modernization package" came into force and in view of alleviating the workload resulting from the enforcement of competition rules, the Commission had already been encouraging the decentralization of the administration of EC competition law by actively pushing the courts of the Member States to cooperate and coordinate their efforts in applying Articles 81 and 82 of the Treaty.[2] However, these efforts had minimal incentives and, therefore, limited consequences.

Conversely, through the "block exemption" system, the Commission's objective of decentralizing EC competition law has undeniably been making far more notable progress. Now, where block exemptions exist, the Commission may benefit from the support of a solid network of twenty-five Member States' national authorities and courts, who will help in modeling the national law of those twenty-five Member States on these EC Regulations.

The New System

One of the crucial elements of the new legal framework also resides in the launching of the European Competition Network (ECN). Pursuant to Article 5 of Regulation 1/2003, national authorities, acting either on their own initiative or on a complaint to decide on an infringement of the EC Treaty provisions, may take one of the following decisions:

(1) Order interim measures;

1. OJ 1999 L 101/64.
2. Commission Notice on Cooperation with National Courts, OJ 1993 C 39/6–11.

(2) Require that the infringement be brought to an end;
(3) Accept commitments; or
(4) Impose fines, penalties or other sanctions available under national law.

New cooperation mechanisms have been set up between the national public enforcers (horizontal cooperation), also via the Commission (vertical cooperation), regarding the work-sharing as well as the mutual information relating to pending cases at different stages of the procedure and, in particular, for use in evidence. Special consideration has, however, been given to the issue of leniency applications in cartel investigations. In that respect, information will not be shared with the network without the consent of the leniency applicant, except in cases where the receiving authority ensures its protection.

EUROPEAN COMPETITION NETWORK

A Commission Notice sets out the main pillars of the cooperation between the Commission and the competition authorities of the Member States in the ECN.[1] The Notice sets out the principles for sharing casework between the members of the network. Particular arrangements have been found for the interface between exchanges of information between authorities pursuant to Articles 11(2), 11(3) and 12 of Regulation 1/2003 and the operation of leniency programs. National authorities of the Member States have signed a statement in which they declare that they will abide by the principles set out in the Notice.

Annex 2 details the national competition authorities designated by each Member States. In principle, notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential. Pursuant to Article 33 of EC Regulation 1/2003, the Commission shall be authorized to take measures concerning the practical arrangements for the exchange of information and consultations. However, the Notice does not impose upon Member States a particular format for the exchange of information.

POWERS OF THE EUROPEAN COMMISSION

The DG Competition was, and is still, responsible for the administration of Community competition policy. Under the "old system", the effect of Regulation 17 had been to ensure maximum disclosure to the Commission of business practices in the Community and to give the Commission a major role in deciding whether or not these practices are acceptable in terms of Article 81(1). The DG Competition had wide-ranging powers to enable it to investigate suspected infringements of

1. Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C 101/43–53. For a more detailed directory of national competition authorities and related ministries, please refer to the following link: http://www.europa.eu.int/comm/competition/national_authorities/. Requests for further and updated information may be sent to the Commission, more precisely, to the information service of the Directorate-General for Competition at infocomp@cec.eu.int.

Articles 81 and 82. With respect to the competence of national competition authorities and courts under Regulation 1/2003, the European Commission will limit its intervention to specific responsibilities. The power of the courts and competition authorities of the Member States to apply Article 81(3) is one of the main pillars of the modernization reform.

However, the intervention of the Commission is still possible. Regulation 1/2003 introduced a new instrument at the disposal of the Commission: "guidance letters".[1] Where certain restrictive conditions are fulfilled, undertakings may obtain the Commission's guidance on a particularly tedious issue relating to their agreements. It will, however, restrict its opinion to an economic and legal analysis of the facts of the case. The guidance letter will set out a summary description of the facts upon which it is based, as well as the principal legal reasoning of the Commission. It is important to note that an undertaking may withdraw its request at any time. The Commission Notice on guidance letters provides details on the guidance letters, as well as the procedure for obtaining them. The Commission may also intervene before the national competition authorities and courts, as an *amicus curiae*, and formulate technical, fact-related observations.

For the purpose of Article 7 of Regulation 1/2003, and pursuant to Articles 5 to 9 of Regulation 773/2004, the Commission may handle complaints lodged by any "natural and legal persons" showing a legitimate interest. Complainants shall submit the necessary facts to the Commission by means of a form containing certain specified information. Since it is important for the purpose of legal certainty to define clear and efficient procedures for handling complaints, such complaints shall contain the information required by Form C, as described in Regulation 773/2004.[2] Evidently, the guidance letters and Form C may have an adverse effect upon a particular situation and, therefore, undertakings should seek legal assistance in drafting such documents.

The system under Regulation 1/2003 is a system of parallel competence by which all enforcers have the power to apply Articles 81 and 82. Under that system, several authorities may be in a position to act against a given infringement on their own or in parallel. This is important as, under the new Regulation, the competition authorities cooperating in the network are expected to focus their actions upon the most serious infringements of the competition rules, which are often secret and difficult to detect.

In fact, the Commission will play the part of a "supervisor/coordinator", ensuring effective and close qualitative cooperation, both horizontal and vertical, within the ECN. Such "supervision" task is further complemented by Article 11 of Regulation 1/2003, which obliges the national courts and authorities to inform the Commission within thirty days of the adoption of a decision to bring an infringement to an end, acknowledging commitments or rejecting the application of a block exemption Regulation. Furthermore, Article 21 of Regulation 1/2003 enlarges the Commission's investigative powers, but the prior consent of the competent national authority remains necessary in order to carry out the investigation.

1. Commission Notice on Informal Guidance relating to Novel Questions concerning Articles 81 and 82 of the EC Treaty that arise in Individual Cases, OJ 2004 C 101/78–80.
2. Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ 2004 C 101/65–77.

It is important to note, however, that this Regulation may lead to risks of forum shopping, particularly since the national courts and authorities are required to suspend or cancel proceedings if already dealt with by another Member State.[1] Forum shopping may also arise in respect of the differences in rules of evidence and the burden of proof under Articles 81 and 82 of the Treaty. In that respect, this Regulation does not preclude Member States from implementing within their territory national legislation that protects other legitimate interests, provided that such legislation is compatible with general principles and other provisions of Community law. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with the general principles of Community law.

Legal Framework of the Member States

AUSTRIA

Regulatory Framework

Austrian cartel law, including provisions on vertical agreements on distribution and the application of relevant European competition law, is primarily governed by the Austrian Cartel Act of 1988[2] and in various regulations based on the Cartel Act.[3] Comparable to Article 81 of the EC Treaty, the Cartel Act does not draw a general distinction between horizontal and vertical restrictions on competition. However, vertical agreements on distribution,[4] as a special form of vertical restrictions, are exempt from the Cartel Act's general rules on cartels.

The Cartel Act differentiates between different forms of cartels, which are subject to different provisions of the Cartel Act. The two main cartel types are cartels by intent (*Absichtskartelle*) or cartels by effect (*Wirkungskartelle*). Within these types, the Cartel Act differentiates mainly cartels by agreement (*Vereinbarungskartelle*), cartels by conduct (*Verhaltenskartelle*) and cartels by recommendation (*Empfehlungskartelle*). It is the general rule that cartels by intent are prohibited and void unless notified to and expressly approved by the Cartel Court. Cartels by effect may be implemented unless prohibited by the Cartel Court.

With respect to vertical agreements on distribution, the Austrian cartel law has adopted the principles of the European Commission's regulation on the application of Article 81(3) of the EC Treaty to categories of vertical agreements and concerted

1. Regulation 1/2003, Article 13, "Suspension or Termination of Proceedings".
2. *Bundesgesetz vom 19. Oktober 1988 über Kartelle und andere Wettbewerbsbeschränkungen.*
3. Contributed by Volker Glas and Bernhard Kofler-Senoner, Cerha Hempel Spiegelfeld Hlawati, Vienna, Austria.
4. Section 30a of the Cartel Act defines vertical agreements on distribution as agreements concluded between an undertaking (a binding undertaking) and other undertakings (restricted undertakings) by which the latter are restricted with respect to the purchase or sale of goods or services.

practices[1] and on the application of Article 81(3) of the EC Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector.[2] In 2002, the Cartel Act was amended to expressly set out the Austrian competition authority's power to apply European competition law.

Authorities

Locally competent regional civil courts (*Landesgerichte*) have exclusive jurisdiction in civil law cases under the Cartel Act.[3] The main competition authority in Austria is the Vienna Court of Appeals ruling as the Cartel Court (*Oberlandesgericht Wien als Kartellgericht*). The Austrian Supreme Court (*Oberster Gerichtshof*), as the Supreme Cartel Court (*Kartellobergericht*), serves as the court of appeals. The Cartel Court is exclusively responsible for issuing binding rulings in competition proceedings provided for in the Cartel Act and rulings based on Articles 81 and 82 of the EC Treaty as set out in Article 5 of Council Regulation 1/2003/EC.[4] In 2002, the Federal Antitrust Agency (*Bundeswettbewerbsbehörde*, FAA) — as an independent agency, and the Federal Antitrust Attorney (*Bundeskartellanwalt*), subject to directives given by the Austrian Federal Minister of Justice, were established as further enforcement authorities. The Cartel Court and the FAA (and most likely the Federal Antitrust Attorney) qualify as competition authorities within the meaning of Regulation 1/2003.

Procedural Specifics as to Vertical Agreements on Distribution

Where both European and Austrian cartel law apply to a vertical agreement,[5] the Cartel Court must be notified by way of submission of a sample of the vertical agreement.[6] No approval of the vertical agreement from the Cartel Court is required. Where the notification obligation is violated, a fine of between €3,500 and €35,000 may be imposed. However, even if a notification does not take place, the agreement remains valid unless and until it is prohibited by the Cartel Court. No official form is required for such notification.

A notification fee of €30 must be paid. Notifications must be made in German. Whether the whole agreement or only its essential parts must be translated should be discussed with the Cartel Court prior to notification. Notified agreements are filed in a register (*Urkundensammlung*), which is publicly accessible. After notification, the Cartel Court transmits copies of the relevant agreement to the FAA and the Federal Antitrust Attorney as "official parties" (*Amtsparteien*) in order to allow both official parties to examine the filed agreement and possibly file an application for prohibition with the Cartel Court.

1. Regulation 2790/99.
2. Regulation 1400/2002.
3. In Vienna, it is the Commercial Court of Vienna (*Handelsgericht Wien*) that has exclusive jurisdiction.
4. Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty.
5. According to Section 6(1) of the Cartel Act, the Cartel Act applies to agreements having an effect upon the Austrian market.
6. Cartel Act, Section 30b.

Under the Cartel Act, undertakings may ask the Cartel Court to assess whether a certain agreement falls within the Cartel Act.[1] However, this formal procedure does not cover the question of whether agreements that fall under Article 81(1) of the EC Treaty are exempted by Article 81(3) of the Treaty.

Procedural Issues

The Cartel Court may prohibit and declare void vertical agreements violating Article 81 of the EC Treaty only upon a motion for review of the agreement by either the official parties, any undertaking or association of undertakings the legal or economic interests of which are affected by the agreement, the Federal Chamber of Commerce, the Federal Chamber of Labor, the Presidential Conference of the Austrian Chamber of Agriculture and certain other institutions specified by federal law. Complaints may be brought directly before the Cartel Court or before the FAA.

In the case of a violation of Article 81 of the EC Treaty, the Cartel Court may impose fines of between €10,000 and €1-million or up to ten per cent of the worldwide aggregate turnover in the preceding business year of each undertaking taking part in such transaction. Apart from final rulings, the Cartel Court may also impose interim measures, such as injunctions, upon application by a party to the proceedings. The Cartel Act provides for an appeal to the Supreme Cartel Court against the Cartel Court's final rulings on both procedural and substantive grounds.

Costs

The notification fee, which must be paid by the notifying undertaking, is €30. A general court fee that ranges between €375 and €15,000 must be paid in the case of proceedings on the prohibition of vertical agreements. Generally, the unsuccessful party bears the payment obligation for such court fee.

Confidentiality

The notification procedure for vertical distribution agreements certainly constitutes a confidentiality issue for the notifying undertakings, since the Cartel Court's register where the agreements are filed is publicly accessible. This issue is mitigated to a certain extent because undertakings need only notify a sample of the agreement and not the agreement itself.

In prohibition proceedings before the Cartel Court, generally, only the parties to the proceedings have access to the files. The Cartel Court may allow third persons access to the files or part of the files only if such third persons demonstrate a legal interest that outweighs the confidentiality interest of the parties to the proceedings.

Recent Developments

It is expected that an amendment of the Cartel Act bringing about a clarification and simplification of the Austrian cartel law will be approved by the Austrian legislator

1. Cartel Act, Section 8a.

in the first half of 2005. The respective draft amendment has recently been published and can be downloaded at www.bmwa.gv.at.

According to the draft amendment, one of many changes expected is that the differentiations of the various different types of cartels currently included in the Cartel Act (as outlined above) not known to Article 81 of the EC Treaty will be eliminated. In the field of vertical agreements, the notification obligation will be repealed.

BELGIUM

Regulatory Framework

The Law of 1 April 1993 on the Protection of Economic Competition (*Loi sur la protection de la concurrence économique/Wet tot bescherming van de economische mededinging*), applying Articles 81 and 82 of the EC Treaty, coordinated on 1 July 1999[1] and updated on 3rd May 2004,[2] regulates competition law in Belgium (the Law).[3] However, Belgian authorities are still in the process of harmonizing Belgian legislation according to the "Modernization Package".

Administrative Bodies and Courts

Pursuant to the Law, the following bodies are empowered to regulate EU and local competition issues:

(1) The Competition Service (*Service de la concurrence/Dienst voor de mededinging*), which is responsible for detecting and noting the existence of anti-competitive practices and investigates all cases in which action must be taken and enforces rulings or decisions of the Competition Council;
(2) The Committee of Rapporteurs (*Corps des rapporteurs/Korps verslaggevers*), whose main task consists of:
   (a) heading and organizing investigations;
   (b) issuing instructions to agents who are assigned to carry out investigations; and
   (c) drawing up the investigation report, as well as presenting it to the Competition Council;
(3) The Competition Council (*Conseil de la concurrence/Raad voor de Mededinging*), which, being an administrative entity empowered to take decisions as well as to put forward proposals and opinions, is in charge of:
   (a) assessing whether or not competition rules have been infringed;
   (b) deciding on the acceptability of concentrated practices; and
   (c) granting individual exemptions at the request of the enterprises concerned;

1. Published in the Belgian *Official Gazette* on 1 September 1999.
2. Royal Decree of 25 April 2004 modifying the Law on the Protection of Economic Competition and published in the Belgian *Official Gazette* on 3 May 2004.
3. Contributed by Dan Zaum, Miller, Bolle & Partners, Brussels, Belgium.

(4) The Competition Commission (*Commission de la concurrence/Commissie voor de Mededinging*), which is an advisory body representing the viewpoints of labor, industry, agriculture, commerce, crafts and consumers; and
(5) The Ministry of Economy, which, together with the Belgian Council of Ministers, is also competent with regard to competition matters.

The Ministry of Economy may consult the Competition Council on questions of general competition policy. The Ministry may also require the Committee of Rapporteurs to investigate alleged violations involving competitive practices. It may entrust the Competition Service with conducting general and sector-specific investigations and may also contest the decisions of the Competition Council by lodging an appeal with the Brussels Court of Appeals. The Competition Service and the Committee of Rapporteurs assist the European competition authorities with the enforcement of EU rules on competition in Belgium.

Complaint Forms and Procedures

Applications and complaints relating to restrictive competitive practices are lodged with the Competition Council, which forwards them to the Committee of Rapporteurs for investigation.[1] Where the Rapporteur concludes that the complaints or applications are inadmissible or groundless, he submits to the Council a reasoned proposal to close the file. If the Council accepts the proposal, it closes the file. If it does not accept the proposal, it remits the case to the Rapporteur, who proceeds with the investigation.

At the end of the investigation and before a reasoned report is drawn up, the Rapporteur formulates objections to the undertakings concerned and summons them to submit their observations. The Rapporteur lodges his reasoned report with the Council, which includes the investigation report, a proposed list of observations and a proposed decision.

Where the Council considers that objections other than those raised by the Rapporteur should be examined, the Rapporteur examines them and carries out a complementary investigation, if necessary. He supplements his report and submits it to the Council. After the report has been lodged, the Rapporteur advises the undertakings whose activities have been under investigation, as well as the complainant, where the Council deems it appropriate, and sends them a copy at least one month before the date of the hearing at which the Council will examine the case. The Rapporteur will inform the relevant parties that they may consult the file at the Secretariat of the Competition Council and obtain a copy of it upon payment of a fee.[2]

The parties submit their written observations to the Council. At the hearing, the Council examines the case, including submissions by any natural or legal person where it deems necessary. The Competition Council may request the Rapporteur to file a supplementary report, the content of which it specifies. The Council's reasoned

1. Law on the Protection of Economic Competition, Article 24.
2. Law on the Protection of Economic Competition, Article 27.

decision must be handed down within six months following the filing of the report with the Council, including any injunction or other measure it deems necessary to order.

Interim and Final Measures

The chairman of the Competition Council may, at the request of the complainant or of the Ministry, take provisional measures intended to suspend the restrictive competitive practices being investigated if there is an urgent need to avoid a situation that may lead to serious, imminent and irreparable damage to the undertakings the interests of which are affected by such practices or harm the general economic interest.[1]

If the Competition Council establishes the existence of restrictive competitive practices, the Law empowers the Competition Council to order the cessation of the forbidden practices and to fine such breaching undertakings. The fines may amount to up to ten per cent of the worldwide turnover of each undertaking. There is also a penalty of up to €6,200 for each day of non-compliance with the Competition Council's decision against each undertaking concerned.[2]

Timing

A decision must be handed down in any event within six months following the filing of the report with the Council. This period also applies in the event of a proposal to close the file.

Confidentiality

The Competition Council's hearings are not public, so only interested parties and persons summoned by the Competition Council may be present. All persons involved in the proceedings are subject to an obligation of confidentiality.

Moreover, the chairman of the Competition Council may refuse the parties access to certain documents and information contained in the file relating to business secrets.[3] Once the decisions of the Competition Council are published, the authorities must also protect the confidentiality and business secrets of the undertakings.

Appeal

The Competition Council's decisions may be subject to appeal before the Brussels Court of Appeals within a period of thirty days running either from the date of the decision or, as far as third parties are concerned, from the date of the publication of the decision.[4] Rulings by the Brussels Court of Appeals may themselves subsequently be subject to an appeal before the Supreme Court.

1. Law on the Protection of Economic Competition, Article 35.
2. Law on the Protection of Economic Competition, Article 36.
3. Law on the Protection of Economic Competition, Article 32*ter*.
4. Law on the Protection of Economic Competition, Article 43*bis*.

Language

Any document must be submitted to the Competition Council in a Belgian official national language (French, Dutch or German) or in English. Documents written in another language must be accompanied by a translation.

Costs

For the filing of a complaint, no fee must be paid to the Competition Council.

CYPRUS

Introduction to the Relevant Law

Law 207/1989 on the Control and Suppression of Actions and Common Actions Restrictive of Trade, the Protection of Competition, the Institution of a Commission for the Protection of Competition and on Other Related Matters, as amended by Laws 111(I)/1999, 87(I)/2000 and 155(I)/2000 (the Law), is the basic competition law in Cyprus.[1] The Law has replaced Law 62/1983 on the Protection of Competition in order to bring competition law in Cyprus in line with Community law.

Articles 4 and 6 of the Law substantially reproduce the provisions of Articles 81 and 82 of the Treaty of Rome at the national level. Block exemptions have been provided for by Orders issued by the Council of Ministers under Article 5 of the Law, whereas the Commission for the Protection of Competition is responsible for the issue of individual exemptions. Article 5 of the Law sets out the conditions upon which individual and block exemptions may be permitted.

Competition Authorities and Courts

The Commission for the Protection of Competition (the Commission) is an independent authority set up by the Law and is the successor of another authority by the same name that had been instituted under Law 62/1983. The Commission is competent for the investigation of violations of Articles 4 and 6 of the Law and the issue of decisions on complaints and petitions to the Commission for negative clearance according to Article 16 of the Law and individual exemptions according to Section 18 of the Law. Commission decisions are published in the *Official Gazette* of the Republic.

Any undertaking the actions of which are the object of a Commission decision, or any other undertaking the lawful interests of which are affected by a Commission decision, may apply to the Supreme Court of Cyprus, in Nicosia, for a review of the Commission decision under Article 146 of the Constitution. Such an application for review must be filed within seventy-five days from the date upon which the decision was notified to the undertaking concerned. The filing of an application for review will not automatically affect the validity or enforceability of the Commission

1. Contributed by Nicos Georgiades and Galatia Sazeidou, Georgiades & Pelides, Nicosia, Cyprus.

decision. An application may be filed for a stay of execution until the review proceedings are concluded.

The review proceedings are not an appeal on the merits of the case. The purpose of Article 146 proceedings against a Commission decision are to check that the Commission has acted within the powers and competence given to the Commission by the Law, has not abused its authority or exceeded the limits of its authority and has not, in reaching its decision, acted in a way that is plainly contrary to the Law. The Supreme Court will not issue a decision on the substance of the case before it, substituting its view for the view of the Commission. A single judge of the Supreme Court will hear the review proceedings. An appeal lies against the decision of the judge to a panel of three judges of the Supreme Court.

Complaints and Other Procedures

Any natural or legal person may file a complaint to the Commission, provided that such natural or legal person has suffered or is in real danger of suffering financial loss or has been put at a disadvantage competition-wise as a direct result of the action complained of. The Commission may, of course, investigate any suspected violation, even if it has not received a complaint from an interested party. The complaint must be filed in writing and must be signed by the person making it. Standard forms are available, in Greek, for the submission of complaints, but they need not be used. It is sufficient that a complaint is in writing and sets out:

(1) The nature of the interest of the person submitting the complaint;
(2) The facts that allegedly constitute a violation of Article 4 or Article 6 of the Law; and
(3) The reasons for thinking that a violation has been committed.

The Commission must also be invited to instigate the complaint. The Commission has a duty to investigate the complaint, provided that, upon a preliminary inquiry by the Commission, a *prima facie* case for the commission of the violation has been set up.

A standard form is also available, in Greek, which must be submitted to the Commission for the purpose of:

(1) Requesting negative clearance;
(2) Notifying the Commission of an agreement/action in violation of Article 4 of the Law and requesting an individual exemption; or
(3) Notifying the Commission of an agreement/action and requesting an individual exemption or, in the alternative, negative clearance.

Information must be submitted to the Commission in relation to:

(1) The nature of the agreement/action, its purpose and duration;
(2) The market involved; and
(3) The reasons for believing that negative clearance or an individual exemption should be granted.

The notification to the Commission, which is part of the application for an individual exemption, is deemed to be valid either from the date it is received by the Commission or from the date of the post office stamp if the notification was sent to the Commission by registered post. Any one or all of the undertakings involved may notify the Commission. Where only one of the undertakings is submitting the notification form, a copy must be sent to the other undertakings involved.

Timing

The Law does not set a time frame within which the Commission must conclude its investigations and issue a decision. The Law does, however, restrict the power of the Commission to impose a fine. Fines in relation to violations of Articles 4 or 6 may only be imposed within five years from the date upon which the violation was committed.

Interim and Final Measures

The Commission may, upon a finding of violation of Article 4 or Article 6 of the Law:

(1) Note that there has been a violation which has, in the meantime, been brought to an end;
(2) Order the undertaking concerned to bring the violation to an end within a certain period of time;
(3) Impose a fine of up to c£5,000 for each day during which the violation continues;
(4) Impose a fine of up to ten per cent of the gross income of the undertaking or association of undertakings during the year in which the violation was committed or the year before; and
(5) Issue interim measures.

Interim measures may be either prohibitory or mandatory. They can be issued by the Commission, either upon an application by an interested party or upon a decision of the Commission itself, where:

(1) There is evidence before the Commission of a strong *prima facie* case of violation of Articles 4 or 6;
(2) The matter is one of urgency; and
(3) There is danger that irreparable harm will be suffered either by the applicant or the public interest.

The Commission may impose a fine only after an appropriate investigation has been carried out and a reasoned Commission decision issued. The Commission, when deciding upon the fine to be imposed, must take the nature and the gravity of the violation concerned into account.

Confidentiality

The Commission has wide powers to research and collect information necessary for the conduct of its investigations. This information may only be used for the purpose for which it was collected. According to Article 26 of the Law, the President and other members of the Commission and all other officers and employees who come across information of a confidential nature during the course of the exercise of their duties are under an obligation to treat such information confidentially and may not publicize such information, except to the extent required by the provisions of the Law. Any other person who acquires knowledge of such information is also under an obligation to treat the information confidentially.

Language

The language of the proceedings before the Commission is Greek.

Costs

No fee is payable upon the submission of a complaint to the Commission. A fee of c£200 is payable upon the submission of either an application for negative clearance or an application for an individual exemption. Where an application is submitted for negative clearance and, in the alternative, for an individual exemption, the fee is c£300.

CZECH REPUBLIC

Relevant Law and Administrative Bodies

Antitrust law is primarily governed by Act Number 143/2001 Coll. on the Protection of Economic Competition (the Act).[1] The Act was overhauled in connection with the Czech Republic's accession to the EU in order to provide the Czech competition authority with the power to apply Articles 81 and 82 of the Treaty and to implement the other procedural changes necessitated by the introduction of Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty.[2] As a result, Czech antitrust law is now generally consistent with EC law.

The competition authority charged with the enforcement of the Act and of Articles 81 and 82 of the EC Treaty is the Office for the Protection of Economic Competition in Brno (the Office). The Office has issued a block exemption for certain categories of vertical agreements,[3] which transposes into national law the principles laid down in the EC Regulation, subject to a few adjustments. Moreover, prior notification has b een

1. Contributed by Radan Kubr, Prochazka Randl Kubr, Prague, Czech Republic.
2. Act Number 464/2004 Coll. introduced the amendment.
3. Decree Number 1998/2001 of the Office for the Protection of Economic Competition authorizing a general exemption from the prohibition of agreements distorting competition pursuant to Section 3(1) of Act Number 143/2001 Coll. on the Protection of Economic Competition for certain categories of vertical agreements.

abolished altogether in connection with the Czech Republic's accession to the EU[1] and the Act now provides for the automatic exemption of an agreement if conditions identical to those set out in Article 81(3) of the EC Treaty are met.[2]

Complaints and Procedures

The Act essentially provides for the same procedural rules in relation to the enforcement of national law and of Articles 81 and 82 of the EC Treaty. The Office is entitled to start investigations into an infringement of national law or of Articles 81 and 82 on its own motion or based on a complaint filed by a party to an agreement or by any other legal entity or natural person. Complaints are not subject to observance of a specific form. The decision of the Office as to whether to start proceedings based on a complaint must be notified to the complainant.

The Office may require businesses and, generally, administrative authorities, to supply all information and documents as may be necessary to carry out its duties. In addition, the officials of the Office are authorized to enter any premises, land and means of transport used by undertakings in connection with their business activities, to examine books and other business records, to take extracts from such books and records and to ask for on-the-spot explanations. If a reasonable suspicion exists that books or other business records are located in non-business premises, including the homes of staff or representatives of the undertaking, the Office may enter such premises subject to prior court approval. The Office may also take testimonies from persons who may contribute to ascertaining the facts.

Prior clearance is no longer available now that the notification system has been abolished and that businesses are required to "self-assess" whether the conditions for individual exemption are met, in line with EC law. The Office has generally been willing to provide informal guidance on interpretational issues, but this might change now that the Act has been in existence for several years and that the latest amendment thereto places stronger emphasis upon enforcement.

Infringements of Articles 81 and 82 of the EC Treaty may give rise to actions for non-contractual liability in Czech courts. The appropriate regional court would have jurisdiction in accordance with the general principles of jurisdiction set out in the Code of Civil Procedure.[3]

Interim and Final Measures

The Office may order interim measures pending a decision on the merits to the extent needed to ensure that the objective followed by the proceedings (restoring undistorted competition) is protected. The interim measures may require the parties to adopt a certain course of positive or negative action or order the seizure of evidence. The Office is entitled to take the following measures with respect to an infringement:

(1) Order that it be brought to an end;[4]

1. Act Number 464/2004 Coll. introduced the amendment.
2. Act Number 143/2001 Coll., Section 3(4).
3. Act Number 99/1963 Coll.
4. The Act provides, in relation to the enforcement of national law, that the Office has the right to prohibit the performance of a prohibited agreement and take other appropriate remedial measures.

(2) Accept commitments; and
(3) Impose fines of up to CZK 10-million (approximately €317,000) or ten per cent of the net turnover achieved by the relevant undertaking in the previous calendar year if such undertaking intentionally or negligently breached the prohibition in Section 3(1) or failed to comply with an accepted commitment.

In addition, the Office may (repeatedly) impose:

(1) A fine of up to CZK 300,000 (approximately €9,500) on anyone who intentionally or negligently fails to provide complete, accurate or true information fails to submit books or other business records does not allow for their examination or otherwise refuses to cooperate;
(2) A fine of up to CZK 100,000 (approximately €3,170) on anyone who, without serious reason, fails to appear at a hearing or refuses to give testimony or otherwise obstructs the course of the proceedings; or
(3) A fine of CZK 1-million (approximately €31,700) for failure to comply with an enforceable decision of the Office.

Timing of Procedures

It is currently unclear what time limit the rules apply. It has been suggested that Government Decree Number 150/1958 Coll. governs complaints, notifications and initiatives by workers. Pursuant to the Decree, the Office would be required to deal with a complaint in an orderly and timely manner and to take a decision within ten days if the matter is simple or thirty days if the matter is more complex, subject to extension if warranted.

However, it also has been suggested that Act Number 71/1967 Coll. on Administrative Proceedings governs the matter. Pursuant to this Act, the Office would be required to decide without delay if the matter is simple. If the matter is not simple, the Office would be required to decide within thirty days and, in particularly complex cases, within sixty days, subject to prolongation if certain conditions are fulfilled.

When deciding upon a final measure, the Office is required to observe the time limits set out in the Act on Administrative Proceedings, as set out above. The limitation period for imposing fines for substantive infringements is three years from the time when the Office became aware of the infringement, but at the latest ten years from the time when the infringement occurred.

Confidentiality

The Office is required to keep the identity of a complainant confidential at the complainant's request. As a rule, Section 24 of the Act requires all persons with an employment or other relationship with the Office to keep confidential all confidential information or business secrets acquired by them in connection with their duties.

Language

The proceedings before the Office and the competent courts are held in the Czech language.

Costs

Complaints are not subject to the payment of costs.

Appeal

No appeal is available against a decision of the Office not to open an investigation based on a complaint. The decisions of the Office ordering interim and final measures are subject to appeal to the Head of the Office within fifteen days of their notification. While the decisions of the Head of the Office relating to interim measures are not subject to appeal, the decisions of the Head of the Office relating to final measures may be submitted for review to the administrative law section of the Regional Court in Brno within two months of their notification, subject to payment of a CZK 2,000 (approximately €63) fee. Finally, the decisions of the Regional Court in Brno may be appealed to the Highest Administrative Court within two weeks of their notification, subject to payment of a CZK 3,000 (approximately €95) fee. While an appeal to the Regional Court in Brno or to the Highest Administrative Court does not automatically suspend the execution of the decision, suspension can be requested.

DENMARK

Introduction and Legislation

The Danish Competition Act came into force on 1 January 1998, but has undergone several revisions since.[1] The Danish regulatory framework for competition matters has recently undergone further revision to incorporate Regulation 1/2003 into the Act. The revision of the Act has been necessary, despite the direct applicability of the Regulation, to ensure that the Danish regulatory framework reflects the new approach to competition regulation allowing for the parallel competence of the European Commission and the competent national authorities.

Denmark has opted to implement the European Directives, Regulations and other legislative measures relating to competition regulation through incorporation into the Act and derivative legislation. Block exemptions have likewise been adopted as part of the Danish regulatory framework. A draft bill of the revised Act went through a consultation procedure last summer. The bill was adopted by the Danish Parliament in December 2004 and came into force on 1 February 2005.

In the context of notification of distribution agreements, the primary legislation as of 1 February 2005 is as follows:

(1) Consolidated Act Number 539 of 28 June 2002, as amended by Act Number 381 of 28 May 2003 and Act Number 1461 of 22 December 2004 (*Konkurrenceloven*, the Act); and

1. Contributed by Lise Engel, Philip & Partners, Copenhagen, Denmark.

(2) SI Number 211 of 26 March 192003 concerning rules governing the notification of agreements to the Danish Competition Authority (*Konkurrencestyrelsen*, DCA).

Articles 81 and 82 of the Treaty were made directly applicable as part of a revision of the Act in 2000.[1] The revised Act expressly states that matters involving Articles 81 and 82 may be handled by the Danish competition authorities and courts where the matter concerned has an affiliation (as further defined in the Act) with Denmark. The two Articles are specifically mentioned in Sections 16, 16a and 17 of the revised Act, dealing with the organization and powers of the competition authorities.

Administrative Bodies and Courts

The day-to-day administration of the Act and derivative legislation has been entrusted to the Danish Competition Authority, which is an independent body under the Ministry of Economic and Business Affairs (*Økonomi- og Erhvervsministeriet*). The DCA acts as secretariat to the Competition Council (*Konkurrencerådet*), which is the primary administrating body for competition matters. The Competition Council may take up a case on its own initiative, following a notification, on the basis of a complaint or as a result of a referral from other EU competition authorities or the Commission. It consists of eighteen members (appointed by the Minister) and a Chairman (appointed by the Sovereign). The Chairman and eight members must be independent of any business or consumer interests.

The handling of complaints, consultations and general administration is the responsibility of the Competition Council, which decides all major cases and test cases on the basis of submissions prepared by the DCA. The Competition Council also handles requests for negative or prior clearance, but cannot issue abstract opinions on the interpretation of Danish competition regulation. Anyone with an individual significant interest in a specific issue may, however, complain to the competition authorities and thus extract an "opinion" on the specific issue concerned. Decisions by the Council may be appealed or referred to the Competition Appeals Tribunal (*Konkurrenceankenævnet*, the CAT) and, in some cases, thereafter be taken to the Danish civil courts. The CAT consists of a Chairman (who must be a Supreme Court judge) and four other members, of which two must have specialist financial knowledge and the other two must have specialist legal knowledge. All of them must be independent of any business interests.

Notification and Language

No fee is payable when filing a notification. Any agreement requiring notification under the Act must be notified to the DCA. The recent revisions of the Act do not, for the time being, abolish the notification procedure at the national level in Denmark. The filing of a notification under the Act must be done using a special form (Form K1), which can be obtained from the DCA website (available currently in Danish only).

1. Competition Act, Section 23a.

Together with the form, the applicant(s) must submit the information outlined in Part B of Form K1, otherwise the notification will be incomplete and will not be reviewed by the Competition Council. The revised Act now includes provisions that permit the DCA and the Council (and, consequently, the CAT) to conduct case reviews in English.[1]

Complaint Forms and Procedures

There is no formal requirement that specific complaint forms need be used by those who wish to complain about the activities of competitors, suppliers or others acting in the same market segment, nor is there any such requirement for complaints against decisions by the Competition Council or the CAT. When filing a complaint with the CAT, a standard fee of DKK5,000 must be submitted together with the complaint. Taking a complaint to the Danish civil courts requires certain writ formalities to be observed and the payment of regular court fees.

There are no statutory requirements for when a complaint should be filed, save in the case of appeals to the CAT or the challenging of a decision by the CAT in the courts, but the generally applicable Danish statute of limitations is five years. Complaints against decisions by the Competition Council may be lodged by:

(1) Anyone at whom a decision is directed; and
(2) Any other party who has an individual substantial interest in the case.

If the Competition Council takes the view that a complaint does not give sufficient grounds for investigation, such a decision cannot be appealed to the CAT. Appeals against decisions by the Competition Council must be lodged with the CAT within four weeks of communication of the decision to the relevant parties. Appeals against the decisions of the CAT must be brought before the Danish civil courts within eight weeks of the decision having been communicated to the parties. No decision by the Council may be brought before the courts prior to the CAT having decided on the matter.

Interim and Final Measures

The Competition Council is authorized to levy daily or weekly fines as a coercive measure upon anyone who fails to provide or procure information that the Council is empowered to request pursuant to the Act. Such fines may also be levied upon anyone who fails to comply with a condition or order issued by the Council pursuant to the Act. The Competition Council may also order, for example, that agreements, decisions or contract terms be terminated in whole or in part.

Infringements of the Act resulting from intentional or grossly negligent behavior are punishable by fine, unless subject to a higher penalty under other Danish legislation. The revised Act has extended the Competition Council's powers to:

(1) Make binding upon the undertakings concerned any commitments offered as part of a notification procedure; and

1. Competition Act, new Sections 15c and Section 19(5).

(2) Authorize the Competition Council to issue orders as the national competent authority pursuant to Articles 81 and 82 of the EC Treaty.

Confidentiality

The Danish Act on Access to Administrative Files (*Lov om offentlighed i forvaltningen*) is not generally applicable to cases handled pursuant to the Act and there is, consequently, no general third-party right of access to the cases/files handled under the Act. Decisions by the Competition Council are required to be published and will also be available on the website of the Competition Council.

The Competition Council has a statutory duty to share confidential information with EU competition authorities or competent national authorities in other Member States in certain circumstances. These disclosure requirements expressly exempt certain sensitive information, for example, information of a technical nature, including research, production methods, and about products and operation and business secrets if such information is of "substantial economic importance to the person or undertaking(s) concerned".

ESTONIA

Introduction to Relevant Law

The principal legal act in the field of competition law in Estonia is the Competition Act (*Konkurentsiseadus*, the Act).[1] The Act has been drafted in accordance with Articles 81 and 82 of the EC Treaty, as well as with other regulations dealing with competition law in the EU. The scope of the Act is the safeguarding of competition in the interests of free enterprise regarding the extraction of natural resources, manufacture of goods, provision of services and sale and purchase of products and services (hereinafter goods) and the preclusion and elimination of the prevention, limitation or restriction of competition in other economic activities. The Act has been amended recently to comply with Regulation 1/2003/EC.

In addition to the Act, the Government has passed several regulations concerning competition law, such as regulations on block exemptions and guidelines on issuing concentration control notices. Some matters relating to competition law are also regulated by the Penal Code (*Karistusseadustik*), Criminal Procedure Code (*Väärteomenetluse Seadustik*) and the State Duties Act (*Riigilõivuseadus*).

Administrative Bodies and Courts

The Estonian Competition Board (*Konkurentsiamet*, the Board) is responsible for ensuring that the market participants comply with the Act. The Board is given the tasks of applying concentration control measures, prevention of abuse of dominant market position, granting individual exemptions to agreements between market participants (that is, prior clearance) and cooperation with authorities of other States

1. Contributed by Edgars Briedis, Sorainen Law Offices, Tallinn, Estonia.

and the commission. The latter obligation was added in the recent amendments to the Act that entered into force on 1 August 2004.

Decisions of the Board may generally be appealed before the administrative courts (*halduskohtud*) as courts of first instance. Other competition law matters may be brought in civil suits and in criminal cases before the ordinary city or county courts (*linna- ja maakohtud*). District courts (*ringkonnakohtud*) function as appellate courts for all of the above courts. Finally, the National Court (*riigikohus*) acts as a supreme court, where decisions of district courts may be appealed if given permission by the National Court Appeals Selections Committee.

The Ministry of Financial Affairs deals with issues related to State aid. In matters related to unfair competition, the parties may resolve the matter in ordinary court proceedings.

Complaint Forms and Procedures

A written complaint submitted to the Board must contain the name of the complainant, the subject matter of the complaint worded in a clear manner, the contact information of the complainant, the date of submitting the complaint and the signature of the complainant or his representative (attaching the appropriate power of attorney). It is recommended to also include a description of the facts, as well as reasons why the activities in question are not in compliance with the Act, the contact information of all the related undertakings and reasons why the complainant has the necessary standing to file the complaint. The complaint should be accompanied by all evidence available to the complainant.

The Board may issue recommendations to improve the competition situation, but may also issue injunctions to perform a specific act, to refrain from performing a specific act, to halt the activity disrupting competition or to restore the situation prior to the violation of the law. Failure to abide by the injunction may result in a fine of EEK 5,000 (approximately €3,200) for natural persons and EEK 10,000 (approximately €6,400) for legal persons. In some cases, the Board may also initiate criminal proceedings, in which case the Board's functions are similar to those of the prosecutor's office.

Timing

A concentration notice must be submitted within one week of concluding the concentration that is subject to control. Upon receiving a concentration notice, the Board must either issue permission for the concentration or initiative further investigations within thirty days. Further investigations must be concluded within four months. Failure by the Board to issue decisions in time will be regarded as permission for the concentration. Failure by the undertaking to submit a concentration notice in time may result in an injunction issued by the Board or even criminal proceedings.

In addition to concentration control, the Act provides a time limit for the Board to issue a decision on individual exemption applications (regarding prohibited agreements between undertakings) within two months of receiving all of the relevant information. The Board may decide that further investigation is needed, which must be concluded within six months after receiving the relevant information.

Interim and Final Measures

The Board may issue both interim and final measures as injunctions, as well as conditions for permitting a concentration or individual exemption.

Confidentiality

According to the Act, the Board and its officials do not have the right to disclose business secrets, including banking secrets, which they have learned while conducting their duties. Business secrets include information concerning the business of an undertaking, the disclosure of which might damage the interests of the undertaking and which is not public.

In principle, the undertaking involved determines what constitutes a business secret, but the Board may demand the undertaking to provide grounds why the information should be regarded as a business secret. Regardless of the above, the Board may disclose and use the business secrets it has learned as evidence of violations of the Act or of Articles 81 and 82 of the EC Treaty. The business secrets also may be used in criminal proceedings and may be presented to the court as evidence. If necessary, the business secrets may be disclosed to the Commission or competition authorities of other Member States in accordance with Article 12 of Regulation 1/2003/EC.

Language

The documents submitted to the Board must be in Estonian or provided with Estonian translations. The Board may waive this requirement at its own discretion. In practice, the Board rarely demands translations of documents in English or Finnish.

In addition, documents provided to the courts must be provided either in Estonian or with verified Estonian translations. Unlike the Board, the courts generally do not waive this requirement and do demand that even documents in English be translated.

Costs

Certain acts of the Board incur a state duty. Submitting a concentration notice incurs a state duty of EEK 2,000 (approximately €1,300). Submitting an individual exemption application incurs a state duty of EEK 1,000 (approximately €640).

Appeal

The acts of the Board may be appealed before the administrative court by submitting a complaint within thirty days from receiving information of the act that has violated the rights of the complainant.

FINLAND

Relevant Law

The current competition legislation involving distribution agreements in Finland consists of the following:

(1) Act 480/1992 on Competition Restrictions (the Competition Act), including amendment 318/2004;
(2) Act 711/1988 on the Finnish Competition Authority; and
(3) Decree 66/1993 on the Finnish Competition Authority.

The Competition Act is the primary source of Finnish competition law.[1] It has been in force since 1 September 1992 and underwent a major change on 1 May 2004 due to the reform of the regulation implementing the competition rules, Council Regulation 1/2003, as detailed below:

A new Article 1a was introduced, which contains a reference to Articles 81 and 82 and all EC regulations related to those Articles, as well as the jurisprudence of the European Court of Justice. The new Article 4 of the Competition Act is based on Article 81(1) of the EC Treaty, and is interpreted accordingly. In Article 5 of the Competition Act, there are exemptions to the prohibitions in Article 4. Article 5 is based on Article 81(3) of the EC Treaty and it is interpreted identically. When interpreting this Article, guidance must be sought from the respective EC regulations, such as those on block exemptions and notifications. The Finnish Competition Authority can give more accurate guidance on Article 5 based on those EC regulations. Article 6 of the Competition Act is based on Article 82 of the EC Treaty and is thus interpreted accordingly.

From 1 May 2004, the Competition Authority can no longer issue exemption orders. Business undertakings' responsibility for the lawfulness of their actions increased, as they must assess the lawfulness of their distribution agreements. Such business undertakings that infringe the provisions of Article 4 or Articles 81 and 82 of the EC Treaty shall be fined a competition infringement fine unless the conduct is deemed to be minor or the imposition of the fine otherwise unjustified with regard to safeguarding competition. In fixing the amount of the penalty fine, regard must be had, for example, to the gravity and duration of the restriction, but the amount cannot exceed ten per cent of the preceding year's total turnover of the business undertaking in question. The Market Court imposes the fine upon a proposal of the Competition Authority.

Along with the amendments of 1 May 2004 came the possibility of an undertaking to avoid penalty payment by assisting the Competition Authority to intervene in arrangements that constitute prohibited competition restrictions.

1. Contributed by Matti Kauppi, Nordic Law Asianajotoimisto, Helsinki, Finland.

The Competition Authorities

The authorities in charge of the supervision and enforcement of the Finnish competition rules are primarily the Finnish Competition Authority, the Ministry of Trade and Industry and the Market Court, as well as the State Provincial Office. The ultimate body of appeal in competition matters is the Supreme Administrative Court. The Finnish Competition Authority and the State Provincial Office investigates competition restrictions and their effects. Both bodies have the right to initiate the necessary proceedings to eliminate competition restrictions or their harmful effects upon the order of the Finnish Competition Authority.

A case concerning a restriction of competition is commenced before the Market Court following the receipt by the Market Court of a proposal by the Finnish Competition Authority or of an appeal against a Finnish Competition Authority decision. A party may, with certain exceptions, appeal a Market Court ruling to the Supreme Administrative Court. The Finnish Competition Authority has an obligation to advise undertakings on the Competition Act. This role has more and more meaning now that exemption orders can no longer be issued and undertakings must assess the lawfulness of their distribution agreements.

Confidentiality

The Act on the Publicity of Court Proceedings shall apply to the proceedings of the Finnish Competition Authority, as well as to the hearing of a case before the Market Court. Market Court rulings are generally public and freely available. Particulars of, *inter alia*, the parties' names and the nature of the cases entered in the *Market Court Journal* are public. An oral hearing on cases is generally public. The obligation to maintain confidentiality may require a hearing *in camera*, in practice, in cases relating to competition restrictions. The public is not entitled to obtain information on business and professional secrets. Other documents are usually public. If a document delivered to the court contains business secrets, the court must be notified. The parties' right to obtain information on the court proceedings and documents is broader than the public's right. With certain exceptions, a party is entitled to obtain information on the content of a non-public document that can or may have influenced the hearing of his case.

Article 10(a) of the Competition Act states that, notwithstanding what is said in Act 621/1999 on the Openness of Governmental Activities, the Competition Authority has a right to submit to the Finnish Communications Regulatory Authority a confidential document obtained or drafted by it in the process of carrying out its duties assigned by the Competition Act. Article 30 of the Act on Openness of Governmental Activities makes provision for the submitting of a confidential document to a foreign competition authority.

Legal Procedures in Competition Cases

The Competition Authority may, after determining that a competition restriction is prohibited under Articles 4 or 6 of the Competition Act or Article 81 or 82 of the EC Treaty, order the business undertaking to terminate the infringing conduct and oblige the business to deliver the product to another undertaking on similar

conditions as offered by the same business to other undertakings in a similar position. The Competition Authority can also enforce its obligation by imposing a conditional fine.

The Market Court takes the decision to order the payment. Pursuant to Article 29 of Council Regulation 1/2003/EC, the Competition Authority may withdraw from an agreement the benefit of a block exemption within Finland when it finds that the agreement has certain effects that are incompatible with Article 81(3) of the EC Treaty within Finland, or a part thereof which has the characteristics of a distinct geographic market.

Interim and Final Measures

If the application or implementation of a competition restriction needs to be prevented immediately, the Competition Authority may issue an interlocutory injunction. The Competition Authority may also temporarily oblige a business to deliver products to another undertaking upon similar conditions as offered to others. After issuing an interlocutory injunction, the Competition Authority must make a decision on the principal matter or a proposal to the Market Court within sixty days. Unless the urgency of the matter or some other specific reasons demand otherwise, the Authority must grant the business undertaking in question an opportunity to be heard before issuing the injunction.

A competition restriction issue shall be brought before the Market Court in writing. The Chief Judge or a Market Court judge conducts preliminary proceedings, during which the business undertaking in question is granted the opportunity to respond either orally or in writing before the final proceedings. The Market Court may oblige a party to appear before it and to produce its business correspondence, financial accounts and other documents, but the obligation to supply documents does not concern business secrets of a technical nature. Otherwise, the Administrative Procedure Act 434/2003 is applied to the appraisal of the matter.

Appeal

Almost all of the Competition Authority's decisions may be appealed to the Market Court, but decisions taken under Articles 11(e) and 14(1) and a decision to conduct an inspection under Article 20 cannot be appealed. Normally, decisions adopted by the Competition Authority shall be followed notwithstanding an appeal. The appeal shall be sent to the Market Court within thirty days of service of the Finnish Competition Authority decision.

A decision by the Market Court may be appealed to the Supreme Administrative Court, excluding decisions of extension of time limit and of an authorization for an inspection. The Market Court's decisions are normally followed despite the filing of an appeal.

Costs

When the Market Court hears a case, the provisions of the Administrative Procedure Act shall apply to indemnification of legal costs. According to the Act, a party is liable

to compensate the other party for its legal costs in full or in part if, especially in view of the resolution of the matter, it is unreasonable to make the latter bear its own costs.

An administrative authority that has taken a decision can also be regarded as a party. A private party shall not be held liable for the costs of a public party unless the private party has filed a manifestly unfounded claim.

Language of Proceedings

According to Section 9(2) of the Administrative Procedure Act, the right of a customer to use and receive service from an authority in his own language is subject to separate provisions and to the terms of international agreements binding upon Finland.

In the Constitution of Finland, it is further prescribed that, before courts of law and other authorities, the language of the proceedings must be either one of the two official languages, therefore, the language of proceedings of the Finnish Competition Authority is either Finnish or Swedish. Certain supplemental documents related to merger control, such as balance sheets, are also accepted in English, if necessary.

FRANCE

Introduction to Relevant Law

The outlines of France's law follow the EU model and principles concerning restrictive agreements, dominant firms and mergers.[1] Actually, in 2001, France's competition law established by the Ordinance of 1 December of 1986 was comprehensively restated and codified in the New Economic Regulations (NRE). The NRE reforms improved the processes of investigation and decision.

They added a pre-merger notification requirement, stronger sanctions and a provision for leniency. Therefore, the impact of Regulation 1/2003 on the organization of French competition rules has been limited. Indeed, the legislator had already put in place a system of legal exceptions, settlement and clemency procedures, as well as close cooperation between the French competition authorities, the European Commission and the other Member States' competition authorities. Ordinance 2004–1173 of 4 November 2004 adapts French national competition regulations to the new Europeans rules and specifies the powers of investigation of the agents, the powers and obligations of the Council (particularly, confidentiality) and the specialization of the courts.

Under French competition law, restrictive trade practices are distinguished from restrictive agreements. Whereas restrictive agreements fall within the jurisdiction of the Council (potential fines), the jurisdiction of criminal courts (prison sentences) and the jurisdiction of the regular courts (annulments), restrictive trade practices fall within the jurisdiction of the regular courts (damages), unless the practices concerned also constitute an abuse of dominant position or an abuse of economic dependency. In that respect, Article L 442–6 of the Code of Commerce (*Code de*

1. Contributed by Hervé Laigo, Campbell, Philippart & Associés, Paris, France.

Commerce) deal with situations of economic dependence and abusive practices between distributors and suppliers. In practice, French law with respect to restrictive agreements is similar to the block exemptions implemented by the EC Treaty. In the event of a challenge, the firms involved must demonstrate that the restrictive agreement is legal because it contributes to economic progress.

Administrative Bodies and Courts

The French competition law system is characterized by a dual institutional structure. The Competition Council (*Conseil de la concurrence*) is an independent statutory body (*Autorité Administrative Indépendante*), which is also the French first instance court for competition matters, the decisions of which can be appealed before the Paris Court of Appeal and then before the Supreme Court (for legal review). The Council is responsible for the enforcement of French and EC competition laws in France and issues decisions, injunctions and fines, as well as having advisory functions.

The Directorate for Competition and Consumer Affairs (*Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes* — DGCCRF), which is a department of the Ministry of Economic Affairs, carrying out its functions on behalf of the Ministry, has monitoring duties. It is central to, and the starting point for, the regulation of French markets. The agents of the DGCCRF have extensive investigative powers under the Code of Commerce, similar to those of the European Commission. They may be instructed to investigate either by the Ministry, the Council or the Commission. They can be assisted by agents of another Member State's competition authority when they investigate for this authority.

Complaint Forms and Procedures

There is no procedure for notifying restrictive agreements or practices under French competition law. Undertakings must, therefore, ensure that their agreements comply with the provisions of the Code of Commerce. Third parties can submit a complaint to the Council or the Minister. There are no formal requirements, but the decision to initiate an investigation or proceedings lies only with the Minister or the Council.

It is important to recall also that, in France, the organization of the jurisdictional system is dual: the administrative courts, on the one hand, and the judiciary courts (civil, criminal and commercial), on the other hand. The administrative courts have jurisdiction to apply competition rules to entities responsible for a "public service" mission. Professional organizations can seek damages for their collective losses sustained before the commercial or civil jurisdictions. These jurisdictions will apply their standard rules of procedure knowing that, when enforcing Articles 81 and 82 of the EC Treaty, they will be able to rely upon the measures provided for in Regulation 1/2003. Furthermore, they can benefit from investigations conducted at a national or even at a European level by the other Member States' competition authorities and national courts. They can also consult the Competition Council. Concerning the visits and executions initiated by the Commission within French territory, a French judge must determine that the measures solicited by the Commission are not arbitrary or disproportionate in relation to the object of the verification ordered.

Timing

The average time spent by the Competition Council on cases concerning restrictive competition practices varies between thirteen and twenty-one months, depending on the type of procedure. In principle, the period of time between the Competition Council ruling and the decision of the Supreme Court does not exceed three years.

Where interim measures (*measures conservatoires*) are ordered, the time needed to deal with the case is two or three months shorter. Also, when the application of Regulation 1/2003 concerns trans-national anti-competitive practices, it can be expected that a significantly longer period will be needed to resolve such cases.

Interim and Final Measures

The civil and commercial jurisdictions can apply summary proceedings when injunctions are sought, determine that agreements are null and void and/or, on the grounds of Article 1382 of the Civil Code (*Code Civil*), award damages as compensation for loss sustained through restrictive competition practices. The administrative courts can also award damages, and the criminal courts can condemn any individual who fraudulently takes part, personally or decisively, in restrictive agreements,[1] order prison sentences as well as fines of up to €75,000 in that respect and award damages on the basis of a civil claim.

The Council can take interim and final measures. Apart from the general fines and measures prescribed by the EU, the Council can decide on measures giving publicity to a given decision, transmit the case to the head of the Prosecution Department and order injunctions to force the parties to modify their behavior. As a consequence, any unlawful agreement, commitment or contract clause is void and unenforceable. The French courts may decide that a specific clause is anti-competitive and, therefore, null and void or that the entire contract is null and void if the anti-competitive clause is essential to the contract.

Confidentiality

French competition rules, in accordance with the EC "Modernization Package", allow the transfer of confidential information within the context of the new cooperation mechanism between the Commission and the Member States' competition authorities and national courts.

However, it is important to note that hearings before the Competition Council are not public. In addition, in the case where a party wishes that some documents remain undisclosed to the other party, it may allege a "business secret".

Language

Any document must be submitted to the Competition Council in French.

1. Restrictive agreements are prohibited in France by Article L 420–1 of the Code of Commerce, which is equivalent to Article 81 of the EC Treaty, and authorized by Article L 420–4 of the Code of Commerce, which is equivalent to Article 81(3) of the EC Treaty.

Costs

It is difficult to evaluate in advance the costs of proceedings before the Competition Council, since it depends on the complexity of the matter. In any event, the costs include the fees of the lawyers and, if needed, of the experts. Court expenses are low and amount to the taxable charges only.

Pursuant to Article 700 of the Code of Civil Procedure (*Nouveau Code de Procédure Civile*), the unsuccessful party may be liable to pay the other party an amount, which is fixed partially on the basis of the sums outlaid, but not included in the taxable charges.

Appeal

Undertakings that are the subject of an infringement decision by the Council, as well as the Ministry, can appeal to the Paris Court of Appeal, which has exclusive jurisdiction. The appeal must be filed within a month, or ten days for interim measures, from the date upon which the decision was notified to the party concerned.

In addition, a petition for a stay of execution can be filed with the Chief Judge of the Paris Court of Appeal should the decision generate excessive adverse consequences or should facts of exceptional seriousness have arisen since the decision. The Supreme Court (*Cour de Cassation*) may review the decisions of the Paris Court of Appeal. These proceedings do not have a suspensory effect.

GERMANY

Introduction

Germany has missed the deadline set by EC Regulation 1/2003.[1] The current draft, the Law against Restrictions on Competition (7. *Novelle zum Gesetz gegen Wettbewerbsbeschränkungen*, GWB) was published recently and was due to come into force on 1 January 2005. The following refers to the current law (C-GWB) and also to the new draft law (D-GWB) to show both the status and the developments to be expected.

Relevant Law

The current German law does not provide for a possibility to notify a distribution agreement. The validity of the contract is dependent upon a self-evaluation by the contracting parties. Section 14 of the C-GWB prohibits any agreements on pricing and price conditions and, therefore, makes all of these agreements void. Section 16 of the C-GWB lists specific restrictive clauses, but does not make them automatically void, instead making that dependent upon a specific revocation by a Cartel Authority. Sections 19 and 20 of the C-GWB prohibit any abuse of market power.[2] The new law will delete Sections 14 and 16.

1. Contributed by Marcus Schriefers, Kleiner Rechtsanwälte, Stuttgart, Germany.
2. Kirchhoff, in Wiedemann, *Handbuch des Kartellrechts* (Munich, 1999) Section 9, note 22.

Instead, Section 1 of the GWB will remain and have a new interpretation similar to that of Article 81 of the EC Treaty. Distribution agreements will thereby be generally prohibited if they are more than necessarily restrictive as to, or even remove, competition. They are exempted under Section 2 of the D-GWB, similar to Article 81(3) of the EC Treaty.

Section 2 also refers to the EC group exemption regulations and makes them explicitly applicable for the German Cartel Authorities.[1] As Section 23 of the D-GWB provides that German law is basically to be interpreted following European competition law, as far as the GWB does not provide otherwise, the general provisions of EC law will apply also in Germany, including Section 1 of the C-GWB and the *de minimis* rule. The exception will be pricing conditions, as Section 4 of the D-GWB still provides that any restrictions on pricing and pricing conditions are generally prohibited, with no exemption.

Administrative Bodies

The main authority for antitrust law in Germany is the Federal Cartel Office (*Bundeskartellamt*, FCO), located in Bonn. It is under the supervision of the Ministry of Economics and Labor, located in Berlin. On the State level, each State Ministry of Economics also has a Cartel Department, which may act in any situation where just the State's territory is concerned, which happens only rarely.[2]

Under the current law, only the FCO is entitled to apply EU competition law.[3] Under the new law, both the State and the Federal Cartel Authorities will be competent for the application of European law, although is it hard to imagine how a State authority, which is limited to its State territory, shall apply European law, which would necessarily include any link to EU trade.

Procedures, Complaints and Timing

Each Cartel Authority can, using its own discretion, initiate proceedings if it becomes aware of any infringement of competition rules. This happens especially with the FCO, as it watches the markets very carefully. Any third party may also send a complaint to the competent Cartel Authority, requesting the initiation of proceedings. In all of these cases, which are administrative proceedings, the Cartel Authorities have full powers of investigation, which is governed by Sections 57 to 59 of the GWB (C and D) and will be extended under the new law by Section 50 a to d of the D-GWB, regarding the new European Network of Competition Authorities.

Third parties and, to some extent, now also general institutions acting to protect competition, may bring civil suits before the competent civil court, which must necessarily be a Regional Court. This complaint can be either for damages or to cease any anti-competitive behavior.

1. Wagner, "Der Systemwechsel im EG-Kartellrecht", WRP 2003, 1369, at p. 1370.
2. For a list, *see* www.bundeskartellamt.de/wDeutsch/service/LKBshtml.
3. Law against Restrictions on Competition, Section 50; Schultz, in Langen/Bunte, *Kartellrecht*, 9th ed. (2001) Section 35, note 6.

The German GWB, current and draft, does not contain any regulations on timing in these cases.

Measures

Under the current law, Section 60 of the C-GWB provides for the possibility of interim injunctions concerning Section 16 of the C-GWB, by which the administrative bodies can regulate any situation until final decision. This will continue in the draft, but the draft now also additionally provides, under Section 32 of the D-GWB, for the possibility of interim injunctions in general, which may be valid for only one year.

Generally, the sanctions under the current law are to cease anti-competitive behavior, which can be applied for both by the Cartel Authorities and third parties, damages being payable to third parties and the skimming of profits acquired through any anti-competitive behavior.[1] This will be extended under the draft by adding Section 32a to c, which also provides for the possibility to agree upon specific binding obligations with the violator.

Confidentiality

Generally, all decisions by the Cartel Authorities are published. During administrative proceedings,[2] the oral hearing can be held publicly, but a party may apply for internal hearings because of business secrets being involved.[3] Civil court hearings are generally public, but also allow for exceptions for the protection of important business secrets.

Language, Costs and Appeal

German law generally requires both administrative and civil court proceedings to be in the German language, although the courts sometimes do accept documents in foreign languages. The costs for administrative proceedings are limited and graded according to the pertinent measure, up to a maximum of €25,000, regarding general restraints on competition.

These can be doubled in special cases. Court costs are dependent upon the German law on court costs, which is similar for lawyers' fees, which are also dependent upon the value in question. Regarding lawyers' fees, it is highly unusual that specialists in cartel law will invoice under the legal rules but, instead, request hourly fee agreements. For both administrative and first instance civil court proceedings, any appeal goes to a specific Higher Regional Court, where certain chambers specialize in cartel law. Decisions by these Higher Regional Courts can again be appealed just on legal grounds to the Federal High Court in Karlsruhe.

1. Law against Restrictions on Competition, Sections 32–34.
2. Kollmorgen, in Bunte/Lange, *Kartellrecht*, 9th ed. (2001) Section 79, note 3.
3. Law against Restrictions on Competition, Section 56.

GREECE

Introduction to Relevant Law

Law 703/1977 on the control of monopolies-oligopolies and free competition (as has been amended by Laws 1934 and 2000/1991, 2296 and 2323/1995 and 2837 of 2000) is the basic antitrust law in Greece (the Law).[1] This law, in essence, reproduces the contents, on the one hand, of Articles 81 and 82 of the Treaty of Rome and, on the other hand, of the relevant regulations of the European Commission and sets the conditions for acceptance of, as well as the restrictions upon, agreements, associations and practices between commercial undertakings. Recent Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty has not yet been embodied in the Law, but it is directly applied and is considered to be internal law.

Nevertheless, new legislation on the harmonization of the Law with the above Regulation is expected to be issued shortly. The national competition authority, the Hellenic Competition Commission (HCC), is already working on a new draft law with this objective. Following the enactment of Regulation 1/2003, the cooperation of the national competition authority with the European Commission and other national competition authorities of the Member States of the European Union has been intensified through the network of competition authorities, which was established by the above Regulation.

Administrative Bodies, Courts and Appeals

The Hellenic Competition Commission was first constituted under the Law. The HCC will most probably be the authority that will be entrusted with the powers delegated by the European Commission by virtue of Regulation 1/2003. It is expected that the HCC, with its new powers, will more efficiently serve the objectives of free competition, both on a national and a European level. The HCC functions as an independent authority supervised by the Minister of Development and is generally competent to check the compliance of all parties concerned with the provisions of the Law.

Under its competence, the HCC issues decisions with a view to certifying that, in specific cases, there is no violation of the provisions of Articles 1(1) and (2) of the Law, concerning the agreements and associations of undertakings and concerted practices which may lead to the distortion of free competition, as well as the abuse of a dominant position in the relevant market. The HCC threatens and imposes fines, pecuniary punishments and other sanctions provided by the Law. In the event that free competition is restricted beyond the domestic level, the interested parties may initiate the relevant procedure before the European Commission. In any event, the HCC may refer the file to the European Commission.

The court competent to decide upon competition issues is the Administrative Court of Appeal of Athens. Before this Court, any appeals against the relevant

1. Contributed by Konstantinos S. Issaias, Daniolos, Issaias & Partners, Piraeus, Greece.

decisions of the HCC and of the Minister of Development[1] may be filed within a time limit of twenty days from service of the relevant decision on the party concerned. Filing of the appeal will not automatically suspend the enforcement of the relevant decision. The hearing of the appeal before the Court should compulsorily take place within three months from filing. The decision of the Court of Appeal may thereafter be subject to an application for reversal before the *Conseil d'Etat* on specific legal grounds. The decisions of the above courts are equipped with *res judicata*. In case no appeal is filed before the courts against a decision of the HCC or of the Minister of Development, according to Article 18 of the Law, all courts may only incidentally (in the course of a separate procedure with a different objective) judge the validity of the relevant decision.

Complaint Forms and Procedures

Article 24 of the Law provides the right of any natural or legal person to complain against any infringement of its provisions. The HCC provides (in Greek) forms for drafting the relevant complaints, as well as for the applications filed for negative clearance. The complaint is filed in duplicate and must necessarily contain the details of the complainant, of the undertakings complained against, the objectives of the complaint, that is, facts and information that establish the infringement, and any other information, for example, details of third parties that may provide evidence.

Applications for negative clearance are also filed in duplicate and should contain the details of the undertakings, their agents for service and legal representatives, information on the contents of the relevant agreement for which clearance is sought and reference to the specific grounds on the basis of which the interested party supports that free competition is not obstructed.

Timing

The HCC is obliged to issue its decision on the complaint within six months from filing thereof and in extraordinary cases within eight months. In practice, the authority quite often cannot observe deadlines because the files of complaints are not complete at the commencement of the procedure and time-consuming searches need to be undertaken.

Interim and Final Measures

According to Article 9(4) of the Law, the HCC is exclusively competent to take injunctive measures *ex officio*, following an application from a complainant or the Minister of Development, in cases where the infringement of Articles 1 and 2 of the Law[2] is considered very probable and there is an urgency consisting of the avoidance of an imminent risk of irreparable damage to the complainant or to the public

1. The Minister of Development is competent to issue block exemptions following the consent of the HCC.
2. Articles 1 and 2 concern the agreements of undertakings and concerted practices, which may lead to the distortion of free competition, as well the abuse of a dominant position in the relevant market.

interest. The HCC may threaten pecuniary penalties for each day of non-compliance. The decision is issued within fifteen days[1] from the application and is subject to appeal before the Administrative Court of Appeal.

In cases of infringement of its provisions, the Law provides that fines may be threatened or imposed by the HCC upon the undertakings concerned. A fine may amount to up to fifteen per cent of the gross income of the undertaking for the current or preceding financial year. There is also a penalty of up to €6,000 for each day of non-compliance with the decision of the HCC in an ordinary procedure and €3,000 for each day of non-compliance with a decision concerning injunctive measures.

Criminal sanctions are provided for persons violating the provisions of the Law individually or on behalf of undertakings. The penalties may either be pecuniary ones (€3,000 to €15,000) or imprisonment for up to three months. In addition, the HCC may make recommendations or oblige the undertaking to abstain from the relevant infringement.

Confidentiality

Article 27 provides that the data collected during the process of the application of the Law should be treated confidentially and may only be used for the purposes pursued by the Law.

In the negative case, disciplinary and pecuniary sanctions are provided. Where necessary, the data collected by the HCC may be transferred to other national competition commissions of other States in the European Union, which are also bound by the confidentiality duty.

Language

The language of the proceedings before the HCC and the courts must be Greek.

Costs

For the filing of a complaint, no fee need be paid to the HCC. For the filing of negative clearance applications or applications for injunctive measures, a cost of €300 is to be paid.

HUNGARY

Regulatory Framework

The fundamental provisions of Hungarian competition law,[2] including provisions on vertical agreements, are set out in Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Competition Act), which covers both competition restricting practices (antitrust law) and unfair market practices of undertakings. The

1. The relevant deadline is strict and is followed by the HCC.
2. Contributed by László Szécsényi and Judit Vadász, Szécsényi Ügyvédi Iroda / Cerha Hempel Spiegelfeld Hlawati, Partnerschaft von Rechtsanwälten, Budapest, Hungary.

Competition Act was most recently amended in 2003 to adapt Hungarian competition law to the key provisions and principles of European competition law. Hungarian competition law, therefore, currently covers the principles of Articles 81 and 82 of the EC Treaty.

Authorities

Locally competent regional civil courts have exclusive jurisdiction in civil law cases under the Competition Act. The responsibilities concerning the supervision of competition as defined in the Competition Act are performed by the Office of Economic Competition (*Gazdasági Versenyhivatal*, OEC). The OEC's decisions cannot be appealed. However, a judicial review may be requested from the Metropolitan Court (*Fovárosi Bíróság*).

An extraordinary judicial supervision of the Metropolitan Court's decision may be requested from the Supreme Court (*Legfelsobb Bíróság*), which serves as the court of last instance. The OEC is entitled to carry out all duties assigned to the competition authority of a Member State by Council Regulation Number 1/2003/EC and qualifies as a competition authority within the meaning of Regulation 1/2003.

No Procedural Specifics as to Vertical Agreements on Distribution

There is no obligation of notification in respect of vertical agreements falling under European and Hungarian competition law. No approval of the vertical agreement from the OEC is required. Companies unsure of whether a vertical agreement contravenes legal prohibitions may apply to the OEC for negative clearance.

The application fee of such procedure amounts to HUF 100,000 (approximately €400). A decision on the merits of the case shall be made by the OEC within ninety days from the date of receipt of the application. Such time limit may be extended by a maximum of sixty days. The OEC publishes its final decisions.

Procedural Issues

The OEC may examine and prohibit vertical agreements falling within Article 81 of the EC Treaty upon the request of persons whose rights or lawful interests are affected by the agreements. Such a proceeding may also be initiated *ex officio*. The exact amount of the procedural costs of such procedure is not specified by the Competition Act, but is determined by the OEC. The costs shall be borne by the undertaking if an infringement was established, otherwise, procedural costs are borne by the State. A decision on the merits of the case must be made within 180 days after the investigation was initiated. Such time limit may be extended twice by a maximum of 180 days each.

In the case of a violation of Article 81 of the EC Treaty, the OEC may impose primary fines. The maximum fine amounts to ten per cent of the net turnover of the violating undertaking in the preceding business year. Apart from primary fines, disciplinary fines may be imposed upon the party or other persons participating in the proceedings if they engage in an act or display behavior that is aimed at prolonging the proceedings or preventing the disclosure of facts.

Recent Developments

An amendment to the Competition Act is currently being discussed. One of the major issues of the amendment is the revision of the current rules of procedure. The aim of the amendment is to simplify and to clarify the relevant provisions of the Competition Act and to harmonize them with the EC competition law. Details of the intended amendment have not yet been published.

Confidentiality

The OEC is obliged to publish its final decision on the merits of a case. As to access to the files in the proceedings, it is the undertaking party to the proceedings and the prosecutor that may, at any time during the course of the proceedings, have access to the file and make copies and notes thereof. Even the party's and the prosecutor's access to documents in the file may, however, be restricted with regard to the protection of business secrets.

Other parties to the proceedings, for example, witnesses, may only gain access to the documents of the proceedings with the permission of the OEC. The OEC may allow third persons or undertakings that are not part of the proceedings access to the files or part of the files only if such third persons or undertakings demonstrate a legal interest and such legal interest outweighs the confidentiality interest of the parties to the proceedings.

IRELAND

Relevant Law

On 1 January 2004, new rules governing the application of Irish competition law to vertical agreements came into effect.[1] The new rules replace the former Notice and Declaration in operation since 1998 and bring the Irish competition law regime more into line with the EU rules on vertical agreements.

The new rules take the form of a Competition Authority Notice and Declaration, which set out the conditions under which vertical agreements will be considered not to infringe Section 4 of the Competition Act 2002 (the Act). Section 4 of the Act is actually the implementation of Article 81 of the Treaty of Rome. Whether the Notice or Declaration applies will largely depend on the type of vertical agreement and the market share of the parties.

Agreements Covered

The new regime covers all vertical agreements in respect of goods and services, which may affect trade in Ireland, in contrast to the previous regime, which applied only to agreements between suppliers and resellers. The new rules do not apply to exclusive purchasing agreements in respect of motor fuels and liquefied petroleum gas (LPG).

1. Contributed by Mark Lonergan, HLB Nathans, Dublin, Ireland.

Agreements for the sale of motor fuels in service stations (solus agreements) will continue to be the subject of a separate Category License/Declaration until 2008. The Authority is currently deciding what, if any, arrangements to make in relation to LPG. The Notice does not apply to vertical agreements between competing undertakings. However, the Declaration will apply where competing undertakings enter into non-reciprocal vertical agreements in certain circumstances.

The Notice

The purpose of the Notice is to give guidance on the types of agreements that the Competition Authority considers fall outside the scope of Section 4 of the Act. Subject to compliance with specific conditions set out in the Notice, the Authority considers that Section 4 will not cover non-exclusive distribution agreements and genuine agency agreements.

In the case of exclusive distribution and exclusive purchasing agreements, selective distribution arrangements and franchising agreements, the Notice applies where the parties to an agreement comply with the conditions set out and have less than a fifteen per cent share of the relevant market. The fifteen per cent threshold is a reduction from twenty per cent under the old rules.

The Declaration

The Declaration covers broadly defined vertical agreements, which fall within Section 4 of the Act but which, in the Authority's view, satisfy the conditions for exemption set out in Section 4(5). Where the supplier or, in certain cases, the purchaser, has thirty per cent or less of the relevant market (but more than fifteen per cent) and the agreement complies with the terms of the Declaration, the agreement will qualify for an exemption under Section 4(5) of the Act. The thirty per cent threshold is the same as that set by the EU Block Exemption Regulation on vertical agreements, and has been reduced from forty per cent under the former Irish regime.

Where the thirty per cent market share threshold is exceeded, vertical agreements, with the exception of genuine agency agreements or non-exclusive distribution agreements, cannot benefit from either the Notice or the Declaration. However, this does not mean that agreements above this threshold are automatically prohibited. It is no longer possible to notify agreements to the Competition Authority for prior clearance. Instead, the parties will need to assess for themselves, with the help of their advisors, whether the arrangements are likely to have anti-competitive effects. In making this assessment, guidance may be obtained from a variety of Irish and EU sources, including the 2000 European Commission Guidelines on Vertical Restraints and the Information Booklet on the Irish regime issued by the Authority in 2004.

Excluded Objects and Restrictions

The Notice or Declaration will not apply to vertical agreements that have as their object: "If an agreement contains any of the above restrictions, it cannot benefit from the Notice or Declaration". Although it is then open to parties to self-assess, some restrictions, in particular, resale price maintenance, are unlikely ever to be acceptable. However, other restrictions, such as a longer than five-year non-compete provision, may be acceptable in certain cases.

Withdrawal of the Notice/Declaration

The Competition Authority may withdraw the benefit of the Notice and/or Declaration to exclude a particular category of goods or services. It will do so in the case of markets characterized by networks of similar agreements, where competition or access to the market is significantly restricted by the cumulative effect of these agreements.

Transitional Period

Agreements entered into after 1 January 2004 must comply with the terms of the Notice or Declaration in order to benefit from the "protection" they give. Parties to agreements entered into before 1 January 2004 have a six-month transitional period, until 30 June 2004, during which to bring their arrangements into conformity with the new regime.

It is hoped that by bringing the Irish regime more into line with the EU regime on vertical agreements, the new Notice and Declaration will facilitate compliance by undertakings with competition law, reduce confusion and lower compliance costs.

Administrative Bodies and Courts

The day-to-day administration of the Act and derivative legislation has been entrusted to the Irish Competition Authority, which is an independent body. The Competition Authority may take up a case on its own initiative, following a notification, on the basis of a complaint or as a result of a referral from other EU competition authorities or the Commission. The handling of complaints, consultations and general administration is the responsibility of the Competition Authority, which decides all major cases and test cases on the basis of submissions submitted to it.

The Competition Authority also handles requests for negative or prior clearance, but cannot issue abstract opinions on the interpretation of Irish competition regulation. Anyone with an individual significant interest in a specific issue may, however, complain to the competition authorities and thus extract an "opinion" on the specific issue concerned.

The Competition Authority currently consists of a Chairman and four other members with specialist financial and legal knowledge, independent of any business interests. The Competition Authority's determinations can be appealed to the Irish High Court, with a further appeal to the Supreme Court on a point of law.

Language

All proceedings before the Competition Authority and the courts in Ireland will be conducted in the English language.

Timing

There is no way to determine in advance how long before the Authority will consider a complaint. The Authority takes the view on foot of its assessment of a complaint where there is reason to believe that there has been a breach of the competition rules.

Appeals

Decisions of the Competition Authority can be appealed to the High Court pursuant to Section 34 of the Competition Act 2002, and further appeals on points of law can be made to the Supreme Court. The respective court procedures must be followed in both courts.

Interim Measures

The Competition Authority has power to impose fines for breaches of competition law. It is also possible for a company to apply to the High Court for an injunction restraining a company from breaching the Competition Act pending a determination of the issues.

Confidentiality

The Irish Competition Authority is under a duty to preserve confidentiality with respect to cases under investigation and is under a statutory duty to share confidential information with European competition authorities or competent national authorities in other Member States in certain circumstances.

ITALY

Relevant Law

Italian Law Number 287 of 10 October 1990, the Competition and Fair Trade Act (the Law), provides for a complete regulation of competition in Italy and established the Italian Competition Authority.[1] The Law has not been amended since Regulation 1/2003 and, as of today, no process of amendment has been proposed or started.

The new Italian Antitrust Law is generally regarded as subordinate to existing EU rules, and its interpretation is to be considered subject to the principles contained in the EU antitrust legislation. Hence, even if an agreement is restricted to the Italian market, it will be governed by Italian law only when not already subject to EU legislation.

Competition Authorities and Courts

The Law established the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*), setting out the regulation of the Authority and indicating its duties and powers. In particular, the Authority is responsible for controlling:

(1) Agreements that impede competition;
(2) Abuses of dominant position; and

1. Contributed by Stefano Cima & Gabriele Pignatti Morano, Piergrossi Villa Bianchini Riccardi, Milan, Italy.

(3) Mergers and acquisitions which create or strengthen a dominant position with the effect of eliminating or restricting competition.

The Authority is competent in respect of misleading and comparative advertising, and it is also required to submit reports to Parliament and to the Government and to provide them with consultancy services. The Italian courts can be asked to rule in respect of Articles 81 and 82 of the EC Treaty if:

(1) The defendant claims that an agreement infringes Article 81 in a court proceeding in respect of the performance of such agreement and states that it is null and void; or
(2) A party claims that the agreement infringes Articles 81 and 82 and claims damages in respect thereof.

Italian courts should rule according to the principles of the European Court of Justice, according to Article 16 of Regulation 1/2003.

Agreements and Exemptions

Title 1 of the Law provides rules in respect of agreements between enterprises, abuse of dominant position and concentrations. Such rules are designed to comply with the EU regulation in respect of Articles 81 and 82 of the Treaty of Incorporation of the European Community. With particular reference to distribution agreements, Article 2 of the Law states that accords and/or concerted practices between undertakings and any decisions, even if adopted pursuant to their Articles or Bylaws, taken by consortia, associations of undertakings and other similar entities, shall be regarded as agreements. Agreements are prohibited between undertakings which have as their object or effect appreciable prevention, restriction or distortion of competition within the national market or within a substantial part of it. Prohibited agreements are null and void.

Article 4 of the Law states that agreements that are subject to the provisions of Article 2 can be exempted by the Authority if they can improve the offer to the market and, as a consequence, can grant a benefit to consumers. Such improvement shall be identified, taking into account the need to guarantee the necessary competition of the enterprises on the international market and connected with the increase of production or distribution, or with technical or technological progress. The exemption may not cause competition to be eliminated from a material part of the market. The exemption is granted by the Italian Competition Authority upon the request of the notifying companies.

As to the notification of agreements, Regulation 1/2003, as well as any other EU regulation, is directly applicable in Italy and its provisions shall prevail over national laws. Therefore, the above notification of agreements should not be necessary according to Regulation 1/2003. However, the regulation issued by the Italian Authority in respect of the notification of agreements and the request for an exemption has not yet been amended. According to such regulation, which contains instructions and information, notifying enterprises must provide a detailed list of information. The request must be completed with a list of documents required by the Authority in order to evaluate the agreement and the reasons for the exemption.

Within 120 days from the filing of a communication of an agreement, or a request for exemption, the Authority can open an investigation to verify the existence of any violation of the Competition Law. If the Authority does not start the procedure within such a time, the Authority cannot start an investigation later as to the agreement, unless the parties have given false or incomplete information. When the Authority starts an investigation into an agreement, it should be completed within 120 days.

Interim and Final Measures

If the Authority finds an infringement of the Competition Law, the Authority may impose sanctions upon the parties to the agreement. However, if the parties do not perform the agreement during the period starting from the notification to the deadline of 120 days, the Authority shall not impose any sanctions upon the notifying enterprises. In addition, the Authority can grant the parties a time period within which to remedy the infringement.

According to Article 33 of the Italian law, petitions for emergency measures to be adopted in respect of infringements of the provisions of the Competition Law must be filed before the Court of Appeal having jurisdiction over the place of infringement. The Court of Appeal, which acts as the court of last instance without possibility of appeal, shall proceed according to the rules of Articles 669*bis et seq.* of the Italian Civil Procedure Code.

Confidentiality

The Authority and its officials and employees must keep any information obtained from the notifying companies confidential. However, the Authority publishes in its weekly bulletin any of its decisions, including communications and requests for exemption.

Notifying companies wishing to keep the information disclosed to the Authority confidential and avoid the publication of their agreements must ask the Authority to keep such information confidential and not to publish it in the magazine.

Appeal

Against a refusal of exemption, the parties to an agreement can bring an appeal before the Administrative Court (TAR) of the Lazio region within thirty days from the notification of the refusal. Against the judgment of the TAR, the parties can bring an appeal before the Higher Administrative Court (*Consiglio di Stato*).

Language

The Regulation does not provide for a specific language, but the notification should be in Italian.

Costs

There are no specific costs for the notification or for the investigation itself.

LATVIA

Introduction to Relevant Law

The basic competition law provisions of Latvia are included in the Competition Law, which has been in force since 1 January 2002 and which has been amended only once on 22 April 2004, the amendments being in force since 1 May 2004.[1] This Law contains rules regarding prohibited agreements, corresponding to Article 81 of the EC Treaty, rules regarding the abuse of a dominant position, corresponding to Article 82 of the EC Treaty, and specific rules of Latvian legislation concerning merger control preventing the market participants from establishing and strengthening a dominant position in the market and rules prohibiting unfair competition.

Administrative Bodies and Courts

The Competition Council of Latvia has been established with the purpose to apply the Competition Law. Its obligations are as follows:

(1) Monitoring the observance of the prohibitions against the abuse of a dominant position, unfair competition and prohibited agreements by market participants;
(2) Monitoring the observance of the Advertising Law;
(3) Examining submitted notifications regarding market participant agreements and decisions taken in respect of them;
(4) Restricting market concentrations by taking decisions in relation to mergers of market participants; and
(5) Cooperating, within the scope of its competence, with relevant foreign institutions.

The aforesaid functions of the Council also include the following rights of the Council:

(1) To announce the Council's opinions and recommendations;
(2) To carry out assessments regarding conformity of the activities of market participants with regulatory enactments that regulate competition; and
(3) To issue prior clearance to the agreements of market participants.

In addition, the Council is entitled to exercise all powers that it has been assigned according to Regulation 1/2003.

According to Latvian legislation, the ordinary courts are allowed to exercise jurisdiction over the infringements of the Competition Law concurrently with the Competition Council. The decisions of the courts of first instance can be appealed.

1. Contributed by Edgars Briedis, Sorainen Law Offices, Riga, Latvia.

Complaint Forms and Procedures

The Competition Council may open a case regarding infringements on the basis of an application, its own initiative or a report from any other institution. Any interested party may submit an application to the Competition Council. A party is recognized as interested if its rights or legal interests may be violated in the case of an infringement. In the application, the following information shall be given:

(1) The party involved in the infringement;
(2) Evidence of the infringement upon which the application is based;
(3) The competition rules breached;
(4) The facts proving the interest of the party submitting the application; and
(5) The measures taken before submitting the application with the purpose of terminating the infringement.

The Competition Council makes a decision regarding the opening of the case or rejecting the application within seven days after receiving the application.

Timing

After opening the case, the Competition Council is empowered to obtain information to make a final decision in the case. The person who is required to submit the information shall do it within seven days. If it is not possible to submit the information within this time, the Competition Council may set another deadline for submitting the information demanded. The Competition Council makes the final decision in respect of the case within thirty days from the case having been opened.

If, due to objective reasons, it is impossible to make the final decision in the case within the said term, the Competition Council may prolong the term for making the final decision for up to four months. If the investigation to be made in the case is time-consuming, the Competition Council may prolong the term for making the final decision for up to a year from the case having been opened. The Competition Council informs the parties involved and any interested party of the final decision or the decision to prolong the term within seven days.

Interim and Final Measures

Final Measures Regarding Prohibited Agreements

The Competition Council may impose upon market participants fines of up to five per cent of their net turnover for the previous financial year, but not less than LVL 250 (€385) for each of them.

The Competition Council may impose upon market competitors fines of up to ten per cent of their net turnover for the previous financial year, but not less than LVL 500 (€770) for each of them.

Final Measures Regarding Abuse of Dominant Position

The Competition Council may impose upon market participant fines of up to five per cent of their net turnover for the previous financial year, but not less than LVL 250 (€385) for each of them.

Interim Measures

Where the Competition Council has evidence of infringement of the EU competition rules and this infringement may cause relevant and irreversible harm to competition, the Competition Council may make an interim decision. Pursuant to this decision, performance of a specific action by a market participant may be demanded or prohibited.

Confidentiality

According to the Competition Law, confidential information obtained in the course of performing the Council's official duties shall not be disclosed, except in specific cases prescribed in regulatory enactments.

Language

The procedural language of the Competition Council is Latvian.

Costs

There are no State fees to be paid upon the submission of an application by an interested party to the Competition Council regarding an infringement of the competition rules, but there are State fees for submitting an application to the court regarding an infringement of the competition rules.

The amount of such fees depends upon the amount of damages claimed by the plaintiff from the market participant who has infringed the competition rules. The fee is minor if the application to the court contains only a request to establish a fact that there is an infringement of the competition rules and a request to impose a duty upon the defendant to stop the infringement, without requesting damages.

Appeal

The administrative courts have jurisdiction over the Competition Council's final decisions.

LITHUANIA

Introduction to Relevant Law

The competence of the Lithuanian competition authorities and national courts to apply Articles 81 and 82 of the EC Treaty and corresponding provisions of the Lithuanian competition law rules is regulated mainly by the Competition Law of the

Republic of Lithuania, which was adopted on 23 March 1999, its last amendments being made on 15 April 2004.[1] This law implements Regulation 1/2003. In addition, the possibility for the national competition authorities and national courts to apply Articles 81 and 82 of the EC Treaty is also regulated by the Regulations of the Competition Council approved by the Government under the Law of the Republic of Lithuania on Administrative Proceedings.

Administrative Bodies and Courts

According to the Competition Law, the administrative body responsible for applying the relevant Lithuanian and EU competition rules is the Competition Council. The Competition Council also has the power to render assessments, opinions and prior clearances. As far as the Competition Law implements Regulation 1/2003, the Competition Council has the same powers as enshrined therein. Its decisions might be appealed to the Vilnius Regional Administrative Court, whose decisions might further be appealed against to the Supreme Administrative Court of the Republic of Lithuania.

Complaint Forms and Procedures

The request for an investigation to be carried out must be submitted in a written application, specifying the facts and circumstances of the restrictive practices the applicant is aware of. Documents confirming these facts must be attached to the application. The Competition Council must examine the application within thirty days. The Competition Council will take a justified decision to investigate the restrictive practices unless:

(1) The facts indicated in the application are immaterial, causing no substantial damage to the interests protected under the competition law rules;
(2) Investigation of the facts specified in the application is not within the Competition Council's remit;
(3) The facts specified in the application have already been investigated and a resolution of the issue has already been achieved;
(4) The applicant has failed to provide the data and documents required to initiate the investigation; or
(5) There is no available data reasonably showing an infringement of the competition law rules.

Timing

The Competition Council must examine applications filed with respect to restrictive practices not later than within thirty days from submission of the application and documentation and take a decision to start or to refuse to start the investigation. The Competition Council must complete the investigation not later than within five

1. Contributed by Edgars Briedis, Sorainen Law Offices, Vilnius, Lithuania.

months from the commencement thereof. The Competition Council may extend the period by a justified resolution by up to three months.

Interim and Final Measures

In cases where there is sufficient evidence of infringement of the Competition Law or relevant EU competition laws, the Competition Council, seeking to prevent substantial or irreparable damage to the interests of undertakings or public interests, has the right to apply interim measures necessary for the implementation of the final decision of the Competition Council. The following interim measures with respect to undertakings suspected of infringement can be applied:

(1) Obligation upon the undertaking to cease illegal activity; and
(2) Upon being issued a warrant by the judge of the Vilnius Regional Administrative Court, an obligation upon the undertaking to perform certain actions if failure to perform the same would result in serious damage to other undertakings or public interests or incur irreparable consequences.

Before adoption of a resolution on an application for interim measures, the undertaking suspected of infringement has the right to make representations. Within one month, the decision of the Competition Council on the application for interim measures may be appealed against to the Vilnius Regional Administrative Court. However, the lodging of a complaint does not suspend the application for interim measures.

Upon establishing that an undertaking has engaged in conduct prohibited under the competition law rules, the Competition Council has the right to apply the following final measures:

(1) To place the undertaking under an obligation to end illegal activity, to carry out actions restoring the previous situation or eliminating the consequences of the infringement, including the obligation to cancel, amend or conclude contracts;
(2) To impose a fine upon the undertaking, the amount of such fine, depending on the infringement, being up to ten per cent of the gross annual income of the preceding business year of the undertaking in respect of which the decision to impose a fine was adopted; and
(3) Upon being issued an authorization by the Vilnius Regional Administrative Court judge, to prescribe restrictions on economic activity by suspending export-import operations, bank operations and the validity of the permit (license) to engage in certain economic activity.

Confidentiality

Commercial secrets disclosed to the Competition Council and its administrative staff during their exercise of control over compliance with the Competition Law and the EU competition laws must be kept confidential and, in the absence of the undertaking's consent, must be used only for the purpose for which the information was provided. For the disclosure of commercial secrets of undertakings, the Competition Council and its administration are liable under the law.

Language

All documents presented to the Competition Council and Lithuanian courts must be in the Lithuanian language. If original documents are not in Lithuanian, verified translations must be annexed thereto. All proceedings in front of the Competition Council and Lithuanian courts are held in the Lithuanian language. A translator might be assigned upon the request of a party.

Costs

There are no costs provided for in the relevant laws and regulations to be paid for the submission of an application for investigation of acts falling under the competition law rules.

Appeal

A resolution by the Competition Council may be appealed against before the Vilnius Regional Administrative Court within twenty days after its delivery or after publishing thereof in the *State Gazette*. Unless the court decides otherwise, the lodging of the complaint does not suspend the implementation of the resolution. Upon investigation of the complaint, the Court shall make one of the following decisions:

(1) To leave the resolution as it stands and to reject the claim;
(2) To revoke the resolution or its individual sections and to remand the case to the Competition Council for supplementary investigation;
(3) To revoke the resolution or its individual sections; or
(4) To amend the resolution on concentration, the application of penalties or interim measures.

The decisions of the Vilnius Regional Administrative Court may be appealed against before the Supreme Administrative Court of the Republic of Lithuania within fourteen days after the announcement thereof.

MALTA

Regulatory Framework

Competition law[1] in Malta is regulated by the Competition Act,[2] enacted by means of Act XXXI of 1994, as amended by Acts XXVIII of 2000, IV of 2003 and III of 2004. The Competition Act (the Act) is in line with the provisions of Council Regulation 1/2003/EC. In addition to the provisions of the Act, two Legal Notices, which

1. Contributed by Antoine Camilleri and David Tonna, Mamo TCV Advocates, Valletta, Malta.
2. Chapter 379 of the Laws of Malta.

have been adopted according to the provisions of the same Act, are of particular relevance:

(1) The Vertical Agreements and Concerted Practices (Block Exemptions) Regulations 2001;[1] and
(2) The Technology Transfer Agreements (Block Exemption) Regulations 2002.[2]

Administrative Bodies and Courts

The Office for Fair Competition (*Ufficcju ghall-Kompetizzjoni Gusta*, the Office) was set up by the Act itself and is headed by a Director. The Office is a government department, which carries out a number of functions according to the law, including advising undertakings and the public in relation to matters concerning fair trading practices, making proposals and recommendations to the Maltese Minister responsible for commerce and carrying out the functions assigned to it by the Act in relation to investigations, determination and suppression of restrictive practices.

The Commission for Fair Trading (*Kummissjoni ghall-Kompetizzjoni Gusta*) was also set up by the Act and is composed of a Chairman and two other members, who are appointed by the Maltese President on the advice of the Maltese Prime Minister. The Act contains a Schedule, which outlines the Rules of Procedure Relating to the Commission for Fair Trading (the Commission). The Schedule requires the Commission to determine any matter before it with fairness and impartiality and in accordance with the provisions of the Act. The meetings of the Commission must be held *in camera*, though the Director has a statutory right to be present during all meetings. In addition, the relevant undertakings and any complainant have a right to make submissions on any matter before the Commission, as well as to present any documents or other evidence that may be relevant.

The European Commission, in all cases involving the application of Article 81 and/or Article 82 of the EC Treaty, has a right to make submissions on any matter to the Commission and is also empowered to present any documents or other evidence that may be relevant. The Act gives the Commission, exercisable through the Chairman, the powers vested in a Maltese civil court of first instance and, in particular, the power to summon witnesses, the power to appoint expert witnesses and referees and the power to administer the oath. In the interpretation of the Act, the Commission is obliged to have recourse to its previous decisions, judgments of the Court of First Instance and the Court of Justice of the European Community. The Commission is also obliged to have recourse to the relevant decisions and statements of the European Commission, including interpretative notices on the relevant provisions of the EC Treaty and secondary legislation relating to competition.

Complaint Forms and Procedures

The Director is duty bound by the Act to ensure that all observe the provisions of the Act. In so doing, he may gather information that may be necessary for him or for the

1. Legal Notice 271 of 2001.
2. Legal Notice 176 of 2002.

Commission to carry out their functions. In this regard, the Director has the power to carry out investigations on his own motion, at the request of the Minister responsible for commerce or upon a reasonable allegation in writing. Such allegations are known as complaints, which are filed by individuals or by undertakings. Investigations may also be set into motion by the Director at the request of any designated national competition authority of another Member State or the European Commission.

The Director is empowered by the Act to enter into and search premises and to seize documents and objects or seal premises. Where, after conducting investigations, the Director deems that an infringement of Article 5 and/or Article 9 of the Act[1] has taken place, he issues a decision finding an infringement, giving his reasons therefor. Such decision is then communicated to the undertaking concerned and may be accompanied by a cease and desist order, whereby the undertaking would be requested to cease and desist immediately from participating in any agreement, decision, concerted practice or conduct deemed to be in violation of Article 5 and/or Article 9 of the Act. Otherwise, the Director may issue a compliance order together with his decision, which would set behavioral or structural remedies to be observed for the purpose of bringing the infringement to an immediate and effective end. The Commission, at the request of the undertaking concerned, may review such decision. In the event of serious breaches of Article 5 and/or Article 9 of the Act, the Director is obliged to submit a report to the Commission outlining the Director's findings and containing supporting evidence.

Interim and Final Measures

The Commission may, at the request of the Director, of an undertaking or of a complainant, through the Director, take interim measures intended to suspend any restrictive practice under investigation if it is urgently necessary to avoid a situation likely to cause serious, immediate and irreparable prejudice to the interests of any undertaking, or to harm the general economic interest.

Any such measure given by the Commission has immediate effect and remains in force for a period of three months unless it is previously revoked by the Commission or unless the matter under investigation has been determined by the Commission before the said period of three months. The Commission is empowered to issue the same measure for a further period or periods of three months each, though the measure may in no case extend beyond a maximum period of one year.

Confidentiality

Any information disclosed to the Director or any document produced to him during an investigation must be kept secret and confidential and may only be disclosed before the Commission in any matter before it or before a competent court in relation to any of a number of different offenses that are sanctioned by the Act.

In addition, where a report is sent to the complainant, the Chairman of the Commission is obliged to ensure that any confidential business information on the undertaking that is the subject of the proceedings is not included in the report. The

1. Articles 5 and 9 of the Act essentially reproduce Articles 81 and 82 of the EC Treaty, respectively.

same applies in respect of decisions of the Commission, which cannot disclose any business secret of any undertaking.

Appeal

The Act does not outline a system of appeal from the decisions of the Commission. However, nothing will preclude an undertaking or a party to proceedings, which had been brought before the Commission and which were decided by the same Commission, from filing an appeal before the Court of Appeal on certain basic principles, such as on principles of natural justice, that is, issues of impartiality of the Commission and the right of the parties to be equally heard in front of the Commission.

Language

Any document may be submitted to the Director and/or the Commission in the Maltese and/or English language.[1] Documents which may be written in another language must be accompanied by a certified translation.

Costs

For the filing of a complaint, no fee must be paid to the Director or to the Commission.

LUXEMBOURG

Introduction to Relevant Law

Further to Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down by Articles 81 and 82 of the EC Treaty,[2] Luxembourg legislation has been amended by the recent Law of 17 May 2004 relating to competition (the Law). This Law repealed the Law of 17 June 1970 relating to commercial restrictive practices. The Law applies to any activities of production and distribution of goods and services.

According to such Law, the price of goods, products and services is freely determined by free competition, except in certain sectors, such as petroleum products, pharmaceutical products and taxis, where the Minister of Economy may agree upon minimum prices with the concerned companies. The Law faithfully reproduces the content of Articles 81 and 82 of the EC Treaty and provides that some agreements, decisions and concerned practices, as defined by the Law, are null and void and that the abuse of a dominant position shall be prohibited. Most important is the creation, for the first time, of domestic competition authorities: the Competition Council (*Conseil de la concurrence*, the Council) and the Competition Inspectorate (*Inspection de la concurrence*, the Inspectorate).

1. The official languages of Malta are Maltese and English.
2. Contributed by Alex Schmitt and Anne Morel, Bonn Schmitt Steichen, Luxembourg.

Authorities

Competition Council

The role of the Council is to regulate the market and ensure that the public interest is protected. Its role is to find, prohibit and sanction restrictive practices. The Council is not a court, but an independent administrative authority, and is not a legal entity. It is in charge of exclusively controlling the correct application of Articles 81 and 82 of the EC Treaty when trade within the EU may be affected. The Council represents the Grand-Duchy of Luxembourg in the network of European competition authorities as set out by Council Regulation 1/2003.

Competition Inspectorate

The role of the Inspectorate is to receive complaints and to ascertain and investigate infringements of the Law and of Articles 81 and 82 of the EC Treaty. The Inspectorate has all the powers of inquiry and collects evidence and refers matters to the Council. To carry out its duties, the Inspectorate is entitled to, by simple request or by decision:

(1) Require undertakings or associations of undertakings to provide all necessary information;
(2) Interview any natural or legal person who agrees to be interviewed for the purpose of collecting information relating to the subject matter of an investigation;
(3) Conduct all necessary inspections of undertakings or associations of undertakings, the investigators being empowered to:
    (a) enter any premises, land or means of transport for professional use;
    (b) take or obtain delivery of books, invoices and any other professional documents;
    (c) make copies of such documents;
    (d) collect information and justifications on site or from persons requested to appear before the Inspectorate; and
    (e) search premises and seize documents only with the authorization granted by the President of the Court (*Président du Tribunal d'Arrondissement*);
(4) Proceed to an inspection of other premises, land and means of transport if there is a reasonable suspicion that the books or other records related to the business and to the subject matter of the inspection, which may be relevant to prove a serious violation of the Law and of Articles 81 and 82 of the EC Treaty, are being kept in such other premises, land and means of transport, including the domicile of the directors or managers or any other members of the staff of the concerned undertakings; and
(5) Appoint any experts and determine their mission.

Complaint Forms and Procedure

A matter may be referred to the Council either by the Inspectorate, by any natural or legal entity having a legitimate interest or by the Minister of the Economy. The complaint is sent by registered letter with acknowledgement of receipt.

The written complaint must contain a detailed description of the facts as well as its legal basis and all pieces of evidence. An appeal against a decision of the Council is brought before the Administrative Court (*tribunal administratif*) as the court of first instance. It is possible to appeal a judgment of the Administrative Court before the Administrative Court of Appeal (*Cour d'appel*).

Interim and Final Measures

The Council may:

(1) Adopt any measure to bring the infringement to an end;
(2) Impose coercive measures to bring the infringement to an end;
(3) Take interim measures in case of serious, immediate and irreparable infringement to public order or to an undertaking;
(4) Make commitments binding upon undertakings, where the Council intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer such commitments to meet the concerns expressed to them by the Council in its preliminary assessment;
(5) By decision, impose upon undertakings and associations of undertakings fines not exceeding ten per cent of their total turnover in the preceding business year; and
(6) By decision, impose upon undertakings and associations of undertakings periodic penalty payments not exceeding five per cent of their average daily turnover in the preceding business year per day and calculated from the date appointed by the decision.

Timing

The Inspectorate informs the undertaking or association of undertakings concerned of the grounds for complaint brought against it, clearly indicating the nature and legal basis of the facts and the time frame within which the addressee must reply to it.

Confidentiality

The members of the Council and agents of the Inspectorate, as well as any experts, are subject to professional secrecy as set out in Article 458 of the Luxembourg Criminal Code. They are required to keep secret all discussions and information with which they have been provided within the framework of their functions.

Language

The languages of proceedings before the Council and the inspectorate are French, German and Luxembourgish.

Costs

No fee must be paid to the Council or the Inspectorate for the filing of a complaint.

THE NETHERLANDS

Distribution Agreements

Under the laws of the Netherlands, no specific statutory requirements for distribution agreements exist.[1] The general provisions of contract law apply, meaning that there are no rules for the form of distribution agreements and that the parties are, in principle, free as to the content of the agreement. However, the freedom of the contracting parties is limited in two important aspects. Unless the agreement is closed after a definite period of time, the agreement may only be terminated upon applying a reasonable notice period, taking into account all relevant circumstances, for example, the duration of the agreement. Furthermore, the agreement may not violate the Dutch Competition Act and the European competition rules. In principle, Dutch law recognizes no right to goodwill compensation upon termination of a distribution agreement.

Dutch Competition Act

In 1997, the Dutch Parliament adopted the Dutch Competition Act (*mededingingswet*).[2] The Act entered into force on 1 January 1998 and, simultaneously, the Netherlands Competition Authority (*Nederlandse Mededingingsauthoriteit*, NMa) began its operations. The Dutch Competition Act applies to agreements, decisions, concerted practices, abuse of a dominant position and concentrations that affect competition in the Netherlands and have no cross-border effect in the European Union. If competition in the European internal market is affected, the European competition rules apply.

The Dutch Competition Act is based on and closely linked to European law. The Act is based on a prohibition system very similar to that of Articles 81 and 82 of the EC Treaty. According to Article 6 of the Dutch Competition Act, agreements, decisions and concerted practices are prohibited if they have as their objective or effect the prevention, restriction or distortion of competition. As in European law, the Dutch Competition Act provides for exemptions.

The *de minimus* provision in Article 7 of the Dutch Competition Act exempts competition agreements that are of minor significance. According to Article 24 of the Dutch Competition Act, undertakings are prohibited from abusing a dominant position. The criteria of Article 82 of the EC Treaty apply. Furthermore, the EC block exemptions based on Article 81(3) of the EC Treaty are incorporated into Articles 12, 13 and 14 of the Dutch Competition Act. Under Article 15 of the Dutch Competition Act, Dutch block exemptions may be granted by general administrative orders. Three such orders are at present in effect:

(1) Decision exemption combination agreements;[3]

1. Contributed by M. Bink and Ph. W. M. ter Burg, Buren Van Velzen Guelen, The Hague, The Netherlands.
2. Published on 22 May 1997, Stb. 1997, 242.
3. Stb. 1997, 592.

(2) Decision exemption agreements protection of branches;[1] and
(3) Decision exemption co-operation agreements retail trade.[2]

Notifications of Distribution Agreements

Further to the enactment of European Regulation 1/2003 and the subsequent abolition as of 1 May 2004 of the possibility to notify agreements to the European Commission, the Dutch Competition Act has been amended accordingly. As of 1 August 2004, the Dutch Competition Act no longer provides for the possibility of notifying an agreement to the NMa for obtaining dispensation under the Act. In addition, the NMa has abandoned its former practice of giving informal opinions on the validity of agreements under the Dutch Competition Act. Therefore, companies will have to make their own assessment as to the extent to which their practice is in compliance with the European and Dutch competition rules.

Measures

The NMa has been charged with the supervision of compliance with the Dutch Competition Act and, since 1 August 2004, also with the enforcement of the European competition rules. The Dutch Competition Act is enforced under administrative law. There is no role for penal law. As part of the enforcement of the Dutch Competition Act, the NMa can impose administrative fines, which makes Dutch competition law consistent with European competition rules.

In addition to the imposition of administrative fines, the NMa is authorized to impose interim measures subject to penalties. These measures are designed to terminate a violation (quickly) and consequently serve a different purpose from a fine. As measures subject to penalties and fines serve different ends, both can be imposed for the same offense. Fines may not exceed the higher of €450,000 or ten per cent of the undertaking's turnover in these cases. The maximum fine is, therefore, related to turnover and can vary from one undertaking to another. With this choice, too, the Dutch Competition Act complies with the system that applies for the European Commission.

Appeal

The undertaking concerned can file an administrative appeal with the Director General of the NMa against a decision of the Competition Authority to impose a fine and/or interim measures. The administrative appeal must be filed within six weeks of publication of the decision against which it is aimed. The Advisory Committee on Administrative Appeals advises on appeals and, prior to this advice, the interested parties will be invited to be heard. The NMa assesses cases on administrative appeal on the basis of the evidence and rules in effect at that time.

This means that parties can submit both new evidence and new arguments. The NMa must decide upon the appeal within a period of ten weeks, which period may be

1. Stb. 1997, 596.
2. Stb. 1997, 704.

extended once by four weeks. After such extension, the decision may only be postponed by the mutual consent of all parties. For the administrative proceedings, no fees or levies are due and no representation by a lawyer is required. The proceedings are not public, but the decision is published.

In the event that the undertakings concerned disagree with the decision on the administrative appeal, they may lodge a judicial appeal with the Rotterdam District Court. Against a decision of the Rotterdam District Court, an appeal may be filed with the Regulatory Industrial Organization Appeals Court (*College van Beroep voor het Bedrijfsleven*, CBB) in The Hague. For both courts, court registry fees are due and representation by a lawyer is required.

The Dutch Competition Act may also be raised in proceedings between market parties. For example, a party to an agreement may contest the validity of the agreement or certain clauses thereof on the basis of violation of the European or Dutch competition rules. Civil courts in summary proceedings often hear these cases.

Language

In principle, all legal proceedings in the Netherlands are held in the Dutch language. However, knowledge of the English language is widespread and often, although not as a rule, the filing of English language documents is allowed as evidence without the requirement to have these translated into the Dutch language.[1]

POLAND

Introduction to Relevant Law

Competition law in Poland is generally governed by the Act of 16 April 1993 on Counteracting Unfair Competition (UnCom),[2] which is designed to ensure fair competitive behavior, and the Act of 15 December 2000 on the Protection of Competition and Consumers (PCC), aimed at:

(1) Protecting the market against abuse of a dominant position;
(2) Regulating the market to prevent any entity from achieving a dominant position; and
(3) Counteracting activities violating the general interests of consumers.

The PCC provides rules for concentration notification and contains provisions that forbid the abuse of a dominant position and entering into agreements that exclude, limit or infringe upon competition in a given market. Article 8 of the PCC (abuse of a dominant position) adopted the same wording as Article 82 of the Treaty of Rome. Article 5 of the PCC, which has the same wording as Article 81 of the Treaty of Rome, excludes agreements which limit or infringe upon competition in a given market.

1. Further information, also in English, about the Dutch Competition Act and/or the Netherlands Competition Authority may be found at www.nmanet.nl.
2. Contributed by Iwona Chelkowska-Kamionka and Konrad Brzozowsk, Kalwas & Partners, Warsaw, Poland.

However, Article 7 of the PCC provides the Council of Ministries with the right to issue resolutions to declare the provisions of Article 5 of the PCC inapplicable with regard to certain vertical agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(1) Impose upon the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; or
(2) Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Any resolutions issued by the Council of Ministries must include requirements which must be met by the agreements (block exemption) in order to exclude the applicability of Article 5 of the PCC, the term of the exclusion (which varies in each resolution) and provisions that cannot constitute a part of agreements. Such agreements are excluded from the applicability of Article 5 of the PCC if the entrepreneurs involved share not more than thirty per cent of the market. It should be noted that the requirements for exclusion are defined separately for each resolution. Vertical agreements concluded in accordance with the resolutions of the Council of Ministries are not the subject of notification to the President of the Competition and Consumer Protection Office (CCPO). The resolutions excluding the applicability of Article 5 of the PCC, which have already been issued, concern:

(1) The vehicle sector in accordance with Commission Regulation 1400/2002;
(2) Exclusive sale and distribution agreements between entrepreneurs; and
(3) Selective distribution and franchising agreements, in accordance with Commission Regulation 2790/1999.

UnCom provides an open catalogue of activities deemed to be acts of unfair competition, which include:

(1) Misleading designation of enterprise;
(2) False or fraudulent designation of geographical origin of goods or services;
(3) Misleading designation of goods or services;
(4) Violation of business confidentiality;
(5) Encouragement to terminate or not to carry out agreements;
(6) Product imitation;
(7) Imputations against or dishonest praise of goods;
(8) Obstruction of market access; and
(9) Dishonest or unlawful advertising.

Administrative Bodies and Courts

The PCC appoints the President of the Competition and Consumer Protection Office as the State authority governing competition issues and issuing decisions. Appeals against such decisions should be lodged with the Anti-monopoly Court within fourteen days of their delivery to the party.

The President is designated by the Competition Authority regarding the implementation of Articles 81 and 82 of the EC Treaty and the provisions of Council Regulation 1/2003. On the other hand, any issues arising from UnCom are to be adjudicated by the common courts in the first instance. Appeals against these verdicts shall be lodged with the District Court within fourteen days of their delivery to the party.

Complaint Forms and Procedures

The PCC introduces anti-monopolistic proceedings and proceedings regarding activities violating the general interests of consumers. These proceedings are instituted upon a complaint or by the President of the CCPO and may be preceded by an explanatory proceeding, which may last up to sixty days, initiated by the President. The PCC includes the catalogue of subjects entitled to file a complaint.

This catalogue in anti-monopolistic proceedings includes an undertaking or an association of undertakings, a territorial self-government body, a national control body, a consumer right spokesman and a consumers' organization. In proceedings regarding activities violating the general interests of consumers, this catalogue includes a citizens' rights spokesman, an insured spokesman, a consumer rights spokesman and a consumers' organization. A complaint shall be filed in written form. During the proceedings, a trial may be carried out, as well as an inspection of the undertaking or association of undertakings. The proceedings are ended by the decision of the President.

UnCom provides uniformed proceedings regarding activities deemed to be acts of unfair competition, initiated upon the motion of an entrepreneur whose interest has been infringed. As UnCom does not contain separate provisions, the proceedings are conducted in accordance with the standard rules included in the Civil Proceedings Code. Uncom defines the catalogue of subjects entitled to file a complaint. The proceedings are ended by the verdict of the court.

Timing

The PCC provides that:

(1) Anti-monopolistic proceedings shall be finished within five months of their institution;
(2) Proceedings regarding activities violating the general interests of consumers shall be finished within two months; and
(3) Intended mergers notification proceedings shall be finished within two months.

There are no statutory timing regulations concerning any proceedings arising from UnCom.

Interim and Final Measures

The PCC provides the President with the right to order an entrepreneur to bring the infringement to the end and to eliminate the effects of the prohibited activities. In addition, non-observance of the terms of the PCC may result in pecuniary fines being

imposed by the President. The fines can amount to up to ten per cent of the annual income of the entrepreneur. There are additional fines for delay in implementation of the President's decision, for example, regarding cessation of the prohibited activity. The fines vary from €500 to €10,000 for each day of delay.

UnCom provides that acts of unfair competition are not invalid by the force of law, but the entrepreneur whose interest has been infringed may claim:

(1) Cessation of the prohibited activities;
(2) Elimination of the effect of the prohibited activities;
(3) Public statements of appropriate content and in proper form;
(4) Redress for damage caused to the entrepreneur;
(5) Refund of unjust benefits; and
(6) Imposition of fines for a specific public purpose in the case of willful acts.

Some acts of unfair competition may also result in criminal liability. These measures are decided by the court.

Confidentiality

The PCC requires the officials of the CCPO, as well as any other officials participating in the inspection of the undertaking, to protect any confidential information acquired in the course of the proceedings. Such information shall not be used in other proceedings except, for example, for the exchange of information with the European Commission competition authorities of the Member States on the basis of Article 12 of Regulation 1/2003.

Language

The official language is Polish. Only documents in Polish may be used as evidence in proceedings. Documents prepared in foreign languages need to be translated by a certified translator.

Costs

Lodging a complaint is subject to the initial fee of approximately €110 (PLN 500). Lodging an appeal against a decision of the President is subject to a fee of approximately €250 (PLN 1000). In proceedings instituted upon a complaint, the party who loses the case shall refund the costs necessary for reasonable vindication of the other party's rights, including expert opinions.

In proceedings instituted *ex officio*, the costs are to be covered by the entrepreneur or association of entrepreneurs who violated the PCC regulations. Court costs of the proceedings resulting from the violation of UnCom are the standard costs and depend upon the value of the claim.

Appeal

According to the PCC, appeals against decisions of the President should be lodged with the Anti-monopoly Court within fourteen days of their delivery to the party. As

UnCom does not provide separate regulations, appeals against the verdicts of the common court shall be lodged with the District Court within fourteen days of their delivery to the party, in accordance with the Civil Proceedings Code.

PORTUGAL

Introduction to Relevant Law

Compliance with the norms of competition[1] within the Portuguese legal system is enforced mainly through Decree-Law Number 18/2003 of 11 June 2003 (Legal Regime of Competition); Decree-Law Number 370/93 of 29 October 1993, amended by Decree-Law Number 140/98, of 16 May 1998 (Individual Competition Restrictive Practices); Decree-Law Number 10/2003 of 18 January 2003 (Competition Authority); Ordinance Number 1097/93 of 29 October 1993 (Power of Pronouncement on Legality or Illegality of Agreements or Concerted Practices of Undertakings); and Decree-Law Number 433/82, republished by Decree-Law Number 244/95 of 14 September 1995 and amended by Law Number 109/2001 of 24 December 2001 (General Regime of Misdemeanors). Practices in restraint of competition under Portuguese law are almost identical to those provided for under European law. In particular, there are few differences between Articles 4, 5 and 6 of Decree-Law Number 18/2003 and Articles 81 and 82 of the Treaty establishing the European Community.

Decree-Law Number 18/2003, however, provides for a specific infringement of competition, which is the abuse of economic dependency. This innovation mainly regards the major distributors, as its aim is to penalize undertakings that take abusive advantage of their economic strength, though they do not have a dominant market position. A state of economic dependency exists when an undertaking relies upon others to achieve the capacity to resist and to enter into commercial relationships. Therefore, a state of economic dependency can only be characterized, in regulatory terms, as the lack of an equal alternative.

Where undertakings, on their own account, impose discriminatory price and sales conditions, do not have price lists and sales conditions, practice dumping, refuse to sell goods or render services under certain circumstances or adopt abusive negotiation practices, such situations are considered as abusive by the rules set forth in Decree-Law Number 370/93. Although not producing serious effects on competition — therefore, their regulation is not analyzed here — such individual restrictive practices are less transparent and it was, therefore, considered necessary to regulate them under Portuguese law. EU block exemption regulations are applied in Portugal.

Administrative Bodies and Courts

Competition Authority

The Competition Authority (*Autoridade da Concorrência*, the Authority) is empowered to ensure observance of the rules of competition by economic players.

1. Contributed by Margarida Roda Santos and Rita Aleixo Gregório, F. Castelo Branco & Associados, Lisbon, Portugal.

The Authority, consisting of a Council (the Authority's highest body) and a sole auditor, has three basic powers:

(1) Punitive powers that enable the Authority to investigate alleged restrictive practices, to initiate the respective proceedings and to penalize offenders;
(2) Supervisory powers that enable the Authority to conduct studies, enquiries, inspections or audits and to assess the admissibility of agreements between undertakings; and
(3) Regulatory powers that enable the Authority to approve regulations, to issue relevant recommendations and directives on the subject and to approve codes of conduct and manuals for undertakings or any type of arrangements between undertakings.

In order to exercise their role and powers to the fullest extent, the public services and departments that make up the direct, indirect or autonomous administration of the Portuguese State must cooperate with the Authority.

Lisbon Commercial Court and Lisbon Court of Second Instance

These courts also play a critical role in the day-to-day enforcement of the rules of competition by way of reviewing the complaints filed with them against the decisions of the Authority, which enables them to exercise jurisdictional control over the decisions pronounced by the Authority.

Prior Assessment by the Competition Authority

In view of the legal protection of economic players, Portuguese law has provided for the administrative process of prior assessment by the Competition Authority of their practices, with regard specifically to agreements or concerted practices, with the aim of pronouncing on their lawfulness or their justification under legal terms.

Accordingly, any interested undertaking or association of undertakings should request the Authority, in writing, in duplicate and by registered letter, with acknowledgement of receipt, to pronounce itself on the lawfulness or unlawfulness of any agreement or concerted practice among undertakings or of any decision of an association of undertakings, as well as to confirm that the legal requirements for its justification are met. Pronouncements on the lawfulness of these practices or decisions that may be made by the Authority are binding upon the latter within the limits and contents of the request, provided that there is no change in the circumstances under which the same were issued.

Complaint Forms and Procedures

Practices in restraint of competition are misdemeanors. Thus, the Authority may start administrative offense proceedings against offenders, which are subject to a limitation period of five years. Whenever the Authority becomes aware of any anti-competitive practices, by any means (including complaint), it must conduct an inquiry, within the scope of which it will arrange for steps to be taken to conduct the investigation needed to identify those practices and the respective agents. Upon completion of the inquiry, should the Authority believe that there are clear signs of

anti-competitive practices, it must initiate proceedings by notifying the undertakings involved.

Within the framework of the proceedings, the Authority must study the written defense (and/or oral defense if the defendant undertakings so request) on the content of the complaints made against them and the evidence produced. The Authority may also order additional steps to be taken in order to obtain further evidence at the request of the defendant undertakings, if it considers this to be pertinent or relevant, or on its own initiative, as long as the defendants are given an opportunity to oppose this. Upon completion of the proceedings, the Authority will issue a final decision by which it may:

(1) Order the case to be terminated;
(2) Declare that an anti-competitive practice exists and, in this event, order the offender to take the steps necessary for the termination of that practice or of its effects within a specific time limit;
(3) Apply the fines and other penalties provided for by law; or
(4) Authorize an agreement when the legal requirements for its justification are met.

Interim and Final Measures

In the course of the investigation, inquiry or proceeding, should there be any signs that the practice against which proceedings are taken is likely to give rise to imminent, serious and irremediable damage, or damage that would be difficult to rectify as regards competition or the interests of third parties, the Authority may, on its own initiative or at the request of any interested party, order, as an interim measure, the immediate termination of the mentioned practice or any other provisional measures necessary for the immediate re-establishment of competition or measures that are necessary for the effectiveness of the final decision. Notwithstanding any criminal liability and administrative measures which may be involved, anti-competitive practices also represent misdemeanors, punishable by fines that may not exceed, for each of the undertakings involved, ten per cent of their total turnover in the preceding year.

When any types of associations of undertakings are involved, the fine may not exceed ten per cent of the sum of the annual turnover of the associated undertakings participating in the infringement. Should the seriousness of the offense justify it, the Authority may apply further penalties, in the form of advertising, at the offender's expense, of its final decision in the *Official Gazette* (*Diário da República*) and/or in a national, regional or local daily newspaper, according to the geographical market in which the anti-competitive practice occurred.

In the case of the undertaking's non-compliance with the Authority's final decision imposing a penalty or ordering that specific measures be taken, the Authority may also decide, whenever justified, to apply a periodic penalty payment in an amount that cannot exceed five per cent of the average daily turnover of the preceding year for each day of delay starting from the date set in its final decision. The limitation period for the enforcement of penalties is five years from the date upon which the Authority's decision determining their application becomes definitive or beyond appeal.

Confidentiality

The members of the bodies of the Authority, as well as their personnel, are bound to secrecy in relation to the facts which may come to their knowledge in the discharge of their duties and which may not be disclosed under the law. In particular, during the proceedings, the Authority must safeguard the legitimate interests of the undertakings in the non-disclosure of their business secrets.

Language

The Portuguese language is used in the proceedings initiated by the Authority.

Appeal

Appeals against the Authority's decisions that determine the application of fines or other penalties may be filed with the Lisbon Commercial Court. Appeals must be in writing and must be submitted to the Authority no later than twenty business days after the defendant has had knowledge of the application of a fine. The Authority must, also within twenty business days, send the records to the Public Prosecution Service. It may attach further statements and other data or information that it may consider relevant to the decision in question, as well as offer evidence. Decisions of the Lisbon Commercial Court that may be appealed (since not all may be appealed) should be filed with the Lisbon Court of Second Instance, which will issue a final decision. Appeal to the Supreme Court against that court's decision is, therefore, not admissible.

Costs

The Authority's decisions in administrative proceedings must set the costs and determine who should bear them. In general terms, costs include court fees, fees due to any appointed representatives, fees payable to expert witnesses and other costs related to the proceedings.

Nevertheless, the administrative proceedings initiated by the Authority are exempt from court fees and so are the judicial appeals against its decisions. However, if the judge's decision is pronounced against the defendant, the defendant must pay court fees in an amount that may not exceed €1,780.

SLOVAKIA

Introduction to Relevant Law

The protection of competition is governed by Article 55, Section 2, of the Constitution and also principally by Act Number 136/2001 on the Protection of Economic Competition (the Act). The Act was recently amended by Act Number 465/2002 and Act Number 204/2004,[1] which came into force on the same day as Slovakia's accession to the EU came into effect.

1. Contributed by Peter Harib, Valko & Partners, Bratislava, Slovakia.

The provisions of the Act, as amended, defining the forms of unauthorized restriction of competition are almost identical to the wording of Articles 81 and 82 of the EC Treaty and other relevant EU regulations. Consequently, there are several lesser legal regulations and the issue is also regulated by Article 149 of the Criminal Code, specifying the factual basis for the criminal act of abusing participation in competition. The purpose of the Act is to protect economic competition in the market for products, works and services (goods) from any restriction thereof, to encourage its further development with the aim of promoting economic development to the benefit of consumers and to define the authority and the jurisdiction of the Slovak Anti-monopoly Office (the Office).

Administrative Bodies and Courts

The Office is a central State administrative body for the protection and support of competition. The Office is headed by a Chairman, appointed and recalled by the President of the Slovak Republic upon the proposal of the Government. The Act also establishes a Council of the Office, which shall decide on appeals and also review decisions outside appeal proceedings. The Council shall decide also upon the renewal of proceedings and upon a prosecutor's objection in cases where the Chairman of the State administration body decides pursuant to special regulation. The Office's tasks are:

(1) To perform general investigations in the relevant market;
(2) To issue decisions on the activity or conduct of an entrepreneur prohibited under the provisions of the Act or Articles 81 and 82 of the EC Treaty;
(3) To decide upon imposing an obligation to refrain from this action;
(4) To remedy the illegal state of affairs,
(5) To issue a decision that the State administrative bodies or municipality bodies have breached the provisions of the Act;
(6) To proceed and decide in all matters of competition protection ensuing from the provisions of the Act;
(7) To control enforcement of the decisions issued within the Office's proceedings; and
(8) To issue an opinion under the special legislation.

Office proceedings are governed by special provisions of the Act and by the general provisions of the Administrative Proceedings Act. First instance Office decisions may be appealed within fifteen days following the day upon which the decision is received. The legality of the Office's final decision may be appealed before the courts.

Consumers whose rights may have been violated by the unlawful restriction of competition may present a claim before the appropriate court requiring the violating party to refrain from the behavior or to remedy the breach. A legal person authorized to protect the interests of consumers may also claim this right. Other matters of competition law may be brought up as commercial or criminal cases before the appropriate district or regional courts.

Complaint Forms and Procedures

Proceedings begin on the Office's own initiative or by a written complaint submitted by a natural or legal person. In cases of arrangements restricting competition and abuse of a dominant position, the proceeding always begin on the Office's own initiative. The parties in the proceedings shall be:

(1) In case of arrangements restricting competition, the parties to the arrangement;
(2) In the case of abuse of a dominant position, the entrepreneur whose activity or conduct is allegedly abusing a dominant position in the market;
(3) In the case of a concentration, the entrepreneurs who are the subject of a concentration or merger or are directly or indirectly gaining control over one or more companies, or a part thereof;
(4) The State administration or municipality bodies; or
(5) Any other persons whose rights, protected interests or duties may be decided under the Act.

The Office is obligated to inform the parties of their procedural rights and obligations. If a deficiency in a written complaint occurs, the parties will be called upon by the Office to remedy such deficiency in their complaint or claim within a specified period of time.

Timing

A concentration that is subject to control by the Office must be notified within thirty days from the date of:

(1) The agreement being concluded;
(2) The announcement of acceptance of submission of a bid in a public tender;
(3) Delivery of a decision of a State body to an entrepreneur;
(4) A European Commission announcement to an entrepreneur that the Office shall proceed further; or
(5) Any other fact upon which a concentration is based.

The term starts on the day upon which the first of the above facts occurs. An entrepreneur may request the Office to issue an opinion on the intention of a concentration. The Office issues such an opinion within thirty working days from the receipt of such request, but the obligation to announce a concentration will still exist. An entrepreneur cannot exercise the rights and fulfill obligations resulting from a concentration until a valid decision has come into force.

The Office, upon the request of the entrepreneur, must issue a decision by which it may grant an exception from the ban if sufficient reasons exist. The Office shall issue a decision on a concentration within sixty working days from receipt of the notification. The Chairman of the Office may, before the expiration of the time period for issuing the decision and in complicated cases, adequately and repeatedly prolong the overall period for a concentration-related decision, but at the most by ninety working days.

Interim and Final Measures

The Office may issue a decision approving the concentration, it may attach to its decision conditions and duties related to such conditions or it may prohibit the concentration. The Office imposes a fine on an entrepreneur for breaching the provisions of the Act of up to ten per cent of his turnover for the previous closed accounting period or up to SKK 100,000 for those whose turnover is not possible to calculate. A fine is imposed on an entrepreneur for breaching any condition, duty or obligation imposed by the decision of the Office or who does not fulfill an obligation imposed by the decision, or upon an undertaking for breaching a ban to execute rights and obligations resulting from the concentration.

A fine of up to SKK 20,000 is imposed upon State administrative and municipal bodies for breaching the ban stated in Article 39 of the Act. The Office may impose these fines repeatedly. However, the Office may impose such fines no later than within eight years following the date upon which the provisions stipulated by the Act or by Articles 81 and 82 of the EC Treaty were breached or the provisions of any stipulated obligation in the decision were breached. If an entrepreneur fails to pay the fine imposed before the set period, he shall be obliged to pay a penalty of 0.1 per cent of the amount of the fine for each day of delay.

Confidentiality

The Office is obliged to inform a party, at the beginning of the proceedings, that the party may identify information or documents submitted to the Office as a business secret or as being of a confidential nature. The Office shall protect information the confidentiality of which has been demanded. Such information may, however, be disclosed if it is deemed necessary for a decision and if a party to the proceedings does not submit other information and documents that do not contain business secrets or do not have a confidential nature.

Language

The documents submitted to the Office must be in Slovak, or certified translations of foreign texts may be demanded. All documents presented to the courts must be in Slovak or submitted with certified translations.

Costs

The only applicable administrative fee is related to the submitting of a Concentration Notice and amounts to SK 100,000 (approximately €2,400).

Appeal

The acts of the Office may be appealed before the court by submitting a complaint within two months from the delivery date of the decision of the administrative body of last instance. This time limit cannot be extended.

SLOVENIA

Relevant Laws and Regulations

In Slovenia, the distribution agreement is not a type of agreement that is specifically regulated by law, which means that the regulation of the rights and obligations of the parties thereto remains at the discretion of the contracting parties.[1] Notwithstanding this, important aspects of the content of the distribution agreement are subject to competition law. On a national level, the most important rules related to competition are laid down in the Act on the Prevention of Competition Restrictions (*Zakon o preprecevanju omejevanja konkurence* — ZPOmK).[2] Pursuant to the general rule in Article 5(1) of the ZPOmK, agreements restricting or preventing competition are generally prohibited.[3]

Although full adjustment to EU law has not yet been tested in Slovenia, it looks like both the ZPOmK and the Government Decree on Block Exemptions (*Uredba o skupinskih izjemah* — the Decree)[4] are adjusted to the EU legislation, including Articles 81 and 82 of the EC Treaty and EC Regulation 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices. This has also been unofficially confirmed by representatives of the Competition Protection Office of the Republic of Slovenia (*Urad za varstvo konkurence* — CPO). With respect to this, it should be noted that adjustment to EU law was the main reason for the 2004 amendment of the ZPOmK, while the Decree was proclaimed to have been adjusted to EU law since its entering into force in September 2002.

Notwithstanding the above, the aforesaid should not be interpreted in a way that slight differences are not possible, for example, immaterial differences exist in Slovenia with respect to distribution in the motor vehicle industry when compared to Regulation 1400/2002, such as:

(1) The Decree does not distinguish a personal vehicle from a light commercial vehicle; and
(2) When defining the obligation not to compete, an obligation of the buyer to purchase fifty per cent of the relevant goods or services from the supplier or its nominee, calculated on the basis of the previous year's purchases, is considered restrictive under the Decree, while a thirty per cent threshold is set under the EC Directive.

Similarly, discrepancy with EU law exists under the Decree in relation to the power of the CPO to withdraw the benefit of the relevant block exemption if, *inter alia*, the CPO establishes that the effects of a relevant agreement are incompatible with the

1. Contributed by Jurij Dolzan, Odvetnik, Ljubljana, Slovenia.
2. *Official Gazette* of the Republic of Slovenia, Numbers 56/1999 and 37/2004.
3. Article 51(1) of the ZPOmK states that "Agreements between undertakings with respect to conditions on business operations in the market and whose object or effect is to prevent, restrict or distort competition in the Republic of Slovenia shall be prohibited and shall be null and void".
4. *Official Gazette* Number 69/2002.

general exemption provided for under Article 5(3) of the ZPOmK.[1] However, such withdrawal can only apply to agreements between Slovenian undertakings since, in the case of an agreement having an impact upon trade between the Member States of the EU, such withdrawal is reserved to the Commission pursuant to Article 6 of Commission Regulation 2790/1999. In practice, the discrepancy mentioned above should not take place for the reasons explained below.

Based on the supremacy of EU legislation over national, being one of the basic principles of the EU, and the "subordination" of the Slovenian legal system to the rules of EU law, as provided for in Article 3a of the Constitution of the Republic of Slovenia, it may be interpreted that in the case of a conflict between the Decree and the Regulation (or other EU law), EU law shall prevail in all cases where trade between Member States is affected. As a result, Council Regulation 1/2003 shall also be directly applicable in Slovenia.

Sanctions for having entered into restrictive agreements contrary to the ZPOmK are both penal, including fines of between SIT 30-million (approximately €125,000) and SIT 90-million (approximately €375,000), and civil, such as nullity.

Administrative Bodies

The CPO is an independent administrative body empowered to supervise the application of, and compliance with, the ZPOmK, to monitor and analyze the market conditions if necessary for the development of fair and free competition and to conduct proceedings and issue decisions under the ZPOmK. The CPO also provides opinions to the Parliament and the Government on issues within its competence. The 2004 amendment to the ZPOmK empowered the CPO also with the competence to conduct proceedings with respect to violations of Articles 81 and 82 of the EU Treaty pursuant to EU Regulation 1/2003.

Complaint Forms and Procedures

The proceedings before the CPO are initiated by its issuance of an order. Such order may be issued by the CPO *ex officio* if it believes that the ZPOmK has been breached or at the request of a party that shows that it has a legal interest in such proceedings and the probability that the ZPOmK has been breached. Any motions of the CPO, as well as its decrees, shall fulfill the basic requirements for any motion or ruling, as applicable, set forth by the Administrative Procedures Act (*Zakon o splošnem upravnem postopku*, ZUP),[2] for example, the number of copies, a description of the parties, the subject matter and facts and the objectives and evidence.

It is worth mentioning that the party against which the investigation process has been initiated may propose its own commitments with a view to removing circumstances which give rise to the probability of a breach of the ZPOmK or Articles 81

1. According to Article 5(3), the general prohibition shall not apply, subject to certain conditions, to "agreements which contribute to the improvement of production or distribution of goods, or which promote technical and economic development, allowing at the same time to the consumers a fair share of the resulting benefit".
2. *Official Gazette*, Numbers 80 /99, 70/00, 52/02 and 73/04.

and 82 of the EU Treaty. When deciding upon such commitments, the CPO may stay proceedings until fulfillment, or the expiry of the period set for the fulfillment, of such conditions.

Timing

Pursuant to the ZUP, the CPO is required to issue its decision, in cases where proceedings are initiated at the request of a party, or *ex officio* if the decision is in the interests of the party, within two months or, in summary proceedings (that is, proceedings where all facts relevant for the decision may be obtained from the application or where urgency exists), within one month.

Measures

After the investigation is completed, the CPO shall issue a decision. The CPO shall decide within the special administrative procedure (according to the ZOPmK and the ZUP) without a trial, unless it determines that a trial needs to be conducted.

Pursuant to the ZUP, the CPO may also issue interim decisions, should this be required under the circumstances, and which may, at the discretion of the CPO, be conditional upon the provision of appropriate security for damage that may eventually be suffered by the other party. Such interim decisions apply only until the final decision is made and may be challenged and/or enforced like any other decision. The final decision shall be served upon all participants. The decision, but not its grounds, shall be published in the *Official Gazette* of the Republic of Slovenia.

Confidentiality

All information or data on the undertakings in respect of which proceedings have been initiated and that has been acquired by the CPO during the investigation procedure shall be kept confidential.[1] By way of example, the law expressly provides that, in a case where the CPO's decision includes confidential information, such information is omitted from the explanation of the decision served upon the other participants.

Costs

Disregarding legal fees, other experts' fees and the parties' own costs and expenses and eventual translation costs, relatively low administrative fees are payable for the application and the CPO's order. For challenging the CPO's order before the Administrative Court, the court costs are SIT 34,200 (approximately €140) and, for challenging the judgment of the Administrative Court, the court costs are SIT 38,000 (approximately €160).

1. Act on the Prevention of Competition Restrictions, Article 32.

Language

CPO proceedings are conducted in the Slovenian language, and documentation must be in the Slovenian language or translated into Slovenian.

Appeal

The CPO's decisions may be appealed before the Administrative Court. A complaint initiating such proceedings shall be filled within thirty days after receipt of the CPO's decision. Decisions of the Administrative Court may be challenged, subject to certain conditions, in the Supreme Court of the Republic of Slovenia within fifteen days from the receipt of the first instance decision.

SPAIN

Relevant Laws

The Spanish antitrust system is built on the Competition Act 16/1989 of 17 July 1989 (*Ley de Defensa de la Competencia*). The Competition Act lays down prohibited conduct, procedures and bodies entrusted with antitrust supervising functions.[1] The Competition Act follows the pattern set by Articles 81 and 82 of the Treaty establishing the European Community and aims to guarantee competition in a free market economy. The Competition Act has been developed by several implementing Royal Decrees, the most relevant regarding restrictive agreements or practices being Royal Decree 378/2003, which regulates block exemptions, individual authorizations and the competition register, and the recently enacted Royal Decree 2295/2004, which regulates the application in Spain of the European antitrust provisions.

Spanish competition law regarding vertical agreements and particularly regarding distribution agreements is in line with European rules. There are, however, some differences, probably the most significant being the *de minimis* rule, which was first introduced into Spanish law in 1996. The *de minimis* rule was, however, introduced by way of an amendment to the Spanish Competition Act so that it is binding for all instances, including competition authorities and courts.

This is not exactly the situation under European law, as the rule is only provided for in the Communication of the Commission issued on 22 December 2001. A second difference is that the *de minimis* rule contained in the Commission's Communication refers to objective parameters, more specifically to real percentages of the market. This is not the case under Spanish law, since the law does not establish objective parameters, but a simple reference to "conducts of relative unimportance".

European Regulation 1/2003 has not led to a similar modernization of the Spanish Competition Law, and it would appear that there is no intention for this to happen in the near future, so that the competence for granting authorizations or for declaring that certain conduct is forbidden under the Competition Act is still attributed under the Competition Act to the Spanish competition protection authorities. Hence, the

1. Contributed by José Puente, Gómez-Acebo & Pombo, Madrid, Spain.

scheme of prior authorization similar to that of the now repealed Regulation 17/1962 is still in force in Spain. However, it should not happen that if a distribution agreement is valid under Article 81 of the EC Treaty, as it may be declared by a Spanish court, it will not be valid under the provisions of the Spanish Competition Act.

Spanish law has also deviated from European law regarding distribution agreements in connection with abuses of dominant positions. Under Spanish law, suppliers (or distributors, as the case may be) are not only prohibited from abusing their dominant positions in the market, as provided for in Article 82, but also from abusing a situation of economic dependence that a distributor (or supplier, as the case may be) may be in, if it does not have an equivalent alternative for carrying out its activities.

Administrative Bodies and Courts

The Competition Act empowers several bodies.

Competition Protection Service

The Competition Protection Service (*Servicio de Defensa de la Competencia*, the Service), which is part of the General Directorate for Competition Protection, a division of the Ministry of Economy and Finance, is in charge of the surveillance and investigation of anti-competitive behavior occurring in the Spanish market, having broad investigative powers, including the requesting and examination of books, documents and premises. It has a duty to initiate proceedings regarding prohibited conduct and to supervise the execution of and compliance with the resolutions adopted by the Competition Protection Court.

Competition Protection Court

The Competition Protection Court (*Tribunal de Defensa de la Competencia*, the Court) is an independent body, integrated into the Ministry of Economy, but fully independent in its decisions. It is empowered to authorize agreements, decisions, recommendations and practices that may affect competition and, in general, to apply in Spain, Articles 81 and 82 of the EC Treaty. Any person, entity or association may raise questions before the Court. The Court is also entitled to submit opinions to the Government or to the Parliament in connection with drafts of legal provisions that amend the Competition Act or that implement and develop it.

It is responsible for issuing reports regarding economic concentration transactions that are forwarded to the Spanish competition authorities by the Commission as provided for in Article 9 of European Regulation 139/2004. The Court is entitled to request the service of open proceedings in connection with any conduct that may infringe the Competition Act. Once such proceedings are terminated, the Court may impose a sanction on the entities responsible.

Other Bodies

Act 1/2002 regulates the distribution of competence between the Spanish State and Autonomous Communities. The Spanish State is responsible for observing conduct that alters or may alter free competition on a supra-autonomous level or in the national market as a whole, while the Autonomous Communities with competence

in domestic trade are responsible for observing conduct that alters or may alter free competition exclusively within the territory of the respective Autonomous Community.

The Communities that have assumed competence in this area (Catalonia, Basque Country, Madrid and Galicia) are basically replicating the existing national structure of the Competition Service and the Competition Court.

Bodies Applying Powers under European Regulation 1/2003

The enactment of European Regulation 1/2003 coincided with a thorough revision of the Spanish insolvency law, which led to the creation of the Mercantile Courts with competence in a wide spectrum of commercial areas. Organic Act 8/2003 on insolvency reformation established the said courts and attributed to them the competence to deal with the proceedings for the application of Articles 81 and 82 of the EC Treaty. These courts are being implemented, and time will tell how their competence is articulated with those of the Competition Protection Court.

Royal Decree 2295/2004 was recently enacted to adapt the distribution of competence stemming from European Regulation 1/2003. Under the provisions of this Royal Decree, the Court continues being competent to make decisions on the application of Articles 81 and 82 of the EC Treaty, without prejudice to the competence that the Mercantile Courts may assume, and the Service continues being competent for the initiating of proceedings. The Court takes the decisions entrusted to the national competition authorities under Article 5 of European Regulation 1/2003, though it is also possible for the Service to terminate proceedings upon acceptance of a commitment from the parties.

As provided for in Article 11 of European Regulation 1/2003, the Court and the Service shall inform the European Commission with respect to their competence. Regarding the cooperation duties between the Spanish Administration and the European Commission, and without prejudice to the general functions of the Ministry of Foreign Affairs, the Service will be the competent body for cooperating with the European Commission. It is the Service that will support and assist the Commission in investigating undertakings and associations of undertakings as provided for in Articles 19 and 20. Likewise, the Service will also be the contacting and assisting entity with other competition authorities of other Member States. Regarding cooperation with judicial national courts, both the Court and the Service may submit written or oral observations in connection with civil proceedings brought before those courts.

Request for Authorization and Timing

A distinction must be made between voluntary requests for the authorization of restrictive agreements or practices and denouncements of said behavior. Under Article 4 of the Competition Act, any person may apply for a specific authorization of a contract or practice that could affect competition. The request must be filed with the Service, which will analyze the case and, after obtaining information, will submit the file within a maximum period of thirty days to the Court so that the latter can take a decision.

If no decision is taken within three months from when the request was initially filed, the interested persons may start provisionally applying the relevant agreement

or practice. There is a standard application form for applying for a specific authorization. The Court shall determine under what conditions the authorization is granted and for what period of time. The authorization may be renewed, amended or repealed, as the case may be.

Complaint Forms and Procedures

The Service is entitled to initiate, *ex officio* or following a complaint of any interested party, a procedure to ascertain whether conduct is in breach of the Competition Act. The Service will conduct the necessary instruction proceedings in order to clarify the circumstances and determine responsibilities. Once that information has been obtained, the Service may:

(1) Close the proceedings if it understands that there is not sufficient evidence of prohibited conduct or because an agreement has been reached with the parties; or
(2) Submit the file to the Court with a proposal as regards possible resolution.

If the proceedings are submitted to the Court, it will first decide upon whether to accept the proceedings or not. If the Court accepts the proceedings, it will notify the parties of this within fifteen days and the parties may request the fixing of a date for the hearing and produce evidence. After evidence is obtained, the Court may decide to hold a hearing; if not, it will grant the parties fifteen days within which to submit final pleadings. Once the proceedings are terminated, the Court shall pass a final resolution within twenty days. The Court's resolution is final and terminates any administrative proceedings.

It should be noted that the short time periods provided for in the law do not lead in all cases to short proceedings, since the obtaining of evidence normally determines that the duration of the proceedings be extended. According to the law, the maximum period of time within which proceedings may be initiated by the Service is twelve months and the maximum period of time for the Court to resolve the matter is another twelve months. However, these periods are subject to interrupting events or extending circumstances, and the proceedings conducted by the Service may normally take up to eighteen to twenty-four months and the procedure in the Court up to sixteen months. According to the last activity report issued by the Court (regarding year 2002), almost all resolutions taken in 2002 referred to proceedings filed with the Court in 2001. As regards the sanctioning proceedings currently in progress, all refer to proceedings begun in 2003 and 2004, except for four proceedings that go back to 1996 and 1997.

Interim and Final Measures

The Service, once proceedings have been instituted, may propose to the Court, either *ex officio* or at the request of an interested party, the granting of any necessary interim measures in order to ensure the efficacy of any future decision, including:

(1) Cease and desist orders or imposing specific conditions to prevent the conduct which may cause further damage; and

(2) Submission of guarantees.

Final resolutions or declarations of the Court may include:

(1) Cease and desist orders in relation to the forbidden practices;
(2) Imposing additional conditions or obligations upon the parties;
(3) Imposing fines; and
(4) Authorizing the practices.

The fines that can be imposed by the Court depend on, among other things, the size of the affected market, the duration of the anti-competitive conduct and the repetition of the prohibited conduct. Decisions taken by the Court, as a body subject to administrative law, are presumed to be valid and effective as of the date when they are issued, so that parties are obliged to comply with them. If these decisions are not observed, then they can be enforced following the applicable administrative law procedures.

Confidentiality

Any party that proves to have a valid interest in proceedings before the Service and the Court will be admitted as a party to the proceedings and will have access to all information and documents existing in the file. The hearing before the Court is not public, and only interested parties and persons summoned by the Court will be present.

All persons involved in the proceedings are obliged to keep their contents confidential. The Court or the Service may order at any time, *ex officio* or at the request of any party, that certain information and documents remain secret as between the parties.

Language

The Service and the Court are administrative bodies subject to the general provisions regarding administrative procedures provided for in Act 30/1992. In Spain, the official language is Spanish, but in some Autonomous Communities there are regional languages that are also co-official languages.

The Service and the Court are located in Madrid, and in Madrid only the Spanish language is official, therefore, the proceedings regarding applications for authorizations and complaints are conducted in Spanish. Proceedings before autonomous competition authorities in Catalonia, Basque Country and Galicia can be dealt with in Spanish or in the relevant co-official language.

Costs

No fees are due to the Service or to the Court in connection with applications for the authorization of restrictive practices or for the filing of complaints.

Appeals

The Service and the Court are administrative bodies and, therefore, almost any decision taken by the Service or by the Court are subject to appeal. An administrative appeal can be filed before the Competition Court against resolutions adopted by the Service within a period of ten days.

The decision of the Court upon the discovery of evidence in the proceedings on interim measures or final resolutions issued by the Court are not subject to any further administrative appeal, and only a contentious-administrative appeal before the law courts may be lodged.

SWEDEN

Relevant Law

The current Swedish Competition Act (*Konkurrenslag*)[1] entered into force on 1 July 1993. The Act closely follows the EC model and principles relating to restrictive agreements and dominant position. It is stated that the decisions of the European Court of Justice shall give guidance on the interpretation of the Swedish Act.[2] Article 6 of the Competition Act contains the same prohibition against anti-competitive cooperation as Article 81(1) of the EC Treaty. Changes to the Swedish legislation have been made in order to comply with Regulation 1/2003/EC.

From 1 July 2004, the competition rules in the EC apply as Swedish law in parallel with Swedish legislation. From this date, Swedish undertakings can no longer receive negative clearance. The earlier possibility of receiving individual exemptions regarding agreements or practices has been replaced by a directly applicable exemption. The agreement or practice is accepted if it fulfils the conditions for exemption laid down in Article 8 of the Competition Act. These conditions are the same as those in Article 81(3) of the EC Treaty.

In correspondence with EC law, the prohibition against anti-competitive cooperation in Article 6 is not applicable where the impact of the agreement upon competition is not appreciable (*de minimis*). The Swedish Competition Authority has, in its guidelines for application of the exemption (*Konkurrensverkets allmänna råd om avtal av mindre betydelse (bagatellavtal) som inte omfattas av förbudet i six Section konkurrenslagen*),[3] stated that an annual turnover not exceeding SEK 30-million is not appreciable if the relevant Swedish market share does not exceed fifteen per cent, which differs from EC regulations. Regarding other matters, the Competition Authority refers to the Commission's directions.[4]

1. (1993:29).
2. Contributed by Magnus Ivarsson, Advokatfirman Lindmark Welinder AB, Lund, Sweden.
3. KKVFS 2004:1 (1993:20).
4. Commission Notice on agreements of minor importance, which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community, 2001/C 368/07.

There is a Swedish block exemption regarding vertical agreements,[1] which corresponds to the EC block exemption regarding vertical agreements.[2] An important difference though is that the national exemption is applicable to agreements entered into by companies with market shares not exceeding thirty-five per cent. In the corresponding EC block exemption, the threshold is thirty per cent. Above the market share threshold of thirty-five per cent, the Swedish block exemption does not apply. Regarding agreements not covered by the block exemption, an individual analysis must be made of the conditions for exemption laid down in Article 8 of the Competition Act.

The Competition Authorities

The Swedish Competition Authority[3] is the State authority with responsibility for supervision and enforcement of the Swedish enforcement rules. The Competition Authority further has the power to issue guidelines and instructions concerning the interpretation of Swedish competition law.

Some of the Competition Authority's decisions must be approved by the Stockholm City Court.[4] A decision by the Competition Authority or a decision or judgment of the Stockholm City Court may be appealed to the Market Court.[5]

Procedures and Measures

As mentioned above, the prior system of negative clearance no longer exists, which means that there is no formal procedure for notifying restrictive agreements or practices under Swedish competition law. Undertakings must, therefore, themselves ensure that their agreements comply with the provisions of the law. Third parties can submit a complaint to the Swedish Competition Authority requesting the initiation of proceedings, but there are no formal requirements. However, the decision to initiate an investigation or proceedings lies only with the Authority.

The Swedish Competition Authority may, under penalty of a fine, order an undertaking to terminate an infringement of a prohibition. An obligation may be imposed for the period until a final decision is taken on the matter. Appeals against obligations issued by the Competition Authority may be filed with the Market Court within three weeks. If the Competition Authority in a particular case decides not to impose an obligation, the Market Court may do so upon a request from an undertaking that is affected by the decision.

1. *Förordning (2000:1193) om gruppundantag enligt 17 Section konkurrenslagen (1993:20) för vertikala avtal.*
2. Commission Regulation 2790/1999 on the application of Article 81(3) of the EC Treaty to categories of vertical agreements and concerted practices.
3. Address: Konkurrensverket, 183 85 Stockholm, Sweden. Tel: +46–8–700 16 0; Fax: +46–8–24 55 43; E-mail: konkurrensverket@kkv.se.
4. Address: Stockholms tingsrätt, Box 8307, 104 20 Stockholm, Sweden. Tel: +46–8–657 50 0.
5. Address: Marknadsdomstolen, Box 2217, 103 15 Stockholm. Tel: 8–412 10 30; E-mail: mail@marknadsdomstolen.se.

Infringements of competition prohibitions are sanctioned with an administrative fine. This sanction is imposed by the Stockholm City Court upon application from the Competition Authority. The Stockholm City Court's decision can be appealed before the Market Court. The fine may be between SEK 5,000 and SEK 5-million, or a higher amount not exceeding ten per cent of the undertaking's annual turnover in the preceding business year.[1] There is a statutory limitation of five years upon imposing a fine, which means that an application must be served within five years of termination of the infringement.

The Competition Authority is given investigating powers similar to those under EC law. Such investigations, such as dawn raids, must be approved by the Stockholm City Court and may be appealed before the Market Court. The Court's decision may be issued without interaction with the party who is the object of the inspection. A decision to conduct an investigation may have a fine attached to it in order to compel an undertaking or other person to submit to the investigation. The party who is the object of the inspection has the right to summon a legal representative, but the inspection may, under certain circumstances, begin before the arrival of the legal representative. Documents, or parts of documents, in the possession of a member of the Swedish Bar Association may be protected by professional secrecy (legal privilege) and cannot, in that case, be subject to investigation.

The Competition Act also contains rules which have consequences under civil law. Resembling EC law, agreements covered by the prohibition against anti-competitive cooperation are void. An undertaking may also be liable for damages to another undertaking or party that has been disadvantaged by a breach of the law.

Costs

Costs in Swedish proceedings, as a general rule, are borne by the defeated party. Swedish authorities and courts meet their own costs.

Language

Correspondence with Swedish authorities and courts shall be in the Swedish language. Norwegian and Danish may be accepted, but not English.

Confidentiality

As a general rule, all correspondence with authorities and courts in Sweden are public, as well as hearings and rulings. A party who wishes confidentiality should expressively make such a demand and specify in detail the reasons for secrecy.

1. The fine may be substantial. The Swedish Competition Authority recently petitioned to the Stockholm City Court for a fine of approximately SEK 1.6-billion for a cartel in the asphalt industry.

UNITED KINGDOM

Relevant Law

The Competition Act 1998 broadly brought competition law in the United Kingdom in line with EC competition law.[1] Section 2 of the Competition Act 1998 mirrors Article 81 of the EC Treaty and prohibits agreements, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition which may affect trade in the United Kingdom or part thereof (the "Chapter 1" prohibition). Distribution agreements commonly contain restraints such as exclusive purchase obligations or minimum purchase requirements, which potentially come within Article 81(1) or Chapter 1.

Section 18 of the Competition Act mirrors Article 82 of the EC Treaty and prohibits conduct by undertakings which amounts to an abuse of a dominant position which may affect trade in the United Kingdom or part thereof (the "Chapter II" prohibition). In contrast to EC competition law, Sections 188 and 189 of the Enterprise Act 2002 make a cartel a criminal offense in the United Kingdom punishable by fines and imprisonment.

The Modernization Regulation

Since the Modernization Regulation came into effect on 1 May 2004, the Office of Fair Trading (OFT) and the United Kingdom National Competition Authorities (NCAs)[2] have the obligation to apply and enforce EC competition law as well as national competition law. In the regulated sectors, the sector regulator applies and enforces competition law in that sector concurrently with the OFT. The sector regulator can give guidance in the same circumstances as the OFT, and concurrent regulators will decide between them who is dealing with a case.

The provisions of the Modernization Regulation deal with the primacy of Community law and include provisions to ensure consistency of application. In addition to those obligations, Section 60 of the United Kingdom Competition Act requires the NCAs and the United Kingdom courts to deal with cases under the Act consistently with Community law insofar as this is possible having regard to any relevant differences between any of the provisions concerned. The United Kingdom authorities must ensure that there is no inconsistency with either the principles laid down by the EC Treaty or any relevant decision of the European Court. The United Kingdom Authorities must also have regard to any relevant decision or statement of the European Commission.

1. Contributed by Amanda Howlett, Pannone & Partners Solicitors, Manchester, England.
2. The Office of Fair Trading and the various sector regulators in relation to their specific industries: (1) Office of Communications (OFCOM); (2) Gas and Electricity Markets Authority (OFGEM); (3) Northern Ireland Authority for Energy Regulation (OFREG NI); (4) Director General of Water Services (OFWAT); (5) Rail Regulator (ORR); and (6) Civil Aviation Authority (CAA).

Exclusions and Exemptions for Distribution Agreements

Distribution agreements are usually vertical agreements. In the application of Article 81 of the EC Treaty, exemptions/exclusions would be applied by the United Kingdom NCAs and the United Kingdom courts. There are the following exclusions/exemptions from Chapter I, which are applicable to vertical agreements.

De Minimis

Originally, the OFT Guidelines stated that, as a general rule, to have an appreciable effect upon trade when considering the Chapter 1 prohibition, the parties' market share should be twenty-five per cent or more. Revised OFT Guidance on the application of Chapter I following the Modernization Regulation was published on 21 December 2004, which abolished the twenty-five per cent appreciability test so that appreciability is now assessed in the United Kingdom by reference to the lower market shares in the Commission's Notice on Agreements of Minor Importance.

European Vertical Block Exemption

By virtue of Section 10 of the Competition Act, an agreement falling within the terms of the Vertical Block Exemption will be exempt from the Chapter 1 prohibition, as well as being automatically exempt from the application of Article 81(1).

United Kingdom Exclusion Order

The United Kingdom Exclusion Order, made under Section 50 of the Competition Act, excluded vertical agreements from the application of the Chapter 1 prohibition. This exclusion order was, however, repealed with effect from 1 May 2005. Further, the United Kingdom Exclusion Order only offered protection from Chapter 1 and did not preclude the application of Article 81(1) where there was also an effect on trade between Member States. The United Kingdom Exclusion Order was, however, wider than the Vertical Block Exemption on the basis that:

(1) It was not subject to a market share threshold test; and
(2) It was the only "hardcore" restriction which would not benefit from the exclusion related to price fixing.

Until 1 May 2005, agreements which did not have an effect on trade between Member States but which had an affect on trade within the United Kingdom benefited from the United Kingdom Exclusion Order.

Article 81(3)

The application of Article 81(3) after the Modernization Regulation is dealt with above.

Prior Clearances

Until 1 May 2004, it was possible to notify a distribution agreement to the European Commission to seek prior clearance that the conditions of Article 81(3) applied. The Modernization Regulation introduced a "legal exception" regime whereby an

agreement within the scope of Article 81(1), which satisfies the conditions of Article 81(3), is not prohibited and no prior decision to that effect is required or available. It is valid and enforceable for so long as it satisfies the conditions of Article 81(3).

It is, therefore, up to the parties to form their own view as to whether or not a distribution agreement is compliant and would survive an attack by a national competition authority or a third party. Following the Modernization Regulation coming into force, the United Kingdom withdrew its notification system. There are and never have been any prior clearances available in respect of Article 82 or Chapter 2.

Informal Opinions

Informal opinions will be given in very restricted circumstances. The European Commission has retained the power to provide informal guidance in respect of novel or unresolved questions on the application of Articles 81 and 82. Similarly, the OFT has in its guidance stated its intention to provide a written opinion in cases raising novel or unresolved questions about the application of Article 81 or 82 or the Chapter 1 or Chapter II prohibitions where the OFT thinks there is an interest in issuing clarification for the benefit of a wider audience.

The OFT has stated that it will also give ad hoc, non-binding confidential informal advice on the application of Articles 81 and 82 and/or the Chapter 1 and 2 prohibitions. It is likely, however, that the circumstances in which the Commission or the OFT will give informal guidance will be rare, as they do not want to effectively re-introduce the notification system. Neither the European Commission or the OFT have prescribed any particular form in which to make an application for informal guidance. Undertakings considering making a request for an opinion should approach the OFT informally to establish the best way to proceed.

Third-Party Challenges

In the United Kingdom, a distribution agreement could be challenged under Article 81 or 82 or Chapter I or Chapter II by various means.

Office of Fair Trading Investigation

Where the OFT has reasonable grounds for suspecting an infringement of Article 81, Article 82, Chapter 1 or Chapter 2, it can require the production of documents and information, enter premises with or without a warrant and take other necessary steps to investigate and ultimately make an infringement decision and direction. An OFT investigation may be started as a result of its own enquiries or as a result of a third party complaint.

Complaints

Complaints alleging infringement of Article 81, Article 82, Chapter 1 and/or Chapter 2 prohibitions may be made to the OFT or to the appropriate Regulator. There is no specific form, but there is OFT guidance as to the information likely to be

required. If the complaint provides grounds for investigation, the OFT may seek further information from the complainant or go straight to further investigation.

The OFT may, however, decide that there are no grounds for action or that the complaint is outside the OFT's current administrative priorities. The OFT cannot be forced to investigate a complaint. The OFT is currently reviewing the role of complainants and other third parties in cases. The OFT has stated its intention to publish revised guidance on this issue during 2005.

Court Action

Third parties adversely affected by an agreement which they believe is prohibited by Article 81, Article 82, Chapter 1 or Chapter 2 may take action in the United Kingdom courts to seek to stop the behavior and/or to seek damages, or court action can be commenced where a decision of the OFT or the Competition Appeal Tribunal (CAT), on appeal from a decision of the OFT, has already found an infringement of Article 81 and/or Chapter I.

Third parties who consider that they have suffered loss as a result may bring an action for damages against the undertaking or undertakings concerned before the CAT or the court. The CAT and the courts will be bound in such proceedings by the relevant infringement decision, provided that the decision is no longer capable of being overturned on appeal.

Legal Professional Privilege

In the context of Commission investigations into alleged breaches of Articles 81 and 82, legal professional privilege does not extend to advice provided by in-house lawyers. Under English law, legal professional privilege does extend to advice provided by in-house lawyers.

In the case of information received by the United Kingdom competition authorities from other national competition authorities, the OFT has expressed the opinion that, under the Modernization Regulation, the question of what is privileged will be determined by the law of the Member State transmitting the information.

Confidentiality

The Enterprise Act sets out requirements which must be met before the OFT, and Regulators can disclose information relating to an individual or the business of an undertaking. The information can only be disclosed in prescribed circumstances, for example, with consent, in order to facilitate the exercise of statutory functions or to fulfill an EC obligation, but even then the authority must consider if the disclosure would be against the public interest or would cause significant harm to the business or individual.

Information provided to the OFT or a regulator which is confidential should always be put in a separate annex clearly marked as containing confidential information and with a written explanation as to why such information should be treated as confidential.

Timing

Prior exemption gave some certainty to the parties to a distribution agreement, even though the exemption was capable of being withdrawn. Without an exemption, it is up to the complainant to judge the best time to make a complaint or bring a court action. As a market evolves, an agreement which was originally compliant can become infringing.

Costs

There is not at the moment any charge for informal OFT guidance but, as stated previously, the circumstances in which an opinion will be given are very limited. If a complainant can persuade the OFT to bring a complaint, there is no charge for the complainant. If a third party brings an action, then the usual United Kingdom rules on costs apply.

Appeals

Decisions of the OFT as to whether Articles 81 and 82 have been infringed may, as is the case with decisions in relation to Chapters I and II, be appealed to the CAT. Third parties also have this right of appeal if the CAT considers that they have a sufficient interest, although third parties cannot appeal the decision to impose penalties or the level of penalties.

If a third party makes a complaint to the OFT or a regulator, that third party will only have a right of appeal if the OFT or regulator has made a non-infringement decision. If the OFT merely decides not to pursue the complaint without making a formal decision, then there is no right of appeal. Judicial review could be available, but the prospects are likely to be very poor except in very exceptional cases. Appeals against a court decision are subject to the normal rules applicable to the particular court.

Conclusion

The new system of parallel competence for the application of Articles 81 and 82 of the EC Treaty may result in inconsistencies between decisions of different national competition authorities and courts. Therefore, the supervising and coordinating role of the Commission is of major importance. In addition, one must bear in mind, in the new decentralized system, and especially in the light of Article 4 of Protocol 7 of the European Convention on Human Rights, the principle of *non bis in idem*, also a general principle of Community law, according to which a company should be prevented from being sanctioned in multiple actions before the national competition courts and authorities of the twenty-five Member States, on the one hand, as well as before the Commission, on the other hand, especially as regards the fixing of the fine. Particular attention should, therefore, be paid to future practices and case law generated by the new system.

The "modernization package" is a new interactive experience between the relevant authorities of Member States *inter se*, and *vis-à-vis* the Commission, in particular, since not fully integrated by all Member States. Obviously, if the system proves to be efficient, the Commission will be able to concentrate on the development of competition law.

Annex European Competition Network

1.	Austria	*Bundeswettbewerbsbehörde* (Federal Competition Authority)
2.	Belgium	1. *Conseil de la Concurrence, Raad voor Mededinging* (Competition Council) 2. *Commission de la Concurrence, Commissie voor de Mededinging* (Competition Commission) 3. *Corps des Rapporteurs, Korps Verslaggevers* 4. Belgian Federal Ministry of Economy, Energy, Foreign Trade and Science Policy
3.	Cyprus	Commission for the Protection of Competition
4.	Czech Republic	Office for the Protection of Competition
5.	Denmark	*Konkurrencestyrelsen* (Competition Authority)
6.	Estonia	*Konkurentsiamet* (Competition Board)
7.	Finland	*Kilpailuvirasto* (Competition Authority)
8.	France	*Conseil de la Concurrence* (Competition Council) and/or *Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes* (DGCCRF)
9.	Germany	*Bundeskartellamt* (Federal Antitrust Board)
10.	Greece	Hellenic Competition Commission (HCC)
11.	Hungary	*Gazdasági Versenyhivatal* (Office of Economic Competition, OEC)
12.	Ireland	Irish Competition Authority
13.	Italy	*Autorità garante della Concorrenza e del Mercato* (Competition and Market Authority)
14.	Latvia	Competition Council

15.	Lithuania	Competition Council
16.	Luxembourg	*Direction de la Concurrence et de Protection des Consommateurs* (Competition and Consumer Protection Directorate)
17.	Malta	Office for Fair Trading, Consumer and Competition Division
18.	The Netherlands	*Nederlandse Mededingingsautoriteit*, NMa (Dutch Competition Authority)
19.	Poland	Office for Competition and Consumer Protection
20.	Portugal	*Autoridade da Concorrência* (Competition Authority)
21.	Slovak Republic	Anti-monopoly Office
22.	Slovenia	Competition Protection Office
23.	Spain	*Tribunal de Defensa de la Competencia* (Competition Protection Tribunal)
24.	Sweden	*Konkurrensverket* (Competition Authority)
25.	United Kingdom	1. Office of Fair Trading (OFT) 2. Office of Communications (Ofcom) 3. Gas and Electricity Markets Authority (Ofgem) 4. Northern Ireland Authority for Energy Regulation (OfregNI) 5. Office of Water Services (Ofwat) 6. Office of Rail Regulation (ORR) 7. Civil Aviation Authority (CAA)