



Pilot field study on the functioning of the national judicial systems for the application of competition law rules

Final Report

DG Justice under Multiple Framework Contract JUST/2011/EVAL/01



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Submitted by ICF GHK
in association with Milieu Ltd



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EU Country Factsheets

1 Introduction

This Final Report is the fourth deliverable of the “Pilot field study on the functioning of the national judicial systems for the application of competition law rules”, an assignment being undertaken by ICF GHK in cooperation with Milieu, on behalf of DG Justice and under the Multiple Framework Contract for impact assessment, evaluations and evaluation-related services with DG Justice (JUST/2011/EVAL/01/004).

The Final Report presents the following information:

- It provides a synthesis Report including (a) the summary description of the national justice system for the application of EU competition rules; (b) a complete list of cases concerning the application of Articles 101 and 102 TFEU by national courts including a brief description of each case; (c) complete data on the number and length of cases; and (d) the feedback from parties, legal practitioners and judges;
- And 28 Member State factsheets

1.1 Purpose, scope and structure of the study

This assignment concerns a pilot field study on the functioning of the national judicial systems for the application of EU antitrust law rules (Articles 101 and 102 TFEU). It constitutes one of a series of targeted field studies announced by the Commission on how the judicial systems in Member States function in practice when applying selected growth-related EU legislation. The pilot study ran from mid-October 2013 until mid-March 2014.

The overall objective of the pilot study is to provide further information on the functioning of the national judicial systems for the application of EU antitrust law rules – which is to feature in the next edition of the EU Justice Scoreboard.

The specific objectives of the pilot field study, as set out in the Terms of Reference, are:

- To collect data on the functioning of the national judicial systems in the application of EU competition law rules¹, in particular on the number of incoming, pending and resolved cases in which Articles 101 and 102 TFEU have been applied, as well as the duration / length of proceedings per instance;
- To gather the views of a representative group of stakeholders on the functioning of the national judicial systems, in particular with regard to their efficiency, quality and independence when applying EU competition rules. The feedback should be collected from parties, practitioners and judges who have been involved in both follow-on actions and/ or judicial review of decisions adopted by the national competition authorities (NCAs), as well as representatives of consumers, professionals and businesses, and
- On the basis of the above, to identify trends in practices and recurrent problems in the functioning of the national judicial systems for the application of EU antitrust law rules in the Member States.

The study covered the following cases concerning decisions taken by national competition cases / the European Commission based on EU antitrust law rules:

- Cases of public enforcement (judicial review of decisions taken by national competition authorities covering one or two instances, where applicable); and
- Cases of follow-on private enforcement of competition rules further to decisions of the European Commission or of national competition authorities (covering all instances of review).

Cases where national courts acted as national competition authorities and stand-alone private enforcement actions were not reviewed, nor did the study cover cases in which national competition authorities applied national competition rules having a similar purpose

¹ More specifically, as already highlighted in section 2 above, Articles 101 and 102 TFEU concern antitrust rules.

to that of Articles 101 and 102 TFEU but without applying in parallel the corresponding TFEU rules.

This pilot field study covers the situation in all **28 Member States**. The assignment identifies – in as far as possible – a complete list of the cases per Member State before national courts in which Articles 101 and 102 TFEU have been applied between **1 May 2004** and **1 June 2013**. The completeness of data is discussed in detail in the next sub-section.

The work for this assignment is structured around four different parts. The specific Tasks undertaken as part of the work are indicated under each of the following main Parts of the study that provide the main structure of our work:

Box 1.1 Outline of Method

Part 0 – Inception

Task 0.1: Kick-off meeting

Task 0.2: Mapping of information sources

Output: Inception report

Part A – Background information and statistics

Task A.1: Summary description of national systems

Task A.2: Data collection

Task A.3: Data quality assurance and integration in central database

Output: Interim report (relevant inputs generated under Part A)

Part B – Feedback on the functioning of the national judicial system

Task B.1: Compilation of list of contact details

Task B.2: Online survey

Task B.3: Follow-up interviews

Task B.4: Quality assurance of online survey responses and interview write-ups

Task B.5: Updating of Member State factsheets

Output: Interim report (relevant inputs generated under Part B)

Part C – Analysis of trends in practices and recurring obstacles

Task C.1: Finalisation of Member State factsheets

Task C.2: Preparation of Synthesis Report

Task C.3: Workshop with the Commission

Output: Final Report

2 Methodology

The pilot field study consisted of three main Parts, namely:

- **Part A** which included:
 - The preparation of a summary description of the national judicial system for the application of competition law, including the judicial review system of decisions of national competition authorities;
 - Drawing up a complete list of cases identifying the cases where Article 101 and 102 TFEU were applied, including key data on these cases such as the start and end dates, the parties involved, etc. between 2004 and 2013. The results of this data collection exercise are presented in tables in a central database that allow for an analysis and comparison at EU level, for example showing the average length of cases.
- **Part B** which included the identification and contacting of relevant stakeholders, party to or impacted by cases on judicial review of decisions adopted by national competition authorities and follow-on private enforcement actions further to decisions of the European Commission or national competition authorities, in order to receive their feedback on the functioning of the national judicial system.
- **Part C** which comprised an analysis of the trends in practices as well as the recurring obstacles identified in the Member States.

The methodological tools used under each Part are described in the following sub-sections.

2.1 Methodological approach to Part A

Part A was organised around three main tasks:

- The preparation of Member State factsheets containing summary overviews of national systems (Task A.1)
- Data collection for the preparation of a list of judgments in the EU (Task A.2);
- Quality assurance (Task A.3).

Each of these is briefly described in turn.

2.1.1 Task A.1: Member State factsheets

For the purpose of Task A.1, the study team developed a template for a Member State factsheet which the national researchers were asked to complete. Box 2.1 presents the structure of the template.

Box 2.1 Structure of Member State factsheet

Abbreviations used

- 1 Overview of the National Legal Framework**
- 2 National Legislation establishing competition law rules**
 - 2.1 General legislation
 - 2.2 Industry-specific legislation
- 3 The National Competition Authority**
 - 3.1 The establishment of the National Competition Authority
 - 3.2 The reform of the National Competition Authority
 - 3.3 Composition and decision-making
 - 3.4 Cooperation with other entities
 - 3.5 Investigations

3.6	Decision-making
4	Competent courts
4.1	Judicial branch
4.2	Administrative branch
5	Proceedings related to breaches of Competition Law rules
5.1	Legal standing in judicial review and follow-on proceedings
5.2	Judicial Review Proceedings
5.3	Follow-on Proceedings (private enforcement)
5.4	Alternative dispute resolution mechanisms
6	Contextual Information
6.1	Duration and cost of competition law cases
6.2	Influencing Factors
6.3	Obstacles/Barriers
Annex 1 Bibliography	

2.1.2 Task A.2: Data collection on cases

The study team categorised the Member States by type of case (e.g. public or private enforcement), allocating them either to Type A (Member States with good information availability / accessibility), Type B (Member States with medium information availability / accessibility) or Type C (Member States with poor information availability / accessibility), as presented in Table 2.1 below. This categorisation took account of:

- The extent to which cases were centrally available or spread over different courts
- In relation to the above, where cases were spread over different locations, the total number of courts which might have handled relevant cases
- The availability of some form of indexation / organisation of cases so that relevant ones could easily be found or whether cases would have to be searched 'manually'
- The extent to which information was available online or in paper format only
- Whether access to cases had to be requested or required specific authorisation.

The national experts were expected to find all judicial review cases². As regards follow-on, national experts were also expected to find all follow-on cases for those categorised as Type A or B. Whilst this was most likely feasible for Type A situations, in Type B situations national experts would perhaps not find all cases. They were asked to verify this with the NCA and to make an estimate whether they considered to have identified 100% of all cases or whether possibly there were 'undetected' cases, for example because these could have been brought forward in small courts, because not all judgements were published, or because it was particularly difficult to identify Article 101 and 102 TFEU cases in certain databases.

The approach to Type C Member States was however drastically different. As stated in the inception report, in these situations, if from the onset of the national research or after a few days, it became clear that it would be impossible to access data on cases – for example because cases could have been handled by any local / regional court in a particular Member State – the national experts were asked to follow a different method. The latter consisted of focusing on identifying cases in the highest court first, followed by a mapping of relevant

² For these cases all countries were categorized as A or B. However, it cannot be discarded that in a limited number of cases not all relevant cases may have been identified, for example because these cases were not all published (e.g. in Germany) or because the courts could not provide information on cases within the deadlines of the study.

cases in the lower instance courts which had generated most cases and, where applicable, applying the same approach in the lowest instance courts which generated most cases.

Table 2.1 Categorisation of Member States

	Judicial review			Follow-on action		
	A	B	C	A	B	C
Austria	X					X
Belgium		X		X		
Bulgaria		X		X		
Cyprus		X		X		
Croatia ³	X				X	
Czech Republic		X				X
Germany		X			X	
Denmark	X			X		
Estonia		X			X	
Greece		X				X
Spain	X					X
Finland	X				X	
France	X					X
Hungary	X			X		
Ireland	X			X		
Italy		X				X
Lithuania	X				X	
Latvia	X			X		
Luxembourg	X			X		
Malta	X			X		
Netherlands	X			X		
Poland	X					X
Portugal	X					X
Romania	X			X		
Slovenia		X			X	
Slovak Republic	X				X	
Sweden	X			X		
United Kingdom		X			X	

The national experts were asked to compile a list of all relevant cases identified, by completing information on each case in a template datasheet in excel. Detailed guidance was provided at the onset, as well as through a total of three sets of additional guidelines to further clarify matters. The datasheets asked the experts to record the information as presented in Table 2.2 below. It is important to note that each case, as recorded in the datasheet, corresponds to a judgement on the merits per instance (or to a pending, yet to be resolved case). The specific approach taken to coding each case allowed to identify 'complete' cases, i.e. combining – where applicable – the first, second and even third instance.

³ Given the recent accession of Croatia, the national expert was asked to look for cases in which the court applied national competition law mirroring Article 101 and 102 TFEU. These cases have not been included in the overall quantitative analysis, but are mentioned each time separately, for example at the bottom of a table.

Table 2.2 Information entries in the datasheet

Type of Information
Case ID (The case ID comprises the country code + number of the record + number of the instance, e.g. AT-001-1: Case at First Instance and AT-001-2: Case at Second Instance)
Date on which the case record is created
Source
National Reference of the case
Type of case (Public enforcement: judicial review OR Private enforcement: follow-on).
Relevant EU competition law provision (Article 101, Article 102 or both Articles 101 and 102)
Body which took the original decision (NCA or European Commission)
National reference of original decision
Date or original NCA/European Commission Decision
Type of case/judgment (1 st , 2 nd or 3 rd)
If 2 nd and 3 rd instance, description of the type of instance
Date of start of case
Date of end of case/judgment
The estimated duration in days (only if no start and end date can be provided)
Number of hearings and date of first hearing
Status of the cases (resolved or pending/open)
Ruling, if resolved (i.e. whether the court ruled in favour or against the applicant)
Outcome of ruling (details on the type of outcome)
Extent to which there was a reference for a preliminary ruling to the CJEU
CJEU reference or link
Outcome of the CJEU preliminary ruling
Extent to which there was an intervention by amicus curiae
Extent to which interim measures were used (Including those adopted by courts other than the one adjudicating the case)
Extent to which judicial enforcement was requested
Date of start of judicial enforcement
Date of end of judicial enforcement
Extent to which out-of-court mechanisms were used (and which ones)
Parties involved in the case (by applicants and defendants)
Availability of parties' contact details
Other intervening parties
Information on costs (State and court fees; Legal fees; Sanctions; Other costs)
Facts of the case

2.1.3 Task A.3: Quality assurance

Following the submission of the Member State factsheets by the national researchers as part of Task A.1, the central study team undertook quality assurance to make sure that the factsheets were complete, clear and of high quality. Several exchanges between the central team and the national researchers took place before the Member State factsheets were considered as final.

Following the submission of the datasheets by the national researchers as part of Task A.2, the central team checked each case entered on its completeness and accurateness. This included a review as to whether all quantitative information had been entered correctly (also whether it 'makes sense'), whether dates had been entered in the right format, whether all drop-down lists had functioned properly, etc.). National researchers were requested to double-check their entries and to complete missing information. This led in some cases to a reduction of cases, whilst in others national researchers sourced additional ones.

Following the quality assurance of the datasheets submitted by the national researchers, the sheets were stored in a central database in Excel. This database allowed the study team to have a full overview of all data available in one single file and to run STATA queries on it.

2.2 Methodological approach to Part B

The purpose of Part B was to identify relevant stakeholders, party to or impacted by cases on judicial review of decisions adopted by national competition authorities and follow-on private enforcement actions further to decisions of the European Commission or national competition authorities, and to receive their feedback on the functioning of the national judicial system. This feedback was collected via the organisation of an online survey and through follow-up interviews.

Part B was composed of the following Tasks:

- Compilation of a list of contact details of relevant stakeholders at national and EU level (Task B.1)
- Online survey (Task B.2)
- Follow-up interview (Task B.3)
- Quality assurance of online survey responses and interview write-ups (Task B.4)

Each of these is further developed below.

2.2.1 Task B.1: Compilation of a list of contact details of relevant stakeholders

The survey targeted parties, legal practitioners (including in house-lawyers) and judges. The identification of the pertinent stakeholders was carried out by the national experts in parallel with the data collection of relevant cases. For each case identified, national researchers were also asked to identify the contact details of the judge, the legal practitioner and the parties in the case. Where details were not available, the central team provided support with the identification of the emails addresses. In addition, the national researchers were also asked to provide the contact details of relevant stakeholders in their own professional networks. Finally, they were also requested to actively promote the survey.

2.2.2 Task B.2: Online Survey questionnaires

Three survey questionnaires were developed on the basis of the questionnaires provided by DG Justice within the Study specifications. They are the following:

- Online survey for parties involved in the proceedings on the application of EU competition law (See: <http://www.ghkint.com/surveys/eu-competition-rules-parties>)
- Online survey for national judges competent for the application of EU competition law (See: <http://www.ghkint.com/surveys/eu-competition-rules-judges>)

- Online survey for legal practitioners involved in proceedings before national courts for the application of EU competition law (see: <http://www.ghkint.com/surveys/eu-competition-rules-practitioners>)

The questions, however, were adapted and rephrased into closed questions in order to generate comparable and measurable information.

The stakeholders were offered the possibility to reply anonymously to the survey. However, as the study team also intended to follow up the survey replies with interviews to confirm or clarify their responses, respondents were asked to leave their contact details if they were willing to be interviewed afterwards.

2.2.3 Task B.3: Follow-up interviews

On the basis of the survey responses, the central study team identified the key issues which could be further explored as part of the interviews, as well as specific responses which would have benefited from further elaboration through an interview. Survey respondents who had indicated that they were willing to take part in a follow-up interview were contacted initially by email. The interviews were all undertaken by phone.

2.2.4 Task B.4: Quality assurance of online survey responses and interview write-ups

All survey responses and interview write-ups were quality checked by senior members of the central study team.

2.3 Methodological tool for Part C: Analysis of trends in practices and recurring obstacles

The purpose of Part C is to present and analyse the trends and practices, as well as review the recurring obstacles identified in the Member States. The findings of Part C were presented in both the interim and the final reports.

The two reports were based on the Member State factsheets on national judicial systems, the data collected on relevant cases, the online survey responses and the interviews.

3 Comparative analysis of the organisation of national judicial systems

This section provides an overview of the organisation of national judicial systems in the Member States on the application of competition law rules. The information provided is on the basis of the collection of information from the Member State Factsheets elaborated by national experts. The courts competent for applying competition law rules are outlined, followed by a presentation of some of the procedural aspects of cases. Finally, the modes of alternative dispute resolution used in the Member States are presented.

Information relating to national legislation existing in the Member States providing for competition law rules as well as information relating to the national competition authorities are provided in Annex 1 and 2.

3.1 Competent courts

The national courts competent for Competition Law matters vary amongst Member States. In most cases, a distinction can be made between courts competent for judicial review and those competent for follow-on procedures, as outlined in the following sub-sections.

It is worth noting that in the majority of Member States, NCAs adopt (substantive) decisions in line with Article 5 of Regulation 1/2003 themselves. In some cases, however, decisions on sanctions have to be adopted by a court upon request of the NCA. For instance, in Austria, only the Cartel Court can impose fines after it is requested by the NCA. In Ireland, the NCA is empowered to initiate civil proceedings in respect of breaches of competition law but it does not have the power to decide whether a breach has occurred nor may it impose penalties thereof. Proceedings must then be brought before either the Circuit or the High Court, who decide on the substance of the case and the nature of the sanction to be imposed. On the other hand, in Denmark, the NCA has investigative powers and decides on the substance of the case, after which it can then refer the case to the criminal courts to impose a fine. If the case is simple and the undertaking admits guilt, instead of referring the case to the criminal courts, the NCA can impose a penalty notice (administrative fine). A similar system is in place in Finland. Finally, in Sweden, the NCA may issue a fine order in clear cases and when the undertaking concerned does not contest the decision. Otherwise, the case is referred to the courts.

3.1.1 Courts competent for Judicial Review

When examining courts competent for judicial review, Member States can be categorised into the following categories (see also Table 3.1 below):

1. Member States providing for judicial review actions to be dealt with in two different "instances" (AT, BE, BG, CZ, CY, DK, FI, DE, EL, HR, IT, LV, LT, LU, MT, NL, PT, RO, SI, ES, SE and SK); In Sweden and Finland, where sanctions are imposed by a court and not by the NCA, there is only one instance where the decision can be subsequently appealed (the Market Court for Sweden or the Supreme Administrative Court in Finland).
2. Member States allowing judgment at third instance, if required and fulfilling certain conditions (EE, FR, HU, IE, PL and UK).

With regard to those Member States allowing judicial review to be heard in two instances, a few (e.g. BE, CZ, DE, EL, HR, MT and PT) only enable an appeal to be launched at second instance for matters of law only. With regard to third instance courts in the relevant Member States, restrictions to appealing to these courts also exist with third instance procedures tending to be restricted to matters of law only, with strict requirements in place for appeals to third instance. Appeals before Constitutional Courts have not been taken into account. The Member State Factsheets, as well as Table 3.1 below, provide a full overview of whether courts are able to rule on points of law and on facts.

Administrative appeal before going to judicial review: In Denmark, a formal decision on appeal can first be lodged with the Competition Appeal Tribunal that consists of five

members. This administrative formality is available before appeals for judicial review are made to courts. Similarly, in the Netherlands, a three-step process is followed, with the first step consisting of an administrative appeal to the national competition authority with advice from an independent committee, consisting of at least two members. The second and third stages are then before specialist administrative courts.

3.1.1.1 *Specialised courts*

In Portugal, Sweden and the United Kingdom, specialised courts exist for dealing with judicial review. In Portugal, for example, the Competition, Regulation and Supervision Court handles all appeals against the Competition Authority, with the court's competence covering the entire national territory. The Competition Appeal Tribunal ('CAT') in the United Kingdom is entitled to hear appeals on the merits of the case on appealable decisions of the NCA. The Swedish Market Court handles cases related to the Swedish Competition Acts as well as cases related to the Marketing Act and other consumer and marketing legislation. In both instances, the Court of Appeal is the competent court at second instance.

3.1.2 **Courts with exclusive competence**

In addition to the existence of specialised courts, Member State Factsheets reported that some Member States (e.g. AT, BG, CY, CZ, BE, EL, FI, HR, LT, PL, RO and SK) have provided specific courts/chambers at first instance with exclusive competence for ruling on competition law cases, with some of these courts (e.g. AT, BG, BE) having specific 'competition law' chambers. For example, in Belgium, two chambers of the Brussels Court of Appeals have been exclusively appointed to rule on competition law cases, with both chambers exclusively dealing with these cases. Administrative actions in the Netherlands are also exclusively assigned to a specialised court (District Court in Rotterdam) for administrative enforcement of competition rules. In Croatia, competition cases are an exception to the general rule, as cases must go to the first instance administrative court since the High Administrative Court is provided with exclusive competence to deal with these cases. In Germany, for cases relating to administrative offences (proceedings concerning administrative fines), the Higher Regional Courts establish cartel divisions with regard to matters assigned to them. The Federal Court of Justice, at second instance, also has a cartel division. In Greece, the new legislative act provides that specialised competition chambers can be established at the Administrative Court of Appeals in Athens in order to enhance the effectiveness of judicial review.

The court structure for competition law matters in these Member States is thus organised centrally. For example, the Court of Appeals in Vienna, sitting as the "Cartel Court", is the only court in Austria which can impose fines for infringement of Articles 101 and 102 TFEU. In Finland, although decisions made by the FCCA are generally appealed before the Market Court, in some cases, however, is the Market Court who issues the first instance decision which can be challenged by the undertakings concerned. It is a centralised court with nationwide jurisdiction. The same applies for Sweden, where the Market Court sits in Stockholm. Cases in Ireland and Denmark, on the other hand, are not handled centrally since they can be referred to Circuit and Criminal courts respectively. In Romania, a special section of the Bucharest Court of Appeal is competent to hear cases related to judicial review of the decisions of the Competition Authority.

Table 3.1 provides a full overview of the courts competent for judicial review in the Member States.

Table 3.1 Judicial Review Courts in Member States

Member State	First Instance	Second Instance (or Cassation)	Third Instance (Cassation)
Austria	Court of Appeal “Cartel Court”, Vienna <i>Rule of Fact and Law</i>	Supreme “Cartel” Court <i>Rule on Law only</i>	NA
Belgium	Court of Appeal, Brussels (One Flemish court and one French court with exclusive competence) <i>Facts and Law</i>	Court of Cassation <i>Law only</i>	NA
Bulgaria	Supreme Administrative Court (SAC)(Three member panel) <i>Facts and Law</i>	SAC (Five member panel) – grounds are nullity, inadmissibility and illegality	NA
Croatia	High Administrative Court <i>Facts and Law</i>	Supreme Court <i>Extraordinary Legal Remedy</i>	NA
Cyprus	Supreme Court (One judge) <i>Facts and Law</i>	Supreme Court (at least five judges) ⁴ <i>Law only</i>	NA
Czech Republic	Regional Court, Brno <i>Facts and Law</i>	Supreme Administrative Court <i>Law only</i>	NA
Denmark	District Court, Copenhagen <i>Facts and Law</i>	High Court <i>Facts and Law</i>	NA
	Maritime and Commercial Court (if a Direct Application is made) <i>Facts and Law</i>	Supreme Court <i>Facts and Law (though generally no acceptance of witnesses)</i>	
Estonia	Administrative Court <i>Facts and Law</i>	Circuit Court <i>Facts and Law</i>	Supreme Court, Administrative Chamber
Finland	Market Court <i>Facts and Law</i>	Supreme Administrative Court	NA
France	Court of Appeal of Paris <i>Facts and Law</i>	Court of Cassation <i>Law only</i>	State Council (Conseil d’Etat)
Germany	Düsseldorf Higher Regional Court (Administrative Offences) <i>Facts and Law</i>	Federal Court of Justice, Karlsruhe <i>Law only</i>	NA
Greece	Administrative Court of Appeal, Athens	Council of State	NA

⁴ Where the case involves issues of particular importance, it is heard by all of the Supreme Court judges

Member State	First Instance	Second Instance (or Cassation)	Third Instance (Cassation)
	<i>Facts and Law</i>	<i>Law only</i>	
Hungary	Administrative and Labour Court, Budapest <i>Facts and Law</i>	Regional Court of Appeal of Budapest <i>Facts and Law</i>	Curia <i>Facts and Law</i>
Ireland	High Court <i>Facts and Law</i>	Supreme Court <i>Law only</i>	Supreme Court (Court of Appeal) <i>Law only</i>
	Circuit Court ⁵ <i>Facts and Law</i>	High Court	
	Central Criminal Court (Criminal Cases)	Court of Criminal Appeal (Criminal Cases)	
Italy	Regional Administrative Court of Lazio <i>Facts and Law</i>	Council of State <i>Law only</i>	
Latvia	Administrative Regional Court <i>Facts and Law</i>	Supreme Court, Administrative Department <i>Law only</i>	NA
Lithuania	Regional Administrative Court, Vilnius <i>Facts and Law</i>	Supreme Administrative Court <i>Law only</i>	NA
Luxembourg	Administrative Tribunal <i>Facts and Law</i>	Administrative Court <i>Facts and Law</i>	NA
Malta	Competition and Consumers Appeals Tribunal <i>Facts and Law</i>	Court of Appeal <i>Law only</i>	NA
Netherlands	District Court, Rotterdam <i>Facts and Law</i>	Trade and Industry Appeals Tribunal, the Hague <i>Facts and Law</i>	
Poland	Regional Court, Warsaw, the Court of Competition and Consumer Protection (SOKiK) <i>Facts and Law</i>	Court of Appeal, Warsaw – exclusively competent to review judgments of authority <i>Facts and Law</i>	Supreme Court <i>Law only</i>
Portugal	Competition Regulation and Supervisory Court <i>Facts and Law</i>	Court of Appeal, Lisbon <i>Law only</i>	NA
Romania	Court of Appeal, Bucharest <i>Facts and Law</i>	High Court of Cassation and Justice <i>Facts and Law</i>	NA
Slovak Republic	Regional Court, Bratislava <i>Facts and Law</i>	Supreme Court <i>Law only</i>	

⁵ Given the low monetary limits of the lower courts, most competition law actions are taken in the Circuit Court or the High Court.

Member State	First Instance	Second Instance (or Cassation)	Third Instance (Cassation)
Slovenia	Administrative Court <i>Facts and Law</i>	Supreme Court <i>Law only</i>	NA
Spain	National High Court <i>Facts and Law</i>	Supreme Court <i>Law only</i>	NA
Sweden	Market Court, for infringements City Court, Stockholm for fines <i>Facts and Law</i>	Market Court appeal court for fines <i>Facts and Law</i>	NA
United Kingdom	Competition Appeal Tribunal Or or High Court ⁶ <i>Facts and Law</i>	Court of Appeal (England and Wales) Court of Session (Scotland) Court of Appeal in Northern Ireland (NI) <i>Law only</i>	Supreme Court <i>With permission</i>

⁶ Judicial review may also be brought before the Administrative Court of the Queen's Bench Division or the High Court in the case of improper exercise of administrative discretion or procedural irregularities

3.1.3 Follow-on actions

In contrast with judicial review actions, Member States have not organised follow-on actions centrally, nor do specialised or exclusive courts exist in the majority of Member States. Civil and commercial courts, starting at local/regional level at first instance, have competence over these cases.

All Member States provide for follow-on actions to be heard in at least two instances. As with judicial review cases, the last instance can be subject to limitations with the courts mainly competent to rule on matters of law only. For example, in Finland, the Court of Appeal must grant leave for appeal in order for the case to be heard in the Supreme Court. In Lithuania, the Supreme Court can only hear appeals on points of law only, while in Croatia the Supreme Court can only be called for extraordinary legal remedy. In comparison to the majority of Member States, the Curia in Hungary can rule on both facts and law.

In Belgium, a distinction is made between whether the defendant in a follow on case is commercially active or not. If they are commercially active, the Commercial Court shall have competence over the procedure, otherwise the civil court is competent.

Table 3.2 below provides an overview of the courts competent for follow on actions.

Table 3.2 Courts competent for follow on actions

Member State	First Instance	Second Instance	Third Instance
Austria	District (commercial) Court <i>Facts and Law</i>	Regional (commercial) Court <i>Facts and Law</i>	Supreme Court <i>Law only</i>
	Regional (commercial) Court <i>Facts and Law</i>	Higher Regional Court <i>Facts and Law</i>	
Belgium	Commercial Court Court of First Instance ⁷ <i>Facts and Law</i>	Court of Appeals <i>Facts and Law</i>	Court of Cassation <i>Law only</i>
Bulgaria	Regional Court District Court <i>Facts and Law</i>	Appeal Court <i>Facts and Law</i>	Supreme Court of Cassation <i>Law only</i>
Croatia	Commercial Courts <i>Facts and Law</i>	High Commercial Court <i>Facts and Law</i>	Supreme Court <i>Extraordinary legal remedy only</i>
Cyprus	District Courts <i>Facts and Law</i>	Supreme Court <i>Law only</i>	
Czech Republic	Regional Court (commercial law sections) <i>Facts and Law</i>	High Court <i>Facts and Law</i>	Supreme Court <i>Law only</i>
Denmark	Any Danish court <i>Facts and Law</i>		
Estonia	County courts (place of residence of defendant) <i>Facts and Law</i>	Circuit Court <i>Facts and Law</i>	Supreme Court, civil chamber
Finland	District Court <i>Facts and Law</i>	Court of Appeal	Supreme Court <i>Given that the Court grants leave to appeal</i>
France	Tribunal of Grand Instance, Tribunal of Commerce in Marseille, Bordeaux, Lille, Fort-de-France, Lyon, Nancy, Paris and Renne <i>Facts and Law</i>	Court of Appeal, Paris <i>Facts and Law</i>	Court of Cassation <i>Law only</i>
Germany	Specific Regional Courts ⁸ <i>Facts and Law</i>	Higher Regional Court, Cartel Division or Federal Court of Justice, Cartel Division (in certain instances) <i>Facts (to a certain extent) and Law</i>	Federal Court of Justice, Cartel Division <i>Law only</i>

⁷ When the defendant is not commercially active, the Court of First Instance is competent.

Greece	District Civil Court <i>Facts and Law</i>	Court of Appeal <i>Facts and Law</i>	Supreme Court <i>Law only</i>
	Civil Court of 1 st Instance (single judge or three judge panel depending on threshold) <i>Facts and Law</i>		
Hungary	District Court <i>Facts and Law</i>	Regional Court <i>Facts and Law</i>	Curia <i>Facts and Law</i>
	Regional Court <i>Facts and Law</i>	Regional Court of Appeal <i>Facts and Law</i>	
Ireland	Circuit Court High Court <i>Facts and Law</i>	High Court Supreme Court <i>Facts and Law</i> <i>Law only</i>	
Italy	Companies Court, capital of Italian Regions except for Valle d'Aosta <i>Facts and Law</i>	Court of Appeal <i>Facts and Law</i>	Court of Cassation <i>Law only</i>
Latvia	Any court (jurisdiction based on legal address of the entity or address where the natural person has declared its residence) <i>Facts and Law</i>	Supreme Court <i>Law only</i>	
Lithuania	Regional Court, Vilnius <i>Facts and Law</i>	Court of Appeal <i>Facts and Law</i>	Supreme Court <i>Law only</i>
Luxembourg	Tribunals of Peace/District Court <i>Facts and Law</i>	Court of Appeal <i>Facts and Law</i>	Court of Cassation <i>Law only</i>
Malta	First Hall of Civil Court <i>Facts and Law</i>	Court of Appeal (civil jurisdiction) <i>Law only</i>	NA
Netherlands	Sub-District Court (<25,000 damages) District Court <i>Facts and Law</i>	Court of Appeal <i>Facts and Law</i>	Supreme Court <i>Law only</i>
Poland	District Court	Regional Court	Supreme Court ⁹

⁸ In the light of the concentration effect (*Konzentrationswirkung*) established in § 89 GWB the Länder determined specific Regional Courts which are competent for follow on cases of competition matters

⁹ Only if the if the value of the object of litigation amounts to at least PLN 50 thousand (approximately EUR 12 thousand).

	Regional Court ¹⁰ <i>Facts and Law</i>	Court of Appeal <i>Facts and Law</i>	<i>Law only</i>
Portugal	Judicial Court <i>Facts and Law</i>	Court of Appeal <i>Facts and Law</i>	Supreme Court <i>Law only</i>
Romania	Court of First Instance (under Lei 200,000) Tribunals (over Lei 200,000) <i>Facts and Law</i>	Upper courts (e.g. Courts of Appeal and/or High Court of Cassation and Justice) <i>Facts and Law</i>	
Slovak Republic	District Court, Bratislava II <i>Facts and Law</i>	Regional Court, Bratislava <i>Facts and Law</i>	Supreme Court (limited circumstances) ¹¹ <i>Law only</i>
Slovenia	District Court <i>Facts and Law</i>	High Court <i>Facts and Law</i>	Supreme Court (access allowed under strict conditions) <i>Law only</i>
Spain	Commercial Courts/First Instance Ordinary Civil Courts <i>Facts and Law</i>	Provincial Courts <i>Facts and Law</i>	Supreme Court <i>Law only</i>
Sweden	District Court <i>Facts and Law</i>	Market Court <i>Facts and Law</i>	
United Kingdom	Competition Appeal Tribunal or High Court (Chancery Division/Commercial Court) ¹² <i>Facts and Law</i>	Court of Appeal <i>Law only</i>	Supreme Court

¹⁰ Class actions are reviewed by the regional court regardless of the value of the object of the litigation

¹¹ Violation of fundamental procedural rights, insufficient collection of evidence, wrong legal assessment, existence of new evidence

¹² The right to bring a follow-on case before the CAT does not exclude the right to bring a follow-on case to the High Court.

The CAT rules include provisions enabling the transfer of follow-on claims from the High Court to the CAT.

Thresholds also exist in Member States to determine which court should be competent for the follow-on action at first instance. Table 3.3 below provides an overview of the thresholds so far provided in the Member State factsheets.

Table 3.3 Thresholds for Follow on actions

Member State	Threshold
Austria	District Court (claims < EUR10,000) Regional Court (claims > EUR 10,000)
Bulgaria	District Court (claim <BGN25,000 (approximately EUR 12 800))
France	Judge of Proximity (claims < EUR 4 000) Tribunal of Instance (claims between EUR 4 000 and EUR 10 000) Tribunal of Great Instance (cases > EUR 10 000) First instance decisions can be appealed before the Court of Appeal if the amount disputed is more than EUR 4 000.
Greece	District Court (claims < EUR 20 000) Civil Court of First Instance with single judge (claims > EUR 20 000 < EUR 120 000) Civil Court of First Instance with three judge panel (claims > EUR 120 000)
Hungary	District Court (< HUF 30 million (approximately EUR 100 000) Regional Court (> HUG 30 million (approximately EUR 100 000)
Ireland	District Court (claim < EUR 6 348.69) Circuit Court (claim < EUR 38 092.14)
Lithuania	Regional Court (claims > LT 100 000 (approximately EUR 29 000))
Luxembourg	Tribunals of the Peace (claims < EUR 10 000) District Courts (claims > EUR 10 000) Court of Appeal (for Second Instance claims >10 000€)
Netherlands	Sub-District Court (claims < EUR 25 000)
Poland	District Court (claims > PLN 75 000 (approximately EUR 18 000)) Decisions can be appealed to the Supreme Court if the value of the object of litigation amounts to at least PLN 50 000 (approximately EUR 12 000).
Portugal	First Instance (claim < EUR 5 000) Court of Appeal (claim < EUR 30 000) Supreme Court (claim > EUR 30 000)
Romania	Court of First Instance (claim < Lei 200 000 (approximately EUR 45 000)) Tribunal (claim > Lei 200 000) Two instance process if claims are below Lei 500 000 (approximately EUR 112 000) and three instance process if claims are more than Lei 500 000.
Slovenia	Local court (claim < EUR 20 000) District Court (claim > EUR 20 000)

As outlined in the table, the thresholds vary between Member States. While some apply a threshold of EUR 5,000 (Portugal) to EUR 10,000 (Austria and Luxembourg), others increase the threshold for First Instance claims to EUR 25,000 (Netherlands). In Hungary, the threshold for allocating competence between the District and Regional Court is set at EUR 100,000.

Though criminal law cases do not fall under the scope of the study, it is worth noting that **Denmark, Ireland and the United Kingdom** also provide for cases to be heard in criminal

courts when a competition infringement is considered to be a criminal infringement, in accordance with national law. In addition, in **Estonia**, certain violations of competition rules, such as a repeated abuse of dominant position or decisions and concerted practices prejudicing free competition are considered criminal offences under the Penal Code and prosecuted in criminal proceedings initiated by the Prosecutor's Office upon request of the NCA. Other infringements of competition rules are regarded as misdemeanors and prosecuted under the Code of Misdemeanour Procedure. In **France**, the Competition Council can decide to forward a case to the Republic prosecutor, when the breach of competition law rules resulted from fraudulent shams that could be criminally sanctioned. In **Greece**, it is also possible that criminal courts impose criminal sanctions for anticompetitive behaviour in case there is a violation of 2011 Law or articles 101 and 102 TFEU.

3.1.4 Burden of proof

The burden of proof varies in Member States depending on whether the action is a judicial review or follow on proceeding.

Concerning **judicial reviews**, in the majority of Member States (AT, BE, CY, DK, EE, DE, IE, IT, HR, LV, MT, PL, RO, SI, ES and UK) the burden of proof is on the applicant, in the sense that they need to show an error in the decision of the NCA, while in other Member States the burden of proof is on the NCA, which has to show that indeed there has been a breach of competition law rules. In Sweden, the burden of proof differs depending on the judicial review. In case of an appeal of obligations imposed by the NCA or in relation to administrative fines, the burden rests on the NCA. However, the burden of proof rests on the applicant in case of appeal of a decision relating to an infringement. In Greece, the burden lies on both the applicant and the competition authority to prove its claims.

The *level* of proof can also differ in the Member States. For example, the United Kingdom uses the balance of probabilities when imposing the burden of proof on the applicant. This differs from Member States, such as Spain and Romania, where the applicant needs to demonstrate that there has been an error in fact and in law. In Austria, the burden of proof is substantially lowered in favour of the applicant due to the inquisitorial principle of the Non Contentious Proceedings Act.

In comparison to judicial review, all Member States place the burden on the applicant in **follow on actions** to demonstrate that an action should be brought. Similar to judicial review cases, the burden of proof is based on the balance of probabilities in the United Kingdom. In Spain, the applicant must prove the harm suffered and the causal link existing between the infringement of competition rules and such harm. In Sweden, the applicant must 'only' prove the existence and size of the damage claim. Procedural aspects of judicial review and follow-on actions

The Member State Factsheets provide information on the different procedures to be followed for judicial review and follow on actions, with details provided on aspects such as the time limitations for filing a claim, the interim measures available and the enforcement of judgments. These are described in the subsections below.

3.1.5 Time limitations

The timeframe for lodging judicial review cases varies between the Member States. Table 3.4 below provides an overview of the time limitations existing at national level.

Judicial review

With regard to judicial review cases at first instance, the time limitation varies from 14 days following date of notification/publication of the decision (BG) to 75 days (CY) following publication of the decision. At second instance, this ranges from 14 days from the publication of the judgment (BG) to three months (BE) following the notification of the judgment. In comparison to other Member States, applicants in the United Kingdom have two years to file an action for judicial review.

In France, the time limitation for appealing a judicial review action at second instance, is longer than that at first instance. In some Member States (e.g. BE, EE, LV and PL), the time

period for lodging an appeal of a first instance decision is the same as first lodging a claim for judicial review. The time period for lodging an appeal is shorter at second instance in CZ, LT, LU, NL and RO. For example, in Luxembourg, the applicant has 30 months following the publication of the NCA decision to submit an action for judicial review at first instance. However, the applicant only has 40 days following the notification of the judgment at first instance to appeal the judicial decision at second instance.

Follow-on actions

For follow-on cases, as mentioned above, Member States apply general civil and commercial law provisions for the recovery of damages. With this in mind, the time limitation for lodging claims at first instance is significantly longer than an appeal at second instance. Member States can fall under one or more of the following categories for first instance cases:

3. Member States where the time limitation is applied from the time the injured party became aware of the damage (AT, BE, HR, CZ, DE, EL, ES, LV, MT, PL, PT and SI);
4. Member States where the time limitation is applied from when the damage occurred (BE, DE, EL, FI, IE, IT, LT, PL, SE, SI and UK);
5. Member States where the time limitation is linked with the decision of the competition authority (BG, DK, NL and RO);
6. Member States where the time limitation is linked to the end of the violation (FI and FR).

For those Member States where the time limitation is applied from the time the injured party became aware of the damage, this time period ranges from one year (ES) to five years (BE and EL). Where the time limitation is associated with the damage occurring, the time limit ranges from three years (LT) to 20 years (BE and EL). In the Member States where the time limitation is linked to the decision of the NCA, this ranges from two years (RO) to five years (BG and NL). For the final category of Member States, the violation must have ended at the latest five (FR) or 10 (FI) years before the claim is lodged.

In comparison to the long time periods for lodging a follow on action at first instance, the time limitation at second instance is relatively short. This ranges from eight days from the date of receipt of the judgment (HR) to three months following operation of the judgment (NL). In a few Member States (EE, LU, PL and SK), the time limitation at second instance for follow on cases is the same as that applied for judicial review.

It is apparent from the categorisation of the Member States, and from the overview provided in Table 3.4 below, that Member States implement very similar approaches in relation to time limitations for competition law actions.

Table 3.4 Timeframe for lodging claims in Member States

Member State	1 st instance		2 nd instance	
	Judicial Review	Follow On	Judicial Review	Follow On
Austria	4 weeks	3 years from the day both the damage and the identity of the offender became known to the injured party. The limitation period is interrupted for the duration of the cartel proceedings before the Cartel Courts plus six months.	4 weeks	Four weeks after the judgment has been served to the parties. If the judgment was pronounced in an oral hearing in the presence of the parties concerned, the appeal must be submitted within 2 weeks from the time the minutes of the oral hearing have been served. An appeal against a second instance judgment must be filed within four weeks from service of the judgment.

Member State	1 st instance		2 nd instance	
	Judicial Review	Follow On	Judicial Review	Follow On
Belgium	30 days following notification of decision	5 years (after party became aware of damages) for claim for damages or 20 years from occurrence of fact causing damage	3 months of service or notification of judgment	1 month of service or notification of judgment A party may lodge proceedings before the Court of Cassation within three months of the service or notification of the judgment
Bulgaria	14 days following date of notification/publication of decision	5 years following decision of competition authority establishing or confirming the existence of an infringement.	14 days from the date of publication of the judgment	<i>No information</i>
Croatia	30 days following delivery of decision	3 years from time the injured party became aware of damage or 5 years from moment damage occurred	Urgent procedure following decision at first instance Appeal filing for extraordinary legal remedy before the Supreme Court is six months from the date of delivery of final judgment to the parties.	8 days from date of receipt of judgment The deadline for submitting an application for extraordinary remedy against the judgment to the Supreme Court is six months from the date of delivery of the judgment.
Cyprus	75 days following date of notification/publication of decision	No limitation period currently in force ¹³	42 days for an appeal against final judgments.	42 days for an appeal against final judgments.
Czech Republic	2 months following decision	4 years from time injured party became aware of damage	2 weeks following delivery of judgment	15 days from the day the judgment was delivered to the party. The lodging of an appeal in cassation with the Supreme Court is 2 months after delivery of the judgment.
Denmark	8 weeks following decision of Competition Authority ¹⁴	3 years following decision of Competition Authority	Four weeks if appeal to the High Court Eight weeks if appeal to the Supreme Court	Four weeks to appeal to the High Court. Four weeks to appeal to the Supreme Court.
Estonia	30 days after decision was notified.		30 days after judgment was pronounced	20 days from the judgment of country court before circuit court. 30 days following public pronouncement of judgment by circuit court An appeal in cassation of the judgment can be lodged

¹³ Pursuant to the new Limitation Law (N. 66(I)/2012), the limitation period for Tort claims is 6 years from the date on which the cause of action is completed. The new Limitation Law was supposed to come into force on 1st of July 2012 but its implementation has been delayed until 31 December 2014.

¹⁴ A complaint before the national authority must have been logged (unsuccessfully) before any judicial action can be initiated.

Member State	1 st instance		2 nd instance	
	Judicial Review	Follow On	Judicial Review	Follow On
				within 30 days of the public pronouncement of the judgment.
Finland	30 days following notification of decision ¹⁵	10 years following fact that caused damage or 10 years following the ending of a violation (if continuous infringement).	30 days following notification of judgment.	One year to appeal
France	1 month from notification of decision	5 years following end of practice	2 months approximately following notification of judgment	1 month following notification of judgment
Germany	1 month of service of the NCA's decision	3 years (from the end of the year in which the claim arose and the obligee obtains knowledge or would have obtained such knowledge if he had not shown gross negligence) or 10 years after the claim arose or 30 years from the date on which the act, breach of duty or other event that caused the damage occurred.	1 month of service of judgment	1 month of service of judgment At the latest upon the expiry of five months following pronouncement of the judgment
Greece	60 days following date of service of decision	5 years from when the injured party became aware of the damage or 20 years following occurrence of damage	60 days	30 days following the date of service of the decision
Hungary	30 days following notification of decision	5 years after party became aware of damages	15 days following the notification of judgment	15 days following the notification of judgment
Ireland	14 days for Criminal Cases	6 years from the date on which the cause of action accrued	21 days for appeal to Supreme Court	10 days from judgment to High Court. 20 days for appeal to Supreme Court from passing and perfecting of the judgment.
Italy	60 days following notification of decision	5 years from occurrence of fact causing damage	60 days of service or notification of judgment (made by the winning party)	1 month of service or notification of judgment A party may lodge proceedings before the Court of Cassation within two months of the service or notification of the judgment
Latvia	1 month following receipt of decision	10 years after the infringement is identified	1 month following judgment	

¹⁵ Day of notice shall not be included

Member State	1 st instance		2 nd instance	
	Judicial Review	Follow On	Judicial Review	Follow On
Lithuania	20 days following receipt of decision/publication	3 years from the moment of damage occurred	14 days following adoption of judgment ¹⁶	30 days following judgment Cassation appeal to be brought within 3 months
Luxembourg	3 months following publication of decision	10 years	40 days following notification of judgment	40 days following service of decision Cassation to be brought within two months of service of decision
Malta	20 days following notification of decision	2 years after the injured party became aware or should have reasonably become aware of the damage.	20 days following notification of judgment	8 working days
Netherlands	6 weeks following decision (Court must submit judgment within 6 weeks)	5 years following decision	6 weeks following delivery of judgment	3 months following operation of judgment
Poland	2 weeks following delivery of decision	3 years (after party became aware of damages and the entity responsible for them) for claim for damages, but not more than 10 years from occurrence of fact causing damage	2 weeks following service of judgment 3 rd instance to be lodged within 2 months	2 weeks of service of judgment A party may lodge proceedings before the Supreme Court within two months of the service of the judgment
Portugal	30 working days	3 years from time injured party aware of right of compensation	10 days counting from the day of the notification of first instance ruling.	30 days to bring appeals
Romania	30 days following communication of decision	2 years after the sanctioning decision of the NCA or of the European Commission is final and irrevocable. A decision is considered final and irrevocable if it was not appealed within the 30-day term or if appealed it was confirmed by the competent courts (the Bucharest Court of Appeal at first instance and the High Court of Cassation and Justice at second instance)	30 days as of the date when the notification of the first instance judgment is sent (if the judicial review at first instance began <u>after</u> 15 February 2013 – the date when the New Civil Procedure Code entered into force) or 15 days as of the date when the notification of the first instance judgment is sent (if the judicial review <u>before</u> after 15 February 2013 – the date when the New Civil Procedure Code entered into force)	30 days as of the date when the notification of the first instance judgment is sent (if the judicial review at first instance began <u>after</u> 15 February 2013 – the date when the New Civil Procedure Code entered into force) or 15 days as of the date when the notification of the first instance judgment is sent (if the judicial review <u>before</u> after 15 February 2013 – the date when the New Civil Procedure Code entered into force) NB! In some follow on cases (depending on the value of the claims), there is a third instance as well for which the same deadlines mentioned above apply (i.e. 30 days or 15

¹⁶ The Supreme Administrative Court may accept late submission only if there are very important reasons of such delay

Member State	1 st instance		2 nd instance	
	Judicial Review	Follow On	Judicial Review	Follow On
Slovak Republic	2 months following decision becoming effective	Subject to prescription under the Civil or Commercial Code (<i>limitation to be clarified in draft Final Report</i>)	15 days of receipt of first instance decision.	15 days of receipt of first instance decision. The appellate review has to be filed within one month . The constitutional complaint has to be filed within 2 months from the day, when the decision took effect.
Slovenia	30 days following notification of decision to party	3 years from time injured party became aware of the damage or 5 years from date of damage occurring	30 days from delivery of the decision	
Spain	2 months following notification of decision to party	1 year from time party aware of damage ¹⁷	10 days from the day after of the notification of the judgment.	
Sweden	3 weeks of the decision	10 years from when the damage occurred	3 weeks (appeal for fines)	3 weeks
United Kingdom	2 months of the date upon which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier (Section 8 of the Competition Appeal Tribunal Rules 2003, SI 2003/1372). 3 months after the grounds to make the claim first arose (Section 54.5 of the Civil Procedure Rules).-	6 years from the date in which the loss has been incurred. If the loss is concealed, the clock starts running from the date in which the claimant knew, or ought to have known, about the loss (Section 2 of the Limitation Act 1980). 2 years after the date of expiration of the appeal period following a decision by the competent competition authority (CAT) (Section 31 of the Competition Appeal Tribunal Rules 2003, SI 2003/1372).	21 days after the date of the decision of the lower court that the appellant wishes to appeal. The lower court may direct a different time limit (which may be longer or shorter than the period referred to above) (section 52.4 of the Civil Procedure Rules). A party may lodge proceedings before the Supreme Court 28 days from the date of the order appealed from. The Supreme Court may extend this time limit (section 1.2.9 of the Supreme Court's practice directions).	21 days after the date of the decision of the lower court that the appellant wishes to appeal. The lower court may direct a different time limit (which may be longer or shorter than the period referred to above) (section 52.4 of the Civil Procedure Rules). A party may lodge proceedings before the Supreme Court 28 days from the date of the order appealed from. The Supreme Court may extend this time limit (section 1.2.9 of the Supreme Court's practice directions).

3.1.6 Interim Measures applied by Member States

The interim measures discussed in this section of the report relate to those ordered by the court when resolving both public and private enforcement cases.¹⁸

Judicial Review

The request for judicial review does not tend to suspend the validity of the decision rendered by the NCA. Interim measures can be implemented in the Member States in order to suspend the effects of the decision.

¹⁷ In follow-on actions, the date of the decision of the NCA declaring the breach of the competition rules may not coincide with the moment in which the plaintiff was aware of the harm.

¹⁸ Interim measures in competition law cases can be issued both by the national competition authorities when undertaking an investigation as well as by the court competent for dealing with judicial review and follow on actions.

The following thresholds for awarding interim measures exist in the Member States:

- Award of suspension measure following the proof of a degree of urgency (BE, FI, IT and NL)
- Award of suspension measure following the proof that significant and irreparable harm would be caused to the concerned party (e.g. BG, CY, CZ, EL, HU, IT, LV, PT, SK, SI and ES)

The suspension measure, and the conditions relating to its implementation, varies in the Member States. For example, in Greece, the decision of the NCA may be suspended, either in whole or in part, if a serious reason for doing so can be presented to the court. In Portugal, the request for suspension of the national authority's decision is only put into effect if a guarantee in lieu has been paid. The decision on interim relief in Latvia is in force until the moment when the final decision of the NCA is no longer subject to dispute. In Austria, the filing of an appeal has an automatic suspension effect. A full overview of interim measures in the Member States is presented in Annex 3.

In addition to suspension measures, temporary injunctions can also be granted by the court in some Member States. In Slovenia, a request for a temporary injunction can be made in order to temporarily remedy the situation with regard to a disputed legal relationship if the arrangement is necessary particularly in the case of continuing legal relationships. Germany provides for the granting of a preliminary injunction to regulate disputed matters on a temporary basis until a final decision is made by the courts in cases of judicial review.

In Latvia, legislation does not allow the courts to adopt any interim measures in infringement cases of competition rules. Moreover, in Malta, the Appeals Tribunal is not authorised to adopt interim measures *ex officio* and can only uphold or reject interim measures imposed by the NCA.

Follow-on

Injunctive relief is applied as an interim measure in all Member States for follow on cases. Different conditions apply for awarding injunctions in the Member States. Table 3.5 below provides an overview of information available on this matter from Member State factsheets.

Table 3.5 Conditions for awarding injunctions in some Member States

Member State	Follow On
Austria	Claimant must prove that without injunctive relief, he would be ' impeded ' or ' considerably hindered ' in recovering their damages or enforcing their claims
Belgium	Interim injunction can be awarded. Preliminary injunction will be ordered in case of urgency .
Czech Republic	Interim measures if: <ul style="list-style-type: none"> ■ There is a reasonable fear that the future execution of the judgment may be threatened; ■ In case that the relations between participants need a temporal regulation. The court may thus impose a prohibition of disposals of property or rights, an obligation to deposit funds or goods into the court's deposit, or an obligation to do something, to refrain from doing something or to endure something
Denmark	Can be used if the merits of the case warrant it.
Finland	Precautionary measures can be imposed by the court if the applicant can demonstrate that it is probable that he/she holds a debt that may be rendered enforceable by the court and that there is a danger that the opposing party may hide, destroy or convey his/her property or take another action that may endanger the payment of the debt
Greece	Interim are ordered: <ul style="list-style-type: none"> ■ in case of urgency or if the courts estimate that this is necessary for the prevention of imminent danger for the purpose of securing or preserving a right or the purpose of regulating a situation; and ■ If it is reasonably supposed that the measure will serve to temporarily protect a

Member State	Follow On
	<p>specific right in need of protection, given the existence of adequate preliminary evidence to substantiate the claim and justify the ordering of the measure.</p> <p>Full proof of the facts surrounding the case is not required for a court to order interim measures.</p> <p>The mere belief of the court in the possibility that the above conditions are met would suffice for the interim measures to be granted.</p>
Hungary	<p>The court may order interim measure if it's necessary to:</p> <ul style="list-style-type: none"> ■ avert imminent harm; ■ keep the condition that give rise to the dispute unchanged; ■ merit particular legal protection for the applicant.
Italy	<p>Interim measure may be requested if the plaintiff reasonably fears that its rights are likely to be irreparably damaged during the course of the ordinary civil proceedings.</p>
Lithuania	<p>Interim measures imposed if there is sufficient evidence that without these measures the implementation of the decision would be difficult or impossible to achieve.</p>
Luxembourg	<p>An interim injunction can be awarded by the responsible judge in order to put an end to a prima facie unlawful situation if (i) the claim is urgent; (ii) the order is sought to avert a situation which would cause irreparable harm to the plaintiff; or (iii) the order is sought to remedy an unlawful situation which has already occurred. This order is immediately enforceable and may be revoked or amended if new evidence arises.</p>
Portugal	<p>Interim measures may be decided by the court once the following common criteria are fulfilled:</p> <ul style="list-style-type: none"> ■ the existence of a <i>fumus boni iuris</i> as for the right invoked by the plaintiff and for the existence of an unlawful situation; ■ the recognition of a situation of urgency, with the risk of a substantial and irreparable harm for the plaintiff (<i>periculum in mora</i>).
Slovak Republic	<p>Generally, interim measures are issued only upon request, provided that there is a need to temporarily regulate the relationship between the parties in a certain way, or there is a fear that the decision will be enforceable <i>de facto</i> if such a measure is not issued.</p> <p>The applicant must prove its urgency.</p>

As outlined in the table above, the different conditions associated with awarding an interim measure in follow on actions relate to the urgency of the claim, the need to avoid imminent/irreparable harm and the need to protect a specific legal right.

3.1.7 Court Hearings

Member States adopt varying practices relating to court hearings. These range depending on the instance of the case, as well as on whether the case relates to judicial review or follow on proceedings.

For judicial review, oral hearings are not the norm in a small number of Member States (AT, CZ, DK and SI), with written submissions used. This can be compared to the majority of Member States where the judicial review process is a mixture of both written and oral submissions, with at least one hearing initiated in each instance. For follow-on actions, oral and public hearings are the norm in the Member States.

With regard to the publication of judgments for judicial review, the court judgment is not pronounced in public but served to the parties in the post, in a limited number of Member States (AT, DK, FI and LV). This can be compared to other Member States where the judgment is publicly and orally declared. For example, in Greece, every court judgment must be specifically and thoroughly reasoned and must be pronounced in a public sitting.

Annex 4 provides an overview of court hearings at national level.

3.1.8 Enforcement of Judgments

Provisions are in place in the Member States for enforcing judgments relating to follow on actions. Judgments are enforced when the condemned party fails to voluntarily comply with the judgment.

The enforcement measures reported in the Factsheets include the following:

- Compulsory enforcement through executory order/deed/writ;
- Delay of execution of judgment;
- Execution of judgment (e.g. payment) in parts;
- Writ of movables/ Writ for the sale of land/Writ of attachment.

With regard to the enforcement of judgments through executory orders, deeds or writs, the procedure for the enforcement differs in the Member States, with the actors implementing these measures also varying. For example, in many Member States (e.g. AT, BE, DK, EE, DE, LV, LT, MT and PL), an enforceable title is issued through a judgment or notarial deed, which is executed by a bailiff against the defendant. This can be compared to other Member States, such as Ireland, where enforcement orders can be issued by court offices, with the creditor not having to go back to court to get the order. Enforcement orders can be issued up until 12 years after the date of judgment.

A full overview of enforcement orders and their procedures is provided in Annex 4.

3.2 Modes of Alternative Dispute Resolution

Different modes of Alternative Dispute Resolution (ADR) exist amongst the Member States. An overview on the most common modes of ADR identified by national experts is provided in Table 3.6 below.

Table 3.6 Modes of ADR in Member States

Member State	Arbitration	Mediation ¹⁹	Settlements	Conciliation
Austria	X	X		
Belgium	X	X		
Bulgaria	X	X	X	
Croatia	X	X		
Cyprus	X	X		
Czech Republic	X	X		
Denmark	X	X*	X	
Estonia		X	X	
Finland		X	X	
France		X	X ²⁰	
Germany	X	X		
Greece	X	X		
Spain	X	X	X	

¹⁹ This column refers to whether or not Member States have adopted measures transposing Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters. Thus it refers to the availability of mediation but it does not refer to the specific use of mediation in competition cases. Please note that Denmark is not bound by the Directive 2008/52/EC however the Member State does have national legislation providing Mediation as an ADR.

²⁰ The transaction is defined by Article 2044 of the French Civil Code as "a contract by which the parties settle a dispute arising, or prevent future litigation". The transaction is however subject to official recognition by the judge. Once homologated it is not possible to challenge before the courts.

Member State	Arbitration	Mediation ¹⁹	Settlements	Conciliation
Hungary ²¹	X	X		
Ireland	X	X	X	
Italy	X	X	X	X
Latvia	X	X		
Lithuania ²²		X		
Luxembourg	X	X	X	
Malta	X	X		
Netherlands	X	X	X	
Portugal	X	X	X	
Poland	X	X		
Romania	X	X	X	
Slovak Republic	X	X	X	
Slovenia	X	X		
Sweden	X	X		
United Kingdom		X		

The ADR mechanisms existing in the Member States are not specific to competition law matters. With regard to the use of ADR in competition law cases, this varies significantly in the Member States. In some Member States including Estonia and the Slovak Republic, modes of alternative dispute resolution are generally available though no specific dispute resolution mechanisms exist for competition law related matters. In these cases, it is questionable as to whether ADR is really used in these Member States. In a few Member States (e.g. AT, BG, HR, LV and SE), ADR mechanisms do not seem to be used for follow on claims.²³ For example, in Hungary, the use of ADR procedures is not mandatory and ADR are thus rarely used. In Luxembourg, mediation is not usually used for competition law matters, with arbitration considered by practitioners as a more effective manner of resolving competition disputes. In Poland, the majority of competition law related disputes conducted before ADR bodies, concern private law provisions on combating unfair competition rather than relating to follow on actions.

The situation in the aforementioned Member States can be compared to Denmark, where most parties incorporate arbitration clauses into their agreements making competition law cases rare at the courts. Moreover, in Finland, there are competition law cases that have been first brought before the District Court but which have been ended in a settlement procedure. In Lithuania, the new Law on Commercial Arbitration is expected to encourage competition disputes to be solved through arbitration proceedings.

²¹ For private enforcement cases

²² In Lithuania, competition disputes cannot be submitted to arbitration. The only way claims for damages caused by breach of competition rules could be solved in arbitration proceedings is when the fact of infringement of competition rules has already been established.

²³ Information provided by national researchers.

4 Comparative analysis of key features of competition law cases and length of legal proceeding

4.1 Introduction

This section includes the analysis of the cases identified as part of the data collection exercise in the Member States. Two different timespans have been chosen for data collection: data relevant for years 1 May 2004- 1 June 2013 (since the entry into force of Regulation 1/2003) and more recent data for years 1 January 2008- 1 June 2013. Data was collected and analysed jointly for a group of years so that a sufficient number of cases could be taken into account for calculations of averages.

In nearly all Member States, the national experts were confident that relevant judicial review cases have been identified almost fully²⁴. For follow-on cases, the national experts were confident that relevant cases have been identified in most Member States. In the eight Member States which were categorised as C (private enforcement cases only in AT, CZ, EL, ES, FR, IT, PL, PT – see also section 2.1.2 above), it was not always possible to find all cases – although efforts have been made throughout the study to find as many as possible.

When reading the quantitative analyses presented in this section, the following points should be taken into account:

- Each sub-section first presents an analysis of cases which started and/or completed between 1 May 2004 and 1 June 2013, followed by an analysis of cases between 1 January 2008 and 1 June 2013.
- In several tables, the number of ‘observations’ is included. This corresponds to the number of cases which could be included in the respective statistical analysis, because relevant information was indeed available (see also Table 2.2 in section 2 above which presents all requested datasheet entries). It is important to note that it was not always possible for national experts to complete all entries for a particular case, which means that in given cases the number of observations may be slightly lower than the number of cases identified in a Member State.
- The length of cases has been calculated in natural days, starting when an application is lodged and ending when a judicial decision on the substance, applying Articles 101 and 102 TFEU is taken²⁵.

4.2 Number of cases identified

4.2.1 Cases by Article²⁶

Table 4.1 below presents the number of cases by TFEU Article, as well as the share of cases by Article, between 1 May 2004 and 1 June 2013. A total of 1044 cases have been identified. Each of these represents a judgement on the merits of a single instance. When adding up the instances belonging to the same initial (first instance) ruling, the total number of so-called ‘full’ cases is 740. As a reminder, cases in which national competition authorities applied national competition rules having a similar purpose to that of Articles 101 and 102 TFEU but without applying in parallel the corresponding TFEU rules have not been included.

Table 4.2 presents the number of cases by Article, as well as the share of cases by Article, between 1 January 2008 and 1 June 2013²⁷. During this period, a total of 870 cases have been identified, corresponding to 651 so-called ‘full’ cases.

²⁴ In a minority, not all cases may have been identified, for example because these cases were not all published (e.g. in Germany) or because the courts could not provide information on cases within the deadlines of the study.

²⁵ In a limited number of cases, when certain dates were not available, estimates have been made on the basis of procedural deadlines laid down in legislation (see the notes under each table / figure).

²⁶ The numbers presented in this section only include resolved cases (i.e. cases which were still pending have not been included).

Table 4.1 Number of resolved cases by Article and share by Article (2004-2013)

Country	101 TFEU	102 TFEU	101 & 102 TFEU	Total	Country	101 TFEU	102 TFEU	101 & 102 TFEU
Total	738(546)	247(164)	59(37)	1044(740)	LV*	100	0	0
AT	23 (12)	1(1)	0	24 (13)	AT	96	4	0
BE	4 (3)	5(4)	0	9 (7)	FI	96	4	0
BG	12 (7)	9(5)	0	21 (12)	RO	95	5	0
CZ	9(3)	8(3)	0	17(6)	NL	89	11	0
DE	46(27)	21(11)	16(9)	83 (45)	UK	87	13	0
DK	1(1)	5(3)	0	6(4)	HU	86	14	0
EL	80(62)	17(11)	0	97(73)	EL	82	18	4
ES	83(75)	26(20)	1(1)	110(96)	IT	76	25	0
FI	43(43)	2(1)	0	45(44)	ES	75	24	1
FR	64(42)	29(19)	32(21)	125(81)	SI	70	30	0
HU	31(14)	5(3)	0	36(17)	MT	67	33	0
IE	1(1)	1(1)	0	2(2)	PT	61	33	6
IT	151(112)	49(40)	0	200(149)	BG	57	43	0
LT [^]	13(7)	11(6)	9(5)	33 (18)	DE	55	25	19
LU	0	2(1)	0	2 (1)	SK	55	45	0
LV	2(1)	0	0	2(1)	CZ	53	47	0
MT	6(6)	3(3)	0	9(9)	FR	51	23	26
NL	17(13)	2(1)	0	19(14)	SE	50	50	0
PL	6 (4)	20(8)	0	26(12)	IE*	50	50	0
PT	11(5)	6 (4)	1(1)	18(10)	BE*	44	56	0
RO	63(55)	3(3)	0	66(58)	LT [^]	39	33	27
SE	6(6)	6(6)	0	12(12)	PL	23	77	0
SI	7(5)	3(2)	0	10(7)	DK	17	83	0
SK	6(3)	5(2)	0	11(5)	LU*	0	100	0
UK	53(39)	8(6)	0	61(44)	CY**			
CY**					EE**			
EE**					HR [^]			
HR [^]								

Note:

* Less than 10 observations (i.e. number of cases for which relevant data was available);

** No data available;

[^] The national expert confirmed existence of at least 20 additional resolved first instance cases which were joined in second instance for which information was not accessible;

[^] For the sake of comparison, the number of cases in which national competition law mirroring Article 101 and 102 TFEU was applied is the following: 27(27) Article 101 TFEU; 18(18) Article 102 TFEU; and 45(45) in total. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Table 4.2 Number of resolved cases by Article and share by Article (2008-2013)

Country	101 TFEU	102 TFEU	101 & 102 TFEU	Total	Country	101 TFEU	102 TFEU	101 & 102 TFEU
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²⁷ This includes all cases started and / or concluded between 1 January 2008 and 1 June 2013.

Total	629(485)	199(140)	42(29)	870(651)
AT	22(11)	0	0	22(11)
BE	3(3)	4(4)	0	7(7)
BG	12(7)	9(5)	0	21(12)
CZ	8(3)	6(3)	0	14(6)
DE	36(22)	15(8)	7(7)	58(37)
DK	1(1)	4(3)	0	5(4)
EL	73(57)	17(11)	0	90(68)
ES	74(70)	16(16)	0	90(86)
FI	43(43)	2(1)	0	45(44)
FR	39(25)	19(12)	25(16)	83(52)
HU	30(14)	5(3)	0	35(17)
IE	1(1)	0	0	1(1)
IT	126(100)	42(35)	0	168(134)
LT [^]	12(7)	10(6)	9(5)	31(18)
LU	0	2(1)	0	2(1)
LV	2(1)	0	0	2(1)
MT	6(6)	2(2)	0	8(8)
NL	12(12)	1(1)	0	13(13)
PL	6(4)	18(8)	0	24(12)
PT	3(2)	6(4)	1(1)	10(7)
RO	63(55)	3(3)	0	66(58)
SE	4(4)	4(4)	0	8(8)
SI	7(5)	2(2)	0	9(7)
SK	5(3)	4(2)	0	9(5)
UK	41(29)	8(6)	0	49(34)
CY ^{**}				
EE ^{**}				
HR ^{^^}				

AT	100	0	0
LV [*]	100	0	0
IE ^{**}	100	0	0
FI	96	4	0
RO	95	5	0
NL [*]	92	8	0
HU	86	14	0
UK	84	16	0
ES	82	18	0
EL	81	19	0
SI [*]	78	22	0
MT [*]	75	25	0
IT	75	25	0
DE	62	26	12
BG	57	43	0
CZ	57	43	0
SK [*]	56	44	0
SE [*]	50	50	0
FR	47	23	30
BE [*]	43	57	0
LT [^]	39	32	29
PT [*]	30	60	10
PL	25	75	0
DK	20	80	0
LU [*]	0	100	0
CY ^{**}			
EE ^{**}			
HR ^{^^}			

Note²⁸:

* Less than 10 observations (i.e. cases for which relevant data was available)

** No data available

[^] The national expert confirmed existence of at least 20 additional resolved first instance cases which were joined in second instance for which information was not accessible

^{^^} For the sake of comparison, the number of cases in which national competition law mirroring Article 101 and 102 TFEU was applied is the following: 18(18) Article 101 TFEU; 12(12) Article 102 TFEU; and 45(45) in total. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

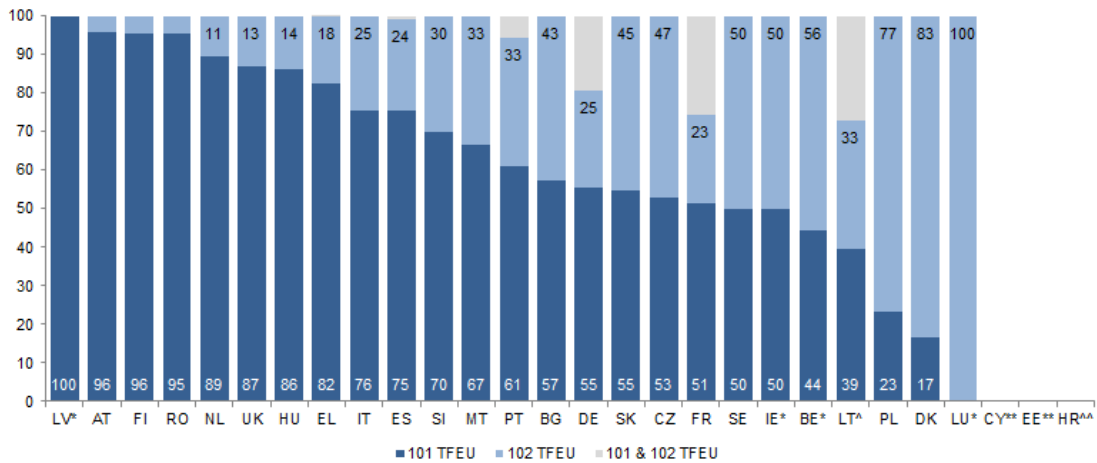
The share of cases between 1 May 2004 and 1 June 2013 is presented in Figure 4.1 below. In most Member States (17), the majority of cases are based on Article 101 TFEU. In five Member States, cases have been identified which both concern Articles 101 and 102 TFEU.

Figure 4.1 presents the same information, but this time covering the period from 1 January 2008 until 1 June 2013. During this period, in 17 Member States the majority of cases

²⁸ For the calculation of the total number of cases only, a few have been included in the 2008-2013 overview by calculating their end date using the average duration of cases or if the NCA decision was after 12/2007.

concern Article 101 TFEU. In 4 Member States there were cases which jointly applied Articles 101 TFEU and 102 TFEU.

Figure 4.1 Share of cases by Article (2004-2013)



Note:

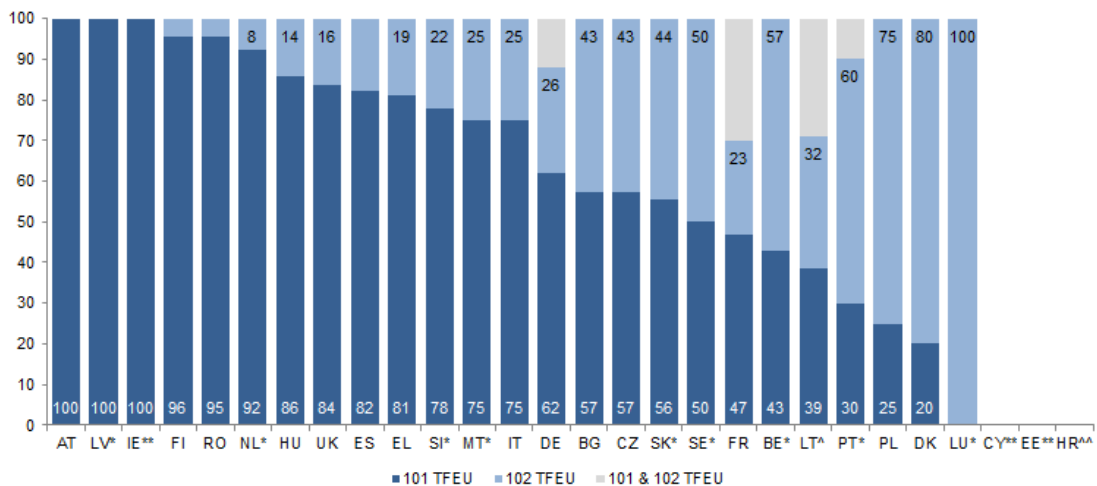
* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

^ The national expert confirmed existence of at least 20 additional resolved first instance cases which were joined in second instance for which information was not accessible

^^: For the sake of comparison, the number of cases in which national competition law mirroring Article 101 and 102 TFEU was applied is the following: 27(27) Article 101 TFEU; 18(18) Article 102 TFEU; and 45(45) in total. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Figure 4.2 Share of cases by Article (2008-2013)



Note²⁹:

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

^ The national expert confirmed existence of at least 20 additional resolved first instance cases which were joined in second instance for which information was not accessible

^^ For the sake of comparison, the number of cases in which national competition law mirroring Article 101 and 102 TFEU was applied is the following: 18(18) Article 101 TFEU; 12(12) Article 102 TFEU;

²⁹ Idem

and 45(45) in total.. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

4.2.2 Number of cases by type of procedure³⁰

Table 4.3 presents the number of cases per type of procedure, showing that between 1 May 2004 and 1 June 2013 the vast majority of cases identified concerned a judicial review / public enforcement. This can, however, in part be explained by the fact that follow-on cases are more difficult to identify and because in eight Member States (AT, CZ, ES, EL, FR, IT, PL, PT), categorised as C, national experts were not expected to find all cases (these have been marked between brackets). The table also includes, for each country, the number of so-called "full" or "complete" cases (i.e. adding up all related instances).

Table 4.3 Number of resolved cases by type of procedure (2004-2013)

	Private enforcement: follow on	Public enforcement: judicial review	Total
Total	208(147)	836(593)	1044(740)
(AT)	17(6)	7(7)	24(13)
BE*	0	9(7)	9(7)
BG	0	21(12)	21(12)
(CZ)	0	17(6)	17(6)
DE	48(26)	35(19)	83(45)
DK	1(1)	5(3)	6(4)
(EL)	1(1)	96(72)	97(73)
(ES)	10(6)	100(90)	110(96)
FI	41(41)	4(3)	45(44)
(FR)	32(25)	93(56)	125(81)
HU	3(1)	33(16)	36(17)
IE*	0	2(2)	2(2)
(IT)	4(4)	196(145)	200(149)
LT^	2(1)	31(17)	33(18)
LU*	0	2(1)	2(1)
LV*	0	2(1)	2(1)
MT	0	9(9)	9(9)
NL	6(6)	13(8)	19(14)
(PL)	1(1)	25(11)	26(12)
(PT)	2(1)	16(9)	18(10)
RO	0	66(58)	66(58)
SE	6(6)	6(6)	12(12)
SI	0	10(7)	10(7)
SK	0	11(5)	11(5)
UK	34(21)	27(23)	61(44)
CY**			
EE**			
HR^^			

Note:

* Less than 10 observations (i.e. cases for which relevant data was available)

** No data available

³⁰ This includes all cases started and / or concluded between 1 January 2008 and 1 June 2013.

() Different method was followed for private enforcement cases

^ The national expert confirmed existence of at least 20 additional resolved first instance cases which were joined in second instance

^^ Cases under national law similar to private enforcement: follow on 1(1); public enforcement: judicial review 44(44); and in total 45(45). Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Table 4.4 below presents the same information, but covering the period from 1 January 2008 until 1 June 2013. Again, Member States in which a different data collection method was followed for follow-on actions have been put between brackets.

Table 4.4 Number of resolved cases by type of procedure (2008-2013)

	Private enforcement: follow on	Public enforcement: judicial review	Total
Total	154(125)	752(526)	870(651)
(AT)	17(6)	5(5)	22(11)
BE	0	7(7)	7(7)
BG	0	21(12)	21(12)
(CZ)	0	14(6)	14(6)
DE	38(23)	20(14)	58(37)
DK	1(1)	4(3)	5(4)
(EL)	1(1)	89(67)	90(68)
(ES)	6(4)	84(82)	90(86)
FI	41(41)	4(3)	45(44)
(FR)	19(14)	64(38)	83(52)
HU	3(1)	32(16)	35(17)
IE	0	1(1)	1(1)
(IT)	2(2)	166(132)	168(134)
LT [^]	2(1)	29(17)	31(18)
LU	0	2(1)	2(1)
LV	0	2(1)	2(1)
MT	0	8(8)	8(8)
NL	6(6)	7(7)	13(13)
(PL)	1(1)	23(11)	24(12)
(PT)	2(1)	8(6)	10(7)
RO	0	66(58)	66(58)
SE*	4(4)	4(4)	8(8)
SI	0	9(7)	9(7)
SK	0	9(5)	9(5)
UK	31(19)	18(15)	49(34)
CY**			
EE**			
HR ^{^^}			

Note³¹:

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

³¹ For the calculation of the total number of cases only, a few have been included in the 2008-2013 overview by calculating their end date using the average duration of cases or if the NCA decision was after 12/2007.

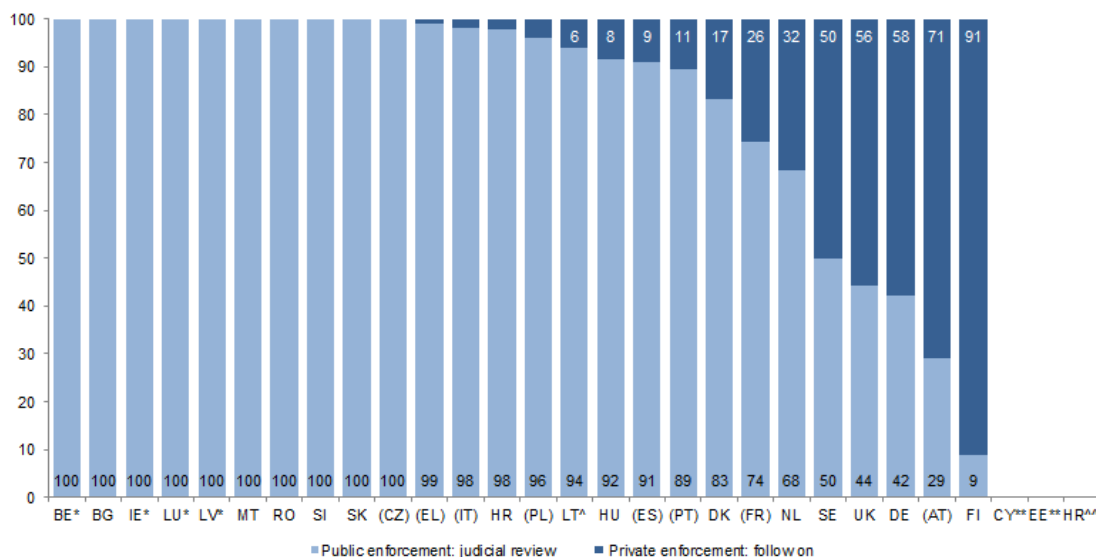
^ The national expert confirmed existence of at least 20 additional resolved first instance cases which were joined in second instance for which information was not accessible

^^ Cases under national law similar to Public enforcement: judicial review 30(30) in total. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

The share of cases between 1 May 2004 and 1 June 2013 by type is presented in Figure 4.3 below. Particularly high shares of follow-on actions were identified in Austria, Finland, Germany, Sweden, Netherlands and the United Kingdom showed the highest shares of follow-on actions. Figure 4.4 below presents the same information for the period from 1 January 2008 until 1 June 2013. During this period, the same Member States as above had the highest share of follow-on actions.

The share of cases between 1 May 2004 and 1 June 2013 by type is presented in Figure 4.3 below. Particularly high shares of follow-on actions were identified in Austria, Finland, Germany, Sweden, Netherlands and the United Kingdom showed the highest shares of follow-on actions. Figure 4.4 below presents the same information for the period from 1 January 2008 until 1 June 2013. During this period, the same Member States as above had the highest share of follow-on actions.

Figure 4.3 Share of cases by type of procedure (2004–2013)



Note:

* Less than 10 observations (i.e. cases for which relevant data was available)

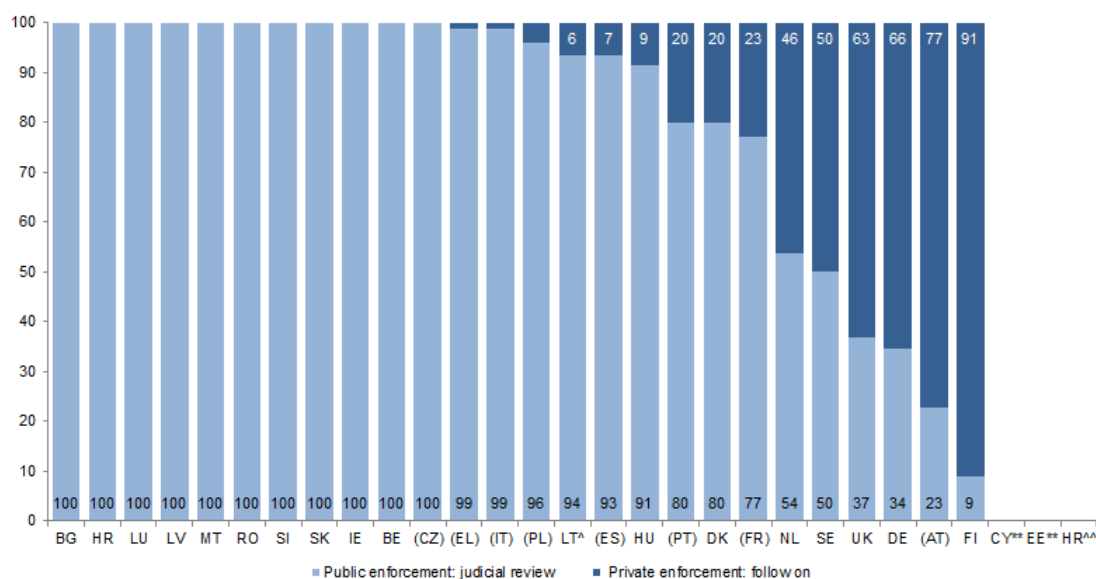
** No data available

() Different method was followed for private enforcement cases

^ The national expert confirmed existence of at least 20 additional resolved first instance cases which were joined in second instance

^^ Cases under national law concerning private enforcement of national competition law rules: follow on 1(1); and public enforcement: judicial review 44(44); and 45(45) in total. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Figure 4.4 Share of cases by type of procedure (2008–2013)



Note³²:

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

^ The national expert confirmed existence of at least 20 additional resolved first instance cases which were joined in second instance for which information was not accessible

^^ Cases under national law similar Public enforcement: judicial review 30(30) in total. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

4.2.3 Average length of judicial proceedings

Table 4.5 below presents an overview of the average length of the judicial proceedings as a mean value (i.e. the sum of the values divided by the number of values) and median value (i.e. the middle value), during the period from 1 May 2004 until 1 June 2013. It does not differentiate per instance nor per type or procedure. Based on the data collection, Finland, Denmark, Belgium, Ireland, Spain and Greece are the Member States in which the duration of a case is longest, whereas in Austria, Bulgaria, Latvia and Lithuania the average length of a case is shortest. There is, however, a great difference in nearly all Member States between the shortest and the longest judicial proceedings.

Table 4.5 Average length of judicial proceedings (2004-2013)

	Nr of Observations	Mean	Median	Min	Max
FI***	44	1363	1287	620	1990
DK*	6	966	925	521	1870
BE*	9	962	498	235	3587
IE*	2	887	887	803	971
ES***	103	795	763	55	4045
EL	88	773	659	11	2692
MT*	9	768	685	119	1467
NL	19	758	587	336	1695
SI***	10	651	734	146	1025
PL***	25	636	422	103	1481

³² Idem

HU***	31	582	384	148	2357
SE	12	478	459	313	805
SK***	11	503	421	128	1040
CZ***	17	446	361	135	1161
FR***	125	437	373	6	1868
UK***	51	425	409	65	2094
PT***	18	396	259	109	1220
IT***	188	376	226	20	3964
RO***	59	338	333	21	784
DE***	74	329	281	2	2071
LU*	2	320	320	247	393
LV*	2	309	309	99	519
LT***	35	233	120	20	1185
AT***	20	228	193	18	600
BG***	21	196	177	106	417
CY**					
EE**					
HR^					

Note:

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

*** (Some) start dates have been calculated, using the max number of days available to launch a next instance case

^ The national expert confirmed existence of at least 20 additional resolved first instance cases which were joined in second instance

^^ Cases under national law similar to Article 101 and Article 102: Nr of observations 45, mean 961, median 1070, min 44, max 2844. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Table 4.6 shows the same information, this time covering the period 1 January 2008 until 1 June 2013. Austria, Slovenia and Spain are the only Member States showing shorter proceedings within this more restricted period.

Table 4.6 Average length of judicial proceedings (2008-2013)

	Nr of Observations	Mean	Median	Min	Max
FI***	44	1363	1287	620	1990
BE*	7	1096	498	235	3587
DK*	5	972	913	521	1870
IE*	1	971	971	971	971
NL	13	849	592	336	1695
MT*	8	849	748	360	1467
EL	82	801	664	11	2692
ES***	86	770	693	55	4045
SI* and ***	9	690	927	146	1025
PL***	23	650	422	103	1481
HU***	31	582	384	148	2357
SK***	9	581	477	231	1040

PT* ***	and	10	532	364	175	1220
SE*		8	518	518	321	805
CZ		14	495	374	135	1161
UK***		41	459	474	161	2094
FR***		83	448	380	6	1574
IT***		161	386	241	20	3964
DE***		52	385	305	2	2071
RO***		59	338	333	21	784
LU*		2	320	320	247	393
LV*		2	309	309	99	519
LT***		31	233	100	20	1185
AT***		18	227	179	18	600
BG***		21	196	177	106	417
CY**						
EE**						
HR^						

Note:

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

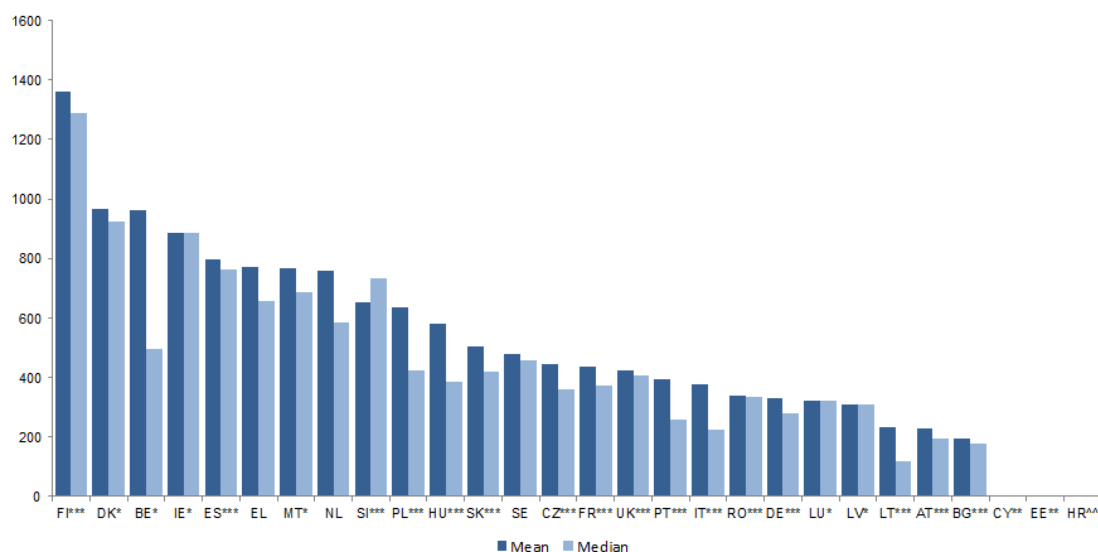
*** (Some) start dates have been calculated, using the legal deadline (i.e. the maximum number of days available) for launching a case in the next instance

^ The national expert confirmed existence of at least 20 additional resolved first instance cases which were joined in second instance

^^ Cases under national law similar to Article 101 and Article 102: Nr of observations 30, mean 838, median 867, min 44, max 2844. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Figures 4.5 and 4.6 below present the average duration of cases based on both the mean and the median value, respectively covering the period from 1 May 2004 until 1 June 2013 and from 1 January 2008 until 1 June 2013.

Figure 4.5 Mean and median average length of judicial proceedings (2004-2013)



Note:

* Less than 10 observations (i.e. cases for which relevant data was available)

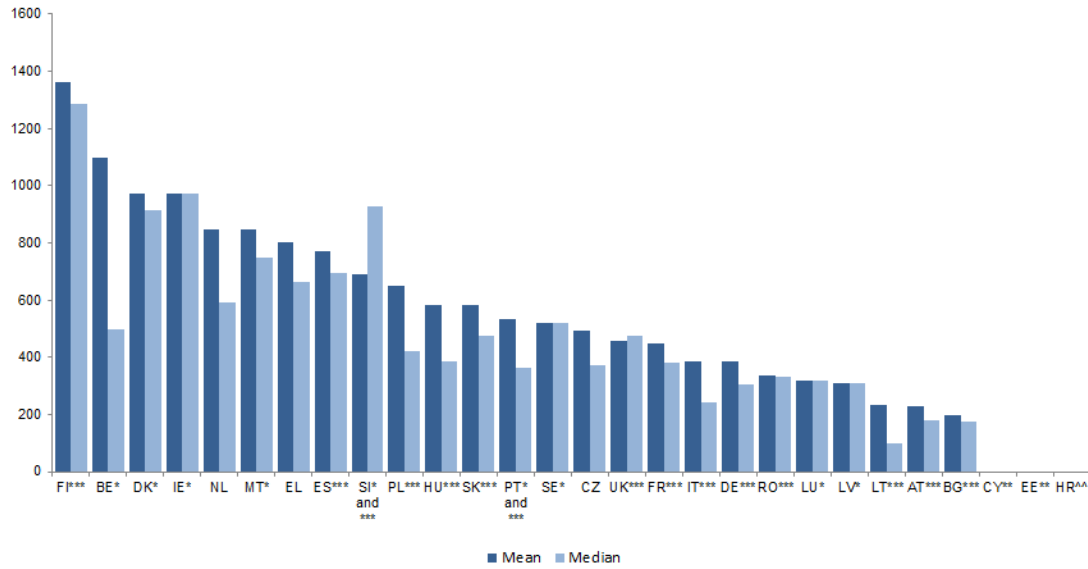
** No data available

*** (Some) start dates have been calculated, using the max number of days available to launch a next instance case

^ The national expert confirmed existence of at least 20 additional resolved first instance cases which were joined in second instance

^^ Cases under national law similar to Article 101 and Article 102 TFEU: Nr of observations 45, mean 961, median 1070, min 44, max 2844. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Figure 4.6 Mean and median average length of judicial proceedings (2008-2013)



Note:

* Less than 10 observations (i.e. cases for which relevant data was available)

** No data available

*** (Some) start dates have been calculated, using the legal deadline (i.e. the maximum number of days available) for launching a case in the next instance

^ The national expert confirmed existence of at least 20 additional resolved first instance cases which were joined in second instance

^^ Cases under national law similar to Article 101 and Article 102: Nr of observations 30, mean 838, median 867, min 44, max 2844.

4.2.4 Average length of judicial proceedings by type of procedure

Table 4.7 below shows the median and mean average number of days required to complete a case by type of procedure, from 1 May 2004 until 1 June 2013. It is noted that given the low number of follow-on actions for which relevant data was available (see the column in grey below), the average values for that type or procedure are not statistically reliable.

Overall, the table confirms that cases Finland, Denmark and Ireland on average report the longest duration whereas Bulgaria, Austria, Lithuania and Germany report the shortest duration. When looking at follow-on actions, there are some differences. They seem to last longer than judicial review cases in Finland, France, Germany, Lithuania and Italy, less in Spain, Sweden, United Kingdom and more or less the same in Netherlands Denmark, Hungary and Portugal.

Table 4.7 Median and mean average length of judicial proceedings (2004-2013)

	Private enforcement: follow on				Public enforcement: judicial review		
	Nr of Observations	Median	Mean		Nr of Observations	Median	Mean
FI***	41	1287	1390	FI* and ***	3	954	988
DK*	1	936	936	DK*	5	913	972

	Private enforcement: follow on			Public enforcement: judicial review			
	Nr of Observations	Median	Mean	Nr of Observations	Median	Mean	
(ES)* and ***	3	673	766	BE*	9	498	962
(FR)***	32	606	718	IE*	2	887	887
NL*	6	590	637	NL	13	561	814
HU* and ***	2	576	576	ES***	100	772	796
(IT)* and ***	2	453	453	EL	88	659	773
SE*	6	403	429	MT*	9	685	768
DE***	41	304	388	SI***	10	734	651
UK***	24	314	380	PL***	25	422	636
(PT)* and ***	2	316	316	HU***	29	384	583
LT* and ***	3	150	282	SE*	6	518	526
(AT)***	13	188	238	SK***	11	421	503
BE^				UK***	27	475	466
BG^				CZ***	17	361	446
CY**				PT* and ***	16	259	406
(CZ)^				IT***	186	226	375
EE**				FR***	93	334	340
(EL)^				RO***	59	333	338
HR^				LU*	2	320	320
IE^				LV*	2	309	309
LU^				DE***	33	228	255
LV^				LT***	32	110	229
MT^				AT* and ***	7	236	210
(PL)^***				BG***	21	177	196
RO^				CY**			
SI^				EE**			
SK^				HR^			

Note:

* Less than 10 observations

** No relevant cases identified

*** (Some) start dates have been calculated, using the legal deadline (i.e. the maximum number of days available) for launching a case in the next instance

^ No follow-on cases identified

() A different data collection method was followed.

^^ Cases under national law similar to Private enforcement: follow on, Nr of observations 1, median 1153, mean 1153. Cases under national law similar to Public enforcement: judicial review, Nr of observations 44, median 1056, mean 957. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Table 4.11 presents the same information for the period ranging from 1 January 2008 to 1 June 2013.

Table 4.8 Median and mean average length of judicial proceedings (2008-2013)

	Private enforcement: follow on			Public enforcement: judicial review		
	Nr of Observations	Median	Mean	Nr of Observations	Median	Mean

	Private enforcement: follow on				Public enforcement: judicial review		
	Nr of Observations	Median	Mean		Nr of Observations	Median	Mean
FI***	41	1287	1390	BE*	7	498	1096
DK*	1	936	936	NL*	7	1154	1030
(IT)* and ***	1	831	831	FI* and ***	3	954	988
(ES)* and ***	2	813	813	DK*	4	767	981
(FR)***	19	694	697	IE*	1	971	971
NL*	6	590	637	MT*	8	748	849
HU* and ***	2	576	576	EL	82	664	801
SE*	4	385	416	ES***	84	693	769
DE***	34	305	410	SI* and ***	9	927	690
UK***	23	319	385	PL***	23	422	650
LT* and ***	2	348	348	SE*	4	598	619
(PT)* and ***	2	316	316	PT* and ***	8	500	586
(AT)***	13	188	238	HU***	29	384	583
BE^				SK* and ***	9	477	581
BG^				UK***	18	500	554
CY**				CZ***	14	374	495
(CZ)^				IT***	160	241	384
EE**				FR***	64	352	374
(EL)^				RO***	59	333	338
HR^				DE***	18	297	337
IE^				LU*	2	320	320
LU^				LV*	2	309	309
LV^				LT***	29	100	225
MT^				AT* and ***	5	164	196
(PL)^***				BG***	21	177	196
RO^				CY**			
SI^				EE**			
SK^				HR^			

Note:

* Less than 10 observations

** No relevant cases identified

*** (Some) start dates have been calculated, using the legal deadline (i.e. the maximum number of days available) for launching a case in the next instance

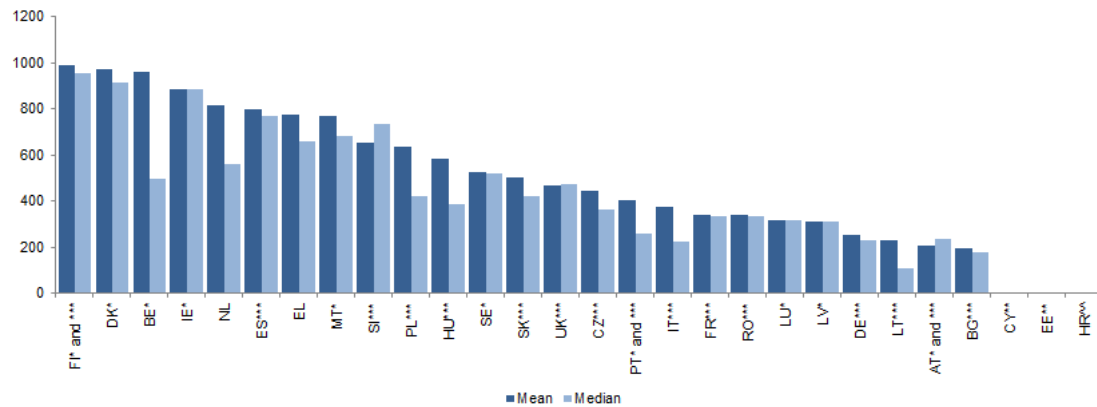
^ No follow-on cases identified

() A different data collection method was followed

^ Cases under national law similar to public enforcement: judicial review, Nr of observations 30, median 867, mean 838. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Figures 4.7 and 4.8 below present the same information in a graphic format for respectively public enforcement cases and follow-on actions for the period from 1 May 2004 until 1 June 2013.

Figure 4.7 Mean and medium average length of public enforcement cases (2004-2013)



Note:

* Less than 10 observations

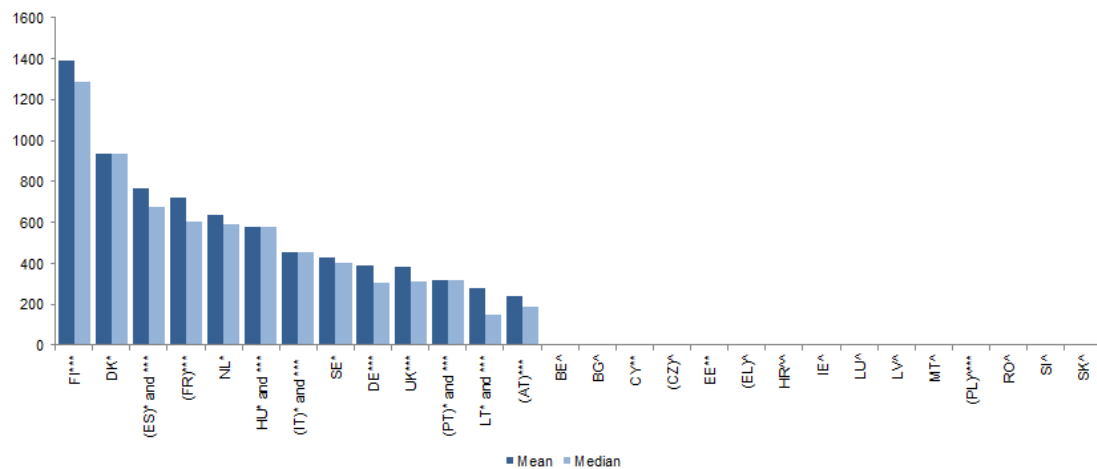
** No relevant cases identified

*** (Some) start dates have been calculated, using the legal deadline (i.e. the maximum number of days available) for launching a case in the next instance

^ No follow-on cases identified

^^ Cases under national law similar to public enforcement: judicial review, Nr of observations 44, median 1056, mean 957. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Figure 4.8 Mean and medium average length of follow-on actions (2004-2013)



Note:

* Less than 10 observations

** No relevant cases identified

*** (Some) start dates have been calculated, using the legal deadline (i.e. the maximum number of days available) for launching a case in the next instance

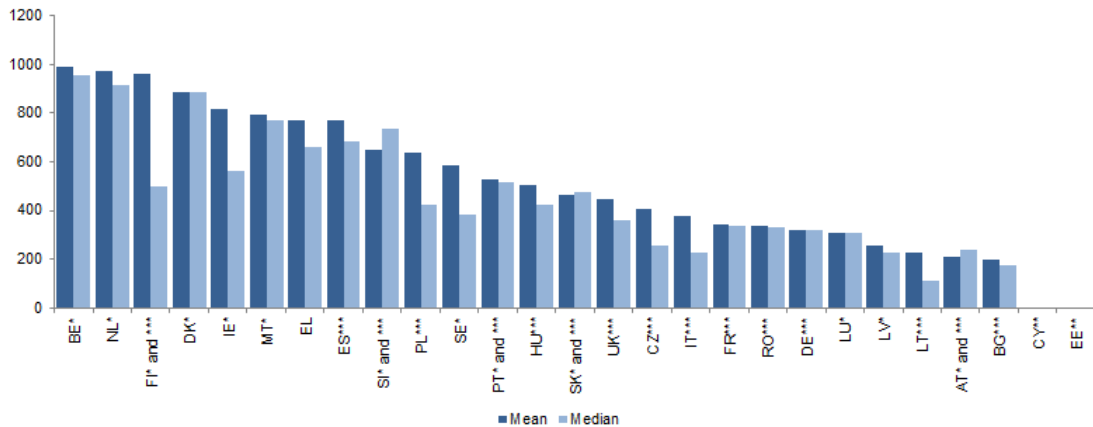
^ No follow-on cases identified

() A different data collection method was followed

^^ Cases under national law similar to private enforcement: follow on, Nr of observations 1, median 1153, mean 1153. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Figures 4.9 and 4.10 below present the information in a graphic format for respectively public enforcement cases and follow-on actions for the period from 1 January 2008 until 1 June 2013.

Figure 4.9 Mean and medium average length of public enforcement cases (2008-2013)



Note:

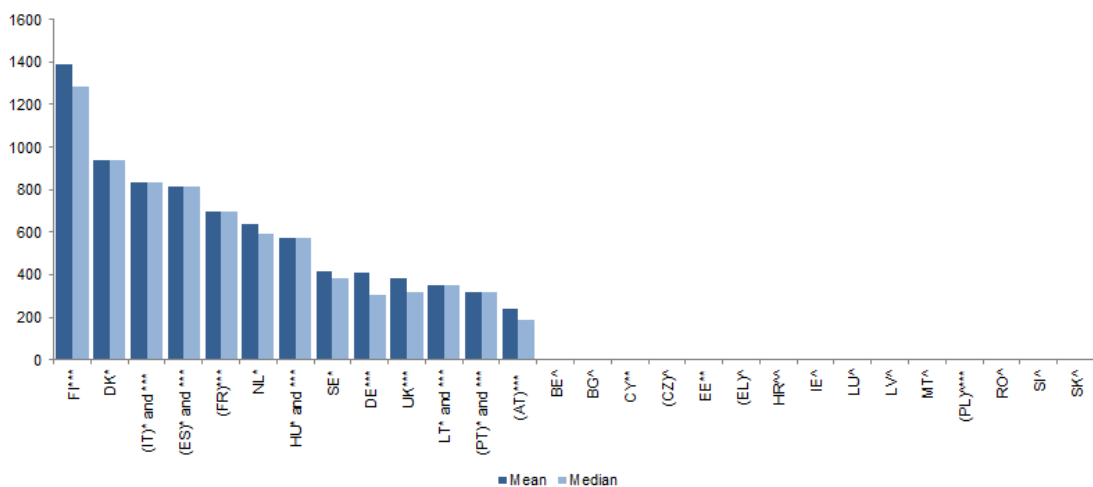
* Less than 10 observations

** No relevant cases identified

*** (Some) start dates have been calculated, using the legal deadline (i.e. the maximum number of days available) for launching a case in the next instance

^ Cases under national law similar to public enforcement: judicial review, Nr of observations 30, median 867, mean 838. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Figure 4.10 Mean and medium average length of follow-on actions (2008-2013)



Note:

* Less than 10 observations

** No relevant cases identified

*** (Some) start dates have been calculated, using the legal deadline (i.e. the maximum number of days available) for launching a case in the next instance

^ No follow-on cases identified

() A different data collection method was followed.

4.2.5 Average length of judicial review proceedings by instance

Table 4.9 below shows the average duration of judicial review cases (mean and median values) by instance, showing first, second and, where applicable, third instance cases. First instance cases are longest in Belgium, Poland, Finland and Ireland. In Greece, Denmark, Spain and Netherlands, second instance cases are longest. First instance cases last more or less the same as second instance cases in Bulgaria, France, Portugal, Romania and United Kingdom.

Table 4.9 Mean and median average length of judicial review proceedings by instance (2004-2013)

	1st Instance			2nd Instance			3rd Instance		
	Nr of Observations	Mean	Median	Nr of Observations	Mean	Median	Nr of Observations	Mean	Median
AT* and***	7	210	236						
BE*	7	1,060	498	2	619	619			
BG***	11	218	192	10	172	146			
CY**									
CZ***	11	415	357	6	503	373			
DE***	25	248	151	8	278	248			
DK*	3	790	913	2	1,245	1,245			
EE**									
EL	69	620	608	19	1,328	1,000			
ES***	90	761	710	10	1,111	1,035			
FI* and***	3	988	954						
FR***	60	311	307	33	393	364			
HU***	14	871	683	10	255	230	5	434	384
IE*	2	887	887						
IT***	137	305	192	49	571	320			
LT***	17	196	120	14	281	90			
LU*	1	393	393	1	247	247			
LV*	1	519	519	1	99	99			
MT*	9	768	685						
NL	7	530	534	6	1,147	1,327			
PL***	11	991	1,035	10	293	243	4	515	424
PT***	9	438	233	7	365	290			
RO***	52	329	331	7	402	427			
SE*	6	526	518						
SI***	7	800	1,006	3	305	229			
SK***	5	243	247	6	719	805			
UK***	23	469	475	4	450	496			

Note:

* Less than 10 observations

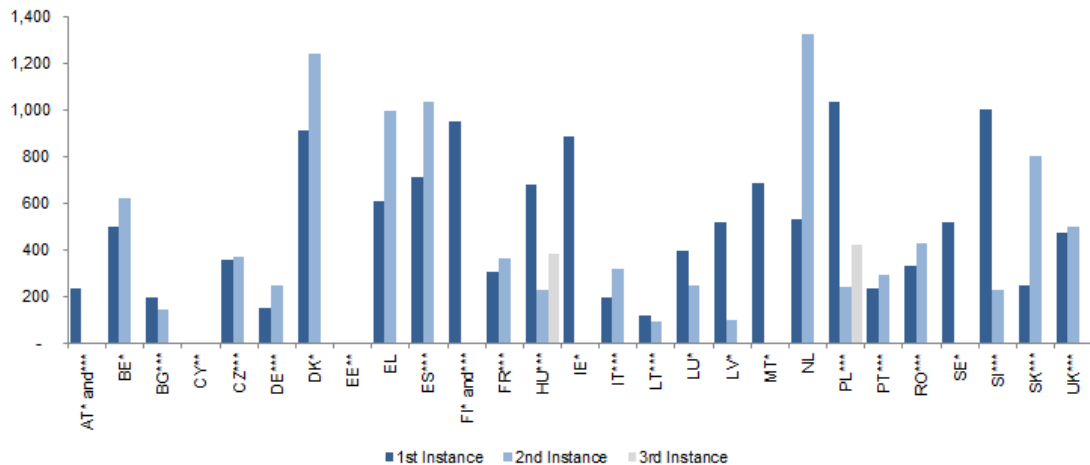
** No data available

*** (Some) start dates have been calculated, using the legal deadline (i.e. the maximum number of days available) for launching a case in the next instance

^ Cases under national law similar to public enforcement: judicial review, 1st instance Nr of observations 44, mean 957, median 1056. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Figures 4.11 and 4.12 respectively provide the median and mean average length of judicial review cases for the period 1 May 2004 to 1 June 2013.

Figure 4.11 Median average length of proceedings by instance (2004-2013)



Note:

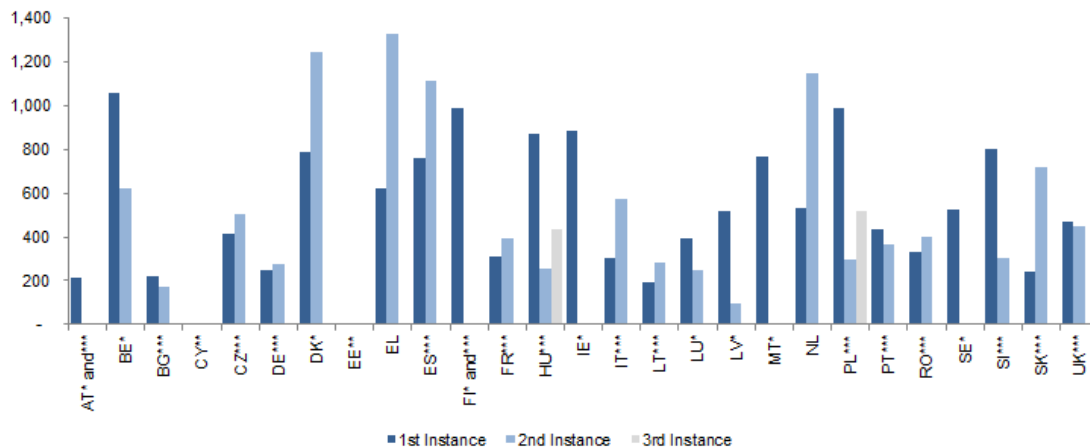
* Less than 10 observations

** No data available

*** (Some) start dates have been calculated, using the legal deadline (i.e. the maximum number of days available) for launching a case in the next instance

HR^^ Cases under national law similar to public enforcement: judicial review, 1st instance Nr of observations 44, mean 957, median 1056. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Figure 4.12 Mean average length of proceedings by instance (2004-2013)



Note:

* Less than 10 observations

** No data available

*** (Some) start dates have been calculated, using the legal deadline (i.e. the maximum number of days available) for launching a case in the next instance

HR^^ Cases under national law similar to public enforcement: judicial review, 1st instance Nr of observations 44, mean 957, median 1056. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Table 4.10 below shows the average duration of judicial review cases (mean and median values) by instance for the period 1 January 2008 until 1 June 2013, showing first, second and, where applicable, third instance cases. First instance cases are longest in Belgium, Poland, Finland and Ireland. In Greece, Spain, Netherlands and Denmark, second instance

cases are longest. First instance cases last more or less the same as second instance cases in Czech Republic, Germany and France.

Table 4.10 Mean and median average length of judicial review proceedings by instance (2008-2013)

	1st Instance			2nd Instance			3rd Instance		
	Nr of Observations	Mean	Median	Nr of Observations	Mean	Median	Nr of Observations	Mean	Median
AT* and***	5	196	164						
BE*	5	1,288	498	2	619	619			
BG***	11	218	192	10	172	146			
CY**									
CZ***	8	488	384	6	503	373			
DE***	11	364	342	7	295	257			
DK*	2	717	717	2	1,245	1,245			
EE**									
EL	63	642	640	19	1,328	1,000			
ES***	78	742	664	6	1,117	1,082			
FI* and***	3	988	954						
FR***	40	367	343	24	385	365			
HU***	14	871	683	10	255	230	5	434	384
IE*	1	971	971						
IT***	114	317	198	46	549	320			
LT***	15	172	100	14	281	90			
LU*	1	393	393	1	247	247			
LV*	1	519	519	1	99	99			
MT*	8	849	748						
NL*	2	415	415	5	1,277	1,499			
PL***	9	1,107	1,194	10	293	243	4	515	424
PT***	5	662	708	3	460	292			
RO***	52	329	331	7	402	427			
SE*	4	619	598						
SI***	6	883	1,013	3	305	229			
SK***	3	307	252	6	719	805			
UK***	15	580	508	3	428	474			

Note:

* Less than 10 observations

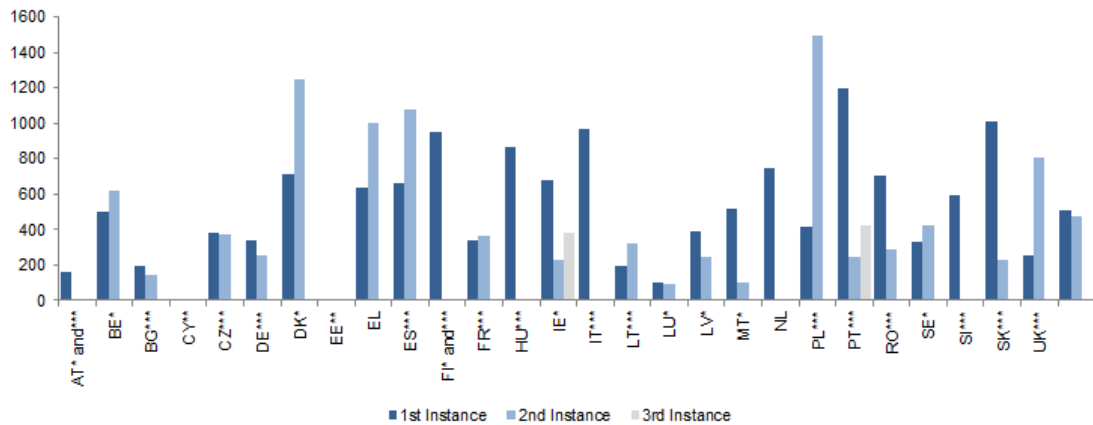
** No data available

*** (Some) start dates have been calculated, using the legal deadline (i.e. the maximum number of days available) for launching a case in the next instance

HR^^ Cases under national law similar to public enforcement: judicial review, 1st instance Nr of observations 30, mean 838, median 867. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Figures 4.13 and 4.14 respectively provide the median and mean average length of judicial review cases for the period 1 May 2004 to 1 June 2013.

Figure 4.13 Median average length of judicial review proceedings by instance (2008-2013)



Note:

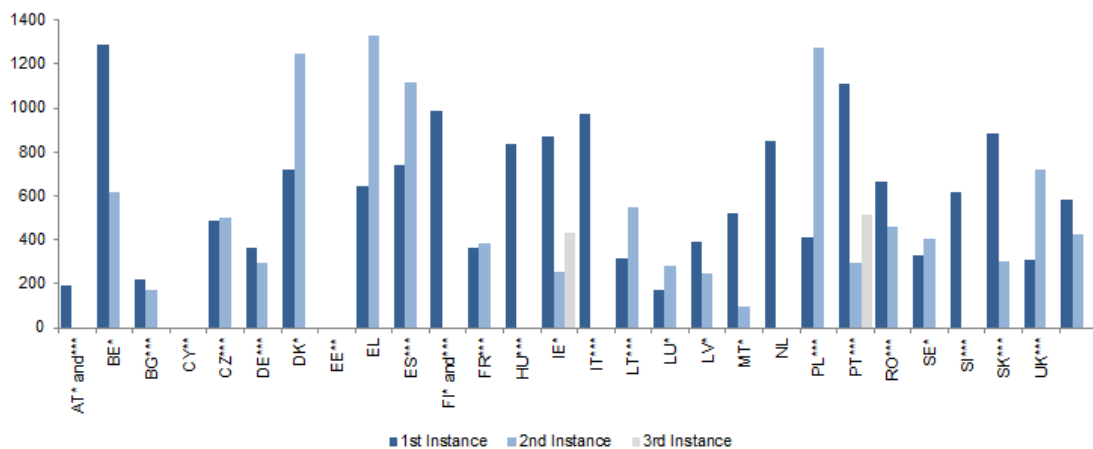
* Less than 10 observations

** No data available

*** (Some) start dates have been calculated, using the legal deadline (i.e. the maximum number of days available) for launching a case in the next instance

HR[^] Cases under national law similar to public enforcement: judicial review, 1st instance Nr of observations 30, median 867. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Figure 4.14 Mean average length of judicial review proceedings by instance (2008-2013)



Note:

* Less than 10 observations

** No data available

*** (Some) start dates have been calculated, using the legal deadline (i.e. the maximum number of days available) for launching a case in the next instance

HR[^] Cases under national law similar to public enforcement: judicial review, 1st instance Nr of observations 30, mean 838. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

4.2.6 Average duration between the start of a case and the first hearing in public enforcement cases

Data necessary to calculate the average duration between the start of a case and the first hearing was scarce and it was therefore only possible to calculate this for 16 Member

States³³. It is interesting to note, however, as shown in Table 4.11 below, that the relatively lengthy duration of cases in some Member States, such as Finland, goes together with a very long waiting period between the start of the case and the first hearing. It is also striking to note that overall, the average period between the start of a case and the first hearing is rather long, with the shortest duration being identified in Romania and Bulgaria.

Table 4.11 Average mean and median duration between start of case and first hearing in public enforcement cases (2004-2013)

	Nr of Observations	Mean	Median
FI*	3	726	825
PT*^	8	682	681
IE*	1	620	620
BE*	8	580	188
NL	13	560	472
EL	114	539	428
PL	19	530	414
SE*	5	378	445
LV*	2	371	371
UK^	26	329	229
DE*^	6	327	265
FR^	89	271	288
LU*	2	255	255
CZ*	3	245	242
RO	79	186	115
BG**	19	145	126
AT**			
CY**			
DK**			
EE**			
ES**			
HR**			
HU**			
IT**			
LT**			
MT**			
SI**			
SK**			

Note:

The numbers include pending cases

* Less than 10 observations

** No data available

^ (Some) start dates have been calculated, using the max number of days available to launch a next instance case

³³ In some Member States, oral hearings do not take place or only rarely.

Table 4.12 presents the mean and median average duration between the start of a case and the first hearing between 1 January 2008 and 1 June 2013.

Table 4.12 Average mean and median duration between start of case and first hearing in public enforcement cases (2008-2013)

	Nr of Observations	Mean	Median
PT*	4	1,049	1,060
BE*	5	798	126
FI*	3	726	825
NL*	7	617	655
PL	18	539	504
SE*	4	471	459
EL	83	446	409
UK	17	399	234
DE*	6	327	265
LV*	1	312	312
FR^	62	296	301
LU*	2	255	255
CZ*	2	246	246
BG	19	145	126
RO	58	116	67
AT**			
CY**			
DK**			
EE**			
ES**			
HR**			
HU**			
IE**			
IT**			
LT**			
MT**			
SI**			
SK**			

Note:

The numbers include pending cases

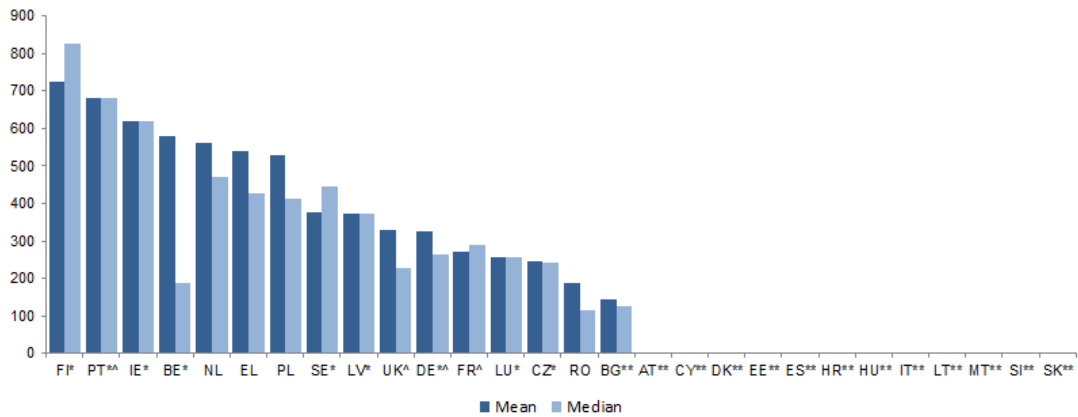
* Less than 10 observations

** No data available

^ (Some) start dates have been calculated, using the max number of days available to launch a next instance case

Figures 4.15 and 4.16 below present the same information in a graphic format, for respectively the period from 1 May 2004 to 1 June 2013 and from 1 January 2008 to 1 June 2013.

Figure 4.15 Average mean and median duration between start of case and first hearing in public enforcement cases (2004-2013)



Note:

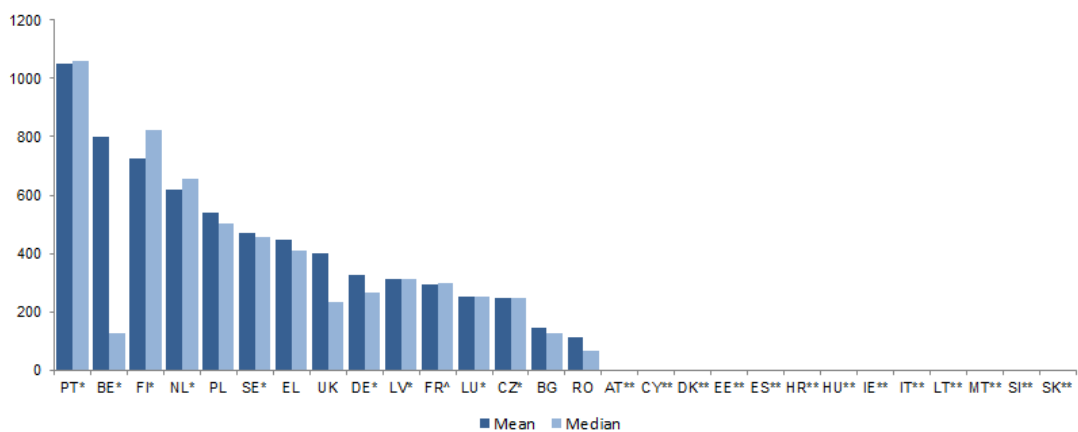
The numbers include pending cases

* Less than 10 observations

** No data available

^ (Some) start dates have been calculated, using the max number of days available to launch a next instance case

Figure 4.16 Average mean and median duration between start of case and first hearing in public enforcement cases (2008-2013)



Note:

The numbers include pending cases

* Less than 10 observations

** No data available

^ (Some) start dates have been calculated, using the max number of days available to launch a next instance case

Table 4.13 below presents the mean and median average duration between the start of a case and the first hearing between 1 May 2004 and 1 June 2013 by type of hearing.

Table 4.13 Average mean and median duration between start of case and first hearing in public enforcement cases by instance (2004-2013)

	1st Instance			2nd Instance			3rd Instance		
	Nr of Observations	Mean	Median	Nr of Observations	Mean	Median	Nr of Observations	Mean	Median
AT**									
BE*	8	580	188						
BG	10	151	128	9	139	126			
CY**									
CZ*	3	245	242						
DE*	1	497	497	5	293	264			
DK**									
EE**									
EL	78	353	329	36	944	872			
ES									
FI*	3	726	825						
FR	57	236	251	32	332	327			
HR**									
HU**									
IE*	1	620	620						
IT**									
LT**									
LU*	1	314	314	1	196	196			
LV*	2	371	371						
MT**									
NL	7	477	378	6	657	726			
PL	8	775	794	10	283	227	1	1,049	1,049
PT*	4	846	1,006	4	518	505			
RO	55	110	76	24	362	356			
SE*	5	378	445						
SI**									
SK**									
UK	23	330	228	3	325	354			

Note:

The numbers include pending cases

* Less than 10 observations

** No data available

^ (Some) start dates have been calculated, using the max number of days available to launch a next instance case

Table 4.14 below presents the same information but covering the period from 1 January 2008 to 1 June 2013.

Table 4.14 Average mean and median duration between start of case and first hearing in public enforcement cases by instance (2008-2013)

	1st Instance			2nd Instance			3rd Instance		
	Nr of Observations	Mean	Median	Nr of Observations	Mean	Median	Nr of Observations	Mean	Median
AT**									
BE*	5	798	126						
BG	10	151	128	9	139	126			
CY**									
CZ*	2	246	246						
DE*	1	497	497	5	293	264			
DK**									
EE**									
EL	65	363	351	18	746	828			
ES**									
FI*	3	726	825						
FR	38	277	280	24	746	828			
HR**									
HU**									
IE**									
IT**									
LT**									
LU*	1	314	314	1	196	196			
LV*	1	312	312						
MT**									
NL*	2	330	330	5	731	797			
PL	7	831	876	10	283	227	1	1,049	1,049
PT*	3	1,094	1,206	1	913	913			
RO	52	109	67	6	175	152			
SE*	4	471	459						
SI**									
SK**									
UK	15	411	234	2	311	311			

Note:

The numbers include pending cases

* Less than 10 observations

** No data available

^ (Some) start dates have been calculated, using the max number of days available to launch a next instance case

4.3 Parties involved

4.3.1 Defendants (2004-2013)

Tables 4.15 and 4.16 provide an overview of the types of parties involved as defendants, by type of proceeding, covering the period from 1 May 2004 until 1 June 2013. It is noted that the numbers presented relate to the number of times a certain type of party was identified as being involved in a case and not to the total number of parties per case.

Table 4.15 Defendant parties in judicial review cases (number of times counted)

	Large	SME	NCA	Other
AT	5	2	7	
BE	1	2	5	3
BG		1	20	1
CY**				
CZ	5	1	12	
DE	3		33	
DK*			8	1
EE**				
EL	10	1	119	41
ES	2	1	96	63
FI*	2	1	3	
FR	42		45	9
HR^^				
HU			33	
IE*		1		1
IT	4		183	1
LT			32	
LU*	1		1	
LV*			4	
MT*			9	
NL			13	
PL			27	
PT	1		16	1
RO	1	6	82	
SE*	3		5	
SI			36	
SK	4	1	5	1
UK	1		26	1

Note:

The numbers include pending cases³⁴

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

^^ Defendant parties in cases under national law similar to Article 101 and Article 102 TFEU, NCA 51

³⁴ It is worth noting that the observations from which these data are gathered correspond to both first and second instance judicial review, which explains why parties other than NCAs also appear as defendants.

Table 4.16 Defendant parties in follow-on actions (number of times counted)

	Large	SME	NCA	Other
(AT)	15	1		4
BE*	1			
BG^				
CY**				
(CZ)^				
DE	36	2		2
DK*	4			
EE**^				
(EL)*	1	1		
(ES)*	8			1
FI	41	8		
(FR)	35			
HR^^				
HU*				3
IE^				
(IT)*	3	1		
LT*	3	3		
LU^				
LV^				
MT^				
NL*	5	1		
(PL)*			1	
(PT)*	3			
RO^				
SE*	7		1	
SI^				
SK^				
UK	37			2

Note:

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

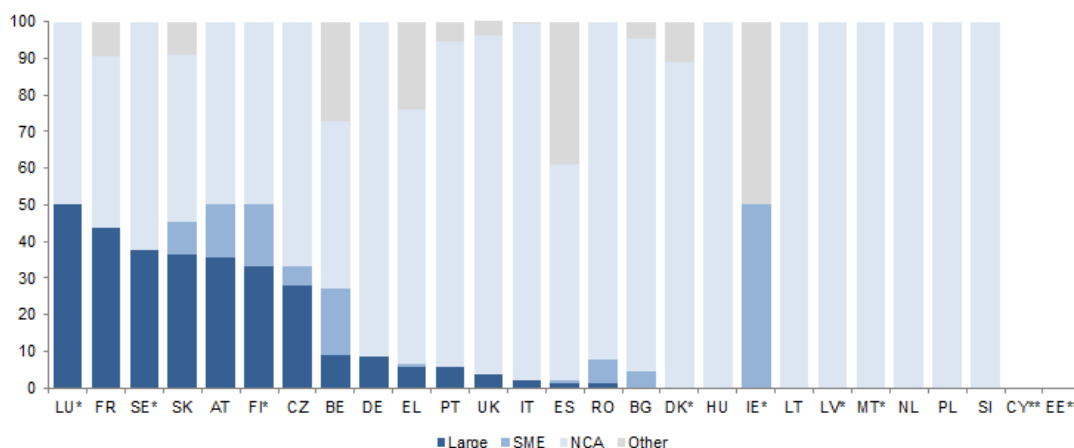
^ No follow-on cases identified

() A different data collection method was followed.

^^ Defendant parties in cases under national law similar to Article 101 and Article 102 Large 2, SME 3
The numbers include pending cases

Figures 4.17 and 4.18 present the same information graphically. In the 14 Member States as part of judicial review cases, parties other than the NCA included large companies, while in nine Member States parties also included SMEs.

Figure 4.17 Defendant parties in judicial review cases (share)



Note:

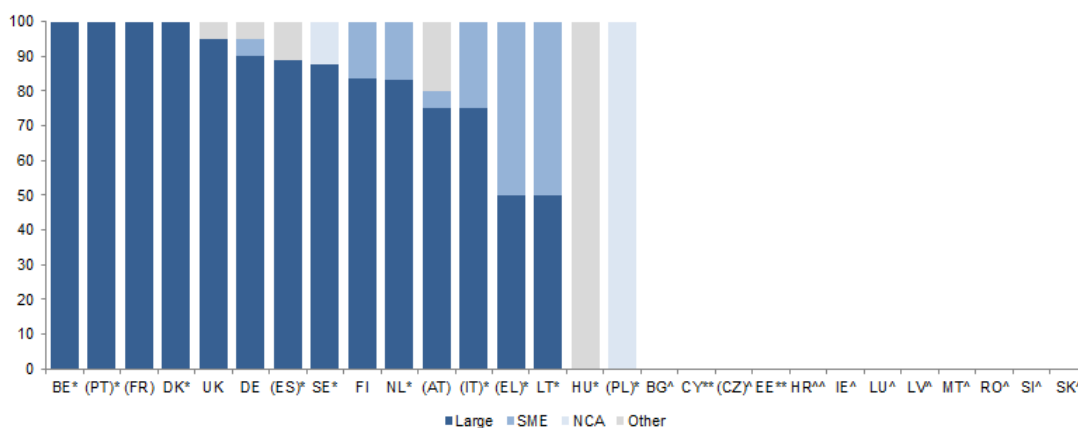
* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

HR^ Defendant parties in cases under national law similar to Article 101 and Article 102 NCA 100%
The numbers include pending cases

In the vast majority of follow-on actions, the defendant is a large company. However, in Germany, Finland, Netherlands, Austria, Italy, Greece and Lithuania, SMEs have also been defendants.

Figure 4.18 Defendant parties in follow-on actions (share)



Note:

The numbers include pending cases

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

^ No follow-on cases identified

() A different data collection method was followed

HR^^ Defendant parties in cases under national law similar to Article 101 and Article 102: Large companies 40%, SME 60%

4.3.2 Defendants (2008-2013)

Tables 4.17 and 4.18 provide an overview of the types of parties involved as defendants, by type of proceeding, covering the period from 1 January 2008 until 1 June 2013.

Table 4.17 Defendant parties in judicial review cases (number of times counted)

Large	SME	NCA	Other
-------	-----	-----	-------

	Large	SME	NCA	Other
AT	2	1	5	
BE		1	4	2
BG		1	19	1
CY**				
CZ	4	1	9	
DE	3		16	
DK			3	1
EE**				
EL	7		83	28
ES	2	1	81	52
FI	2	1	3	
FR	26		37	4
HR^^				
HU			32	
IE		1		
IT	3		154	1
LT			29	
LU	1		1	
LV			2	
MT			8	
NL			7	
PL			20	
PT	1		7	
RO			66	
SE	2		3	
SI			9	
SK	4	1	3	1
UK			17	1

Note:

The numbers include pending cases

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

^^ Defendant parties in cases under national law similar to Article 101 and Article 102 TFEU NCA 30

It is worth noting that the observations from which these data are gathered correspond to both first and second instance judicial reviews, which explains why parties other than NCAs appear as possible defendants.

Table 4.18 Defendant parties in follow-on actions (number of times counted)

	Large	SME	NCA	Other
(AT)	14	1		4
BE*				
BG^				
CY**				
(CZ)^				
DE	14	1		2

	Large	SME	NCA	Other
DK	1			
EE**				
(EL)*	1			
(ES)*	6			
FI	40	8		
(FR)	19			
HR**				
HU*				3
IE^				
(IT)*	2			
LT*	2	2		
LU^				
LV^				
MT^				
NL*	5	1		
(PL)*			1	
(PT)*	2			
RO^				
SE*	3		1	
SI^				
SK^				
UK	29			2

Note:

The numbers include pending cases

* Less than 10 observations (i.e. cases for which relevant data was available)

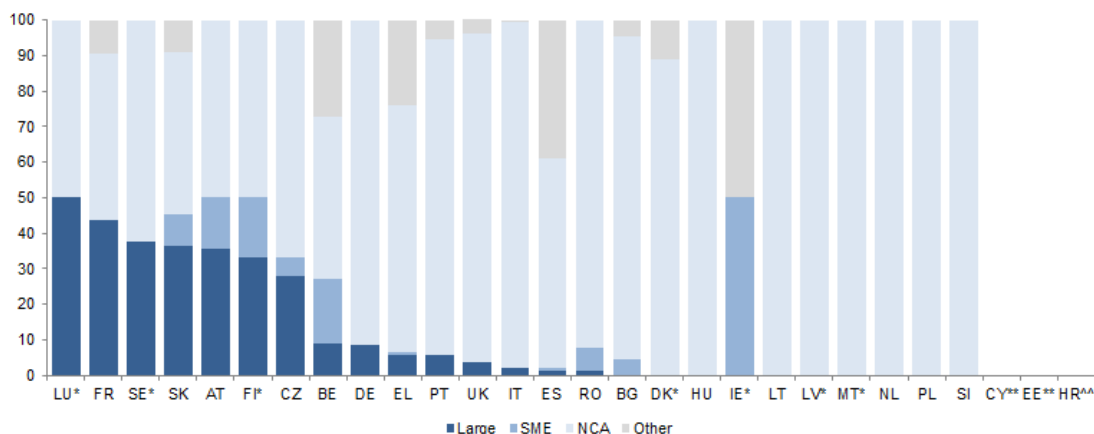
** No relevant cases identified

^ No follow-on cases identified

() A different data collection method was followed

Figures 4.19 and 4.20 present the same information graphically.

Figure 4.19 Defendant parties in judicial review cases (share)



Note:

The numbers include pending cases

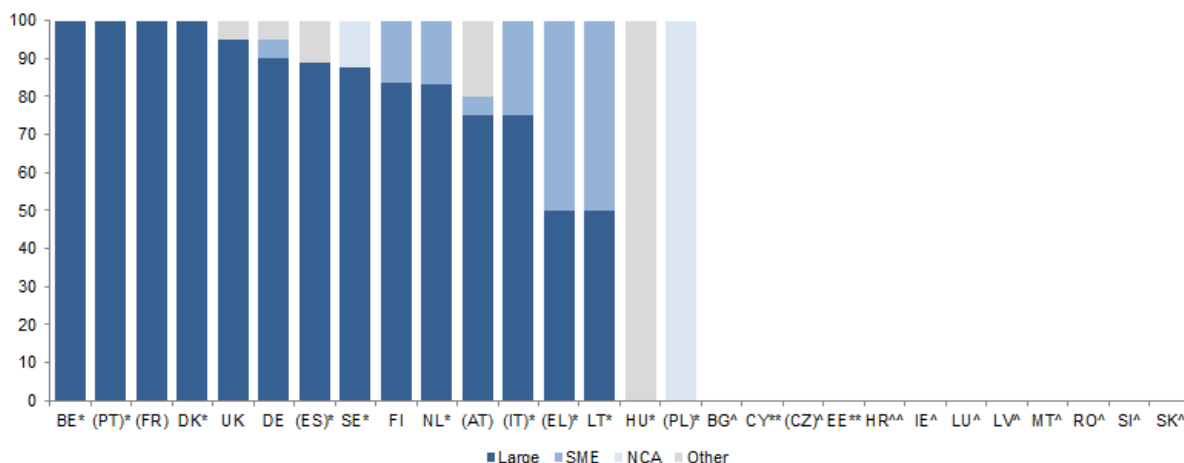
* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

^^ Defendant parties in cases under national law similar to Article 101 and Article 102 TFEU NCA 100%. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

In the vast majority of follow-on actions, the defendant is again a large company. However, in Germany, Netherlands, Austria, and Lithuania, SMEs have also been defendants.

Figure 4.20 Defendant parties in follow-on actions (share)



Note:

The numbers include pending cases

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

^ No follow-on cases identified

() A different data collection method was followed.

4.3.3 Applicants (2004-2013)

Tables 4.19 and 4.20 provide an overview of the types of parties involved as applicants, by type of proceeding, covering the period from 1 May 2004 until 1 June 2013.

Table 4.19 Applicant parties in judicial review cases (number of times counted)

	Large	SME	Consumer Association	Consumer	Other
AT	7	4			4
BE	7	2			4
BG	11	2			9
CY**					
CZ	9	3			6
DE	16	4			13
DK	8				1
EE**					
EL	78	22			29
ES	22	37		1	39
FI	1	2			2
FR	78		5		14
HR^^					
HU	16	12			
IE					2
IT	83	98	2		6

	Large	SME	Consumer Association	Consumer	Other
LT	24	17			27
LU	1				1
LV	1	2			1
MT	4	4		1	1
NL	12	2			2
PL	25	3			2
PT	8				9
RO	51	25			13
SE	3				5
SI	8	26			2
SK	3	1			7
UK	14	14			

Note:

The numbers include pending cases

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

^^ Applicant parties in cases under national law similar to Article 101 and Article 102 TFEU: Large companies 14, SME 34, other 5. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Table 4.20 Applicant parties in follow-on actions (number of times counted)

	Large	SME	Consumer Association	Consumer	Other
(AT)	9	5	1		4
BE					1
BG^					
CY**					
CZ^					
DE	25	6			7
DK	1	3			
EE**					
(EL)*					2
(ES)	4	3	2		1
FI	1				41
(FR)	30	2	3	3	
HR^^					
HU					3
IE^					
(IT)*		4			
LT					3
LU^					
LV^					
MT^					
NL	4				2
(PL)*	1				
(PT)*	3				

	Large	SME	Consumer Association	Consumer	Other
RO [^]					
SE	2	5			1
SI [^]					
SK [^]					
UK	27	10		1	1

Note:

The numbers include pending cases

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

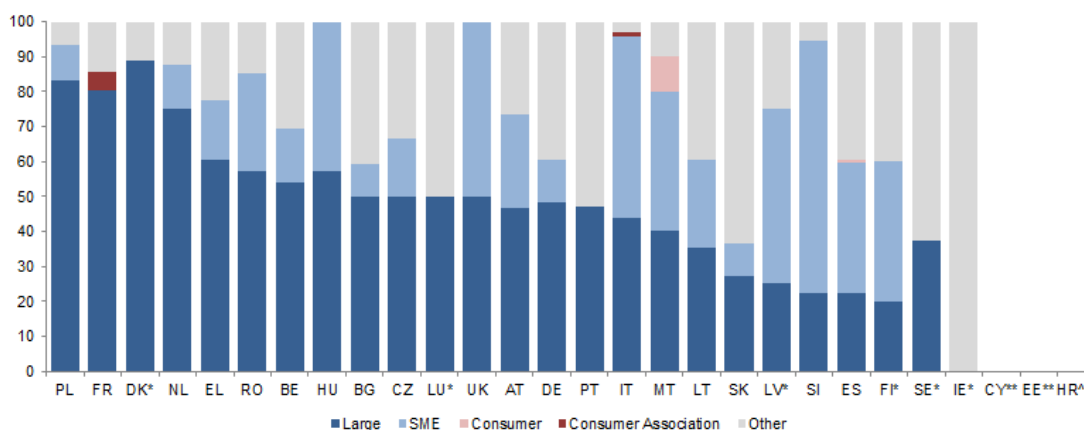
[^] No follow-on cases identified

() A different data collection method was followed

^{^^} Applicant parties in cases under national law similar to Article 101 and Article 102: SME 3

Figures 4.21 and 4.22 present the same information graphically. In both judicial review cases and follow-on actions, applicants are mostly large companies, followed by SMEs. In France, Italy, Malta and Spain, consumers or consumer associations have been involved in judicial review cases. In follow-on cases, consumers and consumer associations were applicants in France, United Kingdom, Austria and Spain.

Figure 4.21 Applicant parties in judicial review cases (share)



Note:

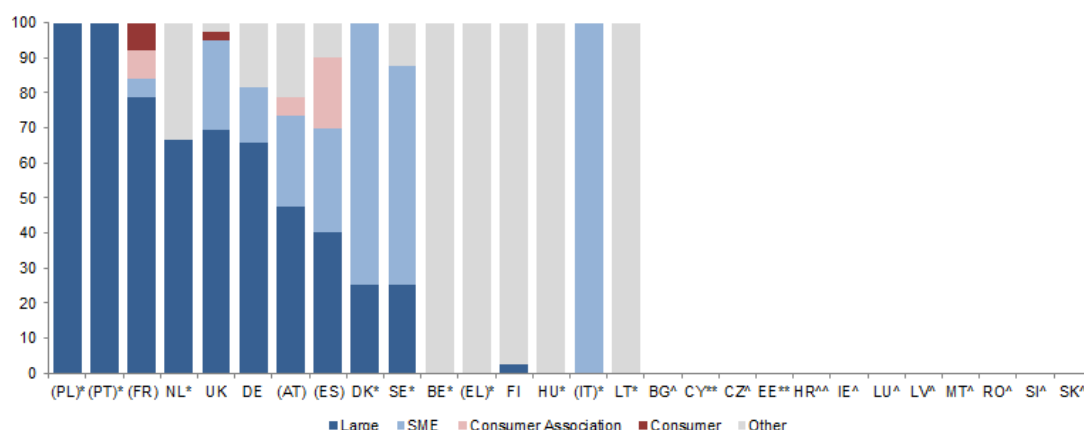
The numbers include pending cases

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

^{^^} Applicant parties in cases under national law similar to Article 101 and Article 102 TFEU: Large companies 26%, SME 64%, Other 9%. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Figure 4.22 Applicant parties in follow-on actions (share)



Note:

The numbers include pending cases

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

^ No follow-on cases identified

() A different data collection method was followed

^^ Applicant parties in cases under national law similar to Article 101 and Article 102 TFEU: SME 100%. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

4.3.4 Applicants (2008-2013)

Tables 4.21 and 4.22 provide an overview of the types of parties involved as applicants, by type of proceeding, covering the period from 1 January 2008 until 1 June 2013.

Table 4.21 Applicant parties in judicial review cases (number of times counted)

	Large	SME	Consumer Association	Consumer	Other
AT	5	3			2
BE	4	1			3
BG	11	1			9
CY**					
CZ	7	2			5
DE	10	1			7
DK	3				1
EE**					
EL	61	14			15
ES	18	31			34
FI	1	2			2
FR	55		2		9
HR^^					
HU	16	12			
IE					1
IT	77	75	2		5
LT	22	15			24
LU	1				1
LV		2			

	Large	SME	Consumer Association	Consumer	Other
MT	4	3		1	1
NL	6	2			2
PL	18	3			2
PT	5				3
RO	39	22			5
SE	2				3
SI	7	2			
SK	2	1			6
UK	7	11			

Note:

The numbers include pending cases

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

^ Applicant parties in cases under national law similar to Article 101 and Article 102 TFEU are: Large companies 7, SME 22, other 2. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Table 4.22 Applicant parties in follow-on actions (number of times counted)

	Large	SME	Consumer Association	Consumer	Other
(AT)	8	5	1		4
BE					
BG^					
CY**					
CZ^					
DE	10	4			3
DK*	1				
EE**					
(EL)					1
(ES)*	3	2	1		
FI					41
(FR)	15	2	2	2	
HR**					
HU					3
IE^					
(IT)		2			
LT					2
LU^					
LV^					
MT^					
NL	4				2
(PL)*	1				
(PT)*	2				
RO^					
SE	1	2			1
SI^					
SK^					

	Large	SME	Consumer Association	Consumer	Other
UK	21	10			

Note:

The numbers include pending cases

* Less than 10 observations (i.e. cases for which relevant data was available)

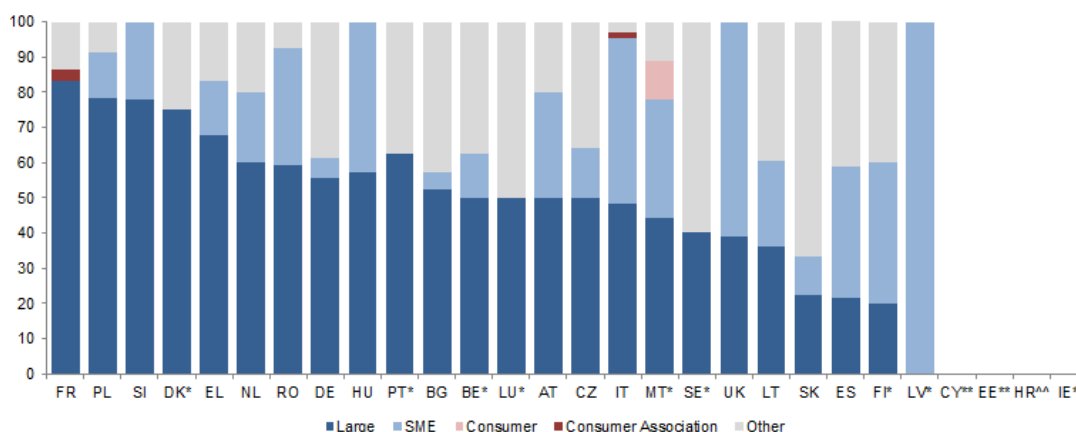
** No relevant cases identified

^ No follow-on cases identified

() A different data collection method was followed

Figures 4.23 and 4.24 present the same information graphically. In both judicial review cases and follow-on actions, applicants are mostly large companies, followed by SMEs. In France, Italy and Malta, consumers or consumer associations have been involved in judicial review cases. In follow-on cases, consumers and consumer associations were applicants in France, Austria and Spain.

Figure 4.23 Applicant parties in judicial review cases (share)



Note:

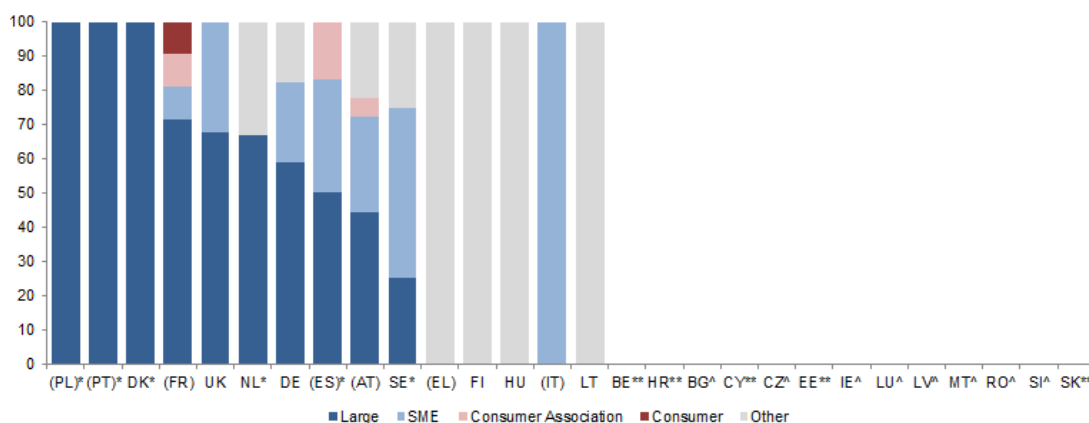
The numbers include pending cases

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

^^ Applicant parties in cases under national law similar to Article 101 and Article 102 TFEU are: Large companies 23, SME 71, other 6. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Figure 4.24 Applicant parties in follow-on actions (share)



Note:

The numbers include pending cases

* Less than 10 observations (i.e. cases for which relevant data was available)

** No relevant cases identified

^ No follow-on cases identified

() A different data collection method was followed

4.4 Costs

Information on costs of cases could only be retrieved in 15 Member States (Belgium, Czech Republic, France, Germany, Greece, Hungary, Latvia, Lithuania, Netherlands, Poland, Portugal, Slovenia, Slovak Republic, Sweden and United Kingdom) and not for all cases nor for all types of costs.

The costs presented in this section have been defined as follows:

- **State and court fees:** this relates to all fees and charges required by law to be paid to the courts or the State for launching and closing a case. They may include stamp duties, filing fees, charges for serving summons and subpoenas, court transcripts, etc., with the exception of the costs for the lawyer / law firm / other legal practitioner (which are included under legal fees below).

In a number of cases, costs are reported for multiple parties. If each party filed a separate action and then the cases were joined by the court because they related to the same NCA/Commission decision and raised similar points of law, then the average cost per party has been included. If an action was filed jointly by more than one party as a group, then usually only one amount is charged to all the parties; whereas in the rare occasions that separate fees were charged to the parties which filed a joint application, the total amounts charged to them has been included.

- **Legal:** this entry exclusively relates to the costs for the services performed by the lawyers / law firm / other legal practitioner, as determined by the court³⁵ in the judgment, if available.
- **Other costs:** Other costs may include any costs which do not fall under the categories above or costs for which it is not possible to determine to which categories they belong. For example, the court may have imposed a general fee without specifying its nature.

Each of these types of costs is presented below.

4.4.1 Costs of State and court fees

Table 4.23 below presents the mean and median average state costs and court fees of the cases for which information was available (in 15 Member States), as well as the minimum and maximum amounts charged by the courts, during the period from 1 May 2004 to 1 June 2013.

Table 4.23 Costs of State and court fees (2004-2013)

	Nr of Cases reporting	Mean	Median	Min	Max
DE*	4	60,151	57,596	10,412	115,000
HU	19	5,488	269	89	45,844
FR*	1	2,300	2,300	2,300	2,300
PT	16	841	662	300	3,323
NL	13	502	281	197	2,450
EL	67	440	300	100	1,380
SI*	9	242	82	82	1,320

³⁵ The amounts reported here therefore do not necessarily reflect the real costs incurred by the legal practitioners involved.

	Nr of Cases reporting	Mean	Median	Min	Max
PL	21	239	239	239	239
SK*	2	208	208	66	350
BE*	5	186	186	186	186
CZ*	6	78	78	78	78
SE*	2	50	50	50	50
LV*	3	28	28	28	28
LT*	4	24	22	5	48
RO	61	1	1	1	11
AT**					
BG**					
CY**					
DK**					
EE**					
ES**					
FI**					
HR [^]					
IE**					
IT**					
LU**					
MT**					
UK**					

Note:

The numbers include pending cases

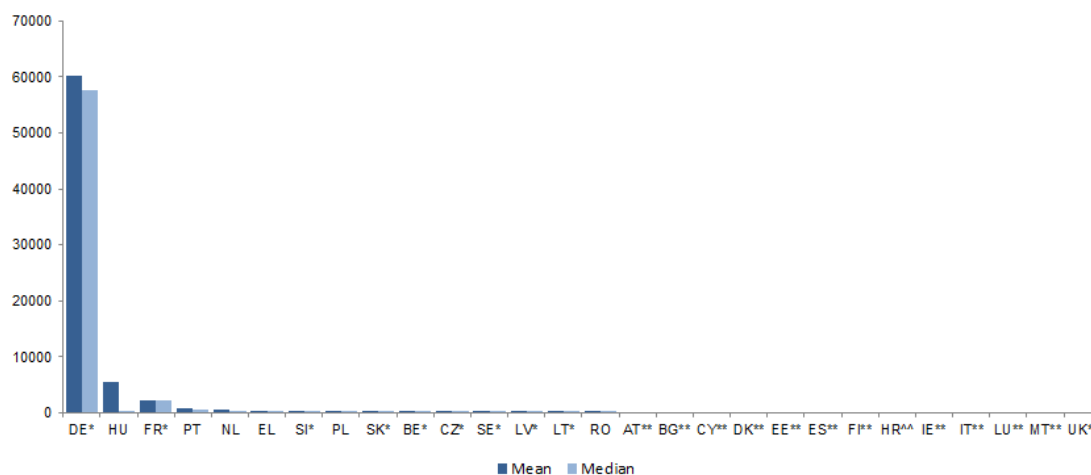
* Less than 10 cases with relevant information

** No data available

[^] Cases under national law similar to Article 101 and Article 102 Nr of Cases reporting 45, Mean 141, Median 130, Min 130, Max 636

Figure 4.25 shows the mean and median average costs (in thousands euro) per Member State, indicating that the highest costs were charged by courts in Germany, Hungary, France, Portugal and Netherlands.

Figure 4.25 Mean and median average costs of state and court fees (in thousands euro) (2004-2013)



Note:

The numbers include pending cases

* Less than 10 cases with relevant information

** No data available

^ Cases under national law similar to Article 101 and Article 102 TFEU Nr of Cases reporting 45, Mean 141, Median 130, Min 130, Max 636. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Table 4.24 in turn presents the same information covering the period 1 January 2008 to 1 June 2013.

Table 4.24 Costs of State and court fees (2008-2013)

	Nr of Cases reporting	Mean	Median	Min	Max
DE*	2	38,118	38,118	10,412	65,824
HU	19	5,488	269	89	45,844
PT*	7	745	714	408	1,468
NL*	8	650	425	197	2,450
EL	60	448	300	100	1,380
SI*	7	278	82	82	1,320
PL	15	239	239	239	239
BE*	5	186	186	186	186
CZ*	4	78	78	78	78
SK*	1	66	66	66	66
LV*	1	28	28	28	28
LT*	3	16	15	5	29
RO	58	1	1	1	1
FR*					
SE**					
AT**					
BG**					
CY**					
DK**					
EE**					
ES**					
FI**					
HR^^					
IE**					
IT**					
LU**					
MT**					
UK**					

* Less than 10 cases with relevant information

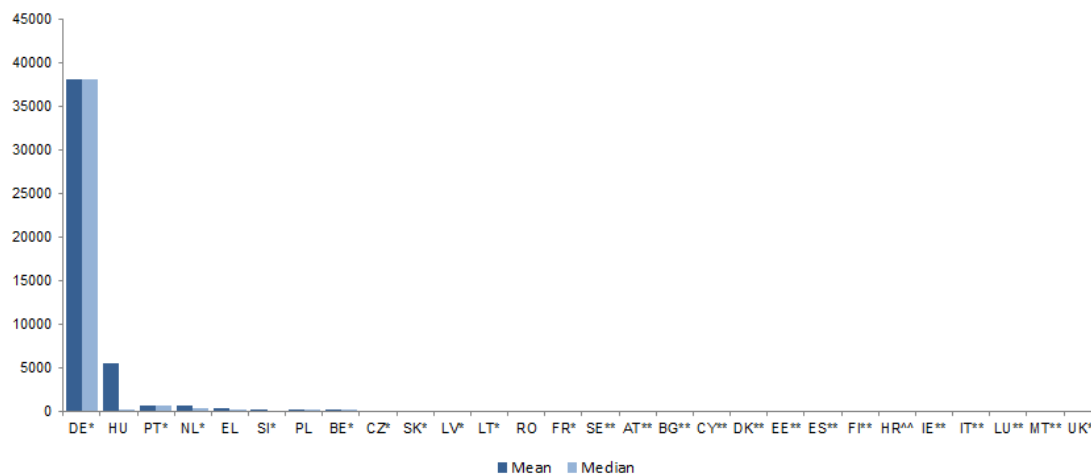
** No data available

^^ Cases under national law similar to Article 101 and Article 102 Nr of Cases reporting 30, Mean 130, Median 130, Min 130, Max 130

The numbers include pending cases

Figure 4.26 shows the mean and median average costs (in thousands euro) per Member State, indicating that the highest costs were (again) charged by courts in Germany, Hungary, France, Portugal and Netherlands.

Figure 4.26 Mean and median average costs of state and court fees (in thousands euro) (2008-2013)



Note:

The numbers include pending cases

* Less than 10 cases with relevant information

** No data available

^ Cases under national law similar to Article 101 and Article 102 TFEU: Nr of cases reporting 30, mean 130, median 130, min 130, max 130. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

4.4.2 Legal fees

Table 4.25 below presents the mean and median average legal fees of the cases for which information was available (15 Member States), as well as the minimum and maximum amounts as determined by courts in judgements, during the period from 1 May 2004 to 1 June 2013.

Table 4.25 Costs of legal fees (2004-2013)

	Nr of Cases reporting	Mean	Median	Min	Max
UK*	1	2,888,051	2,888,051	2,888,051	2,888,051
SE*	7	359,927	196,565	52,193	1,191,073
FI	40	211,339	132,500	32,000	2,596,424
DK*	6	134,635	40,377	13,459	538,358
DE*	3	57,217	66,762	12,086	92,802
RO*	5	9,671	1,815	2	36,227
FR	33	6,121	2,500	1,500	30,000
BE*	5	3,384	3,073	186	7,500
SK*	4	2,988	355	133	11,107
HU	20	2,554	627	66	16,755
NL	15	2,079	1,288	644	10,703
BG	11	907	383	41	4,469
CZ*	7	382	336	93	777
LT*	2	292	292	117	467

	Nr of Cases reporting	Mean	Median	Min	Max
PL	11	132	129	65	176
AT**					
CY**					
EE**					
EL**					
ES**					
HR^^					
IE**					
IT**					
LU**					
LV**					
MT**					
PT**					
SI**					

Note:

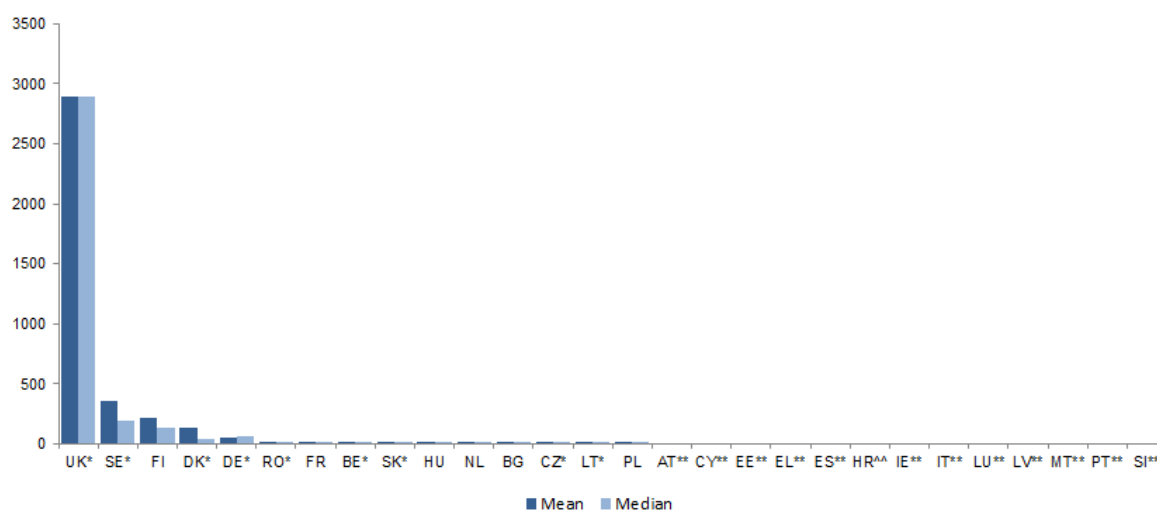
* Less than 10 cases with relevant information

** No data available

^^ Cases under national law similar to Article 101 and Article 102 TFEU Nr of cases reporting 45, mean 527, median 525, min 525, max 636. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Figure 4.27 shows the mean and median average costs (in thousands euro) per Member State, indicating that the highest costs were those determined by courts in the United Kingdom, Sweden, Finland and Denmark.

Figure 4.27 Mean and median average costs of legal fees (in thousands euro) (2004-2013)



Note:

* Less than 10 cases with relevant information

** No data available

^^ Cases under national law similar to Article 101 and Article 102 TFEU Nr of cases reporting 45, mean 527, median 525, min 525, max 636. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Table 4.26 in turn presents the same information covering the period 1 January 2008 to 1 June 2013.

Table 4.26 Costs of legal fees (2008-2013)

	Nr of Cases reporting	Mean	Median	Min	Max
UK*	1	2,888,051	2,888,051	2,888,051	2,888,051
SE*	5	471,988	311,481	100,803	1,191,073
FI	40	211,339	132,500	32,000	2,596,424
DK*	5	153,486	40,377	13,459	538,358
DE*	2	52,444	52,444	12,086	92,802
RO*	5	9,671	1,815	2	36,227
FR	18	5,889	2,500	2,000	30,000
BE*	5	3,384	3,073	186	7,500
HU	20	2,554	627	66	16,755
NL*	10	2,325	1,288	644	10,703
BG	11	907	383	41	4,469
CZ*	5	423	376	93	777
SK*	2	334	334	133	535
LT*	2	292	292	117	467
PL*	9	139	172	65	176
AT**					
CY**					
EE**					
EL**					
ES**					
HR^					
IE**					
IT**					
LU**					
LV**					
MT**					
PT**					
SI**					

Note:

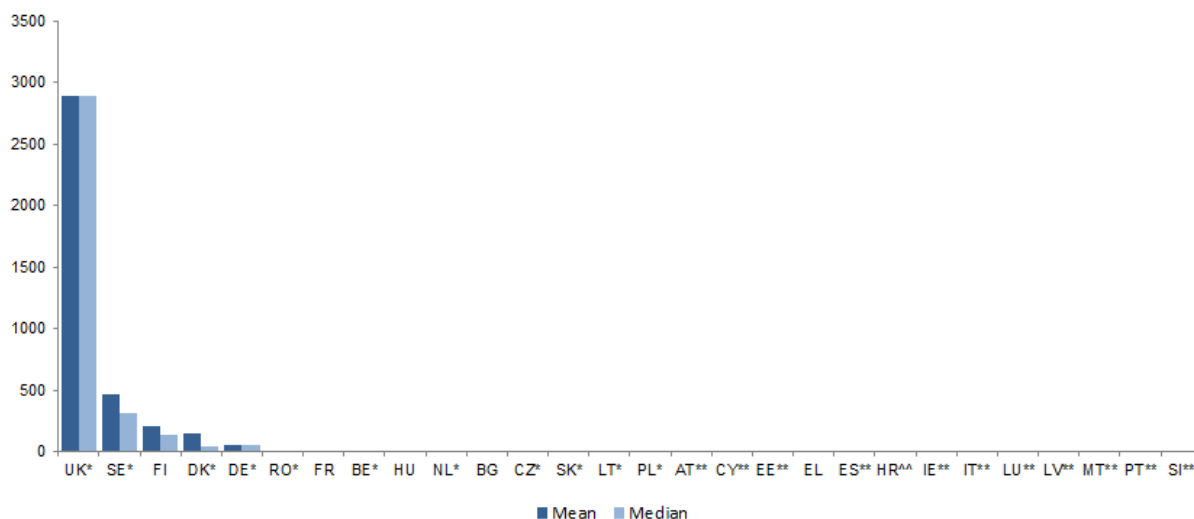
* Less than 10 cases with relevant information

** No data available

^ Cases under national law similar to Article 101 and Article 102 TFEU Nr of cases reporting 30, mean 525, median 525, min 525, max 525. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

Figure 4.28 shows the mean and median average costs (in thousands euro) per Member State, indicating that the highest legal fees were (again) those determined by courts in the United Kingdom, Sweden, Finland and Denmark.

Figure 4.28 Mean and median average costs of legal fees (in thousands euro) (2008-2013)



Note:

* Less than 10 cases with relevant information

** No data available

** No information available

^ Cases under national law similar to Article 101 and Article 102 TFEU Nr of cases reporting 30, mean 525, median 525, min 525, max 525. Since these cases did not refer to the application of EU competition law rules they have not been added to the table.

4.4.3 Other costs

The nature of other costs included in the datasheets varies greatly, ranging initial sums claimed by the applicants, to 'sums' of costs because no separation was made in the judgement, etc.

Table 4.27 below presents the other costs, in the seven Member States where these were recorded, covering the period 1 May 2004 to 1 June 2013.

Table 4.27 Other costs (2004-2013)

	Nr of Cases reporting	Mean	Median	Min	Max
DE	38	21,7000,000	4,698,755	25,000	200,000,000
DK*	1	11,000,000	11,000,000	11,000,000	11,000,000
RO	17	544,235	26,518	4,227	7,002,347
UK*	6	507,494	307,496	66,321	1,205,899
EL	35	92,012	100,000	3,000	100,400
LT*	1	70,169	70,169	70,169	70,169
SE*	6	38,615	26,078	125	144,372
PL*	2	1,476	1,476	129	2,822
HU*	1	25	25	25	25

Note:

The numbers include pending cases

* Less than 10 cases with relevant information

Table 4.28 presents the same information, this time for the period from 1 January 2008 until 1 June 2013.

Table 4.28 Other costs (2004-2013)

	Nr of Cases reporting	Mean	Median	Min	Max
DE*	22	12,700,000	5,000,000	30,000	81,000,000
DK*	1	11,000,000	11,000,000	11,000,000	11,000,000
RO	17	544,235	26,518	4,227	7,002,347
UK*	6	507,494	307,496	66,321	1,205,899
EL	31	92,978	100,000	3,000	100,400
LT*	1	70,169	70,169	70,169	70,169
SE*	5	41,395	27,441	125	144,371
PL*	2	1,476	1,476	129	2,822
HU*	1	25	25	25	25

Note:

The numbers include pending cases

* Less than 10 cases with relevant information

4.5 Other useful information

4.5.1 Interim measures

With regard to interim measures, these were taken as part of 82 cases in Belgium, Germany, Greece, France Lithuania, Poland, Portugal, Romania, Slovak Republic and Sweden. In another 518 cases it was confirmed that no interim measure were taken, whereas in another 497 cases, no evidence was found in the judgement that an interim measure was or was not taken.

The interim measures mainly concerned requests for the cases to have a suspensive effect, to ensure that the earlier decision or judgement was not enforced until the final outcome. Other requests concerned the provisional seizure of the property and funds of the companies involved, corresponding to the amount of the initial sanction. In one case, the interim measure consisted of a fine of nearly 4 million euro and in another case, access to a full file was requested.

4.5.2 Judicial enforcement measures

With regard to judicial enforcement measures, these were identified only in one case, reported in France.

4.5.3 Out-of-court settlements

Only in five cases it was reported that the parties had attempted to settle out of court prior to starting the legal proceeding (two conciliation efforts in Germany, a compromise in France, a settlement in Lithuania, another conciliation in Poland and one 'administrative contract' in Latvia).

In 591 cases it was confirmed that no such attempt had been made, while in another 498 cases, information was not possible to confirm or deny this.

4.5.4 Intervention by *amicus curiae*

On the basis of the cases identified, the European Commission intervened in one case in Austria, Lithuania and the Slovak Republic and three times in France³⁶. The NCA intervened

³⁶ These cases are: Austria Case (16 Ok 4/11); Lithuania Case (A-502-34-09); Slovakia Case (1Szhpu/2/2008) "Zeleznicna spolocnost Cargo a.s. v Protimonopolny urad SR"; and France Case (04-16.896) Syndicat des Professionnels Européens de l'Automobile (SPEA) v Renault, Peugeot et concessionnaires, Case (04-19.092) SPEA v Peugeot et GCAP and Case 2008/23812 Pierre Fabre v NCA.



once in Belgium, twice in Lithuania and three times in Spain. In 440 cases it was confirmed that no such intervention had been made, while in another 750 cases, information was not possible to confirm or deny this.

5 Analysis of feedback on efficiency, quality and independence of the national judicial systems

5.1 Introduction

The analysis of feedback on the efficiency, quality and independence of the national judicial systems in proceedings related to the application of Articles 101 and 102 TFEU undertaken as part of this study is based on an online survey, follow-up interviews and inputs and views provided by the network of national researchers. The analysis in this section reflects the specific views and information provided by individuals on certain matters, such as the length of cases and/or the costs involved, which may not always correspond with the data collected on the judgments analysed in section 4 above.

5.1.1 The online survey

The survey targeted parties, legal practitioners (including in house-lawyers) and judges. The identification of the pertinent stakeholders was carried out by the national experts in parallel with the data collection of relevant cases.

Three survey questionnaires were developed on the basis of the questionnaires provided by DG Justice within the Study specifications. These were the following:

- Online survey for parties involved in the proceedings on the application of EU competition law;
- Online survey for national judges competent for the application of EU competition law;
- Online survey for legal practitioners involved in proceedings before national courts for the application of EU competition law.

The questions, however, were adapted and rephrased into mostly closed questions in order to generate comparable and measurable information.

The surveys were elaborated in English and translated into 18 EU official languages.³⁷ The invitation to participate in the survey, together with the link to the online survey was disseminated via email to the identified stakeholders, accompanied by the accreditation letter provided by DG Justice between 6 and 16 December 2013. The online surveys were accessible for seven weeks. The study team undertook several efforts to increase the response rate of the stakeholder consultation. This included sending two reminders to all those which had received the invitation to participate in the survey, as well as further consultation with relevant stakeholders, such as European associations and federations active in consumer policy, law, etc., asking them to help disseminate the survey.

Numbers of stakeholders contacted

The study team sent a total of **1,638** links to the surveys. In total 231 courts and/or judges, 742 legal practitioners and 665 parties to the proceedings have been contacted. Overall, 7.2% of the emails (i.e. 119) were returned and thus not delivered to their addressees for different technical reasons. Therefore, a total of 1,523 surveys have effectively reached their recipients.

Furthermore, the study team also requested its national researches to disseminate the survey in addition to the mailing list of the College of Europe network due to the high number of legal practitioners working on competition law matters. While it is difficult to estimate the reaching scope of the national legal researcher's network, it is estimated that the target audience of the College of Europe is around 2,800 people.

³⁷ BG, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IT, LT, LV, PL, PT, RO, SI and SK

5.2 Responses received

A total of 94 responses have been received from the surveys (45 from national judges, 41 from legal practitioners and 8 from parties). The responses have been classified on the basis of their geographical origin and their category. Figure 5.1 provides the distribution of survey replies by stakeholder categories.

Figure 5.1 Responses received per survey category

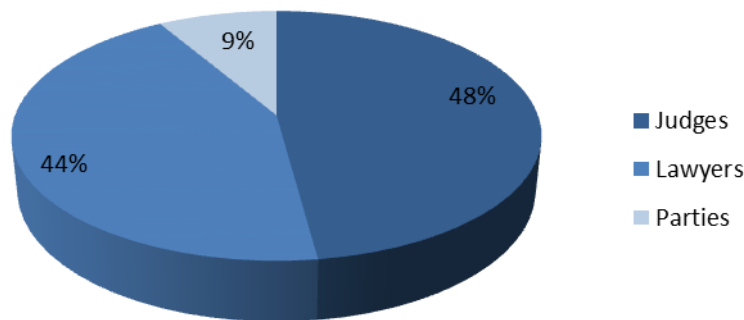


Figure 5.1 shows the number of responses received by stakeholder category³⁸. The data shows that there is a significant gap in the response rate between legal practitioners and national judges on one hand, and parties on the other. This may be due to the difficulties encountered in contacting legal departments from the relevant companies and the delay in obtaining the appropriate addresses. Parties also proved to be more reluctant to reply to the survey than national judges or legal practitioners.

5.2.2 Follow-up interviews

As mentioned in Section 5.1 follow-up interviews were undertaken in order to complement the survey responses. A total of 27 stakeholders have been contacted and invited to undertake a telephone interview representing 17 different Member States. The team undertook a total of 17 interviews.

The stakeholders to be interviewed were selected on the basis of different criteria, including, for example: the number of survey replies received by Member State and by type of stakeholder; particular characteristics of Member States' proceedings (e.g. long or short length of proceedings, costs, etc.); the content of the stakeholders' survey replies; the geographic spread of the replies and the agreement of the stakeholders to be interviewed.

5.3 Analysis of feedback provided by national judges competent for the application of EU competition law

The main target group of the national judges' online survey were judges with experience in the application of EU Competition Law rules. The following analysis provides, at first, the results of the total amount of judges' responses, including both judges which have and have not been called to apply EU competition law rules in their courts, and subsequently provides the results provided by judges who indicated were actually called to apply EU competition law rules.

³⁸ Responses were received from 26 Member States and one EU respondent. More than 56% of the responses come from ten Member States (DE, EL, DK, FI, HR, PL, LV, SE, SK and UK) with Sweden accounting for 11% of the total responses and followed by Germany representing 10% of the responses.

5.3.1 Basic Information

A total of 45 survey responses were received from judges from 22 Member States, with 13% of the responses provided by Germany, followed by Croatia (11% of the responses), Poland (9%) and Finland, Portugal, Slovakia and Sweden (each providing 7% of the responses).

71% of the judges confirmed they had applied EU competition law rules, in particular Articles 101 and 102 TFEU. The remaining 29% of the respondents indicated they had not been called to apply EU competition law rules. It is worth mentioning that while the Croatian judges provided 11% of the survey responses, due to the recent accession of Croatia none of them had yet been involved in cases applying EU competition law rules.

Professional experience

Regarding the judges' professional experience, Figure 5.2 below shows that the majority of the respondents have between 5-15 years professional experience. More specifically, 24% of the judges indicated their professional experience range between five to ten years (SE, FI, CY, CZ, LV, FI, SK and PT) while also 20% indicated their professional experience range between ten to fifteen years (LU- PL (2)- HU, DE, RO (2), NL).

Figure 5.2 Number of years of experience of total national judges responses

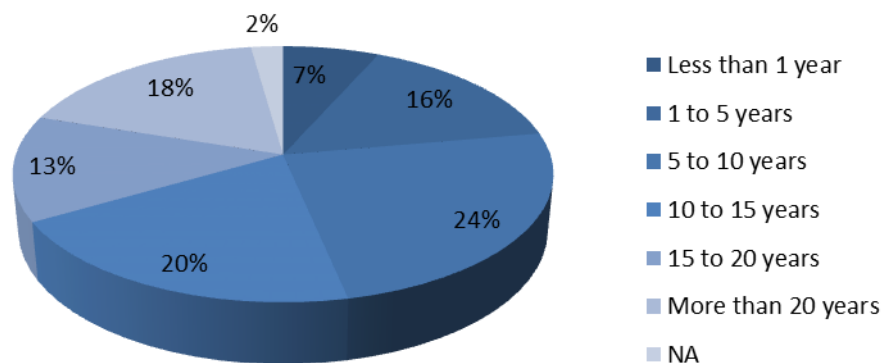
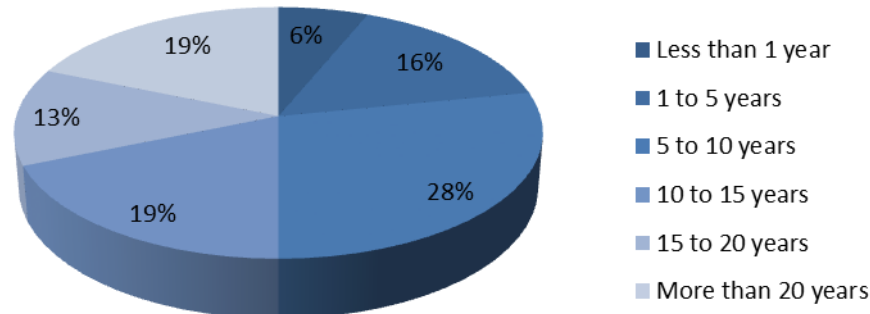


Figure 5.2 also provides the professional experience indicated by those *judges who have applied EU competition law rules*. Data shows 19% of the respondents indicated that their professional experience ranged between ten to fifteen years, while judges with five to ten years' experience represented 28% of the respondents.

Figure 5.3 Number of years of experience of national judges applying EU Competition law rules



Of the total of number judges who have applied EU competition law rules, 34% indicated the Supreme Court as their main court followed by 13% who indicated the Commercial court and Civil Court. 9% indicated the Administrative Court and another 9% of the judges indicated that their main court was the Specialised Competition Court of their Member States. The majority of the judges who have not been called to apply EU competition law rules indicated the Supreme Court as their main court (25%) followed by those working at Appellate Civil/Commercial Courts (23%), Administrative Courts at the last instance (15%) and Commercial Courts (15%).

Type of procedure and number of cases

The information on the type of procedure and the number of cases was only requested from those judges who have been involved in relevant cases (i.e. 71% of the respondents).

Regarding the type of procedures in which the respondent judges have been called to apply Arts. 101 and 102 TFEU, the majority (56%) indicated that they mostly applied judicial review procedures; while 16% of the judges indicated private enforcement procedures (SE, IT and CY³⁹). The remaining 28% of the judges indicated they have been involved in both types of procedures.

Half of the national judges who had only dealt with judicial review procedures indicated that during the mentioned period they had dealt with one to ten cases. These judges represent the following Member State jurisdictions: Poland (4), Hungary, Slovakia (2), Latvia and Portugal. Three national judges, from Spain, Latvia and Portugal, indicated that the number of judicial review cases surpassed the 100 cases.

Five judges (SE, IT, DE, PT and CY⁴⁰) have only dealt with private enforcement cases during the period covered by the study. All judges have dealt with one to ten EU competition law cases under follow-on (private) procedures except for the Italian judge who indicated a higher number of cases, between 75 and 100 cases.

Eight judges (Austria, Germany, Denmark, Ireland and Sweden) indicated that they had been involved in both judicial review cases and follow on actions. While the number of judicial review cases of the Austrian judge was between 75 – 100 cases the number of private enforcement cases handled by the same judge ranged between zero and ten. The

³⁹ It should be noted that in the case of Cyprus, the respondent judge specified that while there have been no cases where EU competition law has been applied, the answers provided to the survey reflect cases applying national competition rules.

⁴⁰ The answers provided by the Cypriot judge concern cases on the application of national competition rules.

Danish, Irish and Swedish judges indicated that the number of private enforcement cases ranged between ten and 25 and between one and ten judicial review cases.

5.3.2 Training for the application of EU competition law rules

National judges were asked to indicate whether and what type of training they had followed on the application of EU competition law rules. From the 65% of judges who responded they had been involved in EU Competition law cases, the majority (58%) confirmed to have received training (Denmark, Sweden (2), Poland (2), Hungary, Finland, Slovakia (3), Spain, Italy, Latvia, Netherlands, Bulgaria, Portugal (2) Lithuania), while the remaining 39% indicated they had not participated in any training (Germany (6), Cyprus, Poland (2), Austria, Finland, Portugal and Ireland). The majority of the aforementioned judges highlighted the lack of awareness of existing training at national level as the main reason for their lack of training.

With regard to the type of training, the majority of judges indicated forums and seminars as the main type. One Portuguese judge indicated to have participated in training provided by the European Judicial Network, while two Polish judges indicated training by peers as the main type of training received and one Latvian judge indicated Seminars and Training by European Judicial Network. From the eight judges interviewed, six of them (AT, IT, FI, DE, CY and SK) highlighted they had not been provided with specific training on the application of EU competition law but they overall agreed that such training was available. Four of the judges (SK, IT, CY and FI) highlighted their participation in EU seminars and conferences, whereas the Cypriot and the Slovak judges also stressed their participation in activities and training organised as part of the Association of European Competition Law Judges (AECLJ). The Italian and the Finnish judges explained that most of their knowledge on EU competition Law derived from their own initiative, in terms of reading research and studies.

The majority of the judges surveyed (63%) also considered that the resources available to judges to obtain updated information necessary to decide on the application of Articles 101 and 102 TFEU were sufficient. Such resources included internet, jurisprudence, national databases, books, EUCJ case law and exchange of information with colleagues. However, 31% of the judges considered that the resources available to obtain information necessary to decide on the application of Articles 101 and 102 TFEU (Poland (3), Italy, Slovakia (3), Cyprus, Finland and Ireland) were insufficient. These judges argued that the resources were inadequate given the complexity of competition law cases. For example, according to the Italian judge interviewed, there is a lack of human resources in terms of specialised assistants. Most judges also considered that they lacked financial resources and opportunities to attend seminars in other Member States. Furthermore, the follow-up interviews also showed that in some instances, judges did not have time to attend training because they are overwhelmed by the high overall number of cases they are dealing with (also non-competition law cases).

In relation to the workload required for applying Articles 101 and 102 TFEU in their courts, 46% of the judges rated this as “reasonable” (Denmark, Poland (2), Germany, Finland, Cyprus⁴¹, Spain, Latvia, Poland, Austria and Portugal (2)). Eight of these respondents only apply judicial review procedures, three of them apply both private enforcement and judicial review procedures and only one judge applies private enforcement procedures. Another 27% of the judges rated their workload as “high” (Sweden, Slovakia (3) Poland, Netherlands and Finland), only one of the judges applies private enforcement procedures, the rest apply judicial review procedures). The Italian and Portuguese judges, applying only private enforcement procedures, rated the workload as too high, one Swedish judge applying the same procedure, rated the workload as too low. The follow-up interviews also showed that in the case of Italy the workload of the courts also depended on their jurisdiction. For example, in places such as Milan (jurisdiction of the interviewed judge) which is considered as one of the main Italian economic and business areas, the courts have a high number of private enforcement cases. Judges from AT, ES and DE confirmed the workload as reasonable.

⁴¹ The answers provided by the Cypriot judge concern cases on the application of national competition rules.

One Finnish judge rated the relevant workload at the Markets Court as reasonable, given that it did not handle many EU competition law cases.

5.3.3 Length of the judicial proceeding

When asked to provide information on the average length of proceedings applying Articles 101 and 102 TFEU, 41% of the judges indicated that the average length of the proceeding varied between one and two years (Sweden, Poland (2), Germany, Slovakia, Spain, Netherlands, Bulgaria, Ireland and Finland) while 38% of provided an average length between six and twelve months (Sweden, Hungary, Finland, Slovakia, Poland (2) Latvia, Lithuania, Germany and Portugal). The majority of these judges only apply judicial review procedures. All Portuguese judges and the Austrian judge indicated that proceedings took less than six months. The Austrian judge also explained that while judges could take time for a more in depth analysis of the issues within the cases, this might not be the case for every judge as it also depended on their personal workload.

The highest average length of procedure- between two and five years- was indicated by 13% of the judges (Denmark, Cyprus⁴², Italy and Slovakia) which mainly apply private enforcement procedures. The Italian judge interviewed explained that proceedings lasted very long due to the complexity of the cases and the need to find and appoint court technical experts for most of them. A considerable amount of time was said to be spent by these experts in order to write their final reports on cases (sometimes up to two years).

61% of the judges considered the average length of procedure to be “reasonable” or “quite reasonable” (Denmark, Germany, Italy, Latvia, Poland, Austria, Bulgaria, Portugal (2), Sweden, Hungary, Finland, Slovakia (2), Spain, Lithuania and Germany (6)) while 35% of the judges considered the average length of procedure as not reasonable (Sweden, Poland (2), Cyprus⁴³, Netherlands, Finland, Slovakia). The Dutch judge interviewed explained that the length of the proceeding also depended on the management of the cases and on the availability of resources for the courts. According to the judge, every instance should in principle be completed within one year; however some take more due to procedural complications. In the case of Slovakia, one of the judges interviewed indicated that a case could also last longer due to its complexity, as well as the quantity of information to be processed and the strategy and experience of the lawyers involved. The same judge also highlighted that cartel cases were particularly lengthy. Finally, the Cypriot judge added that efforts were currently being implemented to shorten the length of all judicial proceedings in general.

5.3.4 Hearings

The vast majority of judges (94%) confirmed that hearings had been held during the proceeding. Only two judges, one from Spain applying only judicial review procedures and one judge from Austria applying both private and judicial review procedures indicated there had not been any hearing.

5.3.5 Alternative Dispute Resolution

Judges were also requested to provide their opinion on the use of Alternative Dispute Resolution (ADR) mechanisms. The results show that 57% of the judges considered that there was no sufficient use of ADR (Denmark, Poland (3), Cyprus, Italy, Spain, Bulgaria, Finland, Portugal (3), Lithuania, Germany, Ireland and, Latvia) while 14% considered that ADR mechanisms are sufficiently used (Sweden, Finland, Netherlands and Slovakia). The Dutch judge interviewed further indicated that, as a standard practice, the use of ADR was encouraged by the courts. According to one of the Slovak judges, ADRs are not used at all as going to court in Slovakia is easy and affordable and thus the preferred option of most people.

⁴² Idem

⁴³ The answers provided by the Cypriot judge concern the average length of cases on the application of national competition rules.

5.3.6 Available communication tools for the application of EU competition law

Judges also provided information regarding the availability of ICT tools the courts have at their disposal to communicate with the parties, with other national courts or with European authorities. Regarding ICT tools to communicate with the parties, 63% of the judges (Sweden (2), Finland (2), Slovakia (3), Italy, Latvia (2), Poland, Austria, Finland, Portugal (2), Lithuania and Germany (5)) confirmed that these were available. The majority indicated ICT tools such as e-mail, telephone and e-resources. On the other hand 22% of the judges (Denmark, Poland (2), Hungary, Spain, Ireland and Netherlands) indicated there were no ICT tools available to communicate with the parties. The follow-up interviews showed that half of the judges interviewed (IT, AT, CY and SK) made use of their personal networks to communicate at national or European level with other courts or authorities. In the case of Spain, the judge referred to a specific electronic portal used for communication between the courts and the practitioners.

In relation to ICT tools to communicate with national or European authorities, 56% of the judges (Sweden, Hungary, Finland (2), Slovakia (2), Italy, Latvia, Poland, Finland, Portugal (2), Germany (5) and Lithuania) confirmed that these were available. The majority of such ICT tools are to a great extent e-mail, telephone and to a smaller extent, websites. Also, 56% of the judges confirmed to have access to ICT tools to communicate with other courts (Hungary, Slovakia (2), Italy, Latvia, Finland, Portugal (2), Austria, Germany (6) and Lithuania). The main ICT tools indicated were e-mail, telephone and E-sources. The remaining 28% of indicated they were no ICT tools (Denmark, Sweden, Poland (4), Finland, Ireland and Spain) while 16% of the judges indicated that they did not know (Sweden, Cyprus, Slovakia, Bulgaria).

Regarding the existence of monitoring tools, 38% of the judges indicated that such tools existed in their courts (Sweden, Italy, Latvia (2), Poland, Austria, Netherlands, Slovakia, Germany (2) and Portugal (2)). Of these, 90% are used to collect data on the number of pending or resolved cases. Another large share of judges (44%) however indicated that no monitoring tools were available (Denmark, Sweden, Poland (3), Hungary, Finland, Slovakia, Cyprus, Germany (3), Ireland and Spain). The Finish judge interviewed highlighted that, while courts had their own registry, cases were not classified by the application of EU competition law or by their legal basis. Finally, one of the German judges indicated that a project regarding the electronic communication on cases was to be tested in the summer 2014.

5.3.7 Assessment of the effectiveness of the national judicial systems

Judges were also requested to provide their assessment on the effectiveness of their national judicial systems to apply Articles 101 and 102 TFEU in practice. The majority of the judges (56%) considered that their national judicial systems were 'somewhat effective' (Sweden (2), Hungary, Germany (3), Ireland, Cyprus⁴⁴, Slovakia, Spain, Latvia, Poland, Austria, Bulgaria, Portugal (2) and Lithuania) and another 16% found their national judicial system 'very effective' (Denmark, Germany (3) and Netherlands) while one Portuguese judge assessed is system as 'very ineffective'. According to the Dutch judge interviewed, the national judicial system was very effective as EU competition law does not substantially differ from national law in this area. The national judicial system was also able to deal well with cases involving economic legal assessments, which are often required as part of competition law cases too.

The Spanish and the Austrian judges interviewed considered their national judicial systems as reasonably effective, because their systems provided the parties with a rapid procedure. The Spanish judge also added the high level of legal certainty provided by the courts' exercising powers on the NCA decision. One Slovak judge considered the national judicial system to be 'somewhat ineffective' to apply Articles 101 and 102 TFEU in practice. During the follow-up interview, this judge explained that this was mainly due to the lack of

⁴⁴ The answers provided by the Cypriot judge concern cases on the application of national competition rules

enforcement and the length of the proceedings applying Articles 101 and 102 TFEU. The remaining judges adopted a neutral position (Poland (2), Finland (2), Slovakia and Italy).

Finally, a few judges (from PT, ES, and SE) highlighted that the effectiveness of their judicial systems was mainly due to the specialisation of the relevant courts and the judges. Having specialised tribunals was considered to be particularly beneficial in this regard.

5.4 Analysis of feedback provided by legal practitioners competent for the application of EU competition law

The main target group of the online survey and follow-up interviews were practitioners with experience in cases concerning the application of EU competition law rules, particularly Articles 101 and 102 TFEU. The following analysis is divided in to subsections. First, the survey's basic and general information is provided, which includes the total amount of legal practitioners' responses, the type and number of procedures in which legal practitioners have been involved between the period of 1st May 2004 and 1st June 2013, and their role in the proceeding. Furthermore, the analysis also provides information regarding the use of Alternative Dispute Mechanisms (ADRs), the availability and use of ICT tools with the courts and the legal practitioners' assessment on the effectiveness of the national judicial systems, in addition to their assessment on the independence and impartiality of the court.

The second and third subsections present the analysis of the procedural cases provided by the legal practitioners in the survey. Legal practitioners have provided examples of both judicial reviews and private enforcement proceedings in which they have been involved between the period of 1st May 2004 and 1st June 2013. The results of analysis of the cases are presented by type of procedure. Section 5.4.7 presents the analysis of the judicial review procedures and Section 5.4.8 presents the analysis of the data provided on private enforcement procedures.

5.4.1 Basic Information

The legal practitioners' survey received 41 responses. However, only 36 responses have been considered for this analysis given that three legal practitioners indicated they had never been involved in cases concerning the application of Articles 101 and 102 TFEU and one response had to be dismissed due to the lack of information.

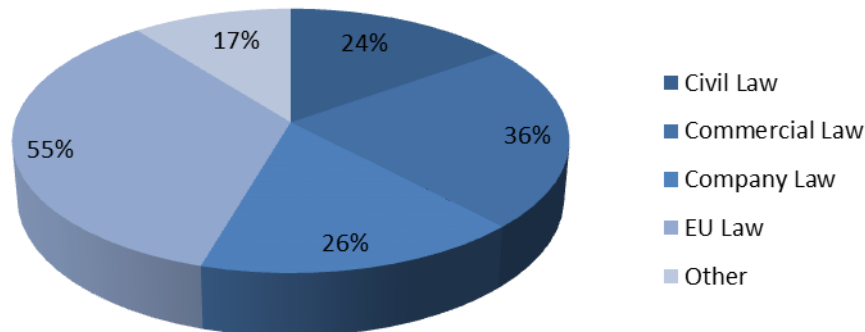
The total 36 responses were received from seventeen Member States, with 16% of the responses being provided by Sweden, followed by Denmark, Latvia and United Kingdom each providing 9% of the responses and one response from Cartel Damages Claims which overall represents any country in the EU.

Professional experience

86% of the respondents indicated they did not provide services in a Member State different than that of their establishment and the remaining 14% of the respondents indicated they both offered their services in their Member States (Czech Republic, Latvia (2), and Sweden) as well as in Austria, Belgium, Denmark, Germany, Finland, Luxembourg, Lithuania, Sweden and United Kingdom.

With regard to the field of expertise, all legal practitioners indicated to have specialised in Competition Law, however, additional practice areas were also indicated. These are shown in Figure 5.4 below.

Figure 5.4 Fields of expertise



Types of procedure and number of cases

Legal practitioners were requested to specify the main types of procedure and the number of cases in which they have been involved between the period of 1st May 2004 and 1st June 2013. More than half of the respondents (56%) indicated they had been involved in cases concerning the application of Articles 101 and 102 TFEU between 1 and 10 times. Only 9% of the legal practitioners (Netherlands, Greece and United Kingdom) had been involved in such cases between 51 and 75 times.

The respondents' participation in judicial review procedures is higher than in private enforcement cases: overall 56% of the practitioners had been involved in judicial review procedures⁴⁵, where 41% of the practitioners had been involved in private enforcement procedures.⁴⁶

Number of cases provided

Legal practitioners were invited to provide examples of up to three relevant cases in which they had been involved. As a result the study team received a total of 68 relevant cases. 42% of the practitioners (15) provided one relevant case, while 22% (8 practitioners) provided two cases. The remaining 36% of the practitioners (13) provided three cases. The analysis of the feedback provided is provided in sections 5.4.7 and 5.4.8 below.

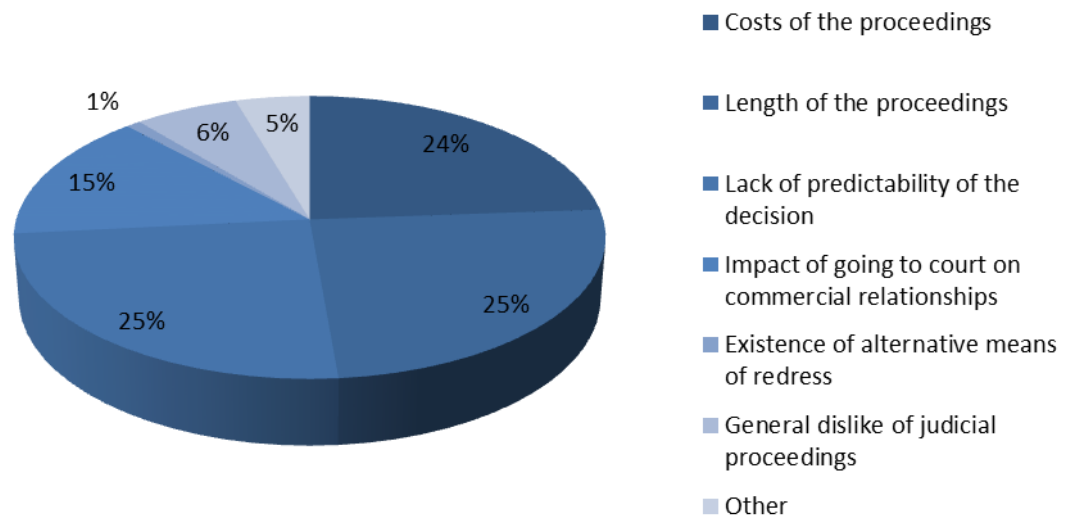
Dissuasive elements for going to court

In addition, practitioners were asked to indicate the potential elements which may dissuade their clients from going to court. Figure 5.5 below shows the proportion of the main dissuasive elements identified by the legal practitioners.

⁴⁵ Most legal practitioners had been involved in judicial review or private enforcement proceedings between ten or less times. 63% of the practitioners who had participated in judicial review cases indicated they had dealt with 1 to 10 cases. These practitioners were from the following jurisdictions: Croatia, Czech Republic, Denmark (2), Finland, Germany (2), Greece (2), Ireland, Latvia (3), Poland, Slovakia, Sweden (3) and the United Kingdom (2). Only five practitioners from Denmark, Finland, Greece, the Netherlands and Spain indicated that they had dealt with more than 20 judicial review cases. Likewise, one practitioner in the United Kingdom indicated that 30% of the cases he/she had been involved were judicial review cases.

⁴⁶ These include responses where legal practitioners were allowed to select judicial review, private enforcement procedures or both. In total 68% of the legal practitioners were involved in private enforcement proceedings between 10 or less times (Czech Republic, Finland, Germany, Greece (2), Ireland, Latvia (2), Spain, Sweden (4), EU (CDC) and the United Kingdom). Only one practitioner from the United Kingdom stated that she/he had been involved in private enforcement proceedings more than twenty times. As above, the UK practitioner declared that 70% of relevant cases in which she/he had been involved concerned private enforcement proceedings.

Figure 5.5 Dissuasive elements for going to court



The cost and the length of the proceedings, as well as the lack of predictability of the decision, were indicated as the most common dissuasive elements for clients. These were commonly indicated by practitioners acting in Sweden and in the UK. The Lithuanian practitioner interviewed also considered that a lack of predictability could deter clients from going to court. The length of the procedure is more worrisome for practitioners in Denmark (2 times), Finland (2 times) and Germany (2 times). Latvian practitioners (3) also place the cost of proceedings as one of the most important deterrent elements to initiate proceedings.

The Latvian practitioner interviewed indicated that the state fees contributed to the high costs, as they started at 6% for claims up to 700 000 euro and further increased for higher claims. The practitioner also mentioned that the stringent evidentiary thresholds put in place by Latvian courts, also deterred clients from going to court. Other practitioners interviewed also highlighted that the high costs associated with starting a judicial proceeding were at the core of their clients' decisions of not going to court: this was mentioned by the UK practitioner and the EU-wide practitioner, who noted that in particular damage claims against cartels were extremely costly for individuals and companies.

The impact of going to court on commercial relationships was indicated as an important dissuasive element for practitioners in Poland (two times), Germany (two times) and the UK (two times). During the follow-up interviews, the Danish practitioner mentioned that clients indeed preferred to first discuss potential issues with their suppliers within their regular business cycle, rather than bringing a case before the courts. This opinion was shared by the EU-wide practitioner, who noted that ongoing commercial relationships sometimes dissuaded even corporate victims of cartel cases from going to court. Only one practitioner (Finnish practitioner) mentioned the existence of alternative means of redress as dissuasive element.

6% of respondents (Czech Republic, Estonia, Finland, Hungary, Ireland, Latvia and the UK) indicated the general dislike of judicial proceedings as a dissuasive element preventing clients from going to court. Finally, the Lithuanian practitioner interviewed noted that the lack of expertise of the judiciary also constituted an important dissuasive element; this was also mentioned by survey respondents from Greece and Poland.

Role in the proceedings, size of the company and type of clients

The majority of practitioners (67%) indicated they had acted as external counsels and most of them (60%) belonged to a company or a legal team with more than twenty employees.

11% of practitioners (acting in Croatia, Poland, EU (CDC) and Greece) indicated they were part of a company or a legal team with less than five employees.

With regard to the type of clients, the majority of practitioners (76%) represented companies, whereas only 4% (a UK and Greek practitioner) acted on behalf of consumers. 13% of respondents represented associations in Denmark, Greece, Ireland and Sweden.

5.4.2 Alternative Dispute Resolution

Legal practitioners were asked to provide their opinion on the existence and use of Alternative Dispute Resolution Mechanisms (ADR). The survey results showed that 69% of the legal practitioners indicated that ADR mechanisms were available in their Member State; these were from Czech Republic (2), Denmark (3), Estonia, Finland (2), Greece (2), Ireland, Latvia (2), Netherlands, Poland, Sweden (4) and United Kingdom (3). The remaining 31% indicated that no ADR were in place according to the following jurisdictions: Croatia, Germany (2), Hungary, Latvia, Lithuania, Poland, Slovakia, Spain and Sweden. According to the Lithuanian practitioner, the very few parties who had attempted to use ADR before going to court failed to do so due to the legal restrictions imposed on the use of ADRs for competition cases. The Latvian practitioner indicated that even if ADR mechanisms were available, parties were not interested in using them for antitrust cases. The EU-wide practitioner explained that in many Member States ADR mechanisms were not foreseen for cartel damage claims. In those instances where ADR mechanisms are available, practitioners interviewed (Denmark and Sweden) considered that these were infrequently used. The Swedish practitioner however noted that economic consultants, devoted to facilitate settlements in competition cases, had proved to be relatively useful.

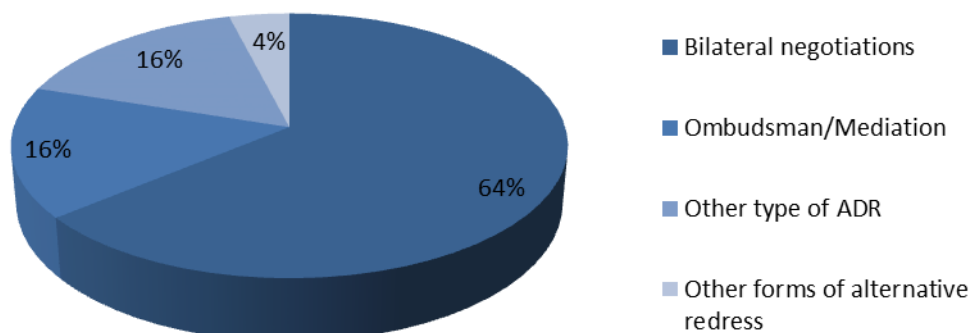
Different views were identified regarding the availability of information on ADR. Whereas 58% of the practitioners indicated that such information was available, 42% estimated that there was no information on ADR at all. However, practitioners from the same countries seem to have different opinions on this issue, for example respondents from Czech Republic, Denmark, Germany, Greece, Latvia, Poland and Sweden had both indicated that there was and that there was no information available on ADRs.

The UK practitioner interviewed considered that although ADR was very well known in the UK, the methods used were not suitable to resolve disputes related to competition matters and were only feasible once all liability questions had been resolved. It was further explained that ADRs did not work in the context of group claims.

Regarding the use of ADR before going to court, 56% of the legal practitioners indicated their clients used of ADR before resorting to court proceedings. These legal practitioners belonged to the following jurisdictions: Czech Republic (2), Denmark, Estonia, Finland (2), Greece, Ireland, Latvia (3), Poland, Sweden (3), EU (CDC) and United Kingdom. The remaining 47% of the practitioners indicated that clients had not tried ADR before going to court (Croatia, Denmark (2), Germany (2), Greece, Hungary, Lithuania, Netherlands, Slovakia, Spain, Sweden (2) and the United Kingdom.) Legal practitioners interviewed (operating in Denmark and Sweden) observed a lack of interest amongst clients for resorting to ADR. A German practitioner mentioned that ADR mechanisms did not offer enough prospects of success in relation to the pecuniary sums involved in antitrust cases.

Figure 5.6 below provides the most common ADR mechanisms used according to the legal practitioners responses.

Figure 5.6 Type of ADR used by the clients according to legal practitioners



The majority of legal practitioners (64%) indicated that their clients resorted to bilateral negotiations. These were most used in Latvia (3), Sweden (3), Greece (3), EU (CDC), Czech Republic and Finland (2). The EU-wide practitioner explained that informal bilateral talks were often initiated with the defendants. Only 16% of practitioners considered that their clients made use of the Ombudsman or other means of Mediation in order to settle the dispute and avoid going to court. The use of these other ADR or other mechanisms was reported by practitioners in Denmark, Germany, Finland and Latvia and Sweden.

In those cases where practitioners had stated that their clients resorted to ADR before going to court, practitioners were also requested to provide the reasons why the attempt to settle the dispute out of court may have failed. According to the legal practitioners' responses, most of the failed attempts (63%) were due to the lack of will of the other party to compromise. This was particularly indicated by practitioners in Latvia (3), Sweden (3), Germany, Greece (3) and Czech Republic. In 15% of the cases, legal practitioners considered the lack of the clients' acceptance of the result of a non-binding third party determination, or the lack of acceptance of the other party on the result of a non-binding third party determination as one of the reasons of attempt failure for 11% of the cases (Denmark, Germany, Finland, Ireland and Poland). A practitioner from Ireland indicated that the reason for a non-successful settlement was the willingness of the other party to obtain a decision made by a court.

Only few practitioners indicated that the reasons why their clients would prefer not to resort to ADR. In 19% of the cases practitioners considered that their clients found ADR too complicated (Netherlands, Slovakia and Sweden). In 13% of the cases, practitioners indicated their clients found ADR to be too expensive (Hungary and Slovakia). 19% of the practitioners (in Greece, Croatia and Lithuania) indicated that their clients were not aware of ADR. Whereas 38% of the practitioners (Denmark (2), Germany, Spain and United Kingdom (2)) indicated "other" non-specified reasons for their clients to not use ADRs before going to court.

5.4.3 Available communication tools for the application of EU competition law

Regarding whether or not clients need a legal practitioner in order to make use of those ICT tools, 31% of the practitioners (EU (CDC), Denmark, Estonia, Finland, Latvia, Lithuania, Poland (2), Sweden (2) and United Kingdom) considered that clients did not need a practitioner to make use of the tools. On the other hand, 19% of practitioners (Czech Republic, Latvia, Netherlands, Sweden (2) and the United Kingdom (2)) indicated that clients would require a legal practitioner to use ICT tools. The remaining 50% did not provide a reply to this question.

Finally, practitioners were asked to assess the efficiency of the available communication tools with the courts. 31% of practitioners (Czech Republic, Denmark (2), Estonia, Finland, Lithuania, Netherlands, Poland and Sweden (3)) considered these to be 'somewhat efficient'. 13% of practitioners (Latvia (2), Poland and United Kingdom) were neutral and another 11% (Finland, Sweden and United Kingdom) indicated that communication was 'very efficient'. The remaining 46% practitioners did not provide a reply to this question.

The Swedish legal practitioner interviewed considered that the communication with the courts via electronic means was fast and very efficient. A UK survey respondent indicated that electronic communication with the lower courts was much smoother than with the High Court in Britain. Another UK survey respondent praised the readiness of the Registry to reply to email requests.

5.4.4 Assessment of the effectiveness of the national judicial systems

Legal practitioners were also requested to provide an assessment on the effectiveness of their national judicial systems to apply Articles 101 and 102 TFEU in practice. 34% of practitioners considered that their national judicial systems were 'somewhat effective' (Czech Republic, Denmark (2), Finland (2), Germany, Ireland, Netherlands, Poland and Sweden (2)) and the remaining 6% of the practitioners found their national judicial systems 'very effective' (Sweden and the United Kingdom). However, 20% of practitioners (Czech Republic, Croatia, Hungary, Estonia, Greece, Latvia and Poland) deemed that the system was 'very ineffective' to apply Articles 101 and 102 TFEU in practice and another 23% of practitioners (Denmark, Latvia, Slovakia, Spain, Sweden and the United Kingdom (2)) considered that the national judicial system was 'somewhat ineffective'.

17% of the practitioners adopted a neutral position (Greece, Germany, Latvia, Lithuania and Sweden).

A third of the practitioners interviewed (Lithuania and the UK) considered that the lack of appropriate training of the judges dealing with competition cases could have a negative impact on the effectiveness of the functioning of the judicial system. This perception was confirmed by the responses to the survey by practitioners from Czech Republic (one), Denmark (1), Germany (2) and Greece (2), who also attributed the lack of effectiveness of the judicial system to the absence of properly specialised judges.

The workload of the courts and the lack of resources allocated to the cases were also mentioned as an obstacle to the effective handling of cases: the interviewed practitioner from Sweden and the EU-wide practitioner, considered that the high workload of the courts coupled with a lack of personnel and financial resources hindered the proper functioning of the courts in Sweden and Germany. This impression was also reflected in the survey response of a practitioner in Greece.

According to the Latvian practitioner interviewed, the court system could not be considered as effective because in recent years, none of the NCA decisions had been revoked by the courts in the final instance. Two Greek respondents to the survey also considered that courts were reluctant to overturn the decisions of the NCA because of economic and political reasons. Finally, some legal practitioners considered that the costs of procedures and the low possibility of recovering legal fees could also influence the effectiveness of the national judicial system. The EU-wide practitioner estimated that the high costs associated with bringing a case before the court (around two million euro on average, in the practitioners view) and the scarce chances that parties could recover their legal fees, could impact the effective functioning of the judicial systems in Germany and the Netherlands. According to the interviewee, these factors might play a smaller role in the case of Finland, where the parties could get reimbursed up to 80% of the legal fees. Survey respondents from Ireland and the UK also stated that the costs of proceedings might reduce the effective application of competition rules.

5.4.5 Assessment of the independence and the impartiality of the court

Practitioners were requested to rate -on a scale from 1 to 5, the court's independence and impartiality (where 5 was very independent/impartial and 1 very dependent/partial)⁴⁷.

Independence of the court

The majority of legal practitioners (53%) considered that their courts were very independent. These practitioners were from the following jurisdictions: Czech Republic, Denmark (2), Finland, Germany (3), Ireland, Greece (2), Netherlands, Spain, Sweden (3) and United Kingdom (3). Also, 29% of the practitioners (Czech Republic, Denmark, Estonia, Finland, Greece, Latvia, Poland (2), Slovakia and Sweden) provided a rating of 4 on the independency of the court, whereas 12% of them (Greece, Latvia (2), Lithuania, Sweden) considered the courts deserved an average mark of 3. No practitioner gave their court a rating of 2 and only 6% (Croatia, Hungary) considered their court was very dependent (rating 1).

Impartiality of the court

Less than half of the legal practitioners (45%) considered their courts were very impartial (rating 5). These practitioners belonged to the following jurisdictions: Czech Republic, Denmark, Finland, Germany (2), Ireland, Greece, Netherlands, Sweden (3) and United Kingdom (3). 19% of the practitioners (Czech Republic, Denmark, Estonia, Greece and Poland (2)) provided a rate of 4 whereas for 13% of them (Finland, Lithuania, Sweden and Spain) considered the courts deserved an average rate of 3. 13% of practitioners (Latvia (2), Slovakia and Sweden) provided a rating of 2 and 10% (Croatia, Hungary and Latvia) considered that their courts were very partial (rating 1).

The impartiality and independence of the courts were jointly discussed during the follow-up interviews. The majority of interviewees (four out of six: Denmark, Latvia, Lithuania and Sweden) considered that the courts displayed a general tendency to align with the decisions of the NCAs. According to practitioners in Latvia and Lithuania, this was due to a lack of expertise of the judiciary, whereas practitioners in Sweden considered that courts attributed too much weight to NCA arguments. The impression that the courts usually followed NCA decisions was shared by survey respondents in Croatia, Latvia, Poland and Sweden. The EU-wide practitioner considered that Dutch and Finnish courts were fairly independent and impartial, whereas in Germany, a respondent claimed that at first instance, where judges were overwhelmed with work, the independency and impartiality of the courts could not always be ensured..

5.4.6 Analysis on positive practices and elements for improvement of the national judicial system

As part of the survey, legal practitioners were invited to provide their opinions on the positive practices and the elements that should be improved in their national judicial systems. These aspects were further explored during the follow-up interviews.

Positive practices

Several practitioners indicated the increasing expertise of the judiciary and their growing awareness and interest in competition cases as one of the most prominent good practices in their respective jurisdictions (Denmark, Greece, Ireland, Netherlands, Poland and the UK).

The organisation of the courts and the smooth functioning of the court system were also highlighted by respondents in Germany and the UK. The German practitioner emphasised that the creation of specialised competences in many district courts constituted a positive practice in the court system. The specialisation of the courts was also mentioned by a Greek practitioner. The Latvian practitioner interviewed considered that the organisation of the procedures and communication with the courts, contributed to the good functioning of the

⁴⁷ It is noted that respondents from the same Member State could provide different responses, as they were expressing their personal views.

Latvian system. The practitioner also mentioned that the ‘informal’ approach to procedures allowed for an open exchange of statements and positions in the court room, which in turn helped identifying the core issues of the case at a relatively early stage. The lack of a formal approach was also highlighted as a positive practice by a Danish respondent to the survey.

The possibility of bringing class actions was considered as a good practice by a survey respondent from Greece and the Swedish practitioner interviewed. In the latter’s opinion, Sweden had a very good system of remedies for class actions in damage claims, although it was rarely used. The UK practitioner interviewed noted that case monitoring and control systems worked very well and allowed for a swift identification of any potential problems.

Many other practices were mentioned as positive elements by survey respondents from different jurisdictions, inter alia:

- Access to justice and claim compensation- (Greece);
- Willingness to accept economic evidence- (Ireland);
- Use of case-law of the CJEU- (Latvia);
- Length of procedures- (Lithuania);
- The availability of funding, conditional and contingency fees (UK).

Elements for improvement

A significant number of survey respondents indicated that training and the specialisation of the judges could be further improved in their respective national systems (mentioned by practitioners operating in Denmark, Czech Republic, Croatia, Greece, Latvia, Poland, Slovakia, and Spain). The need for electronic communication systems was highlighted by a survey respondent in Denmark. This opinion was shared by the EU-wide practitioner interviewed. According to this practitioner, the costs of proceedings, especially of follow-on cases, should also be reduced. Similarly, costs were also mentioned as an element to be improved by a survey respondent from Sweden.

A Latvian practitioner considered that Latvian judges would benefit from independent guidance in competition law. A need for improving procedural matters was also indicated by some survey respondents. The elements for improvement naturally differed from jurisdiction to jurisdiction, since the applicable procedural rules vary between the Member States. Some of the issues mentioned in this regard were:

- Introducing the determination of the damages based on the discretion of the judge and not on the theory of concreteness of damages (EL)
- The procedural overlap between some cases in the Competition Appeals Tribunal and the High Court- (UK)

Finally, survey respondents also mentioned the following elements for improvement:

- Access to information (Finland and Germany);
- Case management (Ireland);
- Cooperation with the European Commission and courts in neighbouring countries (Denmark) and;
- The length of procedures (the Netherlands).

5.4.7 Analysis of feedback on judicial review cases

As explained in section 5.4 above, legal practitioners were invited to provide examples of up to three relevant cases in which they had been involved. The analysis first provides an overview of the number of cases put forward by the respondents involving judicial review proceedings, the legal basis of the cases, the main characteristics of the procedure, the clarity of the decisions-including any interim measures or judicial enforcements applied- and an overall estimate of the costs of the procedures.

Number of cases

From the total 70 cases provided by legal practitioners only 68 cases provided relevant information. The following analysis is therefore based on 68 cases. From the total of cases

analysed, 56% concerned judicial review procedures representing 14 Member States in total. Denmark provided 18% of the cases, followed by Greece (15%), Sweden (13%), Finland, Latvia, Lithuania and United Kingdom (8%).⁴⁸

From the six legal practitioners interviewed, four (Denmark, Latvia, Lithuania and Sweden) stated that they acted in judicial review cases, either exclusively or in a higher proportion than in private enforcement cases. Therefore, their responses regarding the length and costs of procedures, the clarity of the court's decision as well as the information provided will be analysed in this section.

Figure 5.7 Proportion of the cases according to their legal basis (Art 101 and 102 TFEU)

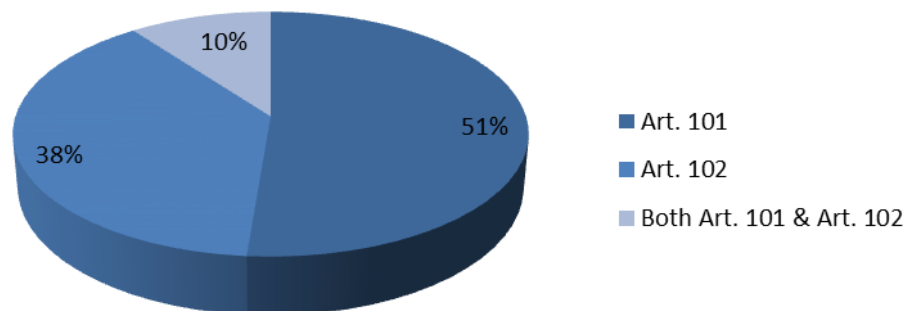


Figure 5.7 above shows that a bit more than half of the cases put forward (51%) concerned judicial review procedures under the legal basis of Art.101 TFEU. The cases were provided in their majority by legal practitioners from Greece (4), Lithuania (3), Finland (2), Denmark (2) and Croatia (2)⁴⁹. 38% of the cases concerned judicial reviews under the legal basis of Art 102 TFEU. Most of the cases were provided by Denmark (5), Latvia (2), Sweden (2) and United Kingdom (2). The remaining 10% of the cases concerned both Articles 101 and 102 TFEU and were provided by Sweden (2), Greece and Poland.

Legal practitioners were asked to list their main reasons for advising their clients to lodge an application before a national court. Results showed that economic harm (28%) and failure of alternative redress (26%) were chosen as the main reasons to lodge a claim. The need to stop behaviour of the other party was also indicated in 16% of the responses as one of the reasons to lodge a claim, while 21% of the respondents indicated there were other reasons to advise their clients, for example in cases where a client was a defendant and had no choice but to go to court. During the follow-up interviews, two legal practitioners mentioned economic harm and the desire to obtain compensation, as the main motivations behind their clients' claims.

In addition, legal practitioners indicated that in 33% of the cases there were dissuasive elements for the parties to go to court, while in 62% of the cases there were no dissuasive elements according to the practitioners. The general dissuasive elements for clients to go to court are indicated in section 5.4.1.

Finally, in 54% of the cases the judicial decision has been appealed. Legal practitioners indicated such appeals were done 45% on the grounds of law and 55% indicated on the

⁴⁸ The number of judicial review cases provided by Member State is the following: DK (7), EL (6), SE (5), FI (3), LV (3), LT (3), UK (3) PL (2), HR (2), SK (1), ES(1), EE (1), DE(1), IE(1).

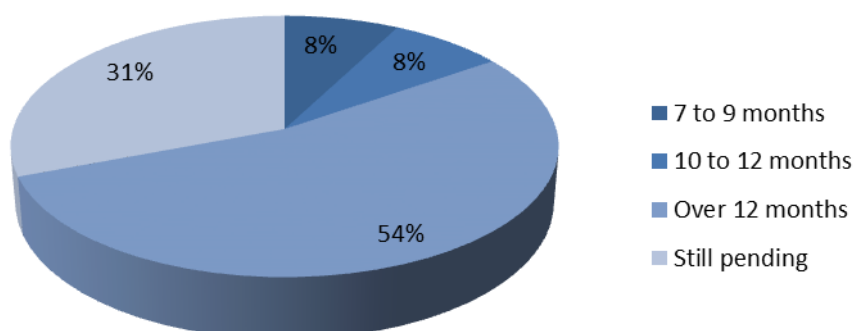
⁴⁹ The legal practitioner has provided examples of two linked cases in which national legislation was mirroring Article 101 TFEU. The cases took place in 2008.

grounds of law and facts. Of those cases where the judicial decision has been appealed, only in 17% of the cases has the appeal been indicated as successful (Ireland, Greece and Poland). In 44% of the cases the appeal has not been successful (Croatia (2), Denmark (2), Finland and Greece (3)). The remaining 50% of the appeals were still pending.

Length of the judicial proceeding⁵⁰

With regard to the duration of the judicial proceeding, the majority of the provided judicial review cases (54%) lasted over twelve months; as indicated by practitioners from the following Member States: Croatia (2), Denmark (3), Estonia, Finland (2), Germany, Greece (4), Ireland, Poland (2), Slovakia, Spain, Sweden (2) and United Kingdom. In Member States such as Greece (2) and Sweden, the cases provided lasted between seven and nine months whereas 8% of the cases also lasted between ten to twelve months. 31% of the cases provided were still pending. Figure 5.8 provides a brief overview of the proportion of the cases by their average length.

Figure 5.8 Average length of the judicial proceeding



Regarding the legal practitioners' opinion on the length of the judicial review procedures, almost 56% of the respondents did not have any opinion on the length, whereas 41% of the practitioners indicated the procedures were too long (Croatia (2), Denmark, Finland (2), Greece (4), Ireland, Latvia, Lithuania, Poland, Sweden (3)).

The majority of the practitioners interviewed considered that the length of judicial review cases was reasonable (three out of four- Denmark, Latvia and Lithuania). The Latvian and the Lithuanian interviewees noted that cases normally took longer at second and third instance than at first instances. According to the Lithuanian practitioner, the administrative courts were quite fast and in judicial review procedures, these were described as "sometimes too fast", with the willingness to reach an agreement as quickly as possible sometimes possibly compromising the quality of the hearings.

The main reasons for the procedures to be considered as "too long" were primary the administration of justice, which represented 29% of the reasons selected by practitioners from Croatia (2), Greece (4), Ireland, Poland, Sweden (2). Other reasons provided were: the complexity of the matter and the judge, each representing 17% of the reasons selected by Denmark, Greece (3), Ireland, Poland and Sweden (2). The parties and the procedural law represented each 11% of the main reasons considered by practitioners from Denmark, Ireland, Sweden (3), Greece (2) and Finland.

⁵⁰ It is noted that survey replies provide the personal views and opinions of a limited number of respondents on the length of judicial proceedings of the cases in which they have been involved / have knowledge of, which may thus differ from the average length as presented in section 4.

In relation to the number of hearings undertaken during the judicial review procedures, while 38% of the legal practitioners did not indicate whether hearings were undertaken or not during the procedure, 49% of the cases indicated there had been hearings. The number of hearings were indicated in Denmark (one or two hearings per case), Estonia, Germany, Finland, Greece, Ireland (five hearings per case), Poland (one and two hearings per two cases), Slovakia, Sweden (one hearing), United Kingdom (three and two hearings within two cases). The remaining 13% of the cases provided did not include any hearings (Croatia (2), Germany and Greece (2)).

Availability and provision of information and clarify of the judicial decision

Concerning the availability and provision of information along the procedure, 72% of the practitioners indicated they were satisfied with the information they had received during the judicial proceeding (Denmark (6), Estonia, Germany, Greece (3), Latvia (3), Lithuania (3) Poland (2), Spain, Sweden (4) and United Kingdom (3). During the follow-up interviews the Danish practitioner stated that there was a fairly good level of information and access to public files, except for those cases where parties acted as complainants and where it was difficult to know the jurisdiction of the case. According to the Latvian practitioner, the problem with information provision did not relate to the courts, but rather to the NCA's decisions as these sometimes were not transparent enough, which could create legal uncertainty and preclude legal practitioners from learning from precedents.

21% of the practitioners indicated they were not satisfied with the information provided (Croatia (2), Greece (3), Finland, Ireland and Slovakia). Legal practitioners, who indicated not to be satisfied by the information provided during the procedure, indicated as one of the main reasons the lack of sufficient information (47%) where both incomplete and unclear information represented 27% of their reasons.

Legal practitioners also provided their opinion on the clarity of the judicial decision. The majority of the practitioners (54%) indicated they considered that the court's decision was clear, particularly in Denmark (4), Finland (2), Germany, Greece (2), Latvia, Lithuania (3), Poland, Spain, Sweden (4) and United Kingdom (2). While 36% did not consider the court's decision was clear (Croatia (2), Denmark, Estonia, Finland, Greece (3), Ireland, Latvia (2), Poland, Slovakia and Sweden).

However, the practitioners interviewed (Denmark, Latvia and Lithuania) considered that court decisions were not always sufficiently clear. According to the Danish practitioner, even if decisions were normally easy to understand, their legal analysis could be improved. The Latvian practitioner indicated that decisions were not always clear when describing the facts of the case and responding to the parties' claims.

When asking the practitioners if they considered the decision was sufficiently reasoned by the court, 56% disagree (Croatia (2), Denmark (4), Finland (2), Greece (6), Ireland, Latvia (2), Lithuania (2), Poland, Slovakia, Sweden); while 33% of the practitioners agreed (Denmark, Finland, Estonia, Germany, Latvia, Lithuania, Poland, Spain, Sweden (3) and United Kingdom (2)). This tendency was confirmed by the follow-up interviews, in which most of the practitioners (three out of four- Denmark, Latvia and Lithuania) stated that the courts' decisions could be better reasoned.

Interim measures and judicial enforcement

18% of the legal practitioners requested interim measures (Greece, Lithuania (3), Poland and Sweden). None of the interim measures were successful. The majority (82%) of the legal practitioners did not request interim measures, based on cases in Croatia (2), Denmark (7), Estonia, Finland (3), Germany, Greece (4), Ireland, Latvia (3), Poland, Slovakia, Spain, Sweden (3) and United Kingdom (3).

Also, the vast majority of the legal practitioners (90%) did not request judicial enforcement; only 8% indicated they had requested judicial enforcement (Greece, Finland and Sweden).

Estimation of the costs for going to court

In relation to the costs of the procedures, while none of the legal practitioners provided the exact costs of the procedures, estimation on the costs of the procedures were provided. The majority of the practitioners (59%) indicated that the costs of the proceeding surpassed 25 000 euro, particularly within the following Member States: Denmark (7), Finland (3), Germany, Ireland, Lithuania (2), Poland (2), Sweden (4) and United Kingdom (3).

15% of the practitioners estimated the costs of the procedure between 1 000 and 5 000 euro mainly in Estonia, Greece (2), Latvia (2) and Sweden. Practitioners from Greece (2), Latvia and Lithuania estimated the costs between 5 000 and 10 000, while 10% of the practitioners estimated the costs between 10 001 and 25 000 (Greece, Croatia (2) and Spain).

82% of the practitioners indicated the costs corresponded to their initial estimation. This opinion was confirmed by the most practitioners interviewed, who at the same time noted that the complexity of the case or the strategy of the counter party could sometimes lead to higher costs. The Latvian interviewee, for example, mentioned that the use of economic expertise could contribute to an increase of the costs of a case. The Lithuanian practitioner also explained that in administrative proceedings, parties were not allowed to recover legal fees from the NCA, even when they won the case.

13 % of the practitioners considered that the costs were higher than expected; these were mainly cases from Finland, Greece (4), Ireland, and Sweden. The Swedish practitioner confirmed during the follow-up interview that procedures tended to exceed the initially estimated costs and that parties could often not recover the legal fees even when they had won the case. In the practitioner's opinion, the courts did not understand the amount of work lawyers put into this type of cases and hence refused to grant the full legal fees to the winning party.

5.4.8 Analysis of feedback on private enforcement cases

Number of cases

From the total number of cases provided by legal practitioners, 41% of the cases concerned private enforcement procedures⁵¹, representing nine Member States in total. The majority of cases (41%) had taken place in Germany and United Kingdom, followed by Czech Republic (10%), Latvia, Greece, Sweden, the Netherlands, Spain representing each 7% of the cases and Finland (3%). In addition, the Cartel Damage Claim (CDC) provided examples of different cases. For the purpose of this analysis, the CDC replies have been considered as EU wide, as cases reflect more than one EU jurisdiction.

From the six legal practitioners interviewed, two (the EU-wide practitioner and the UK practitioner) stated that they acted in private enforcement cases, either exclusively or in a higher proportion than in judicial review cases. Therefore, their responses regarding the length and costs of procedures, the clarity of the court's decision as well as the information provided are analysed in this section. The Lithuanian practitioner interviewed, who acted mainly in judicial review cases, also provided views and opinions on the length of private enforcement cases. These are reflected in this section for the sake of completeness.

⁵¹ The total number of private enforcement cases provided per legal practitioners according to Member States is the following: DE (7), UK (5), EU (3), CZ (3), EL, (2), LV (2), NL (2), ES,(2), SE (2) and FI (1).

Figure 5.9 Proportion of the cases according to their legal basis (Art 101 and 102 TFEU)

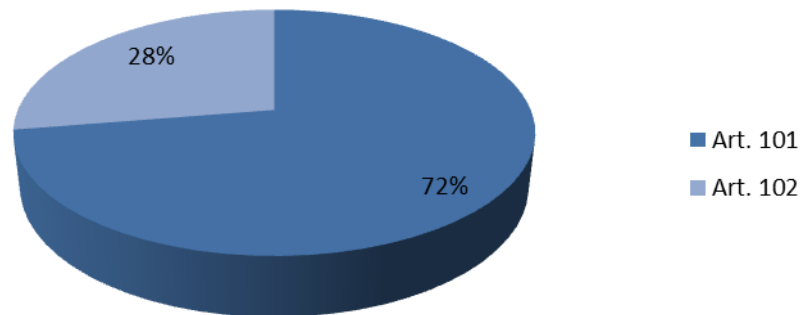


Figure 5.9 above shows that most cases put forward (72%) concerned private enforcement procedures under the legal basis of Art.101 TFEU. All cases that were reported in the United Kingdom concerned Art.101 TFEU, while the rest of the cases took place in Germany (6), Finland, Greece, Latvia, the Netherlands (2), Spain, Sweden, EU wide (CDC) (3) and United Kingdom (5). 28% of the cases concerned private enforcement procedures under the legal basis of Art.102 TFEU. All cases reported in the Czech Republic (3) concerned Art. 102 TFEU while the rest of the cases had originated in Germany, Greece, Latvia, Sweden and Spain.

Legal practitioners indicated that one of the main reasons to advise clients to lodge a claim before the court was economic harm (40%). This was confirmed by the EU-wide practitioner interviewed, who estimated that the main motivation for clients was the damage that has been inflicted upon them. Failure of alternative redress was also listed as one of the main reasons (22%) (such was also confirmed by the interviewed EU-wide practitioner) as well as the need to stop behaviour of the other party (13% of the responses). 13% of the respondents indicated the main reason was that their clients were the defendants and had no choice but to go to court. The EU-wide practitioner explained that in cartel cases, the unwillingness of the infringers to settle outside court left claimants with no other option than going to court.

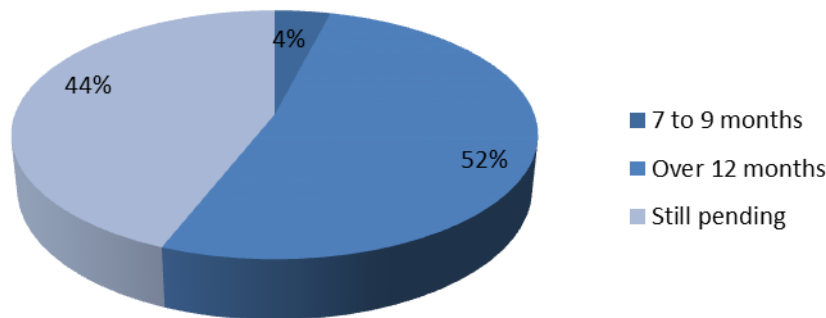
In 55% of the cases legal practitioners indicated there were no dissuasive elements for the parties to go to court, while in 41% of the cases legal practitioners indicated there were dissuasive elements. The general dissuasive elements for clients to go to court are indicated in Section 5.4.1.

In 31% of the cases reported the judicial decision has been appealed. Legal practitioners indicated such appeals were done 56% on the grounds of law and 33% indicated on the grounds of law and fact, while only one case was appealed on the grounds of the facts of the case. Of those cases where the judicial decision has been appealed only in 11% of the cases has the appeal been indicated as successful (Sweden). On the other hand within 33% of the cases the appeal has not been successful (Greece (2) and Spain). The remaining 56% of the appeals are still pending (Finland, Germany (2), Latvia and EU (CDC)).

Length of the judicial proceeding

Figure 5.10 below provides a brief overview of the proportion of the cases by their average length. It shows that the majority of the private enforcement cases (52%) lasted over twelve months; this was indicated in cases that took place in the following Member States: Czech Republic, Germany (3), Greece, Latvia, Spain (2), Sweden (2), United Kingdom (2) and EU (CDC). Only a small proportion of the cases (4%) had an average length between seven and nine months. The remaining 44% of the private enforcement cases were still pending, mainly in Czech Republic (2), Germany (2), EU CDC (2) Finland, Latvia, the Netherlands (2) and United Kingdom.

Figure 5.10 Average length of procedure of cases



Regarding legal practitioners' opinion on the length of the judicial review procedures, the majority of the respondents (75%) did not indicate if in their opinion the average length of procedures was either short or too long, whereas 25% of the practitioners indicated the procedures were too long, particularly in cases taking place in Czech Republic, Germany, Greece (2), Latvia, Spain and EU CDC (2). Of those cases where legal practitioners considered the average length was too long, in 48% of the responses, the complexity of the matter and the procedural law were quoted (in Greece, Germany, Czech Republic, Latvia and Spain). The second reason provided was the administration of justice, which was indicated in 21% of the responses, selected by practitioners from Greece (2), Spain and EU CDC (2).

Practitioners from Greece, EU CDC and Germany also considered that the judge could also affect the length of procedures, together with the parties according to a German practitioner. The EU-wide practitioner interviewed confirmed the impression that judges played an important role in determining the length of procedures for this type of cases. For example, whereas in Finland and the Netherlands there are three judges per case, in Germany there is only one judge per case. In addition, the available technical resources also impact on the duration of procedures, for example: in Finland and the Netherlands, procedures were described as "shorter" due to the use of electronic means, whereas in Germany, the obligation to file everything in paper format extends the duration of procedures.

In relation to the number of hearings undertaken during the private enforcement cases provided, 62% of the legal practitioners did not indicate if hearings were undertaken or not during the procedure and in 24% of the cases it was confirmed that there had been hearings. The remaining 14% of the cases provided did not include any hearings, these was indicated in cases from Czech Republic, Greece, Spain and United Kingdom.

Availability and provision of information and clarify of the judicial decision

72% of the practitioners indicated they were satisfied with the information they had received during the procedure (cases in the Czech Republic (3), Finland, Germany (3), Greece, Latvia (2), Netherlands (2), Spain (2) Sweden (2), the United Kingdom (3), and EU CDC. The UK practitioner interviewed noted that the problem with information provision was rather related to the 'overload' of information provided to the parties and their legal representatives. The practitioner explained that there were current discussions on improving the provision of information and making it more user-friendly.

On the other hand, 17% of the practitioners did not indicate if they were satisfied or not with the information provided during the procedures. Finally, three legal practitioners from a case registered in Greece, Germany and EU CDC indicated not to be satisfied by the information provided during the procedure, as it was considered to be insufficient. According to the EU-wide practitioner interviewed, not all NCAs publish their decisions, whereas others tended to publish very detailed decisions.

Legal practitioners also provided their opinion on the clarity of the judicial decision. Most of the practitioners (57%) indicated that they considered that the court's decision was clear, particularly in Finland, Germany (4), Greece (2), Latvia, the Netherlands, Spain, Sweden (2) and EU CDC. On the other hand, 25% of the practitioners did not consider the court's decision to be clear, particularly in cases from Czech Republic, Germany (2), Latvia, the Netherlands, Spain and United Kingdom. The UK practitioner stated that the lack of clarity of the NCA decisions could also influence the precision of the court's ruling, particularly in follow-on cases. Furthermore, the practitioner estimated that the wording of NCA decisions could lead to inefficiencies, since the lack of clarity would trigger a significant amount of questions during the procedure, which would have not been necessary if the NCA decision had been clear in the first place.

The EU-wide practitioner considered that decisions in the UK and the Netherlands were very clear, even at first instance, while in Germany and Spain, decisions tended to be clearer at second and third instance.

When asked if they considered that the court decision was sufficiently reasoned, 45% of the legal practitioners agreed (Germany (4), Latvia, Netherlands (2), Spain and Sweden (2) and EU CDC (2)); while in 31% of the cases practitioners did not consider the court's decision was sufficiently reasoned (Czech Republic, Germany, Greece (2), Finland, Latvia, Spain and United Kingdom (2)). In the EU-wide practitioner's opinion, decisions at first instance in Spain and Germany were not always sufficiently motivated, which was related to the lack of specialisation of the judges and their high workload.

Interim measures and judicial enforcement

Regarding interim measures, 11% of the legal practitioners requested interim measures in cases taking place in Greece, Latvia and Spain. Only in the Latvian case, the interim measures were not granted by the court and regarding the granted interim measures in the case in Spain, these were indicated as not successful. The remaining 89% of the respondents indicated they had not requested any interim measures.

Also, the vast majority of the legal practitioners (83%) did not request judicial enforcement, whereas the remaining 17% did not indicate whether they requested this or not (Germany (2) and United Kingdom (3)).

Estimation of the costs for going to court

In relation to the costs of the proceeding, none of the legal practitioners provided the exact costs of the private enforcement procedures, but most indicated the range of costs. The majority of the practitioners (83%) have indicated that the costs of procedures surpassed 25 000 euro, particularly within the following Member States: Czech Republic (3), Finland, Germany (5), Latvia, Netherlands (2), Spain (2), Sweden (2), United Kingdom (5) and EU CDC (3).

Only in one case from Greece where the costs estimated between 1 000 and 5 000, while the remaining 7% of the legal practitioners from Greece and Latvia estimated their costs between 5 000 and 10 000.

While the 72% of the practitioners indicated the costs corresponded to their initial estimation, 24% of them disagreed; these were mainly cases from Greece, the Netherlands, Spain, United Kingdom and EU CDC. The EU-wide practitioner considered that the tactic of the defendants in cartel cases, to delay proceedings to make them more expensive, should not be underestimated. The UK practitioner interviewed considered that costs could act as a barrier to justice.

5.5 Analysis of feedback provided by parties to procedures of EU competition law

The main target group of the online survey were also parties who had been involved in cases concerning the application of EU Competition Law rules, particularly Articles 101 and 102

TFEU. The survey targeted all types of entities who may have taken part in such proceedings e.g. companies, associations, group of companies or consumers, *inter alia*.

First, the survey's basic and general information is provided, which includes the total amount of parties responses, the type and number of procedures in which parties have been involved between the period of 1st May 2004 and 1st June 2013, and their role in the proceeding. The analysis also provides information regarding the use of Alternative Dispute Mechanisms (ADRs), the availability and use of ICT tools with the courts and the parties' assessment on the effectiveness of the national judicial systems, in addition to their assessment on the independence and impartiality of the court.

Parties were also invited to provide up to three relevant cases in which they had been involved within the covering period of this study. The results of analysis of the cases are presented by type of procedure in Section 5.5.8 and 5.5.9.

5.5.1 Basic Information

A total of eight responses were received from the parties. However, two responses were excluded from the analysis due to the lack of relevance and the lack of information provided. From the six replies analysed all respondents indicated that they had been involved in proceedings covered by this study and consequently, all six responses have been analysed.

The parties overall represent seven Member States (Bulgaria, France, Finland, Greece, Slovenia and Sweden).

In some instances, the following sections have also been complemented with the information gathered from the follow-up interviews undertaken with the survey respondents, and in particular with the legal team from a German company dealing with competition cases, which provided general views for the purpose of the study⁵².

Size of the company and type of clients

The majority of the parties (4) from Bulgaria, Finland, France and Greece represented a company, whereas 2 belonged to a group of companies (Slovenia and Sweden). With regards to the size of the companies, 2 parties were part of either a medium-sized company⁵³ (Bulgaria and France) or a large enterprise⁵⁴ (Greece). One (Slovenia) represented a small enterprise (less than 50 employees). Another one (Finland) represented a micro company (with less than 10 employees). The German company interviewed falls under the category of a large enterprise with more than 250,000 employees. The respondent from Sweden did not answer this question.

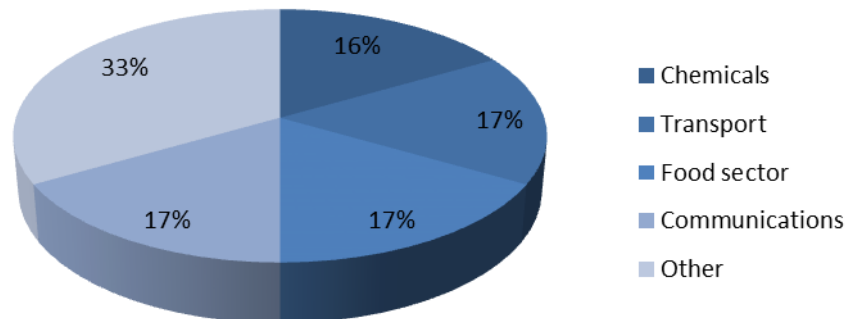
Figure 5.11 below also shows the main company sectors indicated by parties:

⁵² The legal team of such Germany company however did not reply to the survey but only undertook a telephone interview.

⁵³ Less than 250 employees

⁵⁴ More than 250 employees

Figure 5.11 Main company sectors indicated by the parties



The main company sectors indicated by the parties were: Chemicals (France), Transport (Sweden), Food Industry (Greece) and Communications (Finland). Two of the parties (Bulgaria and Slovenia) have indicated that they belonged specifically to the automotive/vehicle distribution and music copyrights respectively.

Experience in in proceedings

Parties were requested to specify the number of cases related to the application of Articles 101 and 102 TFEU in which they had been involved between the period of 1st May 2004 and 1st June 2013.

The majority of the respondents (Bulgaria, Finland and Slovenia) stated that they had been involved in one case related to the application of Article 101 and 102 TFEU during the above mentioned period. Two respondents (Greece and Sweden) had been part of such a procedure in two occasions and only one (France) had been involved in the application of Articles 101 and 102 three times between May 2004 and June 2013.

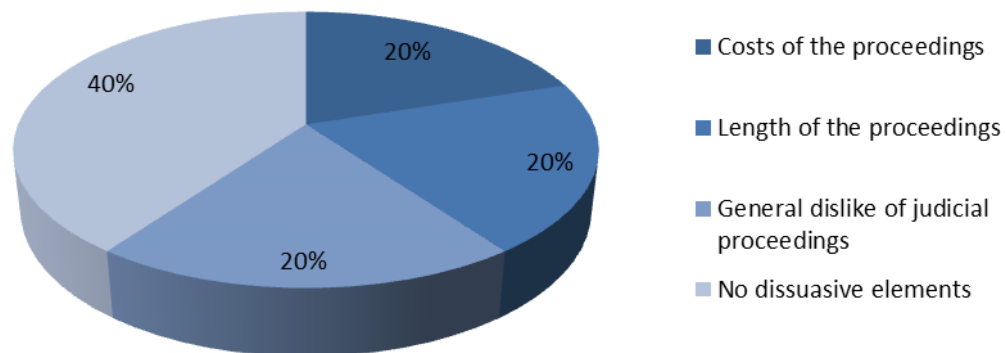
Number of cases provided

The study team received a total of eleven cases from the parties' responses. Three of these cases, however, could not be included in the analysis due to a lack of relevance and lack of information. The analysis of the cases by type of procedure is presented in section 5.5.8 and 5.5.9 below.

Dissuasive elements from going to court

Regarding dissuasive elements, Figure 5.12 below shows the proportion of the most common reasons dissuading the parties to go to court in procedures applying Articles 101 and 102 TFEU.

Figure 5.12 Reasons why parties are dissuaded from going to court



Overall, two parties considered that there were no dissuasive elements to discourage them from going to court (Bulgaria and Sweden). The cost and length of the proceedings were the most relevant elements for the French respondent, whereas in Greece, the party considered the general dislike of judicial proceedings as the most relevant dissuasive element. Significantly, no party considered that the existence of alternative means of redress could be a reason for not initiating court proceedings. The Slovenian party did not provide an answer to this question.

During the follow-up interviews, two out of the three parties interviewed (from Finland and Germany) considered that the main elements dissuading parties from going to court were the costs and the length of the proceedings. According to the Finnish interviewee, the high costs of going to court played a significant role in dissuading small companies from going to court. The German interviewee mentioned that the lack of predictability of the decision could also play a deterrent role, although to a lesser extent. According to the interviewee, other elements such as the stringent requirements to prove the damages established by German courts and problems related to the limitation period, can also negatively influence the decision of going to court. Finally, a French survey respondent mentioned the standard of the proof as an additional dissuasive element.

5.5.2 Alternative Dispute Resolution

As part of the survey, parties to the procedures were asked to elaborate on the existence and adequacy of Alternative Dispute Resolution (ADR) mechanisms. Parties were therefore requested to respond on whether or not they had resorted to ADR during the proceedings applying Articles 101 and 102 TFEU to which they were part.

More than half of the respondents (Bulgaria, Greece, Sweden and France) indicated that they had not made use of ADR before resorting to court proceedings. Only one of the parties (Finland) replied that they had tried ADR before going to court. The party stated that, even though bilateral negotiations were undertaken the attempt to settle the dispute out of court failed because the other party refused to compromise. The Slovenian party did not provide an answer to this question.

Parties were also requested to list the main reasons for not applying ADR before going to court. The majority of responses (Bulgaria, France, Finland and Sweden) indicated different reasons for the failure of ADR. In the case of the Bulgarian party, these were linked to the fact that the case could have only been trialled in court according to their national legislation. In the case of the French and the Finnish parties, it was explained that mediation would have no had good results due to the reluctant attitude of the other party. The Swedish party indicated that the case was more or less already trialled by the National Competition Authority.

Parties from France and Greece indicated they were not aware of ADR mechanisms, whereas the remaining party (Slovenia) did not specify any reasons.

Finally, parties were asked to indicate the available ADR mechanisms in their Member State, more than half of the respondents (France, Greece, Slovenia and Sweden) did not indicate any. Conciliation was indicated as an available ADR mechanism by the Finnish party..

During the follow-up interviews, the Finnish interviewee noted that bilateral negotiations with the counter party were more suitable for settling disputes out of court than ADR mechanisms such as mediation or arbitration. The German interviewee highlighted that even though ADR mechanism were available in Germany, these were not much used in follow-on actions and that their use could be better promoted in Germany. The interviewee considered that mediation was potentially a good method to resolve issues out of court, notably in cases where the two parties had been engaged in a long-standing business relationship.

5.5.3 Availability and provision of information and clarity of the judicial decision

The survey requested parties to state whether or not they were provided with sufficient information before going to court and throughout the procedures and whether they were satisfied with that information. Respondent parties from Bulgaria and Greece considered that they were not provided with enough information *before going to court*. Three of the parties (Finland, France and Sweden) stated that the information provided was sufficient. All three parties indicated that information was provided to them by an external counsel. The Slovenian party did not provide an answer to this question.

Parties who stated that not enough information was provided, were also requested to state which methods had they used to gather the necessary information before going to court. The Greek party stated the information was obtained through the respective NCAs' website, whereas the Bulgarian party mentioned that all necessary information was self-gathered before going to court. During the follow-up interview, the Finnish party indicated that the company had also self-gathered information before the proceedings started.

In relation to the information provided to the parties *during the proceedings*, more than half of the respondents (Finland, France, Greece and Slovenia) replied that they were satisfied with the information provided, whereas one of the parties (Bulgaria) stated that they were not satisfied with the information provided, due to difficulties in understanding the process. The Finnish interviewee was satisfied with the information during the proceedings but added that this was mainly provided by an external counsel. Finally, the Swedish party did not provide an answer to this question.

During the follow-up interviews, both the German and the Bulgarian parties referred to the information provided by the NCA. In the opinion of the Bulgarian interviewee, the NCA did not provide the company with sufficient information on the grounds of the fine imposed. In fact, the lack of information was the basis for the complaint filed before the courts by the company. The German party explained that the main problem with regard to the access to information was not related to the courts, but to the German NCA as the decisions of the latter are sometimes released with a delay, thus exceeding the limitation period for launching an appeal. The provision of information by the German NCA was also described as problematic, since the latter does not publish its decisions and only rarely releases summaries of its decisions, which was considered to impact on the procedural rights of the parties in follow-on cases. The interviewee also indicated that obtaining information from the NCA was costly and a lengthy process.

5.5.4 Available communication tools for the application of EU competition law

Parties also provided information regarding the availability of ICT tools that were at their disposal to communicate with the courts. The majority of respondents, from Bulgaria, Finland, France, Greece, Slovenia and Sweden indicated that these tools were not available. During the follow-up interviews the Finnish party noted that ICT tools were available and widely used. The German interviewee, on the other hand, specified that electronic files were only accepted in a very limited number of cases and that electronic communication was not allowed. The lack of availability of ICT tools was considered to make procedures both lengthier and more costly.

Parties were also asked whether they needed a legal practitioner to make use of these tools. Only the party from Finland replied that such tools were available; in this regard the party indicated that no legal practitioners were necessary to make use of the available ICT tools. The assessment of the efficiency of the communication with the courts through these tools was thus only provided by the Finnish party, who had a 'neutral' opinion.

5.5.5 Assessment of the effectiveness of the national judicial systems

Parties were also requested to provide their assessment of the effectiveness of their national judicial systems to apply Articles 101 and 102 TFEU in practice. Parties from France and Sweden were neutral towards the effectiveness of their national judicial systems. While parties from Bulgaria and Slovenia considered their national judicial system was somewhat ineffective, and the Greek respondent deemed the functioning of their national judicial system was very ineffective. For the Greek respondent, national courts were overall lagging behind in the application and interpretation of Community law.

According to the German interviewee, the German system was very efficient in spite of the length of some of the procedures.

5.5.6 Assessment of the independence and the impartiality of the court

Parties were requested to rate on a scale from one to five the court's independence and impartiality according to their views (where 5 was very independent/impartial and 1 very dependent/partial).

Independence of the court

Respondent parties from Bulgaria and Greece considered their national courts were very dependent (rating 1), whereas respondent parties from Slovenia and Sweden considered their courts as independent (rating 4). The Swedish survey respondent noted that the court had a good understanding of the matters at stake. The French respondent allocated an average rating of 3. The German interviewee considered that the courts were quite independent.

Impartiality of the court

Similarly, respondent parties from Bulgaria and Greece considered their courts were very partial (rating 1) whereas parties from Sweden and France rated their courts as very impartial (rating 5). The Slovenian party considered the courts as impartial (rating 4). The German interviewee considered that courts were quite impartial.

5.5.7 Analysis on positive practices and elements for improvement of the national judicial system

As part of the survey, the parties were invited to provide their opinions on the positive practices and the elements that could be improved in their national judicial systems. These aspects were further explored during the follow-up interviews.

Positive practices

For the French survey respondent, the impartiality and competency of the courts could be considered as a positive practice. The same was mentioned by the German interviewee, who noted that judges were in most cases highly competent in judicial questions (especially at the higher instance) and very professional in exercising their functions. The Swedish survey respondent estimated that even though the Market Court rarely ruled on Competition cases, the court overall had a good understanding of these cases.

None of the remaining survey respondents or interviewees referred to positive practices

Elements for improvement

The lack of expertise and proper training of the judiciary was mentioned as an element to be improved by both the Bulgarian interviewee and the Greek survey respondent. The Bulgarian

interviewee considered that the judiciary would benefit from more training and from the exchange of best practices between Member States.

For the Finnish interviewee, the main element to be improved was the length of proceedings, considering that this was also considered to affect legal certainty, since the laws governing competition cases also were also changing over time, making it more difficult for the parties to know what to expect. The French survey respondent estimated that the identification and taking account of the victims were also elements to be improved within the French judicial system. The respondent considered that the victims' compensation should be integrated in the total amount of the sanctions imposed to the condemned enterprises.

5.5.8 Analysis of feedback on judicial review cases

As explained in section 5.5 parties were invited to provide examples of relevant cases in which they have been involved. This section therefore provides an analysis on the judicial review cases provided by the parties. The analysis firstly provides a brief overview of the available number of cases involving judicial review procedures. The legal basis of the cases, their main elements, the characteristics of the procedure and the clarity of the decisions-including any interim measures or judicial enforcements applied are then presented. Finally, an overall estimate of the costs of the procedures is described.

Number of cases

A total of eight cases were provided by the six parties responding to the survey. The majority of these (six cases) concerned judicial review procedures from four Member States (Bulgaria, France, Greece (2) and Sweden (2)). Two cases (Slovenia and Finland) concerned private enforcement procedures. Two of the cases provided by a French party could not be taken into account due to a lack of information on these cases. During the follow-up interviews, one of the parties stated that they had been part of judicial review cases (Bulgaria). Therefore, their responses regarding the length and costs of procedures, the clarity of the court's decision as well as the information provided have been analysed in this section.

Figure 5.13 Proportion of the cases according to their legal basis (Art 101 and 102 TFEU)

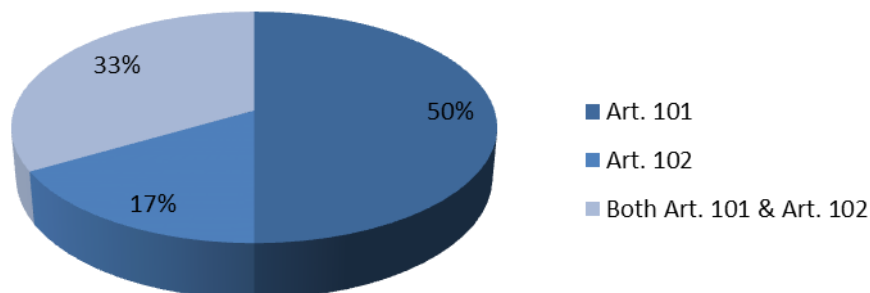


Figure 5.13 above shows that half of the cases (50%) concerned judicial review procedures under the legal basis of Art.101 TFEU. Parties from Bulgaria and Greece (2) identified these cases. One judicial review case, under the legal basis of Art. 102 TFEU, was provided by France. The remaining two cases concerned both Articles 101 and 102 TFEU and were presented by the Swedish party.

Parties also provided their opinion on the clarity of the judicial decision. In both cases provided by the Swedish party it was indicated that the court's decision was clear, albeit not sufficiently reasoned by the court. Regarding the cases provided by Greece (2) the party did not consider that the court's decision was clear although they did consider that it was well

substantiated. The remaining parties (Bulgaria and France) did not provide an answer to this question.

Main elements of the case

When questioned about the role that parties had in the procedures, from the six filled responses (the Bulgarian party opted for not answering this question), half of them indicated that they acted as applicants in first instance (France and Sweden (2)) the other half of the cases it was indicated that they acted as defendants (Greece (2)). The percentage of parties acting as applicants in appeal is, however, slightly higher (67% of the total responses- Bulgaria, France and Greece (2)). The remaining 33% (Sweden (2)) acted as defendants in appeal.

The parties were also requested to provide an estimation of the financial value at stake. The values ranged from almost 16 million euro (in Bulgaria) to no financial value (in Sweden).

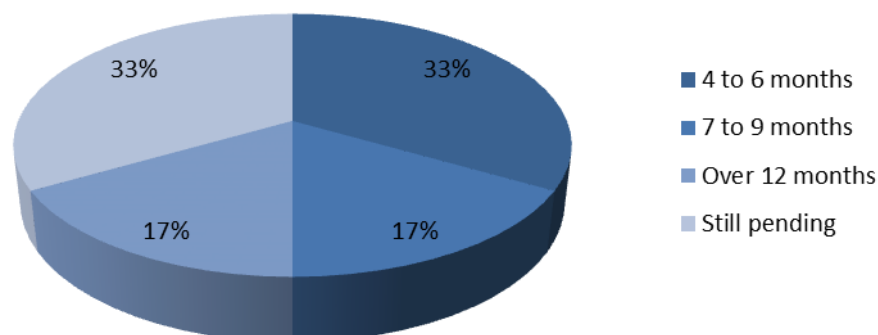
With regard to the type of legal practitioners involved in the cases, an external counsel was involved in the procedures in 100% of the cases provided. Only within the cases provided by parties from Bulgaria and Sweden, more than three external counsels were involved. In most of the cases, an in-house legal advisor was also present (Greece (2) and Sweden (2)).

Parties were also requested to list their main reasons for lodging an application before the national court. Results showed that economic harm, in Bulgaria, Greece (2), France and Sweden and the need to stop the behaviour of the other party (France and Sweden) were chosen by the majority as one of the main reasons to lodge a claim. Prior experience and the predictability of the decision were also indicated as one of the reasons to lodge a claim (both in Swedish cases). During the follow-up interviews, the Bulgarian interviewee noted that the main motivations behind the decision to file court proceedings were the economic harm infringed to the company, the lack of motivation of the NCA decision and the perceived impartiality of the courts.

Length of the judicial proceedings

In relation to the average length of the procedures, one case in Sweden lasted over twelve months. On the other hand, the cases provided by the Bulgarian and French parties were still pending. In Member States such as Greece and Sweden, the cases provided lasted between four and six months. A case in Greece lasted between seven to nine months. The same percentages apply for the length of the court's decision (the time it took the court to take a decision). Figure 5.14 provides a brief overview of the proportion of the cases by their average length.

Figure 5.14 Average length of procedure of cases



Regarding the parties' opinion on the length of the judicial review procedures, the majority of the respondents (Bulgaria, Greece (2) and Sweden (2)) estimated that the time it took the

court to adopt a decision in first instance was reasonable. This is in contrast to the remaining respondent (France) who deemed the decision-taking time in first instance as unreasonable. From the three parties that indicated that their decision had been appealed (Bulgaria, Greece and Sweden), only the Greek party replied to the question on reasonability, by estimating that the time it took the court to take a decision was not reasonable.

Hearings

In relation to the number of hearings undertaken during the judicial review procedures, while parties from Bulgaria and France did not indicate whether hearings were undertaken or not during the procedure, the remaining cases provided by the rest of the parties had hearings. The cases where hearings were undertaken were from: Greece-(two cases with six to seven hearings and four to five hearings respectively) and Sweden (two cases with more than twenty hearings in both cases).

Interim measures and judicial enforcement

In most of the cases (respondents from Bulgaria, France and Sweden (2)), no interim measures were requested, whereas the two cases in Greece demanded interim measures. In both Greek cases, interim measures were granted but none of them were considered as successful for stopping the damages.

All parties who answered the question on whether or not judicial enforcement was necessary (four out of six) indicated that it was not necessary (Greece (2) and Sweden). Parties from Bulgaria and France did not reply to this question.

Finally, in half of the cases provided the judicial decision was appealed (Bulgaria, Greece and Sweden). Of those cases where the judicial decision was appealed, the appeal was indicated as successful in both cases from Greece. In the remaining cases, the decision was not appealed (Greece and Sweden)

Estimation of the costs for going to court

In relation to the overall costs of the procedures, only parties from Greece and Sweden (2) provided an estimation of the total costs of the proceedings. These parties indicated that the costs amounted to: 150 000 euro (Sweden- one case); over 25 000 euro (Sweden- second case); and between 5 000 to 10 000 euro (Greece).

With regard to the estimation of courts fees, from the three responses provided, in Greece and one case in Sweden the cases surpassed 1 000 euro, whereas in the second case provided by the party from Sweden, the court fees amounted to 300 000 euro.

The estimation of the legal practitioner fees was given in four cases. In the case provided by the Greek party, these ranged between 2 500 and 5 000 euro whereas in Sweden, in both cases provided the fees overpassed 10 000 euro. In the remaining cases, one case (Bulgaria) indicated the legal practitioner fees to amount to up to 25 000 euro, whereas in the other (France), the fees surpassed 1 000 000 euro.

With regard to in-house legal advisor fees, these were provided in five cases. In the vast majority of the cases, these were indicated to be under 1 000 euro (Greece and Sweden (2)). In one of the cases (Greece), the fees ranged between 1 000 and 2 500 euro. The Bulgarian party did not indicate such costs.

Finally, with regard to the estimation of other judicial fees, from the four answers provided, (Bulgaria and Greece (2)) stated that these were over 1 000 euro. There is no response to this question for the Swedish cases.

While in the cases from Greece (2) and Sweden (1) the parties indicated the costs corresponded to their initial estimation, for the rest of the cases parties disagreed (Bulgaria, France and Sweden (1)). Moreover, in cases from Bulgaria and Greece the parties considered the costs of going to court were reasonable, whereas the costs of going to court were thought to be unreasonable in the cases from France and Sweden.

During the follow-up interview, the Bulgarian party noted that the costs of procedures very much depended on the duration of the appeal, which if very lengthy could lead to the initial cost estimations being exceeded.

5.5.9 Analysis of feedback on private enforcement cases

As explained above, only two parties (Finland and Slovenia) provided examples of private enforcement cases within the survey. As explained in Section 5.5.1, the study team also undertook an interview with the legal team dealing with competition cases within a German company, dealing in particular with private enforcement cases, which provided general views on these.

Number of cases

Two cases were provided by the survey respondents (Slovenia and Finland). The two cases provided concerned both Article 101 and 102 TFEU. The German interviewee indicated that most of their cases related to Article 101 TFEU.

Clarity of the decision

Both the Slovenian and the German party considered that court decisions were overall clear and well founded.

Main elements of the case

When questioned about the role that parties had in the procedures, the Slovenian party indicated that they had acted as defendant in first instance, while the Finnish party acted as applicant. The German interviewee explained that the company mainly acted as applicant for most of the cases in first instance, although there were also a few cases in which they acted as defendants.

When asked to provide an estimation of the financial value at stake, the German interviewee indicated that even though the financial value usually depended on the case, damage claims normally ranged between one million to one billion euro.

With regard to the type of legal practitioners involved in the cases, an external counsel was involved in the procedures in the two cases provided by the Slovenian and the Finnish respondents (more than three in the case of the Slovenian respondent). The German interviewee clarified that the company had a team of in-house counsellors that dealt with both private enforcement and judicial review cases. It was further explained that in Germany there is an obligation to always involve external counsels, when going to court.

Parties were also requested to list their main reasons for lodging an application before the national court. The Finnish survey respondent explained that the motivations behind their actions were: the failure of alternative means of redress, economic harm and the need to stop the behaviour of the other party. The German interviewee indicated that the main motivation was usually economic harm.

Length of the judicial proceedings

In relation to the average length of the proceeding, the Slovenian party indicated that the length of the proceedings between the start of the procedure and the court decision usually took more than twelve months. The German interviewee noted that in their experience, the length of first instance proceedings ranged from three to five years, and that proceedings before higher instances tended to last even longer.

The Finnish interviewee estimated that the length of the procedure according to the case was not reasonable. The German interviewee considered that the proceedings in their Member State were too lengthy. In the interviewee's opinion, the level of complexity of private enforcement cases did not justify the extended length of these proceedings. The interviewee considered that the length of proceedings could also be explained by the procedural strategies followed by the cartels, who usually tried to extend the procedures over time so as to exhaust the means of the applicants.

Estimation of the costs for going to court

In relation to the cost of proceedings, the Finnish party indicated during the follow-up interview, that the costs amounted over 25,000 euro. It was further explained that the majority of those costs corresponded to administrative court fees; however, the costs had not exceeded the initial estimations.

The German interviewee again explained that the cost of the procedures depended on the case: for example, in cases going through to all three instances, they would calculate an average budget of one million euro for each carteliser for claims of more than 30 million euro (excluding court fees). The high costs were often due to the need to involve experts in the proceedings.

Annex 1 National Legislation

This section outlines the legislation existing in relation to competition law rules in the Member States. Section A1.1 firstly outlines the general national legislation, with Section A1.2 outlining the industry specific legislation.

A1.1 Legislation applying competition law rules

All Member States have legislative instruments in place regulating competition law infringements. An overview of the legislative instruments is provided in Table A1.1 below.

A1.1.1 Amendments

Member State Factsheets reported that a number of Member States (e.g. AT, BE, HR, DK, EE, DE, IE, LT, LV, PT, ES) recently made amendments to their legislation (in 2012 and 2013). The changes introduced by these amendments included, for example, the following:

- The introduction of statutory rules on essential aspects of private competition law enforcement (e.g. passing on defence, stay on proceedings etc.) (AT);
- Undertakings with special or inclusive rights are no longer considered dominant, with special obligations abolished (EE);
- An increase from five to 10 years of the maximum prison sentence for conviction of an offence relating to anti-competitive agreements, decisions and concerted practices and an increase in the maximum fine that can be imposed (IE).

A1.1.2 Damages

With regard to damages due to breaches of competition law, Member States do not tend to have provisions specific to competition law in place for contractual liability or liability in tort. Therefore, many Member States (AT, BE, CZ, ES, FR, HR, DE, IT, LU, NL, PL, PT, SI) use their ordinary legal basis as outlined in their Civil Codes or equivalent instruments.

A1.1.3 Principle of extraterritoriality for the application of national competition rules

According to Regulation 1/2003, National Competition Authorities and national courts are obliged to also apply Articles 101 and 102 TFUE when they apply national competition law to agreements and practices which may affect trade between Member States. The application of Union competition law thus may also be triggered by an infringement covering a whole part of the territory of a Member State⁵⁵. Thus, the issue of extraterritorial application of national competition law may be less relevant, as most situations presenting a cross-border element will trigger the application of Articles 101 or 102 TFEU alone or in parallel to national law. With that in mind, there are differences as to the extraterritorial application of *national competition law*. For example, in Austria, national competition law is applied provided that the agreement/behaviour affects the national territory. In Cyprus, national competition law provides that all agreements and all decisions between associations of undertakings and any concerted practices, having as their object or effect the elimination, restriction or distortion of competition within Cyprus shall be prohibited and shall be void *ab initio*.

In Bulgaria, Greece and Poland, actions which have caused or *may cause* anti-competitive effects on these Member States' market are covered by national competition law. In contrast, in Germany, national competition law applies to all restraints of competition which had directly affected an interest which is protected by national competition law.

These differences between Member States demonstrate that some Member States have a broader approach to applying the principle of extraterritoriality to their national provisions.

Table A1.1 below provides an overview of the Member States' national legislation and available information on the principle of extraterritoriality.

⁵⁵ See Commission Notice on the effect on trade concept, OJ C 101/81 27.4.2004.

Table A1.1 National legislation and the principle of extraterritoriality in Member States relating to the application of competition law rules

Member State	Legislative Instruments	Extraterritoriality
Austria	<ul style="list-style-type: none"> ■ Austria Cartel Act 2005, reform in 2013 – national equivalents of Article 101 and 102 TFEU ■ Competition Act 2002 – governs all issues with regard to the Federal Competition Authority 	National competition law must be applied if the agreement/behaviour concerned affects the Austrian territory.
Belgium	<ul style="list-style-type: none"> ■ Book IV of Code of Economic Law – provides for the enforcement of competition law ■ Competition Act 2013 – provides for competition law provisions to be included in the Code of Economic Law 	Anticompetitive behaviour by an individual, undertaking or trade association that has its residence or registered offices outside Belgium is punishable provided that such behaviour has effect on the Belgian market concerned or a significant part thereof.
Bulgaria	<ul style="list-style-type: none"> ■ Law on Protection of Competition 2008 	Application of the ‘effects’ doctrine - extra-territorial application of competition law to the actions of undertakings within and outside of Bulgaria provided that such actions have caused or might have caused anti-competitive effects on Bulgarian markets.
Croatia	<ul style="list-style-type: none"> ■ Competition Protection Act 2009, amended in 2013 	The Act applies to all forms of prevention, restriction or distortion of competition by undertakings within the territory of the Republic of Croatia, but also outside its territory if such practices take effect in the territory of the Republic of Croatia.
Cyprus	<ul style="list-style-type: none"> ■ Protection of Competition Law 2008 	Competition Law will apply to actions outside the jurisdiction of Cyprus that have as their object or effect the prevention, restriction or distortion of competition in Cyprus.
Czech Republic	<ul style="list-style-type: none"> ■ Act on Protection of Competition 2001 	The act applies to actions of undertakings which occurred abroad if they distort or may distort competition within the Czech Republic
Denmark	<ul style="list-style-type: none"> ■ Act on Competition 1997, amended 2013 	The Competition Act applies a principle of extraterritoriality making all agreements, consorted practice or abuse having effect in Denmark subject to the Act. Consequently, the NCA can in theory act against any behaviour or actions affecting competition in Denmark.
Estonia	<ul style="list-style-type: none"> ■ Act on Competition 2001, amended 2013 	The geographical scope of the application of competition rules extends beyond the territory of Estonia when acts or omissions committed outside have a restrictive effect within the territory of Estonia.

Member State	Legislative Instruments	Extraterritoriality
Finland	<ul style="list-style-type: none"> Competition Act 2011 	
France	<ul style="list-style-type: none"> Code of Commerce, amended in 2004 	If practice affects the French market , national law will apply.
Germany	<ul style="list-style-type: none"> Act against restraints of competition, 1998, last amendments 2013 	Legislation applies to all restraints of competition having an effect within Germany even if they were caused abroad. In order to establish the domestic nexus, it is necessary that the restraints of competition caused abroad affect directly an interest which is protected in an appreciable manner by national legislation.
Greece	<ul style="list-style-type: none"> Law on the Protection of Free Competition 2011 – replaced the Competition Law Act 1977 	Law is applicable to all restrictions of competition that have or may have an effect in Greece , even if those restrictions result from agreements, decisions or concerted practices between undertakings or associations of undertakings concluded, taken or practised outside Greece or by undertakings or associations of undertakings that do not have an establishment in Greece.
Hungary	<ul style="list-style-type: none"> Act on the Prohibition of Unfair and Restrictive Market Practices 1996 	Any market conduct displayed by companies abroad, shall also fall under the scope the Competition Act, if the effect of such conduct may manifest itself within Hungary.
Ireland	<ul style="list-style-type: none"> Competition Act 2002, amended in 2012 	Conduct which has an effect on trade in Ireland or any part of the State.
Italy	<ul style="list-style-type: none"> Law on Competition 1990 	Law applies to anticompetitive conduct taking place outside Italy and having effects within the Italian territory .
Latvia	<ul style="list-style-type: none"> Competition Law 2002, latest amendment 2013 	The Competition Law applies to all market participants in Latvia. The definition of market participants covers foreign undertakings, which perform or intend to perform business activity in the territory of Latvia or which have or may have an impact on competition in the territory of Latvia.
Lithuania	<ul style="list-style-type: none"> Law on Competition 1992, latest amendment 2012 	The law also applies to activities of economic entities registered outside the territory of the Republic of Lithuania if the said activities restrict competition on the domestic market of Lithuania.
Luxembourg	<ul style="list-style-type: none"> Law on Competition 2011 – partially abrogated the Law on Competition of 17 May 2004 	The Council may take into account relevant behaviour or actions that occurred outside Luxembourg provided they have an effect on the Luxembourgish territory.
Malta	<ul style="list-style-type: none"> Competition Act 1994 Competition and Consumer Affairs Authority Act 2011 	The law shall apply where a collusive practice between undertakings or an abuse of a dominant position by an undertaking may affect trade between Malta and any one or more Member States.

Member State	Legislative Instruments	Extraterritoriality
Netherlands	<ul style="list-style-type: none"> Competition Act 1997 	Legislation may take into account a conduct that affects competition on part or the whole of the Dutch market , whereby the place of establishment of the undertakings is not relevant. With respect to restrictive practices, the decisive factor is the place where the agreement, decision or concerted practice is implemented, not where or by whom it is agreed.
Portugal	<ul style="list-style-type: none"> Competition Act 2012 – competition law regime derived from 2003 Law 	The Competition Act applies to all economic activities, whether permanent or occasional, in the private, public and cooperative sectors, covering prohibited practices and concentrations of undertakings on Portuguese territory or whenever these practices have or may have an effect there.
Poland	<ul style="list-style-type: none"> Act on Competition and Consumer Protection 2007 	The Act regulates the principles and measures of counteracting competition-restricting practices and practices infringing collective consumer interests, as well as anti-competitive concentrations of undertakings and their associations, where such practices or concentrations have or may have impact on the territory of the Republic of Poland.
Romania	<ul style="list-style-type: none"> Law on Competition 1996 	Competition Council is competent to investigate and sanction all anticompetitive deeds taking place on the Romanian territory and also the ones that occurred outside of the Romanian territory provided they have an effect on the latter.
Slovakia	<ul style="list-style-type: none"> Act on Protection of Competition 2001, latest amendment 2011 	The Competition Act shall also apply to activities and actions that have taken place abroad , provided that they lead, or may lead, to restriction of competition in the domestic market.
Slovenia	<ul style="list-style-type: none"> Protection of Restriction of Competition Act 2008, amended in 2011 	Principle of extraterritoriality may be taken into consideration when assessing the relevant behaviour or actions , if it had or may have had an effect on the competition on Slovenian territory.
Spain	<ul style="list-style-type: none"> Law on the Defence of Competition 2007 Law creating the Markets and National Competition Commission 2013 	The NCA can apply Spanish competition law to any conduct or abuse of dominant position occurred outside Spain, provided that it has an effect on the Spanish territory.
Sweden	<ul style="list-style-type: none"> Competition Act 2008 	Act applies to behaviour or actions that have effects on Swedish territory.
United Kingdom	<ul style="list-style-type: none"> The Competition Act 1998 The Enterprise Act 2002 The Enterprise and Regulatory Reform Act 2013 	The principle of the extraterritoriality of UK competition law applies only if the agreement, decision or practice is, or is intended to be, implemented in the UK.

Annex 2 National Competition Authorities

This Annex presents an overview of the National Competition Authorities (NCAs) existing in all Member States.

In all Member States, NCAs are collegiate bodies, with the notable exception of Poland, where the President of the Office of Competition and Consumer Protection is in charge of the NCA function. In most cases, NCAs are autonomous though in some instances they are placed under the authority of a Ministry such as the Ministry of Justice (e.g. AT) or the Ministry of Economy (e.g. DE, EE).

Some NCAs have specialised directorates or units, either in specific anticompetitive practices (e.g. BG, CZ, FI, IE, and SK) or in specific activity sectors (e.g. DE, EE, ES, IT, and NL).

A2.1 Establishment of NCAs

The date of establishment of the NCAs in the Member States varies considerably. Most Member States (BG, HR, CY, CZ, DK, EE, FI, FR, DE, EL, HU, IE, IT, LV, LT, LU, NL, RO, SK, SI, ES, SE, UK) initially established these authorities in the 1990s. For example, in Cyprus, the Commission for the Protection of Competition was established in 1990. Other Member States established their Competition Authority in the 2000s (AT, BE, MT, PT). A few Member States have experienced amendments to the structure of their NCAs over recent years (BE, HR, FI, EL, IE, ES, LU, NL, RO, UK).

A full overview of the NCAs, their years of establishment and their structure are provided in Table A2.1 below.

A2.2 Competence of NCAs

NCAs have both investigation and decision making powers relating to competition law infringements. These are outlined in turn below.

A2.2.1 Investigation powers

Investigations in the Member States can be started by the NCA *ex-officio* or upon the request or notification of a government body, legal or natural person with a legitimate interest. This can differ however, in some Member States. For example, in Poland, the investigation can only be launched *ex officio*, regardless of any previous complaint. In the case of Czech Republic, only investigations relating to mergers can be launched on the basis of an external complaint.

In the course of the investigation, the NCA can order various types of measures to collect information and evidence, such as the collection of information and material, the recording of oral and/or written explanations from the parties, the execution of dawn raids and unannounced searches, the hearing of experts or other interested parties, and the seizure of information and material, sometimes with the consent of a Court.

A2.2.2 Decision making powers

In the majority of Member States, NCAs can adopt decisions themselves. In some cases, however, the sanction decisions have to be adopted by a Court upon request of the NCA. For instance, in Austria, only the Cartel Court can impose fines after it is requested by the competition authorities. In Ireland, the courts decide on the substance of the case and the nature of the sanction to be imposed. In the case of Denmark, the NCA has investigation powers and decides on the substance of the case, and it can then refer the case to the criminal courts which will impose a fine. If the case is simple and the undertaking admits its guilt, instead of referring the case to the criminal courts, the NCA can impose a penalty notice (administrative fine). A similar system is in place in Finland. Finally, in Sweden, the NCA may issue a fine order in clear cases and when the undertaking concerned does not contest the decision. Otherwise, the case is referred to the Courts.

NCA decisions determine whether or not a breach of competition law rules was observed. If the practice does not constitute an infringement of those rules or if it does not exist anymore when the decision is adopted, the NCA can order to close the case. Otherwise, the decision orders to terminate the practice and restore the situation and can impose a financial sanction or a fine. NCA decisions can also impose interim measures, such as injunctions or periodic penalty payments.

With regard to hearings, these are either organised as part of the procedure in some Member States (e.g. BE, FR, HR, LU, NL) or can be requested by the undertakings involved in others (e.g. BG, DK, EL, FI, IT, LT, and SE).

Table A2.1 below provides an overview of the establishment and structure of the National Competition Authorities within the Member States, while Table A2.2 outlines the competences and decision making powers of the National Competition Authorities in each Member State.

Table A2.1 Establishment and Structure of NCAs in Member States

Member State	Name	Year of establishment	Structure
Austria	Federal Cartel Prosecutor (Bundeskartellanwalt)	2002	Under the authority of the Federal Minister of Justice.
	Federal Competition Authority (Bundeswettbewerbsbehörde)	2002	<ul style="list-style-type: none"> ■ Independent body ■ Headed by the Director General, assisted by a Head of Agency and a Deputy Head of Agency ■ 23 agents / case handlers
Belgium	Belgian Competition Authority	2006/2013	<ul style="list-style-type: none"> ■ Single, independent administrative body ■ Represented by a President ■ The College of Competition Auditors (CCA) oversees investigations. ■ The Competition College has a decision-making power ■ The Management Committee sets policy priorities and issues guidelines.
Bulgaria	Commission for the Protection of Competition	1991	<p>Seven members:</p> <ul style="list-style-type: none"> ■ President ■ Deputy President ■ Five members (on 5 year term) <p>Organised into five directorates reflecting the NCA's competences:</p> <ul style="list-style-type: none"> ■ Antitrust and concentrations (34 staff) ■ Legal analysis and competition policy (11 staff) ■ Unfair competition (11 staff) ■ Public procurement and concessions (30 staff) ■ Finances and administration (23 staff) <p>117 staff positions in 117.</p>
Croatia	Croatian Competition Agency (Agencija za zaštitu tržišnog natjecanja)	1995/2003	<p>The Agency is a legal person with public powers.</p> <ul style="list-style-type: none"> ■ Managed by the Competition Council, composed of five members ■ Headed by a President
Cyprus	Commission for the Protection of Competition	1990	<ul style="list-style-type: none"> ■ One Chairperson ■ Four Members on a full time basis (and their substitutes). ■ Assisted by the CPC Service for investigations, composed of: <ul style="list-style-type: none"> - A Director and officers - An administrative officer,

Member State	Name	Year of establishment	Structure
			<ul style="list-style-type: none"> - An accountant, - Secretarial and Auxiliary Personnel.
Czech Republic	Office for the Protection of Competition	1991	Central administrative authority <ul style="list-style-type: none"> ■ Headed by a Chairman ■ Divided into five sections: <ul style="list-style-type: none"> - Section of Public Regulation and Administration - Section of Public Procurement - Competition Section (divided in units: unit of dominance and vertical agreements, the unit of cartels, the unit of mergers and the unit of the chief economist) - Section of Legislation, Economics and International Affairs - Section of the Second Instance Decision-Making.
Denmark	Competition Council ((Konkurrencerådet) Danish Competition and Consumer Authority (Konkurrence- og Forbrugerstyrelsen),	1998 ⁵⁶	<ul style="list-style-type: none"> ■ Headed by a Chairman and a Vice-chairman ■ 18 members with a Chairman and a Vice-chairman which are representatives of different trade and professional organisations, consumer NGOs and public bodies.
Estonia	Estonian Competition Authority	1993	<ul style="list-style-type: none"> ■ Government agency, under the authority of the Ministry of Economic Affairs and Communications. ■ Three field-based divisions: <ul style="list-style-type: none"> - Competition Division - Railway and Communications Regulatory Division - Energy and Water Regulatory Division. ■ Headed by a Director General and by Deputy Directors general of the Divisions
Finland	Finnish Competition and Consumer Authority	1988/2013	<ul style="list-style-type: none"> ■ Headed by a Directorate General, the Director of Competition Division and Director of Consumer Division. ■ The following departments operate under competition affairs: <ul style="list-style-type: none"> - Enforcement 1 - Enforcement 2 - Cartel Unit

⁵⁶ <http://www.oecd.org/denmark/2409030.pdf>

Member State	Name	Year of establishment	Structure
			<ul style="list-style-type: none"> - Advocacy Unit - International Affairs.
France	Competition Authority	1986	<ul style="list-style-type: none"> ■ Independent administrative authority ■ Composed of: <ul style="list-style-type: none"> - College of 17 members, including one President - A general rapporteur - Deputy general rapporteurs - Rapporteurs - Investigators - Hearing officer - Leniency officer - Public rapporteur ■ The NCA can sit in plenary or in sections, or in permanent committee and there are six different sections.
Germany	Bundeskartellamt	1999	<ul style="list-style-type: none"> ■ Independent higher federal authority assigned to the Federal Ministry of Economics and Technology. ■ Staff of 320. ■ Organised in Divisions: <ul style="list-style-type: none"> - Litigation and Legal Issues, advising on legal issues, with a special unit on combatting cartels - General Policy Division - Three Decision Divisions created 2005 and 2011 and advised by the General Division
Greece	Hellenic Competition Commission	1995/2011	<ul style="list-style-type: none"> ■ Legal personality. ■ Composed of eight members, of whom six are full-time appointees (the chairman, the vice chairman and four commissioners).
Hungary	Hungarian Competition Authority (Gazdasági Versenyhivatal)	1991	<ul style="list-style-type: none"> ■ Administrative authority. ■ Headed by a President ■ Monitors the work of the Competition Council which comprises the president and its members
Ireland	Irish Competition Authority	1991/2002	<ul style="list-style-type: none"> ■ Independent enforcement power Composed of: <ul style="list-style-type: none"> ■ A Director of Competition Enforcement ■ Six separate divisions, each one headed by a Member of the Authority:

Member State	Name	Year of establishment	Structure
			<ul style="list-style-type: none"> - Cartels - Monopolies - Mergers - Advocacy - Corporate services - Strategy ■ A Competition and Mergers Review Group (CMRG), was appointed to examine competition policy and enforcement processes ■ Executive Board composed of a Chairperson and three members.
Italy	Italian Competition Authority	1990	<ul style="list-style-type: none"> ■ Composed of: - A Chairperson - Four members appointed jointly by the Speakers of the Senate and the Chamber of Deputies from a group of independent candidates ■ Headed by a Director ■ Total of around 230 staff. ■ A General Investigation Directorate (<i>Direzione Generale Istruttoria</i>) coordinates the activities of several units (<i>Direzioni settoriali</i>).
Latvia	National Competition Authority of Latvia	1998	<p>Two bodies:</p> <ul style="list-style-type: none"> ■ Governing body, consisting of a Council of three members ■ Executive Directorate, which prepares the draft investigation file
Lithuania	Competition Council	1992-1999	<ul style="list-style-type: none"> ■ Composed of a Chairman and four members ■ Assisted by the Competition Council administration: - Collegiate body - Head of the Council - Eight structural divisions
Luxembourg	Competition Council and the Competition Inspectorate	2004/2011	<ul style="list-style-type: none"> ■ Independent administrative authority ■ The Council's Board consists of four members – a Chairman and three members (counsellors). ■ The competences of the Board depend on the number of people sitting in it (either in a formation of four or in a formation of three). ■ The Council also includes a clerk responsible for internal organisation and administrative tasks.
Malta	Malta Competition and Consumer Affairs Authority	2011	<ul style="list-style-type: none"> ■ Composed of four different offices: ■ Office for Competition - three different Directorates supported by a legal and

Member State	Name	Year of establishment	Structure
			<p>economic team⁵⁷</p> <ul style="list-style-type: none"> - Office for Consumer Affairs - Technical Regulations Division - Standards and Metrology Institute. <p>Each entity is headed by a Director General.</p>
Netherlands	Netherlands Consumer Authority (Consumentenautoriteit)-	1998/2013	<ul style="list-style-type: none"> ■ Independent regulatory body without legal personality ■ Approximately 400 staff ■ Composed of: <ul style="list-style-type: none"> ■ A Management Board of minimum three and maximum five members. ■ Seven directorates, including: <ul style="list-style-type: none"> - Competition Directorate - Energy Directorate - Telecommunications, Transport and Postal Services Directorate - Consumer Directorate - Sanctions and Legal Affairs Directorate
Portugal	Portuguese Competition Authority	2003	<ul style="list-style-type: none"> ■ Public entity with statutory independence, entrusted with regulatory, supervisory and disciplinary powers. ■ Composed of: <ul style="list-style-type: none"> - A Board responsible for the enforcement of the competition law regime. The Board is chaired by the president of the PCA and has three to five members. - A Sole Auditor responsible for controlling the legality and economy of PCA financial and asset management.
Poland	President of the Office of Competition and Consumer Protection		<ul style="list-style-type: none"> ■ Central government administration authority. ■ One-person body conducting the proceedings and adopting the decisions. ■ No advisory or decisive board but it receives assistance from the Office of Competition and Consumer Protection (OCCP)
Romania	Romanian Competition Council	1996/2011	<ul style="list-style-type: none"> ■ Autonomous institution. ■ The Competition Council Plenum hears both the investigation team and the investigated undertakings and takes the final decision with regards to the alleged infringement. ■ Composed of seven members and different directions.
Slovakia	Antimonopoly Office of the Slovak Republic	1994	<ul style="list-style-type: none"> ■ Independent central state administration body.

⁵⁷ <http://mccaa.org.mt/en/organisational-chart>

Member State	Name	Year of establishment	Structure
			<ul style="list-style-type: none"> ■ Three executive divisions dealing with agreements restricting competition, abuse of dominant position, and mergers. ■ Headed by a Chairman and composed of a Council of the Office, which decides on appeals and review decisions outside appellate proceedings (five members in addition to the Chairman and the Deputy Chairman).
Slovenia	Slovenian Competition Protection Agency	1999	<ul style="list-style-type: none"> ■ Independent and autonomous agency. ■ Composed by two main bodies: <ul style="list-style-type: none"> - The Director - The Council (Svet), composed of five members, one of which is the Council's Chairman. The Director is also the Chairman of the Council. ■ Three units: <ul style="list-style-type: none"> - Sector for Economic Analysis - Sector for Legal Affairs and Investigative Activities and, within the latter, Department of Legal Affairs.
Spain	<p>Markets and Competition National Commission (established in 2013)</p> <p>Formerly the Competition Tribunal (1989-2007) and the National Competition Commission (2007-2013)</p>	1989-2007	<p>Headed by:</p> <ul style="list-style-type: none"> ■ A President, which chairs both the CNMC and the Council ■ The Council, which comprises eight members, in addition to the President and vice-president. It also composed by the four Directorates: <ul style="list-style-type: none"> - The investigation of regulatory supervision matters in the sectors of telecommunications and audio-visual services; - The investigation of regulatory supervision matters in the sectors of energy and transport - The investigation of regulatory supervision matters in the sectors of postal services - The Competition Directorate which is an executive body, in charge of case handling and investigation.
Sweden	National Competition Authority (Konkurrensverket)	1992	<ul style="list-style-type: none"> ■ Independent authority ■ Headed by a Director General ■ Divided into eight departments ■ Management group: Director General and heads of departments. ■ Approximately 135 employees, most of them lawyers and economists.
United Kingdom	The Office of Fair Trading and the Competition Commission	1973-1978-2013	<ul style="list-style-type: none"> ■ The Board of the OFT is made up of a non-executive Chairman and at least 4 other members. There is also a Chief Executive. ■ Responsible for strategy, prioritisation, planning and performance at the OFT. ■ The CC has a full-time Chairman, Deputy Chairmen and part-time members.



Member State	Name	Year of establishment	Structure
	Competition and Markets Authority) as from 2014		■ After 2014 the CMA will designate a Chairman and a Chief Executive and a Board will be also established.

A2.3 Competences of the Member States' National Competition Authorities

Table A2.2 Competences of NCAs in Member States including investigation and decision making powers

Member State	Role, competence and Investigation procedures	Decision Making
Austria	<p>The Federal Cartel Prosecutor and the Federal Competition Authority initiate (individually / both) public enforcement by initiating proceedings at the Cartel Court. Since a 2013 reform, the Federal Competition Authority's enforcement powers were extended to direct enforcement of information requests; power to seal premises; and its right of objection curtailed.</p> <p>Decisions within the Federal Competition Authority are adopted by the Director General, and include:</p> <ul style="list-style-type: none"> - Starting an investigation - Applying for a dawn raid (approved by the Cartel Court) - Requesting an in-depth examination of notified mergers (phase II) - Initiating a proceeding at the Cartel Court 	<p>Only the Cartel Court can impose fines on undertakings, but only on request of the Federal Cartel Prosecutor and the Federal Competition Authority</p>
Belgium	<p>Since a 2013 reform, the Belgian Competition Authority:</p> <ul style="list-style-type: none"> ■ Initiates the investigation on its own initiative, on the basis of a complaint of an individual with a legitimate interest or at the request of a the Ministry or a public body with responsibility over an economic sector ■ Oversees the investigation phase ■ Decides to open an investigation ■ Conducts the investigation ■ Drafts a preliminary decision. 	<p>Two-stage system with strict time-limits:</p> <ul style="list-style-type: none"> ■ The Belgian Competition Authority collects all files and the Auditor-General will address the undertakings concerned a statement of objections if the need arises. ■ The Competition College receives the draft decision and the investigation file. The undertakings concerned may access the entire file and have two months to write comments to the draft. <p>A hearing will be organised after 1 or 2 months following the written procedure. The Competition College will take a decision within one month after the hearing.</p>
Bulgaria	<p>Since a 2008 reform, the Commission for the Protection of Competition is also competent as regards leniency programmes and the possibility to accept commitments. Investigations are started within 7 days from the date of a:</p> <ul style="list-style-type: none"> ■ Ex officio decision of the Commission for the Protection of Competition ; ■ Application by the public prosecutor; ■ Application by an interested third party; 	<p>Decisions are adopted in a collegiate manner following the majority vote of at least four members.</p> <p>During the investigation parties to the proceedings have access to the file excluding confidential information.</p> <p>A hearing can be organised after fourteen days following the deadline for submission of observations.</p>

Member State	Role, competence and Investigation procedures	Decision Making
	<ul style="list-style-type: none"> ■ Leniency application. <p>The Commission for the Protection of Competition has the following investigatory powers:</p> <ul style="list-style-type: none"> ■ To request information and various types of evidence; ■ To record verbal or written explanations; ■ To conduct “dawn raids”; ■ To engage external experts for technical expertise; ■ To request information or cooperation from the EU Commission or NCAs of other Member States. 	<p>Fines up to 10% of the undertaking(s)’ annual turnover of the preceding year can be imposed, as well as fines up to 1% for procedural infringements.</p>
<p>Croatia</p>	<p>The Council can initiate an investigation, but any legal or natural person, association, government bodies etc. can also submit an ‘initiative for initiation of proceedings’.</p>	<p>Decisions are adopted by majority voting of at least three votes. No abstention possible. Decisions finding restrictive agreement as well as abuse of dominance have to be adopted by the Agency within 4 months after the determination of the facts. A main hearing is organised before the final decision is adopted. The final decision is published on the Official Gazette and on the Agency website.</p>
<p>Cyprus</p>	<p>A case will be investigated by the Commission for the Protection of Competition on its own initiative or following a complaint. It has the necessary powers to obtain the information or data that will enable the Commission for the Protection of Competition service to carry out the investigation.</p>	<p>No formal rules of procedure for cases before the Commission for the Protection of Competition, but the rules followed are similar to those applied in the courts. Upon conclusion of the case, a fully reasoned decision will be issued.</p>
<p>Czech Republic</p>	<p>The Office for the Protection of Competition shall create conditions for support and protection of competition and it also supervises the field of public procurement and state aid. The Office for the Protection of Competition initiates investigations on its own motion. Only merger cases are initiated on the basis of a notification.</p>	<p>The Office for the Protection of Competition is independent in its decision-making practice. It either imposes duties and rights to parties of the procedure (substantive decision), or terminates the investigations, or interrupts the proceedings. Competent to :</p> <ul style="list-style-type: none"> ■ Require that an infringement of Articles 101 and 102 TFEU be brought to an end; ■ Order interim measures; ■ Accept commitments ■ Impose fines or other remedies. <p>The decision is sent to the parties and it may be challenged by an appeal to the Chairman of the Office for the Protection of Competition in the time period of 15 days after the decision is notified to the parties.</p>

Member State	Role, competence and Investigation procedures	Decision Making
<p>Denmark</p>	<p>The Competition Council is the executive arm of the Danish Competition and Consumer Authority, and as such, the main enforcer in Denmark The Danish Competition and Consumer Authority prepares cases, but also has the competence to begin an investigation either on its own initiative or on the basis of a complaint. It also exercises inspectoral powers such as:</p> <ul style="list-style-type: none"> ■ Initiating dawn raids ■ Preparing draft decisions ■ Making decisions on minor or routine cases. 	<p>Traditionally the Competition Council makes prohibition decisions. The Danish Competition and Consumer Authority issues non-binding guidance on specific issues considered complicated. Unless considered simple, the Danish Competition and Consumer Authority will submit the case before the Competition Council for the purpose of final decision. Before the final decision is issued, the parties have the right to comment on the draft decision and to a hearing. Subsequently, the Council will deliver its decision. The Danish Competition and Consumer Authority decide on the substance of the case and then refers it to the court, which then decides on the fine except for the instances concerning administrative fines.</p>
<p>Estonia</p>	<p>The Estonian Competition Authority has a wide range of investigatory powers and competences:</p> <ul style="list-style-type: none"> ■ Request natural or legal persons, including state authorities, to provide information or explanations in writing, ■ Request them to submit materials; ■ Initiate and conduct dawn raids at the seat or premises of the business. 	<p>The Estonian Competition Authority can request to the natural or legal persons concerned:</p> <ul style="list-style-type: none"> ■ To perform the act required by the precept; ■ To refrain from a prohibited act; ■ To terminate or suspend activities which restrict competition; ■ To restore the situation prior to the offence. <p>In relation to violations of competition rules that are treated as misdemeanours by the Penal Code, the Estonian Competition Authority conducts the proceedings and imposes pecuniary penalties. The Estonian Competition Authority has a limited authority in leniency matters due to the fact that antitrust violations are criminalised and sanctioned in the criminal procedure before the court.</p>
<p>Finland</p>	<p>The Finnish Competition and Consumer Authority is competent to:</p> <ul style="list-style-type: none"> ■ Investigate restraints on competition and the effects thereof, ■ Initiate the necessary proceedings to eliminate the restraint on competition or the harmful effects or association of undertakings restraints competition as provided by Articles 101 or 102 TFEU. <p>The Finnish Competition and Consumer Authority investigates either on its own initiative or on the basis of complaints. The complaints can be made anonymously on the website of the Finnish Competition and Consumer Authority.</p>	<p>The Finnish Competition and Consumer Authority can:</p> <ul style="list-style-type: none"> ■ Order that the undertaking or association of undertakings terminate the conduct prohibited Articles 101 or 102 TFEU ■ Oblige the undertaking to deliver a product to another undertaking on similar conditions as offered by that undertaking to other undertakings in a similar position. <p>Finnish Competition and Consumer Authority shall make a decision on the principal issue or a proposal within 60 days of issuing an interlocutory injunction.</p>

Member State	Role, competence and Investigation procedures	Decision Making
		<p>The undertakings have a right to a hearing. Finnish Competition and Consumer Authority may impose a periodic penalty payment to enforce the conditions it has set. Finnish Competition and Consumer Authority communicates the decision to the parties and it is also published on its website.</p> <p>The Finnish Competition and Consumer Authority decides on the substance of the case and then refers the case to the court, which then decides on the fine.</p>
<p>France</p>	<p>The Competition Authority has specific investigation powers, the power to control the execution of its own decisions, and a decision power as regards merger controls. It can initiate an investigation under the impulse of its general rapporteur, or upon the request of other ministries.</p> <p>The Competition Authority can modify the interested parties during the investigation.</p>	<p>Once the Competition Authority issues a notification of damage the undertakings have the right to submit a written statement in response within a delay of two months.</p> <p>The rapporteur then addresses a report to which the parties can respond within two months.</p> <p>The Competition Authority gives a ruling – either in section or in plenary – at the end of a hearing.</p> <p>The Competition Authority can impose injunctions (including with a periodic penalty payment), and an immediate financial sanction. It can also adopt a decision accepting the commitments proposed by the parties to restore competition.</p>
<p>Germany</p>	<p>Unless the competence for a particular matter is assigned to a particular cartel authority, the Bundeskartellamt shall exercise the functions and powers assigned to the cartel authority. In all other cases, the supreme Land authority competent according to the laws of the Land shall exercise these functions and powers.</p> <p>During the investigation, the competition authorities can:</p> <ul style="list-style-type: none"> ■ Request information from undertakings and associations of undertakings upon a concrete initial suspicion for competition restraints ■ Inspect and examine business documents upon a local judge court order and to seize evidence. <p>The Bundeskartellamt can open administrative offence proceedings in particular in the case of cartel agreements which lead to particularly severe distortions of competition. The cartel authority can initiate a proceeding on its own initiative or under a request.</p>	<p>The decisions are adopted in a manner similar to judicial proceedings by twelve decision divisions, which are organised according to economic sector.</p> <p>The decision must be a majority decision. The Decision Division decides independently.</p> <p>The Bundeskartellamt can act against anticompetitive agreements and abusive conduct by:</p> <ul style="list-style-type: none"> ■ By administrative proceedings the authority can impose an order to discontinue the conduct objected to and; ■ By imposing fines in administrative offence proceedings
<p>Greece</p>	<p>A 2011 reform introduced the prioritisation of cases, the administrative and criminal penalties for violations, as well as several procedural rules.</p>	<p>Once the investigation is concluded, the General Directorate of Competition assesses the findings and proceeds, in cooperation with one</p>

Member State	Role, competence and Investigation procedures	Decision Making
	<p>The investigative powers of the Directorate in charge of investigations are generally in line with those of other European NCAs.</p> <p>Investigations can be initiated either ex officio or upon a complaint submitted by a third party (usually competitor, supplier or customer).</p>	<p>of the commissioners, to draft a recommendation. Such recommendation is notified to the parties involved, in order to express their position both orally and in writing before the Hellenic Competition Commission (right of prior hearing). After 3 months approximately the Hellenic Competition Commission issues its Decision, which may or may not accept the Statement of Objections, and publishes a press release.</p>
Hungary	<p>The role of Hungarian Competition Authority is to enforce the competition rules to increase the long-term consumer welfare and competitiveness at the same time. Anyone can lodge a notification or complaint to the Hungarian Competition Authority, by means of submitting a special form.</p>	<p>The Competition Council shall adopt its decision in panels composed of three or five members. There is no administrative appeal against the Hungarian Competition Authority decisions.</p>
Ireland	<p>The Irish Competition Authority has extensive procedural competences, such as:</p> <ul style="list-style-type: none"> ■ The power to conduct investigations; ■ To carry out searches; ■ To seize and retain original documents. <p>The only procedural options concluding an investigation which may be taken directly by the Competition Authority are either to close the case without further action or to negotiate an out of court settlement</p> <p>The Competition Authority is competent to initiate an investigation into a breach of competition law, ex officio or on the basis of a complaint</p>	<p>The Irish Competition Authority does not have the competence to make a finding of an infringement of competition law. If the Irish Competition Authority concludes there has been an infringement of competition law, it can initiate summary proceedings in the District Court. In the case of serious (indictable) offences, the Competition Authority's file is referred to the Director of Public Prosecution ("DPP") who may bring proceedings in the Central Criminal Court. Alternatively, the Irish Competition Authority can bring civil court proceedings before the Circuit Court or High Court for an injunction or declaratory order.</p>
Italy	<p>The Italian Competition Authority is an independent agency which acts as both an investigative and a decision-making body. The Italian Competition Authority has competence to begin an investigation either on its own initiative or on the basis of a complaint lodged by an individual having a legitimate interest. The Italian Competition Authority has key investigatory powers, such as:</p> <ul style="list-style-type: none"> ■ To request specific documents; ■ To carry out compulsory interviews with individuals; ■ To do unannounced search of business premises or a hearing; ■ To carry out an unannounced search of business premises amongst others. 	<p>Decisions are adopted by majority voting.</p> <p>After the Italian Competition Authority issues the statement of objections ("SO") by which it notifies the companies involved and any complainant of its objections against the cartel members, the parties can submit their comments and also request a hearing. After the final hearing, the Italian Competition Authority issues a decision. If the infringement is serious the Italian Competition Authority can impose a fine. Decisions are administrative acts. The Italian Competition Authority must set out the principles of law and facts upon which its decision is based in a concise, clear, and relevant manner</p>

Member State	Role, competence and Investigation procedures	Decision Making
<p>Latvia</p>	<p>The National Competition Authority of Latvia's role and competences relate to:</p> <ul style="list-style-type: none"> ■ Monitoring that competition law rules are observed by market participants; ■ Supervising compliance with the Advertising Law within the limits of its competence; ■ Examining notifications regarding agreements by market participants; ■ Adopting decisions with respect thereto; ■ Examining notified mergers; and ■ Cooperating, within the scope of its competence, with relevant foreign institutions. <p>During the investigation, the National Competition Authority of Latvia collects all necessary files, and the undertaking concerned has the right to access the file (except confidential information) and submit their comments on the file.</p>	<p>The Council of National Competition Authority of Latvia is its the decision making body.</p> <p>The National Competition Authority of Latvia has up to two years from the date the investigation is opened to provide a decision. However, in average the investigation of the case takes approximately nine months.</p>
<p>Lithuania</p>	<p>Since a 1999 reform, the Competition Council has been an independent body responsible for the safeguarding effective competition.</p> <p>It undertakes measures against anti-competitive conduct of private undertakings and public bodies and it is the designated Competition Council for the application of Articles 101 and 102 TFEU.</p> <p>The Council has the right to initiate an investigation on its own initiative or on the basis of notifications and complaints.</p> <p>The Council has extensive investigatory powers, such as:</p> <ul style="list-style-type: none"> ■ Requesting information from undertakings under investigation; ■ Searching any premises with or without notice; ■ Inspecting and copying documents; ■ Seizing evidence; ■ Sealing the premises used by undertakings; ■ Obtaining oral and written explanations; and ■ Requiring individuals to appear at the offices of the Council. 	<p>Decisions are adopted by majority voting, with participation of at least three members of the Competition Council, including the Chairperson.</p> <p>The undertakings have access to the investigation file, but not to confidential data.</p> <p>They also have the right to a hearing before the final decision (the hearing can be public or closed under request).</p> <p>The Competition Council can:</p> <ul style="list-style-type: none"> ■ Impose sanctions, ■ Refuse to impose sanctions where there is no basis established by the Law, ■ Terminate the procedure regarding the violation of the Law where there is no violation, or ■ Conduct a supplementary investigation. <p>There is no administrative appeal procedure.</p>
<p>Luxembourg</p>	<p>Its role is to guarantee free competition and to ensure the proper functioning of markets. It is also responsible for the implementation of Articles relating to cartels and the abuse of dominant position. The investigation and adjudication on cartels are made on the basis of administrative law procedures.</p> <p>The Council has the competence to begin an investigation either on its own initiative or on the basis of a complaint lodged by an individual having a legitimate interest.</p> <p>Following a preliminary investigation, if the need arises, the Council may ask for information from the relevant undertakings or their employees. The Council can also carry out searches, proceed to the seizure of documents and ask for an expert opinion.</p>	<p>Following the investigation, the parties are called for a hearing.</p> <p>Following the hearing, the Council will either decide to close the file in the absence of proof of anti-competitive practice or take action, by levying a fine against all or some of the undertakings or by requesting the undertakings to terminate the practice, with or without a financial penalty.</p>

Member State	Role, competence and Investigation procedures	Decision Making
<p>Malta</p>	<p>The responsibility of the Office for Competition is to promote and enhance effective competition in all sectors of the economy. Thus the office shall investigate, determine and suppress:</p> <ul style="list-style-type: none"> ■ Agreements between undertakings, ■ Decisions of associations and concerted practices which restrict competition, the most harmful being cartels involving price-fixing, market-sharing and the allocation of production and sales quotas; ■ And abusive conduct by dominant undertakings. 	<p>Information is not currently available.</p>
<p>Netherlands</p>	<p>Investigations are initiated on the basis of third-party complaints, requests for leniency by a party to an agreement or concerted practice, or on the initiative of the Netherlands Consumer Authority. Changes in procedures and powers of the different divisions of the Netherlands Consumer Authority will be brought by a bill which will enter into force at the beginning of 2014 at the earliest.</p>	<p>All decision-making powers have been conferred to the Management Board. When the Netherlands Consumer Authority pursues a case, it then sends a report to the undertakings concerned. The addressees have access to the documents and may submit a written reply. In practice, addressees of the report are also invited to an oral hearing. The legal service of the Netherlands Consumer Authority subsequently reassesses the case and the Netherlands Consumer Authority issues a decision. A decision imposing an administrative fine, or an order subject to periodic penalty payments, shall be available for inspection at the Netherlands Consumer Authority after it has been announced. The Netherlands Consumer Authority may in addition to the imposition of administrative fines, impose an order subject to periodic penalty payments and impose a binding instruction to comply with the Act in the event of a violation of article 6 (1) or 24 (1) of the Act.</p>
<p>Portugal</p>	<p>The Portuguese Competition Authority has regulatory powers on competition across all sectors of the economy, including the regulated sectors. The Portuguese Competition Authority may define priorities in the handling of cases, having the power to choose which cases to pursue. Investigations are initiated ex officio or following a complaint. Any natural or legal person may denounce a prohibited practice by filling in the form available on the Portuguese Competition Authority's website. Once the Portuguese Competition Authority finds sufficient grounds to initiate proceedings, the investigation comprehends two separate stages.</p> <ul style="list-style-type: none"> ■ The Portuguese Competition Authority collects evidence and undertakes inquiries needed to determine the existence of the infringement and to identify those 	<p>The Portuguese Competition Authority final decision may:</p> <ul style="list-style-type: none"> ■ Close the case by imposing conditions; ■ Impose a sanction in the context of settlement proceedings; ■ Close the case without any conditions or sanctions being imposed; <p>Declare the existence of a prohibited practice in which case the decision may be accompanied by an admonition, the imposition of sanctions (including fines, accessory sanctions and periodic penalty payments) or the imposition of behavioural and structural measures (the latter as ultima ratio).</p>

Member State	Role, competence and Investigation procedures	Decision Making
	<p>involved.</p> <ul style="list-style-type: none"> ■ The party can submit comments and attend a hearing. 	
Poland	<p>The President of the Office of Competition and Consumer Protection is responsible for the competition and consumer protection matters. Since 2007 proceedings on anticompetitive practices are initiated by the President of the Office of Competition and Consumer Protection ex officio, regardless of the existence of a complaint/ motion to launch the proceedings.</p> <p>There are two types of proceedings envisaged by the Act 2007:</p> <ul style="list-style-type: none"> ■ The explanatory investigation ■ The antimonopoly proceedings. <p>Both types of proceedings in cases on competition restricting practices are instituted only ex officio.</p> <p>Any natural or legal person may submit to the President a written notification on a potential existence of competition-restricting practices, however the President is not bound by it to launch an investigation.</p>	<p>The investigation end either by the issuance of a decision or by the discontinuance of proceedings.</p> <p>In cases of anticompetitive practices, there are three types of final decisions:</p> <ul style="list-style-type: none"> ■ Decision recognising that the practice restricts competition and ordering to refrain from it, if an infringement of a prohibition; ■ Decision declaring that the practice, which no longer infringes restricted competition and was discontinued; ■ Commitment decision. <p>In the course of the investigation the President may also adopt a temporary decision, which obliges the undertaking to cease certain actions in order to prevent those threats.</p>
Romania	<p>The Competition Council can begin an investigation either ex officio or on the basis of a complaint lodged by an individual having a legitimate interest.</p> <p>Usually, an investigation starts with an unannounced inspection conducted at the headquarters of the concerned undertakings. The investigation finishes when a Statement of Objections is sent to the investigated parties.</p>	<p>The Competition Council will either decide to close the file or take action, by:</p> <ul style="list-style-type: none"> ■ Imposing a fine against the investigated undertakings, ■ Requesting the undertakings to terminate the practice, with or without a financial penalty; ■ Ordering interim measures; ■ Accepting commitments or ■ Formulating recommendations. <p>The decision is communicated to the parties and a confidential version thereof is published on the website.</p>
Slovakia	<p>The Antimonopoly Office of the Slovak Republic is responsible for the implementation of relevant articles relating to cartels, abuse of dominant position and merger control. Investigations are made in the public interest, on the basis of administrative law procedures.</p> <p>The Antimonopoly Office of the Slovak Republic is competent to conduct investigations in the relevant market. The AMO can begin an investigation on its own incentive or if petitioned by a participant in the proceedings.</p> <p>Following a preliminary investigation if the Antimonopoly Office of the Slovak Republic decides to continue the investigation, it has the right to request information from the relevant undertakings or their employees and it is also able to carry out searches, proceed</p>	<p>The Antimonopoly Office of the Slovak Republic is competent to and issue decisions on imposing obligations to the undertakings in order to remedy unlawful affairs as well as to issue an opinion according to special legislation.</p> <p>If there are sufficient grounds for anti-competitive practice, the concerned undertakings will be notified and they have the right to access the file.</p> <p>A party to the proceedings has a right to lodge an appeal if it disagrees with a decision of the Antimonopoly Office of the Slovak Republic issued in the first-instance proceedings.</p>

Member State	Role, competence and Investigation procedures	Decision Making
	to the seizure of documents and ask for expert opinion.	
Slovenia	<p>The Slovenian Competition Protection Agency is competent to issue ex officio an order on the commencement of procedure. Information on infringements might also be provided by the parties but the Slovenian Competition Protection Agency is not obliged to start a procedure.</p>	<p>Decisions on individual cases are rendered by the Panel and its Chairman.</p> <p>Before the final decision parties have the right to review documents of the case file and make transcripts and copies at their own expense, unless these are confidential. The Slovenian Competition Protection Agency must set a reasonable time-limit within which the parties may provide their comments on the summary. The time-limit may not be longer than 45 days⁵⁸. The Decision is published on the Slovenian Competition Protection Agency's webpage.</p> <p>The Slovenian Competition Protection Agency must adopt a decision within two years after the start of the procedure.</p>
Spain	<p>The Markets and Competition National Commission became operational on 7 October 2013 and therefore its activity so far has been very limited. The Markets and Competition National Commission's role is to ensure an effective competition across all production sectors and markets to the benefit of consumers and users.</p> <p>Regarding investigations, the case preparation and handling is done by the Competition Directorate and the case resolution by the Council.</p> <p>The Competition Directorate can initiate proceedings at its own initiative or upon request of the Council or on the basis of a complaint submitted by any natural or legal person.</p>	<p>The Council is the decision-making body and it is in charge of resolving and ruling on the matters assigned and on infringement proceedings.</p> <p>The Council may act in two formations: Plenum (Pleno) or Chamber (Salas).</p>
Sweden	<p>The National Competition Authority is competent to supervise the application of the public procurement rules in Sweden and competition rules. On the latter it is able to require:</p> <ul style="list-style-type: none"> ■ Undertakings or other parties to supply information, documents or other material, ■ Persons who are likely to be in a position to provide relevant information to appear at a hearing, ■ A municipality or county council engaged in activities of an economic or commercial nature to account for the costs of and revenues from these activities. <p>The National Competition Authority may also carry out inspections on the premises of an undertaking when it considers the prohibitions of Articles 101 and 102 TFEU have been infringed, or obligations imposed have not been complied.</p>	<p>The party inspected has the right to a legal representative and the National Competition Authority may request assistance from the Enforcement Service in carrying out the measures.</p> <p>The undertakings have right to access the files and to a hearing.</p> <p>All documents submitted are publicly available, except for confidential information.</p>

⁵⁸ Article 36 of the Act – 1.

Member State	Role, competence and Investigation procedures	Decision Making
<p>United Kingdom</p>	<p>The Office of Fair Trading and the Competition Commission are currently the national competition authorities however they will be replaced by the Competition and Markets Authority which will be fully operational on April 1st 2014.</p> <p>The purpose of the Office of Fair Trading is to make markets work well for consumers by enforcing competition and consumer protection rules. The Competition Commission cannot initiate investigations. Investigations are referred to the Competition Commission by the Office of Fair Trading, by sectorial regulators or by the Secretary of State. Moreover, the Competition Commission has regulatory functions stemming from various legislative instruments.</p> <p>When a case is referred to the Competition Commission, a group (2 to 6 members) is formed and appointed to investigate.</p> <p>The Competition and Markets Authority board will be responsible for overall strategy, performance, rules and guidance.</p>	<p>Decisions on market cases will be the responsibility of the Board of the Competition and Markets Authority whereas decisions in regulatory appeals will be taken by panels of experts.</p> <p>Once the Office of Fair Trading conducts an investigation, written inquiry will be issued. When the Office of Fair Trading seeks to issue an infringement finding, it will provide the interested parties with a "statement of objections" and will give them the opportunity to rebut the allegations made.</p>

Annex 3 Interim measures for judicial review

Table A3.1 provides an overview of the Interim Measures available per Member State

Table A3.1 Interim Measures for Judicial Review Cases

Member State	Interim Measures
Austria	No interim measures can be granted by the court as judicial review is based on grounds of law only. The filing of the appeal has a suspensory effect however.
Belgium	A request for suspensory measures can be made at any stage of the proceedings. This request is introduced by a separate appeal with the judge dealing with the case. The party requesting suspensory measures has to demonstrate that it has a legitimate interest and that there is a prima facie case and a degree of urgency .
Bulgaria	Suspension if the implementation of the decision would cause significant and irreparable harm to the party .
Croatia	Interim measures to avoid serious and irreparable damage .
Cyprus	A provisional order is granted only if the applicant shows manifest illegality or the likelihood of irreparable damage
Czech Republic	Threat of serious harm to parties in a judicial proceeding
Denmark	Interim measures can be issued but these are rare in competition cases
Estonia	Interim relief available
Germany	Suspensory measure of NCA decision
Greece	Enforcement may be suspended, in whole or in part, for serious reason , following application of the interested party, by the court
Hungary	Suspend the execution of the NCA decision.
Finland	Interlocutory injunction if a restraint on competition must be made at once .
France	Suspensory measure of NCA decision
Ireland	Injunctive relief can be granted by the Circuit Court or High Court on an interim basis. Three types of injunction are available: (i) interim injunction; (ii) interlocutory injunction; (iii) injunction of definite or indefinite duration.
Italy	Stay of execution of NCA decision. Fundamental conditions for the grant of a stay of execution of the NCA's decision are: (i) likelihood of success in the action undertaken (fumus boni juris) and urgency (periculum in mora).
Latvia	Legislation does not allow the courts to adopt any interim measures in infringement cases of competition rules
Lithuania	In urgent cases, interim measures can be awarded to prevent a substantial or irreparable damage to the interests of economic entities or the public .
Malta	The Appeals Tribunal is not authorised to adopt interim measures ex officio. It can only uphold or reject the NCA's interim measures.
Netherlands	The court which has or may acquire jurisdiction in the proceedings on the merits may, if an appeal against an order has been lodged with the court or prior to a possible appeal to the court, on request, grant a provisional remedy where because of the interests involved, speed is of the essence
Poland	Possible to apply for interim measures in competition law cases. Legal interest in granting the interim relief exists when the lack of it prevents or seriously impedes enforcement of the judgment or in any other way prevents or seriously impedes the attainment of the objectives of the proceedings in question .
Portugal	Suspension if the applicant will suffer considerable harm .

Member State	Interim Measures
Romania	Evidence that the alleged anti-competitive practice may cause serious and irreparable harm to competition , the court may order interim measures for a limited period of time but not later than the moment a final decision is adopted by the court.
Slovak Republic	A suspension of the effects of the NCA decision can be requested. This can be done if the 'immediate execution of the objected decision could cause a serious harm.'
Slovenia	Interim measures available, including suspension of NCA decision, in accordance with the principle of proportionality considering the public benefit and the benefit to the parties.
Sweden	Interim measures available
United Kingdom	In order to grant an injunction, the court weighs the damage caused by an injunction to the defendant against the damage caused by the claimant if the injunction is refused.

Annex 4 Court Hearings and Enforcement Orders

A4.1 Court Hearings in Member States

Member State	Judicial Review	Follow On
Austria	<p>Appeal proceedings do not comprise oral hearings.</p> <p>The court judgment is not pronounced in public but served to the parties in the post.</p>	<p>Written briefs and oral hearings exist.</p> <p>Oral hearings are part of the proceedings at second instance but not third instance.</p> <p>Judgments are usually served to the parties by postal delivery.</p>
Bulgaria	<p>Written and oral hearings.</p>	<p>Hearings are oral and generally in public</p>
Croatia	<p>Oral, immediate and public hearings.</p> <p>The judgment is publicly pronounced in the oral hearing in which the procedure has been closed.</p> <p>In situations where the court cannot adopt the decision immediately after the procedure has been closed (due to the complexity of the matter) the pronouncing of the judgment may be postponed for maximum eight days after the proceedings have been closed, and the date of pronouncing of the judgment must be determined immediately</p>	<p>As a rule, oral, immediate and public hearings.</p>
Cyprus	<p>Hearing of all proceedings public but the Court may hear any proceedings in the presence only of the parties.</p>	<p>The norm is that the hearings of all courts shall be public except in special cases.</p>
Czech Republic	<p>Proceedings are generally in writing.</p> <p>The court may order oral hearings if it is necessary or suitable for the case.</p> <p>Judgment pronounced in public.</p>	<p>Proceedings are generally oral.</p> <p>Judgment pronounced in public.</p>
Denmark	<p>Parties can argue their case in public based on written submissions.</p> <p>The judgment is delivered in writing.</p>	<p>Proceedings are conducted orally and on the basis of written submission and pleas. When the court is ready to deliver its decision, it provides the parties with a written copy and in principle reads out the conclusion</p>
Finland	<p>Market court proceedings are mainly written.</p> <p>A court session is not necessary in all cases. An oral hearing is used to establish the facts of</p>	<p>Oral and in writing</p> <p>Supreme court procedure is often written. Oral hearings are only undertaken in</p>

Member State	Judicial Review	Follow On
	<p>the case</p> <p>Decision normally delivered in writing.</p>	<p>the Supreme court where necessary.</p>
<p>Germany</p>	<p>Oral hearing at first and second instance.</p> <p>A decision may be taken without a hearing with the consent of the parties.</p> <p>At second instance normally one hearing takes place.</p> <p>No hearing takes place usually with the Federal Court of Justice.</p>	<p>In principle the parties shall submit their arguments regarding the legal dispute to the court orally. The court may give a decision without an oral argument provided that the parties have consented.</p>
<p>Greece</p>	<p>The sittings of all courts shall be public except when the court decides that publicity would be detrimental to the good usages or that special reasons call for the protection of the private or family life of the litigants.</p> <p>Moreover, every court judgment must be specifically and thoroughly reasoned and must be pronounced in a public sitting</p>	
<p>Ireland</p>	<p>Hearings are held in public with written and oral submissions.</p>	<p>The same as Judicial Review.</p>
<p>Italy</p>	<p>Hearings are normally public.</p>	<p>Hearings are normally public.</p>
<p>Latvia</p>	<p>Oral hearing at First Instance.</p> <p>Supreme Court adopts the judgment in written procedure.</p> <p>Judgment is sent to the parties usually within one month.</p> <p>Non confidential versions of the judgment are made public.</p>	<p>Oral hearings are the usual form in which the courts review cases in civil matters. However, the Supreme Court may use only the written procedure. Judgments of the court are made public</p>
<p>Malta</p>	<p>Proceedings are initiated in writing but mainly through oral hearings.</p> <p>The judgment is pronounced in writing though the operative part is read out in a public hearing.</p>	<p>Though the court proceedings start with a written application, the process continues mainly through oral hearings.</p>
<p>Netherlands</p>	<p>Hearings held in public.</p>	<p>The hearings shall be held in public. However, the courts may determine that the hearing in court will be conducted wholly or partly with closed doors. The judgment is given orally and in writing</p>

Member State	Judicial Review	Follow On
Poland	The hearings of the court are oral and generally public unless the court decides to make them confidential	Same as for judicial review.
Portugal	Court may issue a decision by simple dispatch without recourse to a court hearing. Should there be a hearing it shall be an oral and public hearing	Court hearings are oral and public . The procedure to the Supreme Court of Justice is written but the Court may, ex officio or at the request of any party, exceptionally invite the parties to present their final allegations at an oral hearing.
Romania	All hearings are public ; nevertheless, if the court considers that the parties' interests might be harmed in any way because of this, it orders that the hearings be conducted in private. The hearings have an oral character, but the court may order the parties to provide a written version of the pleadings delivered orally	Same as judicial review.
Sweden	Procedural provisions allow procedures solely in writing if the parties agree but this is unusual. At least one oral hearing per instance is expected. All court judgments are made public in writing.	Same as with judicial review cases.
Slovak Republic	Proceedings before the Regional Court are usually oral . The court can decide that an oral hearing is not required and conduct the whole proceedings in writing. The decision is always pronounced in public. Proceedings before the Supreme Court are always written as a rule unless the public interest requires the opposite. The court can arrange an oral hearing if it considers it necessary.	Proceedings before first instance courts usually include oral hearings. Proceedings at second instance courts can also include oral hearings but only if this is necessary.
Slovenia	Court in principle issues a ruling without a hearing .	Hearing before the court is public unless there are compelling reasons that require otherwise. Court hearings are oral in all instances. The judgment is pronounced in public. The reasoning of the judgment is not always publicly pronounced, depending on whether the main hearing was public or behind closed doors.
United Kingdom	Oral Hearing	Same as judicial review.

A4.2 Enforcement orders in Member States

Table A2.1 Enforcement Orders in Member States for follow on actions

Member State	Enforcement
Austria	<p>When civil courts rule at the last instance on the issue of compensation for damages, the defendant is obliged to pay the damages awarded within 14 days. If the defendant does not pay, the claimant can enforce the judgment (or settlement etc.) by using it as an executory title in front of the respective enforcement court. Enforcement of court orders / judgments is based on the Act on the Enforcement of Judgments.</p> <p>To initiate the relevant proceedings, the claimant must file an execution request with the enforcement court, which is a sub-division of the respective district court. The claimant can request different kinds of execution, e.g. salary execution or execution on claims, movable property or real estate. If the claimant requests enforcement, e.g. against the salary of the debtor, the execution request must be brought at the district court where the claimant is registered. If the claimant requests enforcement against the debtor's real estate, the request must be submitted to the district court where the property is located.</p> <p>Once the enforcement court grants the request for enforcement, the claimant, via bailiffs, can seek compensation from the debtor's assets, e.g. by seizure, public auction etc..</p>
Belgium	<p>Compulsory enforcement if the condemned party fails to voluntarily comply with a judgment. This requires an enforceable title such as a judgment or a notarial deed. The title is executed by a bailiff. The claim is enforced against the debtor's assets and is referred to as attachment.</p>
Bulgaria	<p>Depending on the financial situation of the parties and other circumstances the court can decide to delay the execution of the judgment or to allow its execution in parts (in instalments).</p> <p>In cases where the defendant fails to comply with the judgment in a timely and voluntary manner, the rules of civil procedure provide for a possibility for a plaintiff to apply for an executory order. The executory order is then presented to the judicial executors for forced execution upon the defendant.</p>
Croatia	<p>If the defendant proceeds with no voluntary compliance with the judgment awarding damages on the basis of a follow on claim after the deadline for appeal has lapsed, the plaintiff must initiate proceedings for compulsory execution of the judgment.</p>
Cyprus	<p>There are alternative methods of enforcement of judgments, allowing the creditors to choose/decide which of the following methods is applicable for their case/situation.</p> <p>A. Order for payment of the debt by monthly instalments</p> <p>B. Writ of movables</p> <p>A writ of movables can be considered under certain circumstances as an effective method for the execution of a judgment. Basically it is an order of the Court allowing the Court Bailiffs to take possession of movables and sell them by private auction for the benefit of the Creditors. However, third parties may intervene if they have a claim over the ownership.</p> <p>C. Writ for the sale of land (memo)</p> <p>Creditors have also the choice and right to proceed against immovable property of the judgment debtor registered in his name.</p> <p>D. Writ of attachment</p> <p>In a case where a judgment debtor has no movable or immovable property there is an alternative way to execute a judgment, called "writ of attachment", which is applicable where a judgment debtor may be beneficially interested in any money in the hands of other persons, not parties necessarily to the proceedings. The writ of attachment shall render the property of the judgment debtor, which is in the hands of such other person, for the satisfaction of the judgment debt.</p>
Czech Republic	<p>Within the procedure governed by the CPC, an action for enforcement is addressed to the district court which is territorially competent according to the place of residence/seat of the debtor. The applicant himself/herself must determine which property of the debtor should be affected. The court decides upon the enforcement which is then performed by employees of the court (bailiffs).</p>

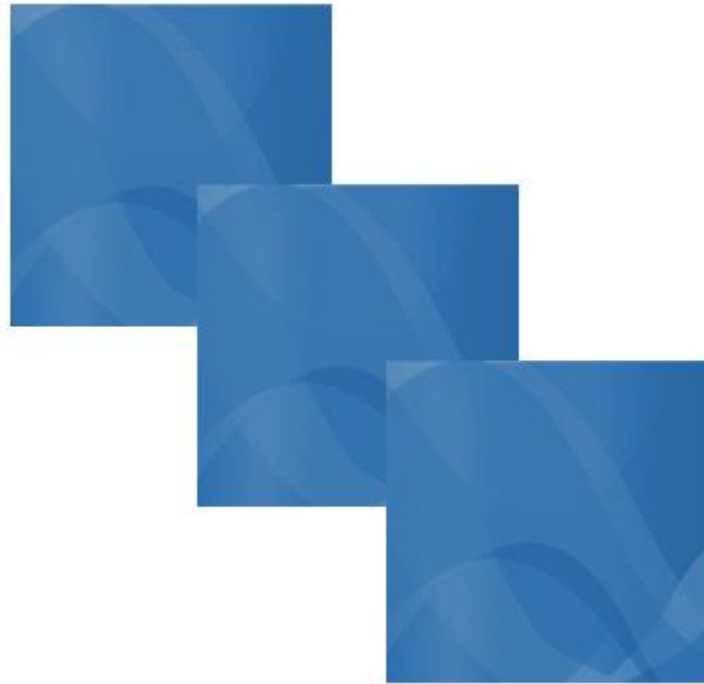
Member State	Enforcement
	According to the Act on Judicial Executors, the applicant lodges a proposal to initiate execution with an executor (executors are not employees of any courts; they are associated in the Chamber of Executors). The executor addresses the proposal to a court of execution which consequently issues an order to perform the execution. The executor then seeks for the property of the debtor and is entitled, contrary to the regime under the CPC, to perform more ways of execution at the same time (seizure and sale of movable properties, sale of real estates, deductions from wages etc.). Therefore, in general, this type of executions is deemed to be more efficient.
Denmark	Judgments take effect unless appealed. Subsequently, it can be enforced by the bailiff's court on the request of the winning party and any awarded compensation or rights collected and enforced in the same manner as any other debt or rights
Estonia	The rules applicable to the enforcement of court judgments (the proceedings initiated by the winning party when the losing party does not immediately fulfil the obligations imposed by the court in the decision) are regulated in the Code of Enforcement Procedure. The forced execution of judgments is carried out by bailiffs upon the application for enforcement lodged by the winning party. Enforcement costs including the bailiff's fee and the costs necessary for enforcement proceedings are collected by the bailiff from the debtor. In case of financial claims, the property of the debtor is seized and the creditor is satisfied from the proceeds of the sale realised in the course of an electronic public auction. Complaints against the actions or decisions of a bailiff should be first submitted to the bailiff. If the participant in the enforcement proceedings is not satisfied with the bailiff's decision, it can contest it before the country court in the jurisdiction where the bailiff's office is located within 10 days of the delivery of the decision. Such appeals are heard by the court within 15 days as of the filing of the appeal. The court takes the decision on the suspension of enforcement measures for the period of adjudication of the appeal.
Finland	In case the defendant refuses to pay for the compensation order by the non-appealable judgment, the claimant can appeal for the enforcement of judgment.
Germany	Under certain circumstances a judgment is to be declared provisionally enforceable against provision of security (Section 708-710 Code of Civil Procedure). The enforcement is executed by the bailiff. This implies that there is an enforceable execution copy of the judgement according to Section 724 (1) Code of Civil Procedure. The enforceable copy is issued by the records clerk of the registry of the court of first instance and, should the legal dispute be pending with a court of higher instance, by the records clerk of that court's registry.
Greece	Substantive conditions for enforcement are the existence of a legitimate interest, i.e. the need for the act of enforcement and the legal protection it provides and the validity of the claim. The purpose of the law of enforcement is to balance conflicting interests between creditors on the one hand and debtors or third parties on the other in the circumstances. The criteria which the courts apply in order to grant an enforcement measure are: <ul style="list-style-type: none"> ■ swift satisfaction of creditors at little cost; ■ protection of the debtor's rights of personality and legitimate interests in general; ■ coincidence of the creditor's and the debtor's interests as regards the need to achieve the best possible price at auction; ■ protection of third party interests.
Hungary	The court's judgment shall be executed by the general rules and principles of the Act LIII of 1994 on Judicial Execution. All courts have the right to decide about enforcement. The general procedure shall be done as follows: The final decision shall be issued for execution at the competent court with the form regulated in the Judicial Execution Act. The court assigns the execution to the competent bailiff.
Ireland	There are a number of different ways of enforcing a judgment. The creditor chooses the means and can use several different means at the same time. In general, once the creditor has a judgment order, the judgment can be enforced. Enforcement orders can be issued by court offices – the creditor does not have to go back to court for the order. Creditors

Member State	Enforcement
	<p>have 12 years from the date of the judgment to look for enforcement orders. The following are the main ways of enforcing judgments:</p> <ul style="list-style-type: none"> ■ Registration of the judgment ■ Execution against goods ■ Judgment mortgage ■ Instalment orders, followed if necessary, by committal orders ■ Attachment of earnings ■ Attachment of debts ■ The appointment of a receiver ■ Bankruptcy proceedings
Italy	<p>Enforcement of court judgments is granted according to the ordinary provisions of the Italian Civil Procedure Code by ordinary civil Tribunals. Italian judgments are ordinarily enforceable only if issued on appeal or if no longer subject to appeal. According to Article 282 of the Italian Code of Civil Procedure even a decision rendered at the end of a first degree proceeding has executory effect, save that the defendant has attacked it and the second instance court has suspended the executory effect of the first instance decision during the appeal proceeding.</p> <p>There are three types of Enforcement proceedings:</p> <ol style="list-style-type: none"> 1. Enforcement of an obligation to pay a sum of money; 2. Specific Enforcement of an obligation to deliver a movable or immovable property; 3. Enforcement of an obligation to perform (or not to perform) a specific act. <p>The most relevant of the three ordinary types of enforcement is surely the Enforcement of an obligation to pay a sum of money, which is carried out through the distraint and forced liquidation of assets belonging to the debtor.</p>
Latvia	<p>If the judgment of the court is not complied voluntarily the judgment can be enforced by the bailiff. The bailiff has rights to arrest and seize the property of the persons (including bank accounts, real property, vehicles, etc.).</p>
Lithuania	<p>If the addressee of a judicial decision does not implement the decision voluntarily, the creditor in question is entitled to apply to the court for the issue of an enforcement order. The enforcement order is then submitted to a bailiff, who acts at a creditor's request to ensure that a judicial decision which is not implemented voluntarily is implemented by means of coercive enforcement measures.</p> <p>There are different measures available, such as recovery from the debtor's funds and rights to assets or property, recovery from the debtor's assets and monies held by other persons, recovery from the debtor's wages and salaries, pensions, grants or other income, confiscation from the debtor of certain items referred to in the judicial decision and their transfer to the claimant, administration of the debtor's assets and use of income to reimburse the claimant, obligation on the debtor to perform or refrain from certain actions, and other measures defined by the law.</p>
Malta	<p>If the defendant does not comply voluntarily with the final judgment, the plaintiff can file an application to the same court, which dealt with the case, to enforce the judgment according to the COCP. Based on the court's decision, a bailiff will be appointed to enforce the judgment.</p>
Netherlands	<p>Bailiffs are authorised to levy enforcement. Two conditions must be satisfied in order to use the coercive measures: one must be in possession of a writ of execution, which is an enforceable judgment, and this writ must first have been notified to the party upon whom enforcement will be levied.</p> <p>The main coercive measure is the executory seizure under a writ of attachment. Executory attachment can be levied on: movable property that is not registered property; bearer</p>

Member State	Enforcement
	<p>rights or rights to order, to registered shares or other registered securities; under a third party (by garnishee order); on immovable property; on ships and on aircrafts.</p> <p>In an enforcement dispute the debtor may attempt to prevent the enforcement. The debtor may not make any further substantive objections to the ruling at this stage. Enforcement disputes are usually handled in interlocutory proceedings. The court may, for instance, suspend execution for a certain period or lift the attachment. The District Court has jurisdiction for all enforcement disputes, regardless of which judge pronounced the ruling to be enforced. The court is competent even if the Courts of appeal or Supreme Court delivered the ruling.</p>
Poland	<p>Execution proceedings are conducted before district courts and bailiffs. They are initiated on the basis of a writ of execution. Writ of execution is an enforcement title, which is <i>inter alia</i>, a judgment of the court, with an enforcement clause. The enforcement clause is awarded by the court on the creditor's motion. The writ of execution entitles a bailiff to commence the execution of the judgment.</p>
Portugal	<p>Specific rules regarding anti-trust cases do not exist in the Portuguese legal framework. The Code of Civil Procedure provides a separate section dedicated to judicial enforcement actions (as opposed to the so-called declarative actions, for the recognition of rights and the imposition of injunctions).</p>
Romania	<p>There are no special provisions within the Law on Competition concerning the rules applicable to the enforcement of court judgments in case of follow-on proceedings. Therefore, the general rules contained within the Civil Procedure Code are applicable in such cases.</p>
Slovak Republic	<p>Judgement issued in civil proceedings are enforced by independent executors, state entrusted professionals that perform a forced execution of different enforcement titles, including civil court decisions. The executor carries out enforcement activities independently. In the exercise of enforcement activities is bound only by the Constitution, laws, other legislation and court decisions issued in the enforcement proceedings and enforcement proceedings.</p> <p>Act No. 233/1995 Coll. on Courts Executors and Enforcement Practice (Enforcement Code) regulates way how the executors, sometimes with review done by the civil courts, enforce the decision of the courts. Depending on the claim granted in the decision (e.g. damages, injunctions, etc.), the executors have different ways how to enforce them. The most problematic is the enforcement of civil injunctions. Injunctions are generally enforced by means of imposing fines. The Enforcement Code, however, sets a maximal ceiling of 30.000 euros in fines that can be granted. The fines are income of the state. If the maximal ceiling is reached, the executor must not impose any further fines. At the same time, criminal liability imposed for cases of non-compliance with the court decision are limited.</p> <p>All pecuniary claims can be enforced by means of forced sale of property, confiscation of funds on the bank account, etc.</p>
Slovenia	<p>Competent court for enforcement procedure is the Local Court. The creditor must file the proposal for the enforcement, which must be based on the enforceable instrument. Enforceable instruments are: (a) enforceable court judgment or the court settlement, (b) enforceable notarial act, (c) other document, for which a statute or ratified and published international treaty or legal act of the EU, which is directly applicable in RS, provides that it is an enforceable instrument. Deemed as court judgments are court judgements or arbitration judgements, decisions and payment or other orders of a court or arbitration. Court settlements are settlements concluded in front of a court.</p> <p>The court judgment is enforceable, if it has become final and if the deadline for voluntary fulfilment of the obligation has expired. The deadline for voluntary compliance with the obligation starts the following day from the date when the debtor was served with the decision. If only a part of the decision has become enforceable, the enforcement may be allowed only in respect to this part. The Court may authorize the execution of the court judgement also if it has not yet become final, is a statute stipulates that the appeal does not suspend the enforcement. Court settlement is enforceable, if the claim from the settlement has become due. The maturity of the claim is proven with the record on the settlement, a public document or a certified document.</p>
Spain	<p>It is necessary to have a final court decision or other instrument that permits enforcement (a judgment, an arbitration decision, court decisions approving or confirming court settlements and agreements reached during the procedure, etc.).</p> <p>Regarding the authorisation of the enforcement, the general rule is to involve a judicial authority, although in the case of foreclosure, and provided that this has been expressly</p>

Member State	Enforcement
	<p>agreed, the sale of the mortgaged property may be carried out via a notary. As for the competent court for ordering enforcement, it is the judge in the ordinary civil courts who issued the judgment to be enforced. If the enforceable instrument is not a judgment, there are special rules for assigning competence which usually indicate that the judge in the place of residence of the defendant is competent.</p>
Sweden	<p>The plaintiff can request enforcement of awarded damages with the Enforcement Authority (Kronofogdemyndigheten). The authority's decisions can be appealed to certain district courts, serving as special courts, and further to the appellate courts (Hovrätterna) and the Supreme Court (Högsta domstolen). The enforcement is carried out by the Enforcement Authority</p>
United Kingdom	<p>The Rules applicable to the enforcement of court judgments are set out in Part 70, general rules about enforcement of judgments and orders, of the Civil Procedures Rules. Namely, a judgment creditor may enforce a judgment or order for the payment of money by: a writ of fieri facias, a warrant of execution, a third party debt order, a charging order, a stop order, a stop notice, or the appointment of a receiver. The Court in question may make the following orders against a judgment debtor: an order of committal (if permitted by a rule of the Debtors Acts 1869 and 1878) or a writ of sequestration (if permitted by RSC Order 45 rule 5)</p>





Pilot field study on the functioning of the national judicial systems for the application of competition law rules

EU Country Factsheets

17 March 2014

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COUNTRY FACTSHEET- AUSTRIA

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Abbreviations used

ABGB	Austrian Civil Code
Cartel Act	Austrian Cartel Act 2005
Cartel Court	Viennese Court of Appeals sitting as Cartel Court
Cartel Supreme Court	Supreme Court sitting as Cartel Court of Appeals
CECI	OECD, Central European Competition Initiative
Competition Act	Austrian Competition Act 2002
ECA	European Competition Authorities
EU	European Union
FCA	Austrian Federal Competition Authority
FCP	Austrian Federal Cartel Prosecutor
ICN	International Competition Network
LIDC	International League of Competition Law
NCA	European Competition Network
UNCTAD	United Nation Conference on trade and development
ZPO	Austrian Civil Procedure Act

6 Overview of the National Legal Framework

The Austrian legal system is based on Civil Law and has its origin in Roman law. The first version of the current Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, JGS Nr. 946/1811 (as amended)⁵⁹, 'ABGB') entered into force already in 1812. It is the oldest codification of civil law in the German legal area which is still in force (although amended several times).

The ABGB has its roots in the so called 'enlightened absolutism' of the Habsburg monarchy in the 18th century. Maria Theresia and her son and successor, Joseph II, both introduced Civil Codes (*Codex Theresianus*, never in force, and *Josephinischen Gesetzbuch*) on which the ABGB is based upon.

Additionally, since 1867, citizens' civil rights are guaranteed in legal statutes. These rights were incorporated into the present Federal Constitution Act (*Bundesverfassungsgesetz*, BGBl. Nr. 1/1930, as amended) which also guarantees the protection of the rights provided in the European Convention on the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 (ratified by Austria in 1958).

The Republic of Austria is a Federal State composed of nine autonomous federal provinces. Legal hierarchy in Austria is characterised by the priority of the so called 'Fundamental Principles' of the Austrian national Constitution (e.g., the democratic principle, the principle of separation of powers) as stated in the current Constitution Act. Other constitutional legal statutes (the adoption of which requires a two third majority in parliament and which are included in many different statutes and acts) are second in hierarchy and above general non-constitutional national Austrian law.

When joining the EU in 1995, EU law became the principle source of law in Austria. It is generally acknowledged that EU law takes precedence over domestic Austrian law, including the Austrian Constitution, but is subordinate to the fundamental principles of the Constitution⁶⁰.

7 National Legislation establishing competition law rules

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
<i>Kartellgesetz 2005</i> (Austrian Cartel Act 2005 (as amended), 'Cartel Act')	Entry into force on 1 January 2006; entry into force of latest amendment on 1 March 2013
<i>Wettbewerbsgesetz 2002</i> (Competition Act 2002 (as amended), 'Competition Act')	Entry into force on 1 July 2002; entry into force of latest amendment on 1 March 2013

7.1 General legislation

There is no specific national legislation in Austria enforcing the provisions of Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU). However, based on the primacy of EU law, these articles must be - and are in fact - directly applied in Austria, as long as trade between Member States may be affected.

⁵⁹ The ABGB and all codes and legal statutes quoted in this factsheet can be downloaded from <http://www.ris.bka.gv.at>.

⁶⁰ For more details see Johannes Öhlböck and Immanuel Gerstner, 'UPDATE: The Austrian Legal System and Laws: a Brief Overview', available at <http://www.nyulawglobal.org/globalex/austria1.htm>.

The national equivalents of Article 101 and Article 102 TFEU are incorporated in the Austrian Cartel Act 2005 (*Kartellgesetz 2005, BGBl. I Nr. 61/2005*, hereinafter the 'Cartel Act')⁶¹.

Article 1 of the Cartel Act, prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition ('cartels'). The term 'undertaking' is not defined itself in the Cartel Act; however, according to the case-law, it covers all independent, not purely private, activities based on the exchange of products or services. The Cartel Act follows a functional approach (comparable to that of EU law), following which undertakings can be legal but also natural persons, which act independently on the market. Profits or the aim to make a profit is not a precondition to be considered as an 'undertaking'.

The Cartel Act prohibits the abuse of a dominant market position⁶² and has brought significant changes in the field of merger control⁶³. It refers, inter alia, to rules of enforcement (also with regard to infringements of Articles 101 and 102 TFEU)⁶⁴, fines⁶⁵, proceedings⁶⁶ and provides for the institutions of the Viennese Court of Appeals sitting as Cartel Court ('Cartel Court') and the Federal Cartel Prosecutor⁶⁷.

Regarding the principle of extraterritoriality, the Cartel Act confirms the applicability of the 'effects doctrine'. More specifically, according to Section 24 of the Cartel Act, national competition law must be applied if the agreement / behaviour concerned affects the Austrian territory.

The Competition Act 2002 (*Wettbewerbsgesetz 2002, BGBl. I Nr. 62/2002* as amended) governs all issues with regard to the Federal Competition Authority, i.e. its organisation, hierarchy, competences (e.g. concerning investigations and dawn raids), remuneration of its agents, etc.

Section 2 of the Cartel Act lists certain exemptions from the scope of the general prohibition set in Section 1 of Cartel Act. Exemptions under Austrian legislation include a de-minimis exemption⁶⁸, certain agricultural co-operations⁶⁹, resale price maintenance with regard to press products and books⁷⁰ and a general clause exempting certain agreements/behaviour, in line with Article 101(3) TFEU⁷¹.

Damages for breach of competition law may be granted under the 'ordinary' legal basis for contractual liability⁷² or tort liability⁷³. The relevant procedural rules are included in the Austrian Civil Procedure Act (*Zivilprozessordnung, RGBL. Nr. 113/1895* as amended, 'ZPO').

With the reform of 2013, the Cartel Act introduced for the first time statutory rules on some essential aspects of private competition law enforcement, e.g. with regard to the limitation of the 'passing-on defence' (i.e. a private damage claim by the direct purchaser is not excluded because the goods or services have been sold on), the interruption of limitation periods for the duration of the cartel proceedings plus six months, the stay of proceedings and the

⁶¹ Concerning Article 101 TFEU see Section 1 of the Cartel Act; concerning Article 102 TFEU see Section 5 of the Cartel Act.

⁶² Section 5 and following of the Cartel Act.

⁶³ Section 7 and following of the Cartel Act.

⁶⁴ Section 26 and following of the Cartel Act.

⁶⁵ Section 29 and following of the Cartel Act.

⁶⁶ Section 38 and following of the Cartel Act.

⁶⁷ Section 58 and following of the Cartel Act.

⁶⁸ Section 2(2)1 of Cartel Act, mirroring the equivalent EU provision.

⁶⁹ Section 2(2)5 of the Cartel Act.

⁷⁰ Section 2(2)2 of the Cartel Act.

⁷¹ Section 2(1) of the Cartel Act.

⁷² Section 1293 and following of the ABGB.

⁷³ Section 1295s, 1311 and following of the ABGB.

binding effect of the decisions of the Cartel Court, the European Commission and other NCAs⁷⁴.

7.2 Industry-specific legislation

Concerning competition law, there is no industry-specific legislation in Austria.

8 The National Competition Authority

There are two National Competition Authorities in Austria. The so called 'Official Parties' (*Amtsparteien*) are:

7. the Federal Competition Authority (*Bundeswettbewerbsbehörde*, 'FCA'); and
8. the Federal Cartel Prosecutor (*Bundeskartellanwalt*, 'FCP').

The FCA is an independent body which administratively belongs to the Ministry of Economics, while the FCP is bound by the Federal Minister of Justice. While the FCA is the sole authority in charge of administering the leniency programme, both the FCA and the FCP can initiate public enforcement proceedings (individually or jointly) by bringing actions before the Cartel Court.

Both Official Parties were established in 2002: the FCA with the Competition Act⁷⁵ and the FCP with the Cartel Act⁷⁶. However, in view of the scope of this study, the sections below focus on the competences of the FCA which is the core National Competition Authority.

8.1 The establishment of the National Competition Authority

As mentioned above, the FCA was established in 2002 under the Competition Act.

8.2 The reform of the National Competition Authority

The 2013 amendments of both the Cartel Act and the Competition Act brought important changes to Austrian competition law.

These amendments, which came into effect on 1 March 2013, had a significant impact on competition law enforcement in Austria. Concerning particularly the FCA, its enforcement rights were extended. The main changes in the FCA can be summarised as follows⁷⁷:

- Direct enforcement of information requests: Under the previous Austrian rules, the FCA was entitled to request information from undertakings, but such requests did not carry the risk of fines. Only the Cartel Court was empowered to issue information requests that could result in sanctions being imposed for non-replying to them. The new rules now grant the FCA the power to enforce its own information requests, by way of fines and periodic penalty payments⁷⁸.
- Strengthening of powers in dawn raids: Like the European Commission, the FCA will in the future have the power to seal premises. In addition, the Authority's right to ask questions during dawn raids is extended: while previously the FCA was limited to asking

⁷⁴ Section 37a of the Cartel Act. With regard to other issues concerning follow-on actions, please see Polster, 'Getting the Deal through, Private Antitrust Litigation 2013, available at [http://www.dbj.at/sites/default/files/Private-Antitrust-Litigation-2013\(1\).pdf](http://www.dbj.at/sites/default/files/Private-Antitrust-Litigation-2013(1).pdf).

⁷⁵ Section 1ss of the Competition Act.

⁷⁶ Section 75ss of the Cartel Act.

⁷⁷ For more details please see Ablasser-Neuherber, Kühnert, Neumayr, Austrian Competition Law Amended, bpv HÜgel Rechtsanwälte OG, Client Alert, February 2013.

⁷⁸ Section 11a (4) and (5) of the Competition Act.

questions regarding the whereabouts and content of documents, it may now ask any representative or employee for explanations on facts or documents relating to the subject-matter and purpose of the dawn raid. Finally, the Authority is also granted the power to seize original documents, to the extent required for the effectiveness of the inspection⁷⁹.

- **Right of objection curtailed:** The most important change affecting the conduct of dawn raids by the FCA relates to the right of the undertakings concerned to object to the inspection of documents. When it was unclear whether documents or data carriers were covered by the subject matter of the inspection order, undertakings were previously entitled to object and seal all documents, which were then sent to the Cartel Court to decide on this issue. This was of particular relevance with a view to the Authority's practice not to conduct the entire search in situ, but to copy data for review later at its own premises⁸⁰.

The 2013 amendments significantly curtail the right of the undertakings concerned to object to the inspection of documents: objections will now only lie on the basis of a legally recognised confidentiality obligation, or a right not to testify under the Criminal Procedure Act. In addition, the undertaking will have to individually name the documents in relation to which it raises objections. Given the time constraints and the FCA's practice to copy entire data carriers, it will be difficult to meet these conditions in practice. In such a case, the undertaking concerned may request that certain categories of documents be sealed before being carried off by the FCA. In this case, the Authority will set a time limit of at least two weeks for the undertaking to individually name the documents in relation to which it raises objections. This restriction of the right to object to the inspections will make it significantly more difficult for the undertakings subject to inspections to effectively exercise their right of defence⁸¹.

8.3 Composition and decision-making

Headed by the Director General, who is assisted by a Head of Agency and a Deputy Head of Agency, there are 23 agents / case handlers in the FCA's team.

The FCA is a 'monocratic' authority, i.e. the Director General is the only one who can take decisions within the authority⁸², e.g. start an investigation, apply for a dawn raid (which must be approved by Cartel Court), request an in-depth examination of notified mergers (phase II) or initiate a proceeding at the Cartel Court⁸³.

The FCA's competences include:

- It is an official party in public enforcement proceedings at the Cartel Court (first instance) and the Supreme Cartel Court (second instance)
- It implements Austrian and European antitrust rules in Austria, e.g. by starting investigations (including dawn raids)
- It conducts general studies on various sectors (e.g., grocery retail)
- It cooperates with the Austrian Cartel Courts, other Member States' NCAs and with the European Commission (see also Section 3.4).

The FCA cannot impose fines on undertakings, but it is the only authority (besides the FCP) which can initiate proceedings at the Cartel Court. The latter is the only authority which can impose fines on undertakings, but, as stated, only upon the request of the FCA or the FCP⁸⁴. Furthermore the Cartel Court is not entitled to impose fines which are higher than requested

⁷⁹ Section 12(4) of the Competition Act.

⁸⁰ According to Section 11a(2) of the Competition Act.

⁸¹ Section 12(5) of the Competition Act.

⁸² Section 1s of the Competition Act.

⁸³ Section 36(1) of the Cartel Act.

⁸⁴ Section 36(1) of the Cartel Act.

by the FCA. Nonetheless, the Cartel Court can reject the FCA's request or impose fines lower than those requested⁸⁵.

8.4 Cooperation with other entities

In Austria, the FCA is working in close cooperation with the FCP.

Internationally, the FCA participates, amongst others, to the network of European Competition Authorities ('ECA'), the European Competition Network ('ECN'), the International Competition Network ('ICN'), the Organisation for Economic Development and Cooperation ('OECD'), the Central European Competition Initiative ('CECI'), the International League of Competition Law ('LIDC') and the United Nations Conference on Trade and Development ('UNCTAD').

Furthermore, the FCA concluded various bilateral agreements, e.g. with the respective NCAs of Moldavia, Serbia, Ukraine and Russia. All these agreements enable NCAs to work together on cross-border infringements, international merger transactions or to exchange best practices.

8.5 Investigations

The FCA can start investigations for suspected breach of Austrian or EU competition law either on its own initiative or upon a complaint submitted by an interested third party (including consumers or trade associations, administrative authorities, competitors, customers, or former employees). A leniency application submitted by an undertaking involved in a restrictive agreement/concerted practice may also lead to an investigation⁸⁶.

The FCA has not published any guidelines for submitting complaints; nonetheless, it has issued a form that can be used to submit the complaints, which is available on the FCA's website⁸⁷. The FCA hereby requests information, e.g. with regard to the identity of claimant and defendant, the affected market (concerning both the respective product/service market and its geographical scope), the facts (based on documents or other proof), the identity of persons who can testify the complaint, the aim of the complaint and whether complaints have been filed in other jurisdictions already.

The FCA can rely on the following procedural powers, as already analysed under Section 3.2:

- Request information from undertakings and associations of undertakings;
- Inspect documents;
- Conduct dawn raids (after approval by the Cartel Court);
- Administer merger control proceedings.

8.6 Decision-making

As mentioned in Section 3.3, in Austria decisions to investigate potential infringements of Articles 101/102 TFEU (and the national equivalents, i.e. Sections 1 and 5 of the Cartel Act) are taken by the Director General of the FCA and by the FCP. As the FCA cannot impose fines on its own, it applies for the commencement of proceedings before the Cartel Court.

In its investigations, the FCA can request information and the submission of documents⁸⁸ as well as initiate dawn raids⁸⁹. Within the dawn raids, but also by explicit orders, natural

⁸⁵ Section 36(2) of the Cartel Act.

⁸⁶ Competition Law Country Report – Austria, available at http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/130711_appendix-2_en.pdf, p. 3.

⁸⁷ Federal Competition Authority website, available at <http://www.bwb.gv.at/KartelleUndMarkmachtmissbrauch/Beschwerdeeinbringung/Seiten/default.aspx>.

⁸⁸ Section 11(3) of the Competition Act.

⁸⁹ Section 12 of the Competition Act.

persons may be obliged to testify during the investigation⁹⁰. During investigations, undertakings do not have the right to access the file⁹¹. If the FCA intends to file an application for the imposition of a fine with the Cartel Court, the parties concerned must be informed of the status of the investigations. Furthermore, the FCA must grant the parties the right to express themselves on basis of a written brief⁹².

The Cartel Court can oblige the undertakings concerned to bring an immediate end to the infringements or impose structural obligations⁹³. It can also accept commitments if these will prevent the undertakings in question from infringing again competition law rules; in that case, proceedings are terminated⁹⁴. Finally, the Cartel Court may impose fines of up to 10% of the aggregate group turnover of the last financial year on undertakings breaching Article 101 or Article 102 TFEU⁹⁵.

9 Competent courts

As outlined in Section 3, the FCA and the FCO (i.e. the Official Parties) are exclusively entitled to initiate proceedings before the Cartel Court for the imposition of fines for infringements of Articles 101 and 102 TFEU.

The Austrian Cartel Court is organised centrally, i.e. there is only one Cartel Court in Austria, located in Vienna. The Viennese Court of Appeals sitting as Cartel Court (*Oberlandesgericht Wien als Kartellgericht*) is the only court in Austria which can impose fines for infringement of Articles 101 and 102 TFEU. As mentioned in Section 3.3, when imposing a fine, the Cartel Court cannot impose fines higher than those requested by the FCA and FCP; however, it can impose lower fines or no fines at all.

The Austrian Supreme Court sitting as Cartel Court of Appeals ('Cartel Supreme Court' *Oberster Gerichtshof als Kartellobergericht*) is the second and last instance for judicial review proceedings in Austria. The Supreme Cartel Court can only rule on legal grounds and thus cannot review the facts of the case.

If requested by the FCA or FCP, the Cartel Court can rule on both EU and national competition law if there is an effect in Austria. However, based on CJEU case-law, the Cartel Court can never take a decision stating that there has been no infringement of EU competition law⁹⁶.

Besides public enforcement of EU competition law rules upon the initiative of the FCA and the FCP, any undertaking affected by an anti-competitive behaviour as well as certain other institutions, such as the Austrian Chamber of Labour⁹⁷, can file a request for a cease and desist order⁹⁸ (also by way of injunctive relief) or an application for a declaratory judgment⁹⁹. Again, the competent court in these cases is the Cartel Court (and the Supreme Cartel Court in second instance)¹⁰⁰.

It should be noted that the Cartel Court is not competent to award damages.

⁹⁰ Section 11a(2) of the Competition Act.

⁹¹ Cf. Section 11(2) of the Competition Act and Section 17 of the Non-Contentious Proceedings Act.

⁹² Section 13 of the Competition Act.

⁹³ Section 26 of the Cartel Act.

⁹⁴ Section 17 of the Cartel Act.

⁹⁵ Section 29 of the Cartel Act. See also Competition Law Country Report – Austria, available at http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/130711_appendix-2_en.pdf, p. 4.

⁹⁶ Case C-375/09 *Sąd Najwyższy – Poland* (reference for a preliminary ruling), ECR [2011] I-03055.

⁹⁷ Section 36 Cartel Act.

⁹⁸ Section 26 Cartel Act.

⁹⁹ Section 28 Cartel Act.

¹⁰⁰ Section 38ss Cartel Act.

The Cartel Court sits in panels consisting of two professional judges and two expert lay judges, with the presiding professional judge having the casting vote. The Cartel Court of Appeals sits in panels of three professional judges and two expert lay judges¹⁰¹. Thus, the Cartel Act ensures that the professional judges of a panel always have the decision-making power.

There are currently 6 professional judges at the Cartel Court. At the Supreme Cartel Court, the Court's 16th senate decides on appeals against decisions of the Cartel Court. This senate consists of 4 professional judges.

There are no specific courts for private enforcement of antitrust rules; thus, the general civil law courts also deal with these actions. At first instance actions are filed with the district courts (*Bezirksgericht*, for claims below EUR 10,000) or the regional courts (*Landesgericht*, for claims over EUR 10,000). At second instance, appeals are filed with the regional courts (appeals against decisions of district courts) or the higher regional courts (*Oberlandesgericht*). Second instance courts may re-examine both the facts of the case and the interpretation of the law in that particular case. At third, and last, instance, an appeal can be brought to the Supreme Court, which is only competent to re-examine how lower instance courts applied the legislation.

If the claim is brought against an undertaking and is related to a commercial transaction on the side of the defendant, it must be submitted to a district commercial court (*Bezirksgericht für Handelssachen*, for claims below EUR 10,000) or to a regional commercial court (*Handeslgericht*, for claims above EUR 10,000) as court of first instance. Regional commercial courts or higher regional courts act as courts of second instance and the Supreme Court (if an appeal is approved) as a court of third instance¹⁰². As outlined above, if the claim is brought against an undertaking and is related to a commercial transaction on the side of the defendant, it must be submitted to the district commercial court (*Bezirksgericht für Handelssachen*, for claims below EUR 10,000) or to the regional commercial courts (*Handeslgericht*, for claims above EUR 10,000) as courts of first instance.

Therefore the court structure concerning follow-on actions is decentralised at the beginning but centralised in the last instance.

Currently, there are 128 district courts, 20 regional courts, 4 higher regional courts and 1 Supreme Court in Austria.

10 Proceedings related to breaches of Competition Law rules

This Section presents the proceedings related to breaches of competition law rules in Austria, both for judicial review and follow-on cases.

10.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases is described in Table 5.1 below.

Table 10.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Each party to the proceedings at first instance at the Cartel Court. i.e., the undertakings concerned as well as the FCA and the FCP.	Every natural or legal person that claims damages based on infringements of the Cartel Act.

¹⁰¹ Section 59 Cartel Act.

¹⁰² See in this regard, but also in general with regard to private antitrust enforcement, Kofler-Senoner, Baratsits 'Getting the deal though, Private Antitrust Litigation, 2009', available at <http://www.chsh.com/fileadmin/docs/publications/Kofler-Senoner/austria.pdf>.

How can an action be filed?	By appealing to the Supreme Cartel Court.	By filing a suit for damages at the respective court of first instance.
With which authorities can the action be filed?	The Supreme Cartel Court	At first instance the action is filed with the district courts or the regional courts, depending on the value of the claim. At second instance, an appeal can be filed with the regional courts or the higher regional courts. At third instance, with the Supreme Court.
Burden of proof	The burden of proof is on the appellant; however, the burden of proof is substantially lowered in the favour of the appellant due to the inquisitorial principle of the Non-Contentious Proceedings Act, i.e. the obligation of the Cartel Court, that all facts, necessary to issue a judgment, must be substantiated ¹⁰³ .	The burden of proving the antitrust infringement, the damage and the causal link between the two lies with the claimant. Civil courts are bound by legally binding decisions of the Cartel Court / Supreme Cartel Court, the European Commission or other EU NCAs on whether competition law has been infringed. However, the parties can present additional evidence, e.g. testimonies or opinions of experts.

10.2 Judicial Review Proceedings

This Section presents the judicial review proceedings in Austria for competition law cases.

10.2.1 Rules applicable to the judicial review of NCA decisions

The only section of the Cartel Act which refers to the procedure to be followed when filing an appeal to the Supreme Cartel Court provides that the deadline for bringing in an appeal is four weeks and that the FCA and the FCP do not need legal representation in the proceedings before the Supreme Cartel Court¹⁰⁴. Otherwise, the judicial proceedings for the judicial review of the Cartel Court decision follow the general principles of the Non-Contentious Proceedings Act (*Außerstreitgesetz*, BGBl. I Nr. 111/2003 as amended).

All parties to the proceedings of first instance which are affected by the decision of the Cartel Court (as court of first instance) are entitled to file an appeal with the Supreme Cartel Court as court of second and last instance for antitrust matters in Austria. The FCA and the FCP, regardless of whether they participated in the first instance proceedings, are also entitled to appeal the decision of the Cartel Court.

10.2.2 Competent Court

As mentioned above, the Supreme Cartel Court is competent to adjudicate appeals against decisions of the Cartel Court.

10.2.3 Timeframe

As mentioned above, the deadline to appeal decisions of the Cartel Court is 4 weeks¹⁰⁵. Once the other parties to the proceedings receive the appeal, they have another 4 weeks to reply to it.

¹⁰³ Section 59 of the Cartel Act.

¹⁰⁴ Section 16 of the Non-Contentious Proceedings Act.

¹⁰⁵ Section 49 of the Cartel Act.

10.2.4 Admissibility of Evidence

Based on Section 49 of the Non-Contentious Proceedings Act and the courts' case-law, the Supreme Cartel Court cannot examine the facts of the case. The judicial review by the Supreme Cartel Court is based on the facts as established by the court of first instance and focuses on how the law was applied by the Cartel Court. In their appeal (and answer to the appeal), parties may complete or correct the facts and evidence presented at the first instance proceedings; however they are not entitled to submit differing or completely new facts¹⁰⁶. Expert opinions can be challenged only on grounds of law if illogical and unlawful¹⁰⁷. Thus, in summary, the Supreme Cartel Court decides strictly on the basis of the Cartel Court decision, the evidence presented before the Cartel Court (and any new evidence complementing that) as well as the written briefs of the parties.

10.2.5 Interim Measures

In appeals against the decisions of the Cartel Court no interim measures may be ordered as the judicial review by the Supreme Cartel Court is based on grounds of law only. It is worth noting, however, that the filing of the appeal has a suspensive effect.¹⁰⁸

10.2.6 Rulings of the court

According to case-law and legal commentary, appeal proceedings do not comprise oral hearings¹⁰⁹. The court judgment is not pronounced in public (as there are no oral hearings), but served to the parties by post. An anonymised version of the judgment is published later on, e.g. on the Legal Information System of the Republic of Austria¹¹⁰.

The Supreme Cartel Court can:

- confirm the decision of the Cartel Court as court of first instance;
- set aside the judgment of the Cartel Court and issue its own decision;
- set aside the judgment of the Cartel Court and refer the proceedings back to the Cartel Court;
- decide to stay the proceedings and seek guidance from the Court of Justice of the EU by way of a request for a preliminary ruling.

10.3 Follow-on Proceedings (private enforcement)

This Section presents the follow-on proceedings in Austria for competition law cases.

10.3.1 Rules applicable to follow-on procedures

Damages for breach of competition law may be granted under the 'ordinary' legal basis for contractual liability¹¹¹ or liability in tort¹¹², as already mentioned in Section 4.

The relevant procedural rules are included in the Austrian Civil Procedure Act (*Zivilprozessordnung*, RGBI. Nr. 113/1895 as amended, 'ZPO'). Therefore, different issues, such as the procedural capacity¹¹³, briefs¹¹⁴, submission of orders¹¹⁵, deadlines¹¹⁶, publicity

¹⁰⁶ See, e.g., 16 Ok 4/03, Judgment of the Cartel Supreme Court on 23 June 2003.

¹⁰⁷ See, e.g., 16 Ok 1/05, Judgment of the Cartel Supreme Court on 14 February 2005.

¹⁰⁸ Section 43 of the Non-Contentious Proceedings Act.

¹⁰⁹ See, e.g., 16 Ok 14/04, Judgment of the Cartel Supreme Court on 11 October 2004.

¹¹⁰ The website of the Legal Information System of the Republic of Austria is www.ris.bka.gv.at.

¹¹¹ Section 1293 and following of the ABGB.

¹¹² Section 1295s, 1311 and following of the ABGB.

¹¹³ Section 1 of the ZPO.

¹¹⁴ Section 74 of the ZPO.

¹¹⁵ Section 87 of the ZPO.

¹¹⁶ Section 123 of the ZPO.

of proceedings¹¹⁷, minutes¹¹⁸, files¹¹⁹, appeals, restitutio in integrum¹²⁰ etc., are governed by the ZPO.

10.3.2 Competent Court

As discussed in Section 4, actions at first instance are filed with the district courts or the regional courts. Competent to hear appeals at second instance are the regional courts or the higher regional courts respectively. At third instance, competence lies with the Supreme Court.

If the claim is brought against an undertaking and is related to a commercial transaction on the side of the defendant, it must be submitted, at first instance, to the district commercial courts or the regional commercial courts; at second instance to the regional commercial courts or higher regional courts respectively; and at third instance to the Supreme Court¹²¹.

10.3.3 Timeframe

The general limitation period for filing a civil action, which also applies to follow-on actions seeking compensation for damages due to (alleged) infringements of competition law, is three years from the day that both the damage and the identity of the offender became known to the injured party¹²². As outlined above, the Cartel Act states that the limitation period is interrupted for the duration of the cartel proceedings before the Cartel Courts plus six months. Furthermore the proceedings can be stayed in case there is an ongoing public enforcement proceeding¹²³.

The judgment of the first instance court in follow-on actions must be appealed within four weeks after the judgment has been served to the parties. If the judgment was pronounced in an oral hearing in the presence of the parties concerned, the appeal must be submitted within two weeks from the time the minutes of the oral hearing have been served to the parties¹²⁴.

An appeal against a second instance judgment ('revision') must be filed within four weeks from the service of the judgment¹²⁵. If the court of second instance decides by order (e.g., on procedural matters) the appeal ('rekurs') must be filed within two weeks¹²⁶.

10.3.4 Admissibility of evidence

As outlined above, Section 37a of the Cartel Act states that concerning the question whether competition law has been infringed illicitly and culpably, the existence of a passing-on defence as such does not hinder the claimant from filing a claim for damages (however, the potential enrichment must be taken into consideration). Civil courts are bound by legally binding decisions of the Cartel Court / Supreme Cartel Court, the European Commission or competition authorities in the meaning of Regulation EC 1/2003.

However, the parties are free to present all kinds of new and additional evidence, e.g. testimonies or opinions of experts. Also civil courts at first and second instance may appoint

¹¹⁷ Section 123 of the ZPO.

¹¹⁸ Section 207 of the ZPO.

¹¹⁹ E.g., Section 219 of the ZPO.

¹²⁰ E.g., Section 529s of the ZPO.

¹²¹ See in this regard, but also in general with regard to private antitrust enforcement, Kofler-Senoner, Baratsits 'Getting the deal though, Private Antitrust Litigation, 2009', available at <http://www.chsh.com/fileadmin/docs/publications/Kofler-Senoner/austria.pdf>.

¹²² Section 1489 of the ABGB.

¹²³ Section 37a of the Cartel Act.

¹²⁴ Section 464 of the Non-Contentious Proceedings Act.

¹²⁵ Section 502s of the Non-Contentious Proceedings Act.

¹²⁶ Section 522 of the Non-Contentious Proceedings Act.

a court expert on their own initiative¹²⁷, i.e. the court is not bound by the evidence which was submitted and presented in the public enforcement proceedings. At second and third instance, the parties are barred from presenting new evidence, except when the new evidence directly refers to evidence, witnesses or written briefs of the proceedings at first instance / second instance or the respective appeal¹²⁸.

10.3.5 Interim Measures

Interim measures can be granted by the civil court which is competent to adjudicate the action for damages. If the claim for interim measures is made outside the civil judicial proceedings, the district court of the district where the defendant has his/her seat/residence is the competent court. The claimant must prove that without injunctive relief, he would be 'impeded' or 'considerably hindered' in recovering his/her damages or in enforcing his/her claims¹²⁹.

10.3.6 Rulings of the court

The proceedings of the first and second instance courts consist of both written briefs and oral hearings¹³⁰. Judgments are usually served to the parties concerned by postal delivery (however, at least theoretically, civil courts are free to pronounce the judgment in an oral hearing). In general the proceedings are open to the public, however, on the parties' request in special circumstances (e.g., concerning public safety), the public can be excluded.¹³¹ Oral hearings are part of the proceedings at second instance, but not at third instance¹³².

Civil courts can grant:

- Full compensation for the actual damage;
- Partial compensation for the actual damage;
- Interim measures.

Civil courts cannot grant punitive or exemplary damages

10.3.7 Rules applicable to the enforcement of court judgments

When civil courts rule at the last instance on the issue of compensation for damages, the defendant is obliged to pay the damages awarded within 14 days¹³³. If the defendant does not pay, the claimant can enforce the judgment (or settlement etc.) by using it as an executory title in front of the respective enforcement court. Enforcement of court orders / judgments is based on the Act on the Enforcement of Judgments (*Exekutionsordnung, RGBl. Nr. 79/1896*, as amended). To initiate the relevant proceedings, the claimant must file an execution request with the enforcement court, which is a sub-division of the respective district court. The claimant can request different kinds of execution, e.g. salary execution or execution on claims, movable property or real estate. If the claimant requests enforcement, e.g. against the salary of the debtor, the execution request must be brought at the district court where the claimant is registered. If the claimant requests enforcement against the debtor's real estate, the request must be submitted to the district court where the property is located.

Once the enforcement court grants the request for enforcement, the claimant, via bailiffs, can seek compensation from the debtor's assets, e.g. by seizure, public auction etc..

¹²⁷ Section 351 of the ZPO.

¹²⁸ See, e.g. Section 482 of the ZPO.

¹²⁹ Section 370s of the Act on the Enforcement of Judgments (*Exekutionsordnung, RGBl. Nr. 79/1896*, as amended).

¹³⁰ Section 171s of the ZPO.

¹³¹ Section 172 of the ZPO.

¹³² Sections 482 and 509 of the ZPO.

¹³³ Section 40s of the ZPO.

10.4 Alternative dispute resolution mechanisms

If agreed upon, competition law disputes may be subject to arbitration proceedings or other alternative dispute resolution methods such as mediation or conciliation. However, these mechanisms are not specific to competition law disputes. Furthermore, alternative dispute resolution never substitutes possible public enforcement. No cases where follow-on actions were subject to alternative dispute resolution mechanisms are known.

11 Contextual Information

This Section presents contextual information relating to the judicial system in Austria.

11.1 Duration and cost of competition law cases

Concerning the duration of cases, see above Sections 5.2.3. and 5.3.3.

In general, the losing party must compensate the winning party¹³⁴ in follow-on actions. However the fees to be compensated and their amount are set by law, which may be well below the actual costs.

Concerning public enforcement, the Official Parties, who are exclusively entitled to initiate proceedings, may only be ordered to compensate the undertakings concerned if the request for the imposition of a fine was malicious¹³⁵.

Concerning the overall cost of cases, no sources are publicly available to allow its assessment. Very roughly estimated, the costs can easily reach EUR 100,000, especially when the testimony of court experts is necessary. Already the detailed opinions of the latter can reach EUR 100,000.

Furthermore, court fees in Austria for bringing actions are extremely high (e.g., compared to Germany). This is due to the fact that there is no cap for such fees; they are rather calculated as a certain percentage of the amount requested. For example, in an action for damages brought in by the BAWAG Bank against the city of Linz concerning SWAP-deals, the bank brought in a EUR 418 Million action (resulting in EUR 5 million court fees). If this proceeding reaches the Supreme Court, the losing party will be required to pay EUR 26 million for court fees only.

11.2 Influencing Factors

No such factors have been identified in Austria.

11.3 Obstacles/Barriers

See Section 6.1 concerning the duration and costs of the proceeding, especially with regard to the amount of court fees and fees of court experts. Also the strict principle that the burden of proof in follow-on proceedings is on the side of the claimant might be considered as an obstacle (as it is, e.g., difficult to prove the exact amount of the damage caused by the infringement of the competition law rules).

¹³⁴ Section 43 of the ZPO.

¹³⁵ Section 41 of the Cartel Act.

Annex 5 Bibliography

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- Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch, JGS Nr. 946/1811 (as amended)*)
- Austrian Constitution, Federal Constitution Act (*Bundesverfassungsgesetz, BGBl. Nr. 1/1930, as amended*),
- Non-Contentious Proceedings Act (*Außerstreitgesetz, BGBl. I Nr. 111/2003 as amended*)

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COUNTRY FACTSHEET - BELGIUM

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Abbreviations used

2006 Act	Act on the Protection of Economic Competition of 15 September 2006
2013 Act	Belgian Competition Act of 3 April 2013
BCA	Belgian Competition Authority
CCA	College of Competition Auditors
CEL	Code of Economic Law
Civil Code	Belgian Civil Code (<i>Burgerlijk Wetboek / Code Civil</i>)
ECA	European Competition Authorities
ECN	European Competition Network
EU	European Union
ICN	International Competition Network
Judicial Code	Belgian Judicial Code (<i>Gerechtelijk Wetboek / Code Judiciaire</i>)
NCA	National Competition Authority of a Member State of the EU
TFEU	Treaty on the Functioning of the European Union

12 Overview of the National Legal Framework

The Belgian legal system is a system in the civil law tradition, comprising a set of codified rules applied and interpreted by judges. Belgium is a federal state. Hence, rules are issued by the Belgian federal authorities as well as lower entities, such as the Communities (*Gemeenschappen/ Communautés*) and the Regions (*Gewesten/ Régions*).

The Constitution¹³⁶ is the highest-ranking norm for Belgian internal law. It sets out among others the separation of powers, the fundamental values of society and the fundamental rights of citizens. A judgment of the Court of Cassation (*Hof van Cassatie/ Court de Cassation*) of 27 May 1971 states, however, that all international and supranational instruments take precedence over national instruments, including the Constitution. Below the Constitution, in descending order, there are: (i) special acts (*bijzondere wetten/ lois specials*); (ii) acts (*wetten/ lois*), decrees (*decreten/ décrets*) and ordinances (*ordonnanties/ ordonnances*); (iii) royal orders (*koninklijke besluiten/ arrêtés royaux*) and government orders (*regeringsbesluiten/ arrêtés de gouvernement*); and (iv) ministerial orders (*ministeriële besluiten/ arrêtés ministériels*).

Titel III, Chapter VI of the Constitution governs the administration of justice, such as the nomination of judges. In addition, the Belgian Judicial Code (*Gerechtigd Wetboek/ Code Judiciaire*, hereafter 'Judicial Code') provides among others for the rules regarding the substantive and territorial jurisdiction of the courts.

13 National Legislation establishing competition law rules

This Section provides an overview of national legislation establishing competition law rules in Belgium. To this end, table 2.1 presents a list of relevant competition law instruments.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
<i>Wet van 3 april 2013 houdende invoeging van boek IV "Bescherming van de mededinging" en van boek V "De mededinging en de prijsevoluties" in het Wetboek van economisch recht en houdende invoeging van de definities eigen aan boek IV en aan boek V en van de rechtshandhabingsbepalingen eigen aan boek IV en aan boek V, in boek I van het Wetboek van economisch recht</i> (Belgian Competition Act of 3 April 2013 which provides for the introduction of competition law provisions in the Code of Economic Law) ¹³⁷	3 April 2013, entry into force on 6 September 2013 ¹³⁸
<i>Wet van 10 juni 2006 tot bescherming van de economische mededinging</i> as amended by: <i>Wet van 15 september 2006 tot bescherming van de economische mededinging</i> (Act of 10 June 2006 on the Protection of	10 June 2006, entry into force on 1 October 2006 15 September 2006, entry into force on 1 January 2007

¹³⁶ The Constitution can be consulted at http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?imgcn.x=48&imgcn.y=5&DETAIL=1994021730%2FN&caller=list&row_id=1&numero=1&rech=1&cn=1994021730&table_name=WET&nm=1994021048&la=N&dt=GRONDWET+1994&language=nl&choix1=EN&choix2=EN&fromtab=wet_all&nl=n&trier=afkondiging&chercher=t&sql=dt+contains++'GRONDWET'%26+'1994'and+actif+%3D+'Y'&tri=dd+AS+RANK+.

¹³⁷ Hence, references to Articles introduced by the Belgian Competition Act of 3 April 2013 are references to the Code of Economic Law.

¹³⁸ According to the Belgian Official Gazette the date of entry into force is 'undetermined'. However, the substantive Articles of the Act entered into force on 6 September 2013.

Economic Competition)

<i>Wet van 5 augustus 1991 tot bescherming van de economische mededinging</i>	5 August 1991, entry into force on 11 September 1999
as amended (among others) by: <i>Wet van 1 juli 1999 tot bescherming van de economische mededinging</i>	1 July 1999, entry into force on 1 March 2001

(Act of 5 August 1991 on the Protection of Economic Competition)

13.1 General legislation

Book IV of the Code of Economic Law (hereafter 'CEL') provides for the enforcement of competition law in Belgium. The Belgian Competition Act of 3 April 2013 (hereafter '2013 Act'), which provides for its (competition law) provisions to be included in the CEL, abrogated most of the Act on the Protection of Economic Competition of 15 September 2006 (hereafter '2006 Act')¹³⁹ and entered into force on 6 September 2013¹⁴⁰.

Article IV.1 CEL prohibits anticompetitive agreements (including cartels) on the Belgian market concerned or a significant part thereof, as Article 101 TFEU does at the EU level. Article IV.2 CEL prohibits the abuse of a dominant position on the Belgian market concerned or a significant part thereof, as Article 102 TFEU does at the EU level.

The scope of Belgian competition law mirrors that of European competition law. Book IV is applicable to all economic activities. It applies to individuals and undertakings¹⁴¹ as well as trade associations, irrespective of whether these individuals, undertakings or trade associations are legal entities.

The principle of extraterritoriality applies to Book IV CEL to the extent that anticompetitive behaviour by an individual, undertaking or trade association that has its residence or registered offices outside Belgium is punishable under Book IV CEL provided that such behaviour has an actual or potential effect on the Belgian market concerned or a significant part thereof.

Article IV.1 CEL prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the Belgian market concerned or a significant part thereof. Article IV.1 §1 and 3 provides for the same examples and exemptions as provided for under Article 101, §1 and 3 TFEU. In addition, Article IV.1 §4 CEL prohibits any natural person (that cannot be qualified as an 'undertaking') to participate in certain restrictions of competition. More specifically, individuals may not negotiate or make agreements for their company (or company federation) with competitors about prices, limitations on production or sales, or the allocation of markets. When an individual is involved in such an illegal cartel, he or she can be held personally liable for the infringement. An individual can file a leniency application and in so doing qualify for immunity from prosecution.

According to Article IV.2 CEL any abuse by one or more undertakings of a dominant position within the affected Belgian market or in a substantial part of it shall be prohibited. Article IV.2 CEL provides for the same examples of abuse of dominant position as Article 102 TFEU.

The applicable rules regarding judicial review against decisions of the Belgian Competition Authority (hereafter 'BCA') are laid down in Article IV.79 CEL.

It is important to note that in Belgium no specific statutory basis exists for bringing actions for damages for breach of competition law. General legal bases therefore need to be used, such as those for contractual claims for damages (Article 1142 and following of the Belgian Civil

¹³⁹ Articles 38, 84 and 85 of the 2006 Act remain applicable.

¹⁴⁰ See, footnote 80 above.

¹⁴¹ An undertaking is defined as any entity engaged in an economic activity, regardless of its legal status or the way in which it is financed.

Code (*Burgerlijk Wetboek/ Code Civil*, hereafter ‘Civil Code’) and claims on the basis of tort (Article 1382 Civil Code).

13.2 Industry-specific legislation

The 2013 Act does not contain sector specific legislation. Some legislative instruments do include provisions that apply to undertakings operating in regulated sectors, such as the telecommunications, energy and financial sector. For example, the Belgian Telecommunications Act of 13 June 2005 establishes monitoring by the industry regulator of prices applied in the market.

The provisions included in Book V CEL provide for a mechanism to adjust the functioning of the market in case of so-called ‘market failure’ that is not the result of anticompetitive behaviour.

In addition, any agreement among competitors to rig bids (‘bid rigging’) is prohibited under Article 314 of the Belgian Criminal Code (*Strafwetboek/ Code Pénal*).

14 The National Competition Authority

This Section describes the National Competition Authority (‘NCA’) in Belgium, detailing its competences and structure, as well as the procedures in place.

14.1 The establishment of the Belgian Competition Authority

The recent 2013 Act establishes the BCA, providing the BCA with the responsibility to promote and safeguard active competition in Belgium. The BCA replaces the former Competition Council and Directorate-General for Competition that was established by the 2006 Act.

14.2 The reform of the Belgian Competition Authority

On 6 September 2013, the 2013 Act entered into force. Amongst other things, the 2013 Act reforms the BCA.

One of the main innovations of the 2013 Act is the simplification of the structure of the institutions charged with investigating and enforcing competition law in Belgium. The former Competition Council was characterised by a dual structure, with the investigation led by an auditor and decisions adopted by an independent administrative court. The (reformed) BCA is a single, independent administrative body, composed of an investigating arm and a decision-making arm. The BCA now exercises both prosecutorial and decision making powers through functionally differentiated organs within a single administrative body. The former Competition Council’s administrative tribunal (*Raad voor de Mededinging/ Conseil de la Concurrence*) has been abolished and the decision-making powers are entrusted to the new Competition College (*Mededingingscollege/ Collège de la Concurrence*).

This should lead to shorter and more efficient procedures, particularly now that the 2013 Act also:

- provides for strict deadlines to reduce the duration of the proceedings;
- recasts the interim measure proceedings (a request for interim measures is now introduced directly with the President and no longer subject to a two-stage procedure: first before the auditor and only afterwards before the President);
- provides for settlement decisions;
- provides the possibility to appeal investigative measures by the College of Competition Auditors (*Auditoraat/ Auditorat*), which oversees the investigative phase.

14.3 Composition and decision-making

The BCA is composed of¹⁴² :

- (1) The President of the BCA, who represents the BCA and is appointed by the Federal Government (Article IV.20 §1 CEL);
- (2) The College of Competition Auditors, hereafter 'CCA' (*Auditoraat/ Auditorat*), which oversees the investigative phase. The CCA decides to open an investigation, conducts the investigation and drafts a preliminary decision (Article IV.30 §1 CEL). This body is headed by the Auditor-General (*Auditeur-Generaal/ Auditeur-Général*). The Auditor-General is appointed by the Federal Government. The Auditors are appointed by the Management Committee of the BCA;
- (3) The Competition College, which has the decision-making power (Article IV.21 CEL). This body is composed of the President of the BCA and two Assessors that are appointed on a case-by-case basis by the President (Article IV.22 §1 CEL);
- (4) The Management Committee (*Directiecomité/ Comité de Direction*), which is responsible for setting policy priorities and issuing guidelines (Article IV.23 CEL). This committee consists of the President of the BCA, the Auditor-General, the Head of Legal Affairs and the Chief Economist (Article IV.24 §1 CEL)¹⁴³. The Head of Legal Affairs and the Chief Economist are appointed by the Federal Government.

14.4 Cooperation with other entities

The Belgian Competition Authority cooperates with other NCAs as well as the European Commission (Article IV.67 CEL).

The Auditors can be charged, pursuant to Article 20, § 5 of Regulation (EC) n° 1/2003, with providing assistance or carrying out controls or other missions as part of its role in ensuring compliance with the TFEU rules on competition, on its own initiative, at the request of the European Commission or at the request of another NCA in accordance with the respective (national) rules on competition (Article IV.68 CEL).

For the purposes of the application of Articles 101 and 102 TFEU, the President of the BCA, the Auditor-General and Auditors may communicate to the European Commission and the other NCAs any *de facto* or legal elements, including confidential information, and if applicable use as means of proof such information obtained from the European Commission or from another NCA (Article IV.68 *in fine* CEL).

The BCA is part of the European Competition Network (ECN), the European Competition Authorities (ECA) and the International Competition Network (ICN).

In Belgium, there are two sector-specific regulators:

- BIPT (for the Belgian postal and telecommunications market). The BCA cooperates with the BIPT. In this regard, the BCA can give non-binding advice to the BIPT and the BIPT can provide the BCA with confidential information.
- CREG (for the Belgian energy market). The CREG and the BCA do not cooperate because the BCA functions as an appeal body for certain decisions of the CREG.

14.5 Investigations

The CCA has the competence to initiate an investigation either:

- on its own initiative; or
- on the basis of a complaint lodged by an individual having a legitimate interest; or

¹⁴² See Article IV.16 §2 CEL

¹⁴³ See, <http://economie.fgov.be/nl/binaries/Organigram_Belgische_Mededingingsautoriteit_tcm325-231864.pdf>, 12 November 2013.

- at the request of the minister, a public body or another specific public institution, with responsibility for controlling or supervising an economic sector (Article IV.41 §1 CEL).

Guidelines for complaints are available on the website of the BCA¹⁴⁴.

Under the 2006 Act, the formal procedure for infringement cases took place in two stages. The first stage concerned the investigation (the investigative phase). Following the investigation, the CCA presented its report (*Verslag/ Rapport*) to the Competition Council. This concluded round one, the investigative phase. There were no set time limits for this investigative phase. In the second stage, the Competition Council took a decision (see point 3.6).

Under the 2013 Act, a different two-stage system has been created with strict time-limits¹⁴⁵. The staff of the CCA is authorised to search for all useful information and among others to carry out the necessary inquiries (requests for information) with the undertakings and associations of undertakings within a time period set by the CCA (Article IV.41 §2 CEL).

Prior to submitting a reasoned draft decision with the President, the CCA assembles all documents collected during its investigation in the investigation file (*onderzoeksdossier/ dossier d'instruction*), including an inventory and a statement on confidentiality (Article IV.41 §6 CEL).

If the case is considered to be founded, the Auditor-General will address the undertakings concerned in a statement of objections (Article IV.42 §4 CEL). This marks the first stage. The undertakings concerned will have a right to access the part of the CCA's file upon which the objections are based and all non-confidential documents and information (the investigation file), enabling it to draft its defence. The time limit for the written reply by the undertakings concerned to the statement of objections is a minimum of one month after the issuance of these objections (Article IV.42 §4 CEL).

Within a time limit of no more than one month of receipt of the written replies, the CCA prepares a draft decision (*met redenen omkleed ontwerp van beslissing / projet de décision motive*) that is submitted to the President (Article IV.42 §5 CEL). This marks the second stage. The undertakings concerned are informed hereof (Article IV.45 §1 CEL), and given access to the investigation file and the process file (*proceduredossier / dossier de procedure*). This includes an invitation to the undertakings concerned to prepare a confidential version of the draft decision. The undertakings concerned have two months to submit written comments as well as to identify documents from the investigation file they would like to add to the process file (Article IV.45 §3 CEL). This marks the end of the written proceedings.

A hearing is organised before the Competition College within at least one calendar month and at the most two calendar months following the end of the written procedure (Article IV.45 §4 CEL). In principle, the Competition College decides on the case within one month following the hearing (Article IV.45 §6 CEL).

The 2013 Act creates the possibility to bring challenges to searches carried out by the CCA in course of the investigation.

14.6 Decision-making

Previously, under the 2006 Act, the defendant could file a defence brief after the CCA presented its report to the Competition Council (the decision-making body). The CCA responded to the defence brief, and then the defendant could counter-respond. There were no time limits for such procedure.

Under the new 2013 Act, the second stage begins with the Competition College's receipt of the draft decision and the investigation file upon which this draft decision is based. At this

¹⁴⁴ Available at <http://economie.fgov.be/en/entreprises/competition/Restrictive_Practices/#investigation>, 12 November 2013.

¹⁴⁵ See, <http://economie.fgov.be/nl/binaries/schema_procedure_restrictieve_mededingingspraktijken_tcm325-231732.pdf>, 12 November 2013.

stage, the undertakings concerned may access the entire file, including the process file (Article IV.48 §§ 1-2 CEL). The undertakings concerned have two months to select the documents relevant to their defence from the investigation file to be added to the file for the proceeding (Article IV.48 § 3 CEL). During this time period the undertaking can add new documents, although this option is limited to documents relating to new objections included in the draft decision (Article IV.48 § 3 CEL). Within this time-frame of two months, the undertaking may submit written comments (Article IV.48 § 3 CEL). One to two months following the written procedure, a hearing is organised (Article IV.48 § 4 CEL). The Competition College hears the Auditor, the undertakings concerned, as well as the complainant (at its request) and also any natural or legal person deemed of interest by the Competition College (at its own request or the request of the Competition College) (Article IV.48 § 5 CEL). The Competition College will take a decision within one month after the hearing (Article IV.48 § 6 CEL).

The undertaking can appeal the decision of the Competition College before the Brussels Court of Appeals within thirty days following notification of the decision (Article IV.66 § 2 CEL).

15 Competent courts

This Section presents the courts competent in Belgium.

15.1 Judicial Review

Belgium has five major judicial areas, each within the jurisdiction of a Court of Appeals (*Hof van Beroep/ Cour d'Appel*). These areas are divided into judicial districts each having a Court of First Instance (*Rechtbank van Eerste Aanleg/ Cour de Première Instance*). The judicial districts also have Labour Tribunals (*Arbeidsrechtbanken/ Tribunaux du Travail*) and Commercial Courts (*Rechtbanken van Koophandel/ Tribunaux de Commerce*). The judicial districts are divided into judicial cantons with Justices of the Peace (*Vrederegerechten/ Justices de Paix*). To conclude, each of the provinces as well as the Brussels Capital has a Court of Assizes (*Assisenhof/ Cour d'Assises*). The Court of Cassation (*Hof van Cassatie/ Cour de Cassation*) is the Supreme Court, the 'court of courts', and has its seat in Brussels.

The hierarchic structure of the Courts is as follows:

4 COURT OF CASSATION			
3	Appeal Courts	Labour Courts	Assize Courts
2	First Instance Courts	Labour Tribunals	Commercial Courts
1	Civil magistrates	Police Courts	

In addition to the courts mentioned above, there are two further courts in Belgium: the Council of State (*Raad van State/ Conseil d'État*) and the Constitutional Court (*Grondwettelijk Hof/ Cour Constitutionnelle*). The Council of State is a superior administrative court and monitors decisions of the administrations. The role of the Constitutional Court is to ensure that acts, decrees, ordinances and orders are in conformity with the Constitution and to oversee the proper separation of powers between the public authorities.

According to Article IV.79 CEL, appeals against a decision of the BCA must be brought before the Court of Appeals (*Hof van Beroep/ Cour d'Appel*) of Brussels. To this end, two Chambers (one Flemish and one French Chamber) of the Brussels Court of Appeals have been exclusively appointed to rule on competition law cases. Under the 2006 Act only one (bilingual) Chamber had such competence. Both Chambers exclusively deal with competition law cases. Each Chamber consists of three judges. Until June 2013, one (full time) law clerk assisted the judges of the Flemish Chamber. Meanwhile, this law clerk has left the Brussels Court of Appeals. It is uncertain whether the clerk will be replaced. The judges of the French Chamber do not have a full time law clerk at their disposal. Only in very large competition law cases, might a law clerk (temporarily) be assigned to the French Chamber.

The Brussels Court of Appeals has full jurisdiction and rules in accordance with a procedure equivalent to summary proceedings. Since the entry into force of the 2013 Act, the judicial review is adversarial (i.e. the BCA, through its President, is the defending party in the proceedings before the Court of Appeals). This is a novelty as this possibility was not included in the 2006 Act. This was criticised by the European Court of Justice in Case C-439/08 (*VEBIC VZW*).

The Brussels Court of Appeals rules with full jurisdiction of powers. Hence, it can replace the decision of the BCA. The Brussels Court of Appeals has national as well as EU competence (i.e. it can give a ruling in accordance with Articles 101/102 TFEU as well as Articles IV.1 and IV.2 CEL).

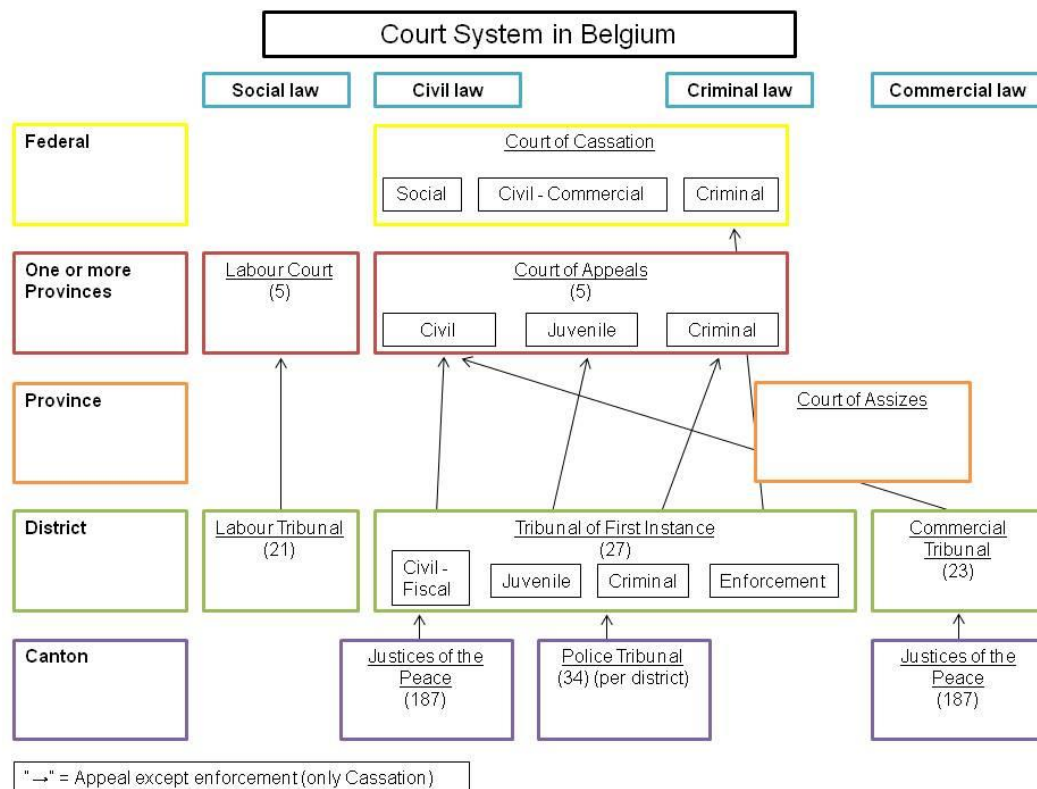
The procedure on appeal does not automatically suspend the decision of the BCA. A suspension can nonetheless be granted by the Brussels Court of Appeals if so requested (suspensory measure based on Article 19, §2 Judicial Code).

It is possible to appeal the ruling of the Brussels Court of Appeals to the Court of Cassation (*Hof van Cassatie/ Cour de Cassation*) on matter of law only, not on the facts. Again, the Court of Cassation has national as well as EU competence.

15.2 Follow-on Cases

There are no specialised courts in Belgium for bringing competition based damages actions. The Commercial Courts (*Rechtbanken van Koophandel/ Tribunaux de Commerce*) will usually be competent due to the typically commercial nature of the defendants in competition law cases (Article 573 Judicial Code). If the defendant is not commercially active, the Court of First Instance (*Rechtbank van Eerste Aanleg/ Tribunal de Première Instance*), civil section, would be competent (Article 568 Judicial Code).

Figure 15.1 Court system in Belgium



Each of the twenty seven judicial districts has one Commercial Court and one Court of First Instance. As regards the territorial jurisdiction of the Commercial Courts/ Courts of First Instance, the plaintiff has the choice between either the court where the defendant has its registered office or the court of the place where the infringement occurred or has effect in

case of a non-contractual infringement. In contractual claims, the territorially competent court is the court elected in a jurisdiction clause or in the absence of such clause, the plaintiff has the choice between the court where the defendant has its registered office or the court of the place where the contract originated or has to be executed (Article 624 Judicial Code).

The Commercial Courts/ Courts of First Instance have national as well as EU competence (i.e. they can give a ruling in accordance with Articles 101/102 TFEU as well as Articles IV.1 and IV.2 CEL).

In Courts of First Instance, each Chamber has one judge unless parties request that the case be heard by a panel of three judges (Article 78 Judicial Code). Each Chamber of a Commercial Court consists of three judges (one professional judge and two lay judges) (Article 84 Judicial Code).

A ruling of the Commercial Court or the Court of First Instance can be appealed to the Court of Appeals of the judicial area to which the judicial district of the Commercial Court/ Court of First Instance involved belongs. In the Court of Appeals, which has full jurisdiction (matters of fact and law), a case will be heard by three judges. A ruling of a Court of Appeals can be appealed before the Court of Cassation on matters of law.

16 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings related to breaches of competition law rules in Belgium for both judicial review and follow-on cases.

16.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in Belgium is described in Table 5.1 below.

Table 16.1 Legal Standing

	Judicial Review	Follow-on
Who can file an action?	Any natural or legal person who has legal standing and interest (Article 17 and 18 Judicial Code).	Any natural or legal person who has the legal standing and interest (Article 17 and 18 Judicial Code).
How can an action be filed?	The appeal must be filed by signed request to the registrar of the Brussels Court of Appeals.	A claim can be filed to the competent court by means of writ of summons.
With which authorities can the action be filed?	The Brussels Court of Appeals.	Commercial Court or Court of First Instance, civil section.
Burden of proof	The burden of proof rests with the party who makes the allegations or statements (Article 870 Judicial Code).	The burden of proof rests with the party who makes the allegations or statements (Article 870 Judicial Code).

16.2 Judicial Review Proceedings

This Section presents the judicial review proceedings in Belgium for competition law cases.

16.2.1 Rules applicable to the judicial review of NCA decisions

Article IV.79 CEL provides for exclusive (*uitsluitend/ exclusivement*) judicial review of decisions of the BCA by the Brussels Court of Appeals (*Hof van Beroep/ Cour d'Appel*). The procedure before the Brussels Court of Appeals takes place as per summary proceedings (*zoals in kort geding/ selon la procédure comme en référé*). This means that although a

decision on the merits is taken, the procedural rules that are applied are those of summary proceedings (without there being a need to demonstrate urgency) (Article IV.79, § 2 CEL *juncto* Articles 1035-1041 Judicial Code). Legislation does not set out any specific grounds of appeal.

16.2.2 Competent Court

The Brussels Court of Appeals has exclusive competence for the judicial review of decisions of the BCA (Article IV.79 CEL). The decision of the Brussels Court of Appeals can be challenged before the Court of Cassation on matters of law only (*Hof van Cassatie/ Court de Cassation*).

16.2.3 Timeframe

The decision of the BCA must be challenged before the Brussels Court of Appeals within 30 days of notification of the decision (Article IV.79 §4 CEL).

Following the judgment of the Brussels Court of Appeals, a party may lodge proceedings before the Court of Cassation within 3 months of the service or notification of the judgment (Article 1073 Judicial Code).

16.2.4 Admissibility of Evidence

There are no general rules limiting the admissibility of evidence based on its form in commercial cases. The Brussels Court of Appeals must discard any evidence which has been obtained surreptitiously, such as through a breach of privacy. The Brussels Court of Appeals can admit, at the request of a party, or order that witnesses be heard in respect of a specific and relevant fact (Articles 915-916 Judicial Code). The Brussels Court of Appeals decides whether this is necessary on a discretionary basis, but will only order this measure if it is likely that identified witnesses can deliver proof of a specific, relevant and admissible fact.

16.2.5 Interim Measures

The procedure before the Brussels Court of Appeals is a substantive procedure, deciding on the facts of the case, but following the procedural rules of summary proceedings (*zoals in kort geding/ selon la procédure comme en référé*) (Articles 1035-1041 Judicial Code). Article 19, §2 Judicial Code provides for the possibility to grant suspensory measures. A request for suspensory measures can be made at any stage of the proceedings. This request is introduced by a separate appeal with the judge dealing with the case. The party requesting suspensory measures has to demonstrate that it has a legitimate interest and that there is a *prima facie* case and a degree of urgency.

16.2.6 Rulings of the court

In cases of judicial review, the Brussels Court of Appeals has full jurisdiction and rules on the appeal in law and in fact. The Brussels Court of Appeals has jurisdiction to replace the decision of the BCA with its own judgment. The Brussels Court of Appeals can amend the decision of the BCA and adjust the fine that was imposed by the BCA.

In case the Brussels Court of Appeals rules, contrary to the decision of the BCA, that there is an infringement of Article 101 or Article 102 TFEU, the jurisdiction of the Brussels Court of Appeals is limited to decide to uphold or revoke the decision of the BCA (Article IV.79 §2 CEL).

16.3 Follow-on Proceedings (private enforcement)

This Section presents the follow-on proceedings for competition law cases in Belgium.

16.3.1 Rules applicable to follow-on procedures

There are no specific rules applicable to follow-on procedures in Belgium. In such an instance, reference is to be made to the general legal grounds for contractual claims for damages (Article 1142 and following Civil Code) and claims on the basis of tort (Article 1382 Civil Code).

16.3.2 Competent Court

The Commercial Courts are usually competent due to the typically commercial nature of defendants in competition-related cases (Article 573 Judicial Code). When the defendant is not commercially active, the Court of First Instance (civil section) is competent (Article 568 Judicial Code).

There are three instances for private enforcement procedures ((i) first instance: Commercial Court / Court of First Instance, civil section; (ii) appeal: Court of Appeals; (iii) cassation (points of law only): Court of Cassation).

16.3.3 Timeframe

Subject to specific statutes of limitations, the right to bring contractual claims is prescribed after ten years. The right to bring a claim for damages under tort law is prescribed if no claim is brought within five years after the damaged party became aware of the damage or its aggravation and in any case after twenty years from the occurrence of the fact causing the damage (Article 2262*bis* Civil Code).

With regard to an appeal against a judgment in first instance relating to a follow-on procedure, the appeal must be lodged within one month of the service or notification of the judgment (Article 1051 Judicial Code). A party may lodge an appeal before the Court of Cassation within three months of the service or notification of the judgment (Article 1073 Judicial Code).

16.3.4 Admissibility of evidence

There are no general rules limiting the admissibility of evidence based on its form. However, in civil cases pertaining to contractual matters, evidence needs to be in written form if the claim exceeds 375 EUR, meaning that at least some written evidence needs to be presented (Article 1341 Civil Code). In commercial cases, which will usually be the case for matters relating to the breach of competition rules, the above rule does not apply (Article 25 Commercial Code).

The Court must discard any evidence which has been obtained surreptitiously, such as breach of privacy.

The Court can admit, at the request of a party, or order that witnesses be heard in respect of a specific and relevant fact (Article 915-916 Judicial Code). The Court decides whether this is necessary on a discretionary basis, but will only order this measure if it is likely that identified witnesses can deliver proof of a specific, relevant and admissible fact.

16.3.5 Interim Measures

In follow-on proceedings, an interim injunction can be awarded by the President of the Commercial Court or Court of First Instance, civil section, as the case may be. The President will only award a preliminary injunction in case of urgency (Article 584 Judicial Code). The notion of urgency is not defined by law and is judged by the President of the Court.

The interim injunction is immediately enforceable notwithstanding any appeal lodged against it and without security. The interim order cannot have a negative influence on the substance of the case (Article 1039 Judicial Code).

16.3.6 Rulings of the court

The competent Court is not bound by the decision of the BCA (as opposed to a decision of the European Commission), but will generally consider the decision of the BCA as an important factual element.

The competent Court, in first instance or on appeal, can grant damages to the claimant who is entitled to full compensation (*damnum emergens; lucrum cessans*). If proven, the damages will cover the entirety of the incurred damage (Article 1382 Civil Code and case law relating hereto) in order to restore the victim to the situation it would have been in had the infringement not taken place.

16.3.7 Rules applicable to the enforcement of court judgments

If the condemned party (the debtor) fails to comply voluntarily with a judgment, the judgment can be enforced through the courts. This is known as compulsory enforcement. It requires an enforceable title such as a judgment or a notarial deed (Article 1386 Judicial Code). The title is executed by a bailiff.

The claim is enforced against the debtor's assets and is referred to as attachment. A distinction is made between the type of goods **attached** (movable (Articles 1499-1528 Judicial Code) or immovable (Articles 1560-1626 Judicial Code)). When the debtor's goods are attached in execution of a judgment they are sold and the proceeds are given to the claimant. The claimant has no right to the attached goods themselves, only to the proceeds of their sale.

16.4 Alternative dispute resolution mechanisms

In Belgium, parties may submit a competition law dispute to arbitration (Articles 1676-1723 Judicial Code) or mediation (Articles 1724-1737 Judicial Code). Various government websites provide detailed information with regard to arbitration and mediation. Very recently, on 1 September 2013, a new Act on Arbitration has come into effect which aims for a more effective regime for arbitration¹⁴⁶.

As regards mediation, the Federal Mediation Commission regulates the profession and keeps an updated list of accredited mediators. In addition, CEPANI, the Belgian Center for Arbitration and Mediation promotes Arbitration and Mediation and handles concrete cases of Arbitration and Mediation. CEPANI has drafted rules for arbitration, mediation and mini-trial. CEPANI aims to provide economic operators and individuals with the tools for finding a speedy and effective resolution of their dispute.

Given that competition law litigation gives rise to lengthy and expensive proceedings often involving experts to estimate damages, parties usually try to negotiate an amicable solution before introducing a court case.

17 Contextual Information

This Section provides contextual information on the judicial system in Belgium.

17.1 Duration and cost of competition law cases

Duration of cases

Both judicial review and follow-on cases follow the standard regimes provided for by the Judicial Code. No separate procedural rules apply for competition law cases.

The Judicial Code in principle leaves the initiative with the parties, meaning that they can agree amicably on a procedural calendar. If they do not, the Court can impose an agenda. In

¹⁴⁶ *Wet van 24 juni 2013 tot wijziging van het zesde deel van het Gerechtelijk Wetboek betreffende de arbitrage* (Act of 24 June 2013 amending the sixth part of the Judicial Code regarding arbitration).

most cases, the parties indeed agree on a calendar containing deadlines for the exchange of briefs. In most Courts, it is only upon termination of the written procedure that the case will be allotted a date for the hearing. There are no time limitations for allotting the date for the hearing. After the date of such hearing, a Court is under no firm obligation to issue its judgment within a given period. Although Courts are in principle expected to issue their judgment within a period of one month following the hearing, this period is very often extended.

It should be noted that, under the CEL, judicial review of decisions of the BCA henceforward takes place as if in summary proceedings (*zoals in kort geding/ selon la procédure comme en référé*). This means that, although a decision on the merits is taken, the procedural rules that are applied are those of summary proceedings (without there being a need to demonstrate urgency) (Article IV.79, § 2 CEL *juncto* Articles 1035-1041 Judicial Code). However, experience with other commercial cases treated as if in summary proceedings has shown that this does not necessarily mean that the duration of cases shortens substantially. This depends on the conduct of the parties and the workload of the relevant Chamber of the Brussels Court of Appeals.

In view of the above, it would be speculative to provide an average duration of competition law cases (be they judicial review or follow-on cases). It is however fair to state that, per instance, several years will easily pass between the enrolment of the case and the decision of the tribunal or court on the merits of the case.

As regards interim measures however, the Brussels Court of Appeals has (in respect of judicial review) since the entering into force of the 2013 Act, demonstrated in several files its willingness to impose interim measures (notably: a suspension of further proceedings before the Competition Council) at very short notice (i.e. a matter of days or weeks) (Article 19, §2 Judicial Code).

The Brussels Court of Appeals is furthermore expected to arrive at judgments within a reasonable time frame with respect to the (potentially numerous) procedural issues arising from the entry into force of the 2013 Act.

Cost of cases

Both judicial review and follow-on cases follow the standard regime provided for by the Judicial Code (Articles 1017-1024 Judicial Code).

In accordance with these Articles, a final judgement will condemn losing party to amongst others the following costs.

1. Enrolment rights and stamp duties

The enrolment rights are be paid by the claimant upon the registration of the case. The costs can be recovered from the condemned party. The enrolment costs are limited, ranging from 100 EUR before the Commercial Court or Court of First Instance, over 210 EUR before the Court of Appeals to 375 EUR before the Court of Cassation. The stamp duties are negligible.

2. Bailiff fees

There are no bailiff fees due in the context of judicial review cases.

This is different from follow-on cases, where the claimant will have to ask a bailiff to serve a writ upon the defendant. The bailiff will request payment of its fees by the claimant. The costs can be recovered from the condemned party. These costs vary slightly, but are in principle limited (200-300 EUR per defendant).

3. Registration rights

The condemned party is liable to pay registration rights amounting from EUR 25 to 3% in case it is condemned to pay sums in excess of EUR 12,500.

4. Procedural indemnity

Procedural indemnity is determined in line with a Royal Decree. Dependant on the value of the claim, a standard amount is awarded to the party winning the case. Either party can request the Court / Tribunal to decrease or increase such amount (up to a minimum and maximum also provided by Royal Decree) based on a limited number of arguments listed in Article 1022 Judicial Code. This procedural indemnity is meant to cover the legal fees incurred by the winning party. In reality, it hardly covers a fraction of the legal costs involved in complex cases.

5. Court appointed expert and witnesses

Without prejudice to point 4, each party has to bear the fees paid to its own legal counsel (or other expert advice).

6. The order for costs shall be distributed *per capita*, unless the judgment states otherwise. The order for costs shall be jointly and severally pronounced if the main conviction itself entails several liabilities.

17.2 Influencing Factors

EU competition law is often applied in Belgium since:

- Belgium is a small Member State;
- There is a high proportion of international business active in Belgium; and
- Belgium has a pro-EU attitude meaning that the effect on trade between Member States is interpreted extensively.

17.3 Obstacles/Barriers

The Belgian national report of the 2004 *Study on the conditions of claims for damages in case of infringement of EC competition rules* (known as the “Ashurst report” <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>) mentioned the following obstacles at the time:

1. Belgian law does not allow for discovery;
2. Belgian law does not allow for cross-examination;
3. Judicial procedures are very long and costly; and
4. The judicial system in Belgium is ailing.

At the date of this report, it is fair to say that not much has changed as compared to the Ashurst report.

Obstacles 1 and 2 continue to apply: Belgian law still does not allow for discovery or cross-examination.

As regards the third obstacle, the introduction of the procedural indemnity is a welcome novelty (as compared to the Ashurst report), as is the introduction by the 2013 Act of the procedural rules for judicial review (as if in summary proceedings). Nevertheless, the effects of the first measures are rather limited in competition law cases. The effects of the second measure will depend on the resources of the Brussels Court of Appeals and the conduct of the parties.

Annex 6 Bibliography

Legislation

- Belgian Competition Act of 3 April 2013
(*Wet van 3 april 2013 houdende invoeging van boek IV " Bescherming van de mededinging " en van boek V " De mededinging en de prijsevoluties " in het Wetboek van economisch recht en houdende invoeging van de definities eigen aan boek IV en aan boek V en van de rechtshandhabingsbepalingen eigen aan boek IV en aan boek V, in boek I van het Wetboek van economisch recht and Wet van 3 april 2013 houdende invoeging van de bepalingen die een aangelegenheid regelen als bedoeld in artikel 77 van de Grondwet, in boek IV « Bescherming van de mededinging » en boek V « De mededinging en de prijsevoluties » van het Wetboek van economisch recht*)
- Belgian Code of Economic Law
- Act of 10 June 2006 on the Protection of Economic Competition, as amended by the Act of 15 September 2006 on the Protection of Economic Competition
- Act of 5 August 1991 on the Protection of Economic Competition, as amended (among others) by the Act of 1 July 1999 on the Protection of Economic Competition
- Belgian Civil Code
- Belgian Judicial Code
- Belgian Criminal Code
- Telecommunications Act of 13 June 2005
(*Wet van 13 juni 2005 betreffende de elektronische communicatie*)

Books and Articles

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- 2004 Study on the conditions of claims for damages in case of infringement of EC competition rules (known as the "Ashurst report"
<http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>)

Data sources

- Website of the BCA: <http://economie.fgov.be/nl/ondernemingen/mededinging/>
- Website of the Ministry of Justice: <http://justitie.belgium.be/nl/>
- Alternative dispute resolution in Belgium:
 - http://economie.fgov.be/nl/geschillen/Consumentengeschillen/Belmed/wat/mogelijke_alternatieve_geschillenregeling/#.UnzABvk2Z9s
 - <http://www.cepina.be/NL/default.aspx>

COUNTRY FACTSHEET - BULGARIA

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Abbreviations used

CJEU	Court of Justice of European Union
CPC	Commission for Protection of Competition
CRC	Communications Regulation Commission
ECN	European Competition Network
EU	European Union
ICN	International Competition Network
LPC	Law on Protection of Competition
NCA	National Competition Authority
NRA	National Regulatory Authority
SAC	Supreme Administrative Court
SMP	Significant market power
UNCTAD	UN Conference on Trade and Development

1 Overview of the National Legal Framework

The formation of the modern Bulgarian legal system dates back to 1878 when the country ended the long lasting period of Ottoman rule marked by the establishment of the Principality of Bulgaria and the adoption of the Tarnovo Constitution (*Търновска конституция*)¹⁴⁷ on 16 April 1879. This was the first Bulgarian Constitution and remained the fundamental law of the State until 1947. On 6 December 1947, the Bulgarian legal system entered into its next phase marked by the establishment of the People's Republic of Bulgaria (*Народна република България*) ruled by the Bulgarian Communist Party until 1990.¹⁴⁸ On 12 July 1991 the current Bulgarian Constitution¹⁴⁹ was adopted by the 7th Grand National Assembly of Bulgaria and started the process of political democratisation, liberalisation of the national economy and integration of Bulgaria into the EU. Most recently the Bulgarian legal system evolved through profound harmonisation of the national legislation with the *acquis communautaire*.

As a member of the Romano-Germanic legal family, the Bulgarian legal system has a strict hierarchy of the sources of law where the statutes or acts of Parliament represented the most important source of legal norms.¹⁵⁰ Case law, legal doctrine, customs, morals and equity can be regarded as subsidiary sources of law applied in the practice of the Bulgarian courts. The hierarchy of the sources of law is following: the Constitution, decisions of the Constitutional Court interpreting the constitutional provisions, international treaties, and acts of Parliament (including codifications).

The Bulgarian Constitution provides for political and financial independence of the judiciary.¹⁵¹ The organisation of the judicial system and its interaction with the legislative and executive authorities is regulated by the Law on Judiciary System.¹⁵² The Supreme Judicial Council represents the judiciary, ensures its independence, and lays down the number and geographic distribution of the court seats.¹⁵³ The administration of justice in Bulgaria has three levels: regional and district courts, appellate courts, and the Supreme Court of Cassation.¹⁵⁴ There is a separate three-level hierarchy for the administrative and military courts.¹⁵⁵ Judicial review of administrative acts is carried out by a network of 28 administrative courts¹⁵⁶ and the Supreme Administrative Court (SAC).¹⁵⁷ According to the Constitution of the Republic of Bulgaria, the SAC carries out supreme judicial supervision on the exact and uniform application of the laws in the administrative jurisdiction.¹⁵⁸

¹⁴⁷ Constitution of the Principality of Bulgaria (*Конституция на Българското Княжество*), <http://parliament.bg/bg/17>.

¹⁴⁸ Constitution of the People's Republic of Bulgaria (*Конституция на Народна република България*), <http://parliament.bg/bg/18>.

¹⁴⁹ Constitution of the Republic of Bulgaria (*Конституция на Република България*), <http://parliament.bg/bg/const>.

¹⁵⁰ See A. Panayotov, V. Dimitrov, and B. Minov, UPDATE: The Bulgarian Legal System and Legal Research, <http://www.nyulawglobal.org/globalex/Bulgaria1.htm>.

¹⁵¹ Constitution, Article 117.

¹⁵² *Закон за съдебната власт*, the Official Gazette No. 64 of 7.08.2007, http://www.vks.bg/vks_p04_06.htm.

¹⁵³ *Висшият съдебен съвет*, <http://www.justice.bg/>.

¹⁵⁴ *Върховен касационен съд*, <http://www.vks.bg/>.

¹⁵⁵ See generally https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-bg-en.do?member=1.

¹⁵⁶ <http://www.justice.bg/bg/start.htm>.

¹⁵⁷ Supreme Administrative Court of the Republic of Bulgaria (*Върховен административен съд*), <http://www.sac.government.bg/>.

¹⁵⁸ Constitution, Article 125.

2 National Legislation establishing competition law rules

This Section presents the national legislation establishing competition law rules in Bulgaria.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
Law on Protection of Competition	28.11.2008
CPC Leniency guidelines	08.03.2011
CPC Methodology for determination of fines	03.02.2009
CPC Decision No. 55 on block exemption from prohibition under Article 15(1) of the Law on Protection of Competition for certain categories of agreements, decisions and concerted practices	20.01.2011
CPC Rules on evaluation of commitments under the Law on Protection of Competition	09.02.2010
CPC <i>de minimis</i> rules	12.02.2009

2.1 General legislation

The Law on Protection of Competition (LPC) is the specific national legislation enforcing the provisions of the Articles 101 and 102 TFEU. The current LPC entered into force on 2 December 2008 and replaced the 1998 LPC¹⁵⁹ by further harmonising the Bulgarian competition law with the *acquis communautaire*.¹⁶⁰

For instance, the new LPC has raised the *de minimis* market share thresholds from 5% to 10% for horizontal and from 10% to 15% for non-horizontal agreements.¹⁶¹ It has also abolished the system whereby companies would submit a notification for individual exemption of anti-competitive agreements under the national equivalent of Article 101(3) TFEU. Under the reformed framework companies can now claim such an individual exemption should the Commission for Protection of Competition (CPC) decide to challenge the agreement in an infringement procedure. Under the LPC, the determination of dominance lost its dominance presumption threshold of 35% market share; therefore, the dominant position is determined on a case-by-case basis taking into account factors, such as: market share, financial resources, conditions of market entry and economic links with other undertakings, which would allow the dominant firm to act independently of its competitors, suppliers and customers.¹⁶² To the non-exhaustive list of actions that may be qualified as an abuse of a dominant position the new LPC has refined the old LPC wording of 'termination of a long-term contractual relationship' to 'refusal to deal'.¹⁶³

To sum up, the new LPC has fine-tuned the substantive rules following the more economic approach to competition enforcement applied at the EU level. It has also equipped the Bulgarian National Competition Authority (NCA) to

¹⁵⁹ Law on Protection of Competition (*Закон за защита на конкуренцията*), published in the Official Gazette, No. 52 of 08.05.1998, as last amended and supplemented in the Official Gazette No. 64 of 07.08.2007.

¹⁶⁰ See A. Chehtova, The Bulgarian Parliament passes a new law on the Protection of Competition, 2 December 2008, e-Competitions Bulletin December 2008, Art. N° 23368; Fessenko, The Bulgarian Parliament adopts a new act on the protection of competition, 28 November 2008, e-Competitions Bulletin November 2008, Art. N° 23076.

¹⁶¹ LPC, Article 16.

¹⁶² LPC, Article 20.

¹⁶³ LPC, Article 21(5).

- carry out the decentralised enforcement of Article 101 and 102 TFEU under the Regulation 1/2003;¹⁶⁴
- cooperate with the EU Commission and NCAs of the Member States within the European Competition Network (ECN); and
- encourage further development of public/private enforcement of competition rules.

Article 15(1) LPC is the national equivalent of Article 101(1) TFEU that prohibits anti-competitive agreements of undertakings,¹⁶⁵ decisions of associations of undertakings and concerted practices that have the restriction of competition as their object or effect. As mentioned above, there is no prior notification system for individual exemptions; the application of the national equivalent of Article 101(3) TFEU is carried out by the CPC on a case-by-case basis with the burden of proof falling on the undertakings concerned.¹⁶⁶ Agreements of minor importance are exempted according to the rules laid down in the national *de minimis* regulation.¹⁶⁷ Certain categories of agreements are subject to block exemption according to the CPC Decision transposing into domestic competition practice the rules laid down in the EU block exemption regulations.¹⁶⁸

The relevant provision mirroring Article 102 TFEU is Article 21 LPC. It contains a non-exhaustive list of actions qualified as abuse of dominant position.

The LPC authorises the CPC to apply sanctions up to 10% of the undertaking's annual turnover for the infringements of Articles 101 and 102 TFEU and their national equivalents.¹⁶⁹ When determining the amount of fine the CPC takes into account the gravity and length of infringement, as well as aggravating and extenuating circumstances as detailed in the 2009 Fining Guidelines.¹⁷⁰ The LPC has also provided for the leniency program, which allows the CPC to grant immunity or reduction of fines for the infringement of Article 101 TFEU or its national equivalent.¹⁷¹ The detailed Leniency Guidelines¹⁷² were adopted by the CPC in 2009 with amendments in 2011 introducing a single leniency application form, the so-called 'marker procedure' allowing the applicants to transform an application for immunity to an application for reduction, as well as additional incentives for notification of participation in multiple cartels.

The applicability of the competition rules laid down in the LPC is based on the 'effects doctrine', which provides for extra-territorial application of competition law to the actions of undertakings within and outside of Bulgaria provided that such actions have caused or might have caused anti-competitive effects on Bulgarian markets.¹⁷³ The application of LPC provisions to the actions of undertakings that restrict competition on foreign markets is

¹⁶⁴ Council Regulation 1/2003, of 16 December 2002, on implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, OJEU L 1, 4 January 2003, p. 1-25.

¹⁶⁵ Article 1(7) of the Additional Provisions of the LPC defines the term 'undertaking' as "any natural, legal or unincorporated entity, which is engaged in economic activity regardless of its legal or organizational form". Article 1(13) of the Additional Provisions defines the term 'economic activity' as "activity of undertakings, the results of which have the purpose of exchange on the market".

¹⁶⁶ LPC, Article 17.

¹⁶⁷ Rules on agreements of minor effect on competition (*Правила за споразуменията с незначителен ефект върху конкуренцията* (*de minimis*), adopted by the CPC Decision No. 125 of 12.02.2009.

¹⁶⁸ LPC, Article 18. CPC Decision No. 55 on block exemption from prohibition under Article 15(1) of the Law on Protection of Competition for certain categories of agreements, decisions and concerted practices (*Решение за групово освобождаване от забраната по чл. 15, ал. 1 от Закона за защита на конкуренцията на определени категории споразумения, решения или съгласувани практики*) of 20.01.2011.

¹⁶⁹ LPC, Article 100(1).

¹⁷⁰ Rules on determination of sanctions under the Law on Protection of Competition (*Методиката за определяне на санкциите по Закона за защита на конкуренцията*), adopted by the CPC Decision No. 71 of 03.02.2009. See M. Favart, The Bulgarian Competition Authority adopts new methodology for setting fines, 3 February 2009, e-Competitions Bulletin February 2009, Art. N° 43795.

¹⁷¹ See M. Favart, The Bulgarian Competition Authority introduces a leniency programme, February 2009, e-Competitions Bulletin February 2009, Art. N° 43781.

¹⁷² Rules on application of the leniency program in case of participation in a clandestine cartel (*Правила за прилагане на програмата за освобождаване от санкция или намаляване на санкции в случай на участие на предприятие в таен картел*), adopted by CPC Decision No. 274 of 08.03.2011.

¹⁷³ LPC, Article 2(1).

carried out by the CPC only to the extent provided for in international treaties to which Bulgaria is a party.¹⁷⁴

2.2 Industry-specific legislation

While the LPC applies to all economic sectors, there are instances of sector-specific legislation aimed at protecting competition in the regulated sectors of the economy. For example, the Law on Electronic Communications¹⁷⁵ enforced by the Communications Regulation Commission (CRC)¹⁷⁶ declares among its objectives the development of competition in communications markets.¹⁷⁷ The CRC determines the undertakings with significant market power (SMP) and imposes certain behavioural obligations aimed at preserving competition and preventing abuses of dominant position by the SMP holders. The decisions of the CRC are issued in accordance with the general rules on administrative procedure and can be challenged before the SAC.¹⁷⁸ In order to ensure better coordination between the CRC and CPC the law provides for certain cooperation and transparency obligations on both agencies.¹⁷⁹

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in Bulgaria, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Commission for Protection of Competition

In 2011 the CPC celebrated its 20th year since its establishment under the first Law on Protection of Competition. The Law was adopted by the National Assembly of the Republic of Bulgaria on 2 May 1991 while the first composition of the CPC was elected on 23 September 1991.

3.2 The reform of the Commission for Protection of Competition

The new 2008 LPC that replaced the 1998 LPC has preserved the collegiate nature of the CPC's decision-making and the function-oriented internal structure of the Bulgarian NCA. The new law has enhanced the investigative and sanctioning powers of the CPC, adding to its tactical tools the leniency programme and the possibility to accept commitments. The reform of the CPC has been largely informed by the requirements of the effective enforcement of EU competition rules and emerging trends and tendencies in competition enforcement at EU level such as the 'more economic approach', prioritising the fight against cartels, and encouraging private enforcement against antitrust infringements.

3.3 Composition and decision-making

The CPC is composed of seven members: President, Deputy President and five members (all elected by the National Assembly for a five-year term).¹⁸⁰ The President of the CPC must have a higher legal education with a minimum of ten years of practical legal experience.¹⁸¹ The members of the CPC must be graduate lawyers or economists with a minimum of five years of practical experience in the respective fields.¹⁸² Currently the CPC is organised into five directorates reflecting the NCA's competences:

¹⁷⁴ LPC, Article 2(2).

¹⁷⁵ *Закон за електронните съобщения*, State Gazette No. 41 of 22.05.2007.

¹⁷⁶ *Комисия за регулиране на съобщенията*, <http://www.crc.bg/>.

¹⁷⁷ Law on Electronic Communications, Article 4(1)(1).

¹⁷⁸ Law on Electronic Communications, Article 35(2).

¹⁷⁹ Law on Electronic Communications, Articles 44, 45.

¹⁸⁰ LPC, Article 4(1).

¹⁸¹ LPC, Article 4(2).

¹⁸² LPC, Article 4(3).

1. Antitrust and concentrations with staff of 34 (with antitrust and merger control departments)¹⁸³;
2. Legal analysis and competition policy with staff of 11;
3. Unfair competition with staff of 11;
4. Public procurement and concessions with staff of 30;
5. Finances and administration (with administrative IT department) with staff of 23.¹⁸⁴

By the end of 2011 the personnel schedule of the CPC provided for 117 staff positions.¹⁸⁵

The current Statute regulating the internal structure and decision-making of the CPC was adopted in 2009.¹⁸⁶ The CPC's decisions are adopted in a collegiate manner following the majority vote of at least four CPC members.¹⁸⁷ The results of the adopted decisions are published within 14 days from the date of the CPC's meeting when the decision was adopted.¹⁸⁸ The CPC maintains an electronic registry where it publishes its decisions concerning the finding of an infringement, no-infringement, and acceptance of commitments.¹⁸⁹

3.4 Cooperation with other entities

The LPC expressly mandates the CPC to cooperate with the EU Commission and NCAs of the Member States pursuant to the provisions of the Regulation 1/2003.¹⁹⁰ This cooperation is primarily carried out under the framework of the European Competition Network (ECN).¹⁹¹

In 2003 the CPC joined the International Competition Network (ICN),¹⁹² a network of NCAs that promotes the adoption of uniform standards and procedures in competition policy, formulates proposals for procedural and substantive convergence of national competition rules and facilitates international cooperation among its members. The CPC also actively participates in the work of the OECD Regional Centre for Competition based in Budapest, Hungary,¹⁹³ which aims at fostering the development of competition policy, competition law and competition culture in the East, South-East and Central European region. Finally in 2012 the CPC joined forces with the United Nations Conference on Trade and Development (UNCTAD)¹⁹⁴ and established the Sofia Competition Forum,¹⁹⁵ an informal platform for technical assistance, exchange of experience and consultations in the field of competition policy and enforcement with participation of NCAs from the Western Balkans.

On the national level, the CPC requests the cooperation of the Ministry of Internal Affairs¹⁹⁶ when conducting 'dawn raids' where assistance of police personnel might be necessary.¹⁹⁷ The procedural rules on cooperation between CPC and the Ministry are regulated in the jointly adopted Instructions.¹⁹⁸

¹⁸³ The Directorate Antitrust and Concentrations is responsible for carrying out the investigation into the alleged infringements of Articles 101 and 102 TFEU.

¹⁸⁴ The CPC's structure is displayed at <http://www.cpc.bg/General/Structure.aspx>. The competences of individual directorates are explained at <http://www.cpc.bg/General/Administration.aspx>.

¹⁸⁵ CPC Statute, Annex to Article 18.

¹⁸⁶ Statute of the Commission for Protection of Competition (*Устройствения правилник на Комисията за защита на конкуренцията*), adopted by CPC Decision of 12.02.2009, published in State Gazette No. 15 of 24.02.2009.

¹⁸⁷ CPC Statute, Article 36(2).

¹⁸⁸ CPC Statute, Article 38(6).

¹⁸⁹ LPC, Article 68. CPC Public Electronic Register is accessible at <http://reg.cpc.bg/>.

¹⁹⁰ LPC, Article 54(1).

¹⁹¹ <http://ec.europa.eu/competition/ecn/>.

¹⁹² <http://www.internationalcompetitionnetwork.org/>.

¹⁹³ <http://www.oecdhungarycompetitioncentre.org/>.

¹⁹⁴ <http://unctad.org/en/Pages/DITC/CompetitionLaw/Competition-Law-and-Policy.aspx>.

¹⁹⁵ <http://scf.cpc.bg/>.

¹⁹⁶ *Министерство на вътрешните работи*, <http://www.mvr.bg>.

¹⁹⁷ LPC, Article 50(3).

¹⁹⁸ Instructions on conditions and procedures for organization and implementation of joint actions by the officials of the Ministry of Internal Affairs and the Commission for Protection of Competition. (*Инструкция за условията*

3.5 Investigations

The investigations of the alleged infringements of Articles 101 and 102 TFEU and their national equivalents are commenced by the CPC within 7 days from the date of (1) an *ex officio* decision of the CPC; (2) an application by the public prosecutor; (3) an application by an interested third party; (4) a leniency application.¹⁹⁹ In order to encourage third parties to inform the CPC about potential infringements of competition rules the CPC adopted the Internal rules on protecting the identity of persons who have provided information or evidence concerning infringements of LPC.²⁰⁰ These rules provide for a possibility to obtain a status of “CPC protected informer”, which protects the identity of “whistle-blowers” reporting competition law infringements. In order to streamline third party complaints, the CPC has adopted a standard complaint form,²⁰¹ which requires the complainant to provide various information including *inter alia* the description of the alleged infringement, structure of the relevant market, possibility of affecting the trade between Member States, etc. If the complainant’s submission does not contain the required information the CPC allows the complainant a 7-day grace period to re-submit the completed complain form or have it formally rejected by the CPC.²⁰²

The LPC accords the CPC with the following investigatory powers: (1) to request information and various types of evidence; (2) to record verbal or written explanations; (3) to conduct ‘dawn raids’; (4) to engage external experts for technical expertise; (5) to request information or cooperation from the EU Commission or NCAs of other Member States.²⁰³

Any natural or legal persons might be requested to provide information to the CPC in the context of an investigation initiated under the LPC or Regulation 1/2003.²⁰⁴ The authorisations for ‘dawn raids’ are issued by the Sofia Administrative Court upon a motivated request by the CPC on the same date and can be appealed before the three-member panel of SAC within three days.²⁰⁵

3.6 Decision-making

The parties who submit an application or notification for initiation of proceedings as well as the parties against whom such proceedings are initiated by the CPC have the status of parties to the proceedings.²⁰⁶ Parties to the proceedings benefit from access to the file excluding information qualified as confidential (procedural, commercial, trade secrets, etc.)²⁰⁷ and correspondence with the EU Commission and NCAs of the EU Member States.²⁰⁸ The parties to the proceedings and other interested parties who submit their observations on the statement of objections issued by the CPC have a right to be heard by the CPC in an open hearing organised after fourteen days following the deadline for submission of observations.²⁰⁹

When the CPC establishes the existence of an infringement of Article 101 and/or 102 TFEU and/or its national equivalents, the NCA is authorised to impose fines up to 10% of the

и реда за организиране и провеждане на съвместни действия от служителите на Министерството на вътрешните работи и Комисията за защита на конкуренцията).

¹⁹⁹ LPC, Articles 38(1), 70.

²⁰⁰ Internal rules on protection of identity of persons who provided information or evidence concerning infringements of LPC adopted by CPC Decision No. 113 of 10.02.2009.

²⁰¹ Standard form for complaint pursuant to Article 38(1) LPC, published on 03.07.2009.

²⁰² LPC, Article 38(2).

²⁰³ LPC, Article 45.

²⁰⁴ LPC, Article 47.

²⁰⁵ LPC, Article 51.

²⁰⁶ LPC, Article 43.

²⁰⁷ Handling and access to confidential information is regulated in the Rules on access, handling and storage of documents containing procedural, commercial or other secrets protected by law (*Правила за достъп, използване и съхраняване на документи, представляващи производствена, търговска или друга защитена от закон тайна*) adopted by CPC Decision No. 161 of 19.02.2009.

²⁰⁸ LPC, Article 55(1).

²⁰⁹ LPC, Article 76.

undertaking's (or undertakings') annual turnover of the preceding year.²¹⁰ Fines of up to 1% of annual turnover can be imposed by the CPC for procedural infringements such as failure to cooperate with NCA, failure to submit the requested information, breaking the seals attached in the course of CPC's inspections, etc.²¹¹ The decisions of the CPC imposing sanctions and fines can be appealed before the SAC pursuant to the procedural rules laid down in the Code of Administrative Procedure.²¹² The CPC's decisions can be appealed within 14 days from the date of notification/publication while CPC's orders can be appealed within a 7-day term.

4 Competent courts

This Section presents the competent courts in Bulgaria.

Table 4.1 Court system in Bulgaria

Level	General courts	Administrative courts	Military courts	Criminal courts
Final instance	Supreme Court of Cassation Върховен касационен съд	SAC (five-member panel) Върховен административен съд		Supreme Court of Cassation Върховен касационен съд
Third instance	Appellate courts <i>апелативни съдилища</i>	SAC (three-member panel) Върховен административен съд	Military appellate court Военно-апелативен съд	Special Appellate Criminal Court Апелативен специализиран наказателен съд
First instance/second instance	District courts <i>окръжни съдилища</i>			Special Criminal Court Специализиран наказателен съд
First instance	Regional courts <i>районни съдилища</i>	Administrative courts <i>административни съдилища</i>	Military courts <i>военни съдилища</i>	

The Bulgarian court system is composed of general and specialised courts. General courts consist of regional courts, district courts, appellate courts and the Supreme Court of Cassation. Specialised courts are split between administrative, military and criminal courts. Administrative courts consist of 28 first instance administrative courts and the SAC, which is the second and final instance of the administrative court system hearing cases in three- and five-member panels. Military courts are broken down between 5 first instance military courts and one Military Appellate Court. Criminal courts consist of one Special Criminal Court, one Special Appellate Criminal Court and the Supreme Court of Cassation.

The SAC based in Sofia is the single court authorised to adjudicate the review of the CPC's decisions.²¹³ Depending on the stage of the judicial review of the CPC's decisions, the panels of the SAC are competent to examine facts of the case and application of the law. As of 1 July 2012 there were 86 judges working at SAC.²¹⁴ They are organised into two colleges each containing four sections. The fourth section included in the first college carries out judicial review of the CPC's decisions.²¹⁵ In 2012 there were 44 judges working within the first college of the SAC. Out of 44 judges, there were 13 judges in the fourth section organized into four panels. Therefore, as of 01 July 2012 there were 13 full time (FTE)

²¹⁰ LPC, Article 100(1).

²¹¹ LPC, Article 100(2).

²¹² LPC, Article 99.

²¹³ LPC, Article 64.

²¹⁴ SAC 2012 Annual Report, <http://www.sac.government.bg/pages/bg/progress-reports>.

²¹⁵ <http://www.sac.government.bg/pages/bg/forth-section>.

judges involved in the judicial review of competition cases including the enforcement of Article 101 and 102 TFEU and their national equivalents. It was not possible to estimate the number of legal practitioners working and involved with SAC. Based on the contents of the judgments applying Articles 101 and 102 TFEU, the parties are represented both by lawyers working at the law firms and by their own in-house counsel. The judgments only mention the names of the lawyers without indicating the name of the law firm. Based on the number of collected judgments the number of lawyers involved in the EU competition law cases is unlikely to exceed one hundred.

The LPC empowers the interested parties who suffered damages as a result of infringement of competition rules to initiate civil actions before the general courts following the rules of civil procedure.²¹⁶ Therefore, follow-on damages actions can be brought by the interested parties before any regional or district court at the domicile of the respondent.²¹⁷ If the value of the dispute exceeds BGN 25,000 (approx. EUR 12,800) then the litigation should fall under competence of a district court as a court of first instance.²¹⁸ Although the general courts are organised in a regional manner, their geographic areas of jurisdiction do not always correspond to the administrative organisation of the country.

There are 113 regional courts, 28 district courts, five appellate courts (in Sofia, Burgas, Varna, Veliko Tarnovo, Plovdiv) and the Supreme Court of Cassation in Sofia.²¹⁹ The statistics of the Supreme Judicial Council indicates that there were 2281 judges as of 30 June 2012.²²⁰ It was not possible to estimate the number of legal practitioners working and involved with the general courts. However, since the private enforcement of EU competition law is scarce the number of lawyers actually involved such follow-on cases will also be negligible.

It should be noted that private enforcement is not limited to the follow-on actions; in the absence of a CPC's decision establishing an infringement of competition rules the claimant will bear the burden of proof. However, the LPC specifies that the CPC's infringement decisions and SAC's judgments upholding the CPC's infringement decisions shall be binding on the general courts hearing private enforcement cases.²²¹

5 Proceedings related to breaches of Competition Law rules

This Section describes the proceedings related to breaches of competition law rules in Bulgaria.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in Bulgaria is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Parties to the CPC proceedings, interested third parties, and State prosecutors.	Any interested third party who sustained damage as a result of competition law infringement
How can an action be filed?	An action can be filed directly	An action can be filed directly

²¹⁶ LPC, Article 104.

²¹⁷ Code of Civil Procedure, Article 105.

²¹⁸ Code of Civil Procedure, Article 104(4).

²¹⁹ https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-BG-en.do?clang=bg.

²²⁰ <http://www.justice.bg/bg/start.htm>.

²²¹ LPC, Article 104(4).

	Judicial Review	Follow on
	before the SAC by the person concerned.	before the court by the person concerned (damages actions are not limited to follow-on claims).
With which authorities can the action be filed?	SAC (three-member panel).	General courts (regional or administrative courts depending on the value of the claim).
Burden of proof	The burden of proof rests with the CPC in relation to the facts mentioned in the decision and compliance with procedural rules.	CPC decisions and SAC judgments have binding power on general courts, burden of proof in relation to the quantum of damages – on claimant.

5.2 Judicial Review Proceedings

This Section presents the judicial review proceedings in Bulgaria for competition law cases.

5.2.1 Rules applicable to the judicial review of NCA decisions

The review of the NCA's decisions in Bulgaria is carried out pursuant to the provisions of the Code of Administrative Procedure.²²² The general grounds for the appeal against CPC decision are: lack of competence; non-compliance with the required form; material breach of the rules of administrative procedure; contravention of the provisions of substantive law; and non-conformity with the objectives of the law.²²³

5.2.2 Competent Court

According to the provisions of the LPC, the SAC is the single first and second instance court competent to carry out the judicial review of the CPC decisions. The initial appeals are heard in a three-member panel²²⁴ while the cassation appeals on the decisions of the SAC three-member panel are heard in a five-member panel.²²⁵ The grounds for cassation appeal are: nullity, inadmissibility; and illegality (due to violation of substantive law or material violation of procedural rules, lack of sufficient reasoning of the decision).²²⁶

5.2.3 Timeframe

As a general rule the CPC's decisions should be appealed before the SAC within a 14-day term from the date of notification/publication.²²⁷ The judgments of the three-member panel of SAC are subject to cassation appeal before the five-member panel within 14 days from the date of the publication of the judgment.

5.2.4 Admissibility of Evidence

Normally the SAC would examine the evidence that was legally collected in the proceedings before the CPC. However, at the request of the parties the SAC might order the collection of new evidence, which is admissible under the Code of Civil Procedure.²²⁸ Electronic documents can be used before the court if they are signed with a digital signature according

²²² Code of Administrative Procedure (*Административнопроцесуален кодекс*), State Gazette No. 30 of 11.04.2006.

²²³ See P. Petrov, Bulgaria Chapter – Enforcement of Competition Law 2009, <http://www.iclg.co.uk/practice-areas/enforcement-of-competition-law/enforcement-2009/bulgaria>.

²²⁴ Code of Administrative Procedure, Article 165.

²²⁵ Code of Administrative Procedure, Article 217.

²²⁶ Code of Administrative Procedure, Article 209.

²²⁷ Code of Administrative Procedure, Article 149.

²²⁸ Code of Administrative Procedure, Article 171.

to the applicable legislation.²²⁹ The range of evidence that can be used in the cassation appeal proceedings before the five-member panel of the SAC is somewhat restrictive: written documents.²³⁰ The cassation appeal panel shall apply the law to the facts established by the three-level panel in the course of initial review of the CPC's decision.²³¹

5.2.5 Interim Measures

At any time during the judicial review proceedings the SAC may be requested by the party to suspend the implementation of the CPC's decision under appeal. The SAC shall order the suspension if the implementation of the decision would cause significant and irreparable harm to the party. The requests for suspension are examined immediately in a closed session and the decisions of the SAC concerning suspension can be appealed within seven days.²³² At the same time, the SAC can allow the preliminary implementation of the CPC decision upon request of the latter. If such preliminary implementation could cause significant and irreparable harm to the party then an appropriate guarantee/security should be provided. The SAC's decisions on the preliminary implementation are taken immediately in a closed hearing and can be appealed by the parties within three days. If the decision allowing preliminary implementation is quashed, the CPC is required to restore the situation as it was prior to the commencement of preliminary implementation.²³³

5.2.6 Rulings of the court

The SAC, sitting in a three-member panel may: declare the CPC's decision null and void (in case of lack of competence); annul the CPC's decision in whole or in part; amend the CPC's decision; or uphold the CPC's decision and reject the appeal.²³⁴ The declaration of nullity refers only to the cases where the CPC did not have competence to act, while the annulment of the CPC's decision by the SAC means the CPC has made errors in its fact-finding, admitted procedural irregularities or incorrectly interpreted the law. The five-member panel of the SAC upon hearing the cassation appeal may: declare the decision of the three-member panel invalid; declare the decision of the three-member panel inadmissible; annul the decision of the three-member panel in whole or in part; uphold the decision and reject the appeal.²³⁵ The procedure before the three- and five-member panels of SAC include both written and oral hearings.

5.3 Follow-on Proceedings (private enforcement)

This Section presents the follow-on proceedings for competition law cases in Bulgaria.

5.3.1 Rules applicable to follow-on procedures

Follow-on procedures are qualified as individual or class actions for damages (general tort rules apply) and can be brought by the parties before the general courts according to the rules of civil procedure laid down in the Code of Civil Procedure.²³⁶ The LPC provides that such actions may be initiated by any natural or legal person who has suffered damages as a result of an infringement of competition rules even if such infringement was not directed against them.²³⁷ This provision extends the circle of eligible plaintiffs beyond just counter-parties and competitors of the infringers to the final customers and consumers who suffered as a result of a cartel or an abuse of dominant position. In case of follow-on actions, the final

²²⁹ Code of Administrative Procedure, Article 141.

²³⁰ Code of Administrative Procedure, Article 219.

²³¹ Code of Administrative Procedure, Article 220.

²³² Code of Administrative Procedure, Article 166.

²³³ Code of Administrative Procedure, Article 167.

²³⁴ Code of Administrative Procedure, Article 172.

²³⁵ Code of Administrative Procedure, Article 221.

²³⁶ Code of Civil Procedure (*Граждански процесуален кодекс*), State Gazette No. 59 of 20.07.2007.

²³⁷ LPC, Article 104(2).

decisions of the CPC and final judgments of the SAC shall be binding on the general courts examining the claims for damages.²³⁸

5.3.2 Competent Court

The Code of Civil Procedure specifies that disputes in respect to legal relationships created by cartel agreements, decisions and concerted practices, economic concentrations, unfair competition and abuse of monopolistic or dominant position shall be regarded as commercial disputes examined by the district courts as first instance courts.²³⁹ The claim should be filed in the district court whose jurisdiction encompasses the domicile of the defendant.²⁴⁰ The appellate courts serve as courts of appeal (second instance), while the final verdict on issues of interpretation of the law in cases exceeding BGN 10,000 (around EUR 5,113) is issued by the Supreme Court of Cassation (third and final instance).²⁴¹

5.3.3 Timeframe

Follow-on claims for damages can be filed within five years following the entry into force of the CPC's decision or the SAC's judgments establishing or confirming the existence of an infringement.²⁴²

5.3.4 Admissibility of evidence

The court collects the relevant evidence with the participation of the parties.²⁴³ The parties can propose to the court the collection of certain types of evidence and the court approves or rejects such requests issuing a determination in that regard. Types of evidence that can be used in the civil proceedings include: witness statements, explanations of the parties, written documents (including electronic documents), expert statements etc. These rules apply to all instances where the court is competent to decide on issues of fact.

5.3.5 Interim Measures

The rules of civil procedure allow the plaintiff to request the adoption of interim measures aimed at securing future enforcement of the judgment.²⁴⁴ The interim measures can take the following forms: foreclosure of immovable property; confiscation of movable property; other appropriate measures including the suspension of registration of motor vehicles and prohibition on their use.²⁴⁵

5.3.6 Rulings of the court

As a general principle of the Code of Civil Procedure, cases are heard orally and in public.²⁴⁶ While preliminary hearings (issues of competence, acceptability of the appeal, etc.) are closed, the hearings in which the arguments of the parties are heard are usually open (for first, second and final instance courts). Upon request of the parties the court can order the hearings to be conducted with closed doors.²⁴⁷ The rulings of the court should be published within one month following the date of the last session where the ruling was adopted.²⁴⁸ The ruling must contain the following information: date and place, identification of the judges and the parties, identification of the case, the decision on the merits (including the decision on

²³⁸ LPC, Article 104(4).

²³⁹ Code of Civil Procedure, Article 365(5).

²⁴⁰ Code of Civil Procedure, Article 105.

²⁴¹ Code of Civil Procedure, Article 280(2).

²⁴² LPC, Article 104(4).

²⁴³ Code of Civil Procedure, Article 148.

²⁴⁴ Code of Civil Procedure, Article 389.

²⁴⁵ Code of Civil Procedure, Article 397.

²⁴⁶ Code of Civil Procedure, Article 11.

²⁴⁷ Code of Civil Procedure, Article 376.

²⁴⁸ Code of Civil Procedure, Article 235(5).

award and quantum of damages), the party who bears the costs, information concerning the possibility of appeal.²⁴⁹

5.3.7 Rules applicable to the enforcement of court judgments

Depending on the financial situation of the parties and other circumstances the court can decide to delay the execution of the judgment or to allow its execution in parts (in instalments).²⁵⁰ In cases where the defendant fails to comply with the judgment in a timely and voluntary manner, the rules of civil procedure provide for a possibility for a plaintiff to apply for an executory order (*изпълнителен лист*).²⁵¹ The executory order is then presented to the judicial executors for forced execution on the defendant.²⁵²

5.4 Alternative dispute resolution mechanisms

Although the general provisions of the administrative procedure rules provide for the possibility for having an agreement between the claimant and the administrative authority that can be approved by the court,²⁵³ there is no evidence that this has been applied in relation to CPC's decisions. With respect to follow-on actions the parties can use general commercial ADR mechanisms such as negotiation, mediation, arbitration, etc. If the parties reach the settlement in the course of the court proceedings, the court upon request of the parties shall adopt the judicial settlement. This will have the effect of a final judgment, which is not subject to appeal.²⁵⁴

6 Contextual Information

This Section provides an overview of contextual information on the Bulgarian judicial system.

6.1 Duration and cost of competition law cases

According to the statistics provided by the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, in 2007 96% of cases were solved by the SAC within 3 months from the date of the lodging of the claim.²⁵⁵ In 2008 this percentage had risen to 99%.²⁵⁶ According to the 2013 The EU Justice Scoreboard,²⁵⁷ the average duration of the administrative cases in Bulgaria in 2010 was between 100 and 200 days while no data was provided on the length of litigious civil and commercial cases that cover follow-on claims.

It is however not possible to establish the duration and cost of competition law cases without the detailed review of the available judgments and interviews of the parties to the proceedings.

6.2 Influencing Factors

Among the factors influencing the application of EU competition rules in Bulgaria are the discretion of the CPC to initiate ex officio investigations and the public awareness of competition rules and general competition culture, which is reflected in the number of complaints brought to the attention of the NCA by the interested parties. As the CPC's

²⁴⁹ Code of Civil Procedure, Article 236(1).

²⁵⁰ Code of Civil Procedure, Article 241.

²⁵¹ Code of Civil Procedure, Articles 404-409.

²⁵² Code of Civil Procedure, Articles 410-425.

²⁵³ Code of Administrative Procedure, Article 20. Administrative Justice in Europe: Bulgaria, p. 25, <http://www.juradmin.eu/index.php/en/tour-d-europe-en>

²⁵⁴ Code of Civil Procedure, Article 234.

²⁵⁵ Administrative Justice in Europe: Bulgaria, p. 27, <http://www.juradmin.eu/index.php/en/tour-d-europe-en>.

²⁵⁶ Administrative Justice in Europe: Bulgaria, p. 27, <http://www.juradmin.eu/index.php/en/tour-d-europe-en>.

²⁵⁷ The 2013 EU Justice Scoreboard, COM(2013)160 final, http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf.

enforcement record for 2012 demonstrates, there is a steady increase in cartel investigations and a reduction in numbers of abuse of dominance and merger cases.²⁵⁸ Another important factor that is likely to have an impact on the application of competition rules and, as a result, on the number of infringement decisions is the effectiveness of the leniency program and application of the commitments procedure by the CPC. A recent practitioners' report indicates that leniency has not yet become a popular enforcement tool in Bulgarian competition enforcement, while the rate of approval of the CPC's decisions by the SAC has been steadily on the rise.²⁵⁹

6.3 Obstacles/Barriers

The centralisation of the judicial review of CPC decisions in a single court – the SAC – should be viewed as a factor that has enhanced access to justice in relation to the public enforcement of competition rules. The current institutional framework for competition law enforcement has been established already in 1991 by the first Act on protection of Competition.²⁶⁰ Despite a number of legislative amendments (in 1998, 2006) aimed at the harmonisation of the Bulgarian competition law with the EU substantive and procedural rules, the enforcement system has preserved its continuity. As a result, the system provides for a coherent and relatively cost-efficient judicial review of the CPC decisions. At the same time, the geographic centralisation of competition institutions in Sofia might have affected the general public awareness about competition rules. At this point there is no clear evidence of obstacles with respect to private enforcement actions including follow-on actions. Importantly, in 2009 it was reported that there was no evidence of successful claims for damages arising out of competition law infringements.²⁶¹ Specifically in relation to the follow-on claims, it should be stated that the general stage of development of private antitrust enforcement and the number of enforcement decisions of the CPC applying Articles 101 and/or 102 TFEU may explain the absence of private enforcement of EU competition rules in Bulgaria.

²⁵⁸ See D. Fessenko, The Bulgarian Commission for the Protection of Competition draws the line on enforcement track-record in the year 2012, 15 May 2013, e-Competitions Bulletin May 2013, Art. N° 56418.

²⁵⁹ See V. Penkov and S. Adrianov, Bulgaria Chapter – Cartels & Leniency 2013, <http://www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-&leniency-2013/bulgaria>.

²⁶⁰ See D. Fessenko, The Bulgarian competition and State aid law, regime and institutions (State Gazette 86, 24 Oct. 2006), 1 January 2007, e-Competitions Bulletin January 2007, Art. N° 12617.

²⁶¹ See P. Petrov, Bulgaria Chapter – Enforcement of Competition Law 2009, <http://www.iclg.co.uk/practice-areas/enforcement-of-competition-law/enforcement-2009/bulgaria>.

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COUNTRY FACTSHEET – CROATIA

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Abbreviations used

Act	2009 Competition Protection Act
EU	European Union
TFEU	Treaty on Functioning of the European Union

1 Overview of the National Legal Framework

The national legal system in the Republic of Croatia (hereafter ‘Croatia’) is derived from the Civil Law system, with many laws based on Austrian or German legislation. The legal order is made up of a hierarchical system. The Constitution (*Ustav*) is the highest source of law followed by statutes (*zakoni*) and regulations (*podzakonski akti*). Statutes must be in accordance with the Constitution, and other regulations in accordance with the Constitution and statutes²⁶².

The Constitution of Croatia came into force on 22 December 1990²⁶³. It is a written document. The constitutional foundations of the State are set out in the text as well as the guarantees for the rights and freedoms of citizens and the organisation of public power. The Constitution provides that the State power in Croatia is organised on the basis of the principle of the separation of powers between the legislative, the executive and the judicial branch²⁶⁴.

The judicial branch is regulated in Chapter IV, subchapter 4 of the Constitution. Judicial power (*sudbena vlast*) is autonomous and independent, and the courts rule on the basis of the Constitution, laws, international agreements and other valid sources of law²⁶⁵. The Supreme Court of the Republic of Croatia, the highest court in the country, secures ‘uniform application of law’ and ‘equality of all in the application of the law’²⁶⁶.

Further information on the court structure in Croatia is provided in Section 4 below.

2 National Legislation establishing competition law rules

This Section provides an overview of the national legislation in Croatia establishing competition law rules.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
<i>Zakon o izmjenama i dopunama Zakona o zaštiti tržišnog natjecanja</i> (Act on Amendments of Competition Protection Act), published in <i>Narodne novine</i> no. 80/2013	21 June 2013, entry into force 1 July 2013
<i>Zakon o zaštiti tržišnog natjecanja</i> (Competition Protection Act), published in <i>Narodne novine</i> no. 79/2009	24 June 2009, entry into force 1 October 2010

2.1 General legislation

The first Competition Protection Act²⁶⁷ in Croatia was adopted in 1995. On the basis of this Act, the Croatian Competition Agency (*Agencija za zaštitu tržišnog natjecanja*) was established and started functioning in 1997.

The second Competition Protection Act²⁶⁸, which replaced the 1995 Competition Protection Act, was adopted in 2003 introducing significant substantive, procedural and institutional

²⁶² Article 5 of the Constitution, *Narodne novine* no. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010.

²⁶³ *Ustav Republike Hrvatske*, *Narodne novine* no. 56/90.

²⁶⁴ Article 4 of the Constitution, *Narodne novine* no. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010.

²⁶⁵ Article 115 of the Constitution, *Narodne novine* no. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010.

²⁶⁶ Article 116 of the Constitution, *Narodne novine* no. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010.

²⁶⁷ *Zakon o zaštiti tržišnog natjecanja*, *Narodne novine* no. 48/1995, 52/1997, 89/1998.

²⁶⁸ *Zakon o zaštiti tržišnog natjecanja*, *Narodne novine* no. 122/2003.

changes to the competition law framework, with a view to aligning Croatian competition legislation with the EU *acquis*.

The 2003 Act was replaced by the 2009 Competition Protection Act²⁶⁹, which came into force on 1 October 2010²⁷⁰. The 2009 Competition Protection Act was partially amended when Croatia joined the EU on 1 July 2013²⁷¹. The 2013 amendments to the 2009 Act provide for the enforcement of Articles 101 and 102 of the TFEU and mirror the provisions of EU Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Article 101 and 102 of the TFEU)²⁷².

According to Article 1, the 2009 Act²⁷³ (hereinafter 'the Act') sets out rules and measures for protection of competition, powers, duties and internal organisation of the competition authority as well as procedural rules.

Article 2 of the Act provides that it applies to all forms of prevention, restriction or distortion of competition by undertakings within the territory of Croatia, but also outside its territory if such practices take effect in the territory of Croatia, thereby providing legal basis for the application of the principle of extraterritoriality. The provision does not whether there is a need for a concrete effect or possible effect on the national market would suffice for this principle to apply.

The Act is applicable to 'undertakings', a notion defined broadly by the Act to encompass companies and other natural and legal persons who are engaged in a commercial activity, State and local government bodies which participate in the market, but also any other natural or legal person active on the market²⁷⁴.

Article 8 of the Act prohibits restrictive agreements; Article 12 prohibits the abuse of dominant position. The relevant provisions mirror Articles 101 and 102 of the TFEU. Also the legal basis for adopting block exemption legislation is provided by this Article²⁷⁵.

The Agency for Protection of Competition (hereinafter 'the Agency') is the competent authority for the enforcement of the competition rules²⁷⁶. It has its seat in the capital city of Croatia, Zagreb. The Competition Council is the managing body of the Agency²⁷⁷. It adopts decisions on the breach of competition rules.

Challenges of the decisions of the Agency are possible by means of initiating an administrative dispute before the High Administrative Court of Croatia²⁷⁸.

Commercial courts have jurisdiction to decide on damages for breach of competition law²⁷⁹. For this purpose the 'ordinary' tort liability rules of the Civil Code are applicable²⁸⁰.

2.2 Industry-specific legislation

The Agency has general competence to apply competition rules to all sectors. The industry-specific legislation relates to the *ex-ante* regulatory rules, for example, in the sector of electronic communications, postal services, energy, where sector-regulators have their

²⁶⁹ *Zakon o zaštiti tržišnog natjecanja*, Narodne novine no. 79/2009.

²⁷⁰ Available at: http://narodne-novine.nn.hr/clanci/sluzbeni/2009_07_79_1877.html.

²⁷¹ Act on Amendments of Competition Protection Act (*Zakon o izmjenama i dopunama Zakona o zaštiti tržišnog natjecanja*), Narodne novine no. 80/2013.

²⁷² Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:en:PDF>.

²⁷³ As amended by the 2013 Act on Amendments of the Competition Protection Act.

²⁷⁴ Article 3 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

²⁷⁵ Article 10 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

²⁷⁶ Article 6 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

²⁷⁷ Article 27 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

²⁷⁸ Article 67 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

²⁷⁹ Article 69.a of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

²⁸⁰ *Zakon o obveznim odnosima*, Narodne novine 35/2005, 41/2008.

competences as provided by the law. The sector-regulators must by law cooperate with the Agency by providing relevant opinions and information in case of possible breach of competition rules. However, they are not entitled to rule on the breach of competition rules themselves.

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in Croatia, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Competition Agency

The 1995 Competition Protection Act²⁸¹ provided a legal basis for the establishing of the Croatian Competition Agency (*Agencija za zaštitu tržišnog natjecanja*). The Agency was founded by a decision of the Croatian Parliament on 20 September 1995²⁸². Under the 1995 Act, the Agency was managed by a Director (*ravnatelj*), who was appointed (as well as deposed), by the Parliament. An advisory body, the Competition Advisory Council (*Savjet za zaštitu tržišnog natjecanja*), was also established under the 1995 Act. Its role was to assess possible breaches of competition rules and to propose to the Director which measures to undertake.

3.2 The reform of the Competition Agency

The 2003 Competition Protection Act²⁸³ introduced significant changes to the institutional framework. The Competition Advisory Council ceased to exist. Instead, the managing body of the Agency was the Competition Council (*Vijeće za zaštitu tržišnog natjecanja*), consisting of five members. One of the members of the Council is a President of the Council (*predsjednik Vijeća za zaštitu tržišnog natjecanja*). The role of the President of the Council was to represent and head the Agency, being responsible for the work of the Agency²⁸⁴.

The 2009 Competition Protection Act²⁸⁵, as amended in 2013²⁸⁶, introduced no significant changes to the institutional framework. The Agency is a legal person with public powers which, as an independent entity autonomously performs activities pursuant to the Act²⁸⁷, the Regulation (EC) No 1/2003²⁸⁸ and Regulation (EC) No 139/2004²⁸⁹. Chapter VI of the Act outlines competences and powers of the Competition Council, President of the Council, as well as of the Expert Team of the Agency (*stručna služba*).

3.3 Composition and decision-making

As provided in Article 27 of the Act, the Competition Council consists of five members – a President and four members. The Competition Council adopts its decisions with the consent of a majority of at least three votes, whereby no member of the Council may abstain. In order to adopt decisions presence of at least three members of the Council is needed, and the

²⁸¹ *Zakon o zaštiti tržišnog natjecanja*, Narodne novine no. 48/1995, 52/1997, 89/1998.

²⁸² *Odluka o osnivanju Agencije za zaštitu tržišnog natjecanja*, Narodne novine no. 73/1995.

²⁸³ *Zakon o zaštiti tržišnog natjecanja*, Narodne novine no. 122/2003.

²⁸⁴ Article 30 of the 2003 Competition Protection Act.

²⁸⁵ *Zakon o zaštiti tržišnog natjecanja*, Narodne novine no. 79/2009.

²⁸⁶ *Zakon o izmjenama i dopunama Zakona o zaštiti tržišnog natjecanja*, Narodne novine no. 80/2013.

²⁸⁷ Article 26 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

²⁸⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 of 4.1.2003.

²⁸⁹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004.

President of the Council obligatorily attends, i.e. in his/her absence the Vice-President must attend²⁹⁰.

The Council is *inter alia* competent for proposing to the Croatian Government the adoption of legislation on the basis of the Act, adopting a decision on the basis of which proceedings are instituted for breach of competition rules, adopting a final decision on the breach of competition rules, instructing the expert team to conduct preliminary investigation in the situation on the relevant market, adopting the annual report to be submitted to the Parliament once a year, conducting competition advocacy activities, conducting activities regarding international cooperation, in particular towards the European Commission and other national competition authorities²⁹¹. Further information on the decision-making functions is provided in Section 3.6 below.

The Expert Team of the Agency *inter alia* carries out preliminary investigations in the relevant market with a view to determine whether sufficient indicia exist in order to start proceedings and for this purpose collects information, proposes to the Council to adopt a decision to start proceedings in a case, conducts proceedings for breach of competition rules and proceedings for pronouncing a fine in individual cases, drafts a decision to be adopted by the Council, prepares annual report, conducts activities regarding international cooperation, drafts legislation and other legal acts needed for the implementation of the Act²⁹².

3.4 Cooperation with other entities

The Agency must cooperate with competent judicial, regulatory and other authorities in cases related to breaches of competition rules in the territory of Croatia. The Ministry of Interior must give assistance to the Agency in dawn raids, and any State or local government body must submit to the Agency relevant information²⁹³.

A mechanism for cooperation between the courts, the European Commission and the Agency is provided in Article 66(a) of the Act. Within the meaning of Regulation (EC) No 1/2003 commercial courts must without delay inform the Agency of any proceedings under Articles 101 or 102 of the TFEU. They must also submit to the Agency a copy of any decision adopted pursuant to Articles 101 or 102 of the TFEU. Additionally, relevant rules exist on acting of the European Commission or of the Agency as *amicus curiae* before the commercial court.

In cases where the Agency is about to adopt a decision finding a breach of Article 101 or 102 of the TFEU, it must within the meaning of Regulation (EC) No 1/2003 inform thereof the European Commission, and if appropriate, another national competition authority²⁹⁴.

3.5 Investigations

The proceedings for breach of competition rules are started by the Agency *ex officio*²⁹⁵. However, any legal or natural person, professional or economic interest group, association of consumers, Government of Croatia, local government bodies, may submit an 'initiative for initiation of proceedings' in a written form²⁹⁶. A person upon whose initiative the proceedings are initiated does not have the status of a party to the proceedings²⁹⁷.

²⁹⁰ Article 31 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

²⁹¹ Article 30 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

²⁹² Article 32 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

²⁹³ Article 66 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

²⁹⁴ Article 59, paragraph 5 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

²⁹⁵ Article 38, paragraph 1 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

²⁹⁶ Article 37 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

²⁹⁷ Article 36 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

The proceedings for breach of competition rules are deemed as opened as of the date of adoption of the conclusion to open proceedings²⁹⁸.

The initiative to start proceedings will not lead to opening of the proceedings if it relates to a conduct which has *de minimis* effect on competition. In such a case the Agency adopts a decision establishing that there was no public interest to initiate proceedings²⁹⁹. If the Agency finds, on the basis of a initiative, and during preliminary investigation of the situation on the relevant market, that there are no grounds for initiating proceedings, it must after establishing what the situation is on the relevant market, and no later than six months after the initiative has been submitted, adopt a decision that there are no grounds for initiating proceedings³⁰⁰.

If the Agency finds that there is no effect on cross-border trade between EU Member States as regards an initiative for opening proceedings pursuant to Article 101 or 102 of the TFEU, it will adopt a decision finding no conditions for initiating proceedings³⁰¹.

If proceedings are pending before the European Commission or another national competition authority, or if the European Commission or another national competition authority has already reached a decision in the same case in which the Agency is about to initiate proceedings, the Agency will adopt a decision that no conditions exist to open proceedings³⁰².

The Agency is authorised to collect information to apply the Act³⁰³. It is also authorised to conduct unannounced searches of business and other premises or vehicles as well as to temporarily seize objects³⁰⁴.

3.6 Decision-making

The decision finding restrictive agreements as well as abuse of dominance has to be adopted by the Agency within four months starting from the date when all the facts relevant for adopting a decision have been determined, i.e. at latest within four months from the date of concluding the main hearing in the proceedings for pronouncing the fine ('administrative-penal measure', *upravno-kaznena mjera*)³⁰⁵.

The decision of the Agency should be submitted to the parties within 30 days from the date when the deadline for adopting a decision has lapsed. The decision is also sent to the person who initiated the proceedings, if appropriate³⁰⁶.

Decisions of the Agency finding a restrictive agreement, an abuse of dominance and in other cases listed in paragraph 11 of Article 59 are published in the Official Gazette (*Narodne novine*) and on the Agency's website³⁰⁷.

²⁹⁸ Article 38, paragraph 3 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

²⁹⁹ Article 38, paragraph 4 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³⁰⁰ Article 38, paragraph 5 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³⁰¹ Article 38, paragraph 6 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³⁰² Article 38, paragraph 7 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³⁰³ Article 41 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³⁰⁴ Article 42 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³⁰⁵ Article 57 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

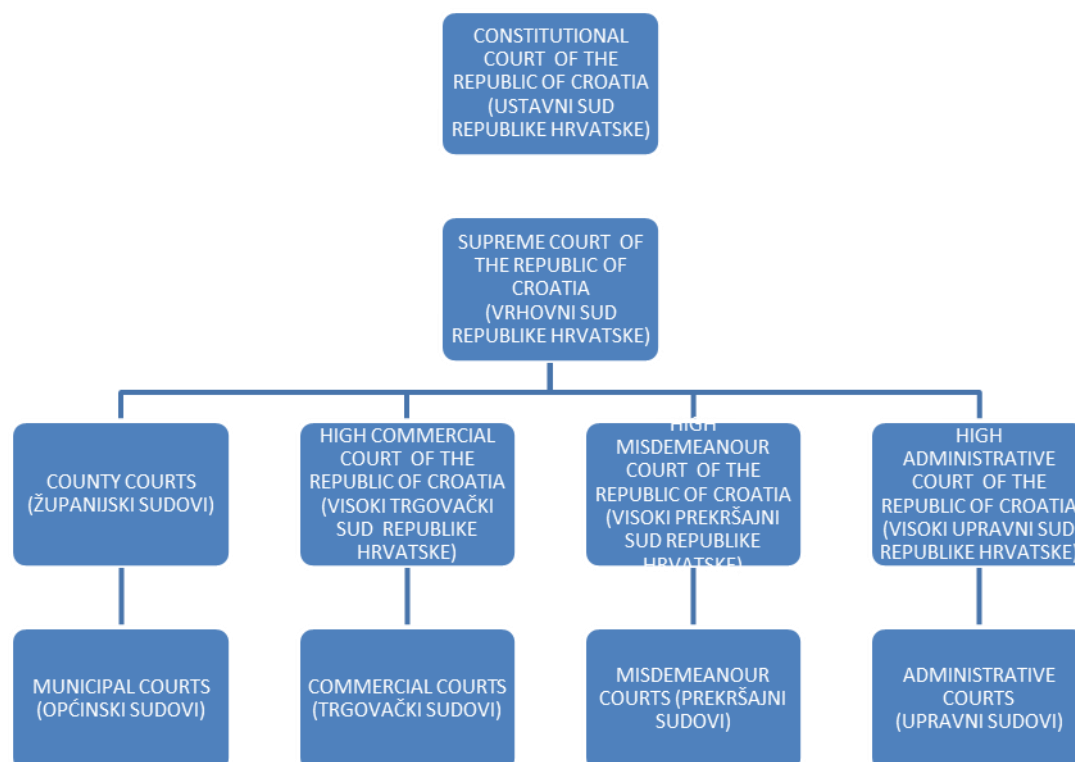
³⁰⁶ Article 59 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³⁰⁷ Article 59 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

4 Competent courts

This Section provides an overview of the competent courts in Croatia. Figure 4.1 first presents a graphic presentation of the court system.

Figure 4.1 Court system in Croatia



In Croatia, the administration of justice is done by misdemeanour courts, municipal courts, county courts, commercial courts, and administrative courts, High Misdemeanour Court, High Commercial Court, High Administrative Court and the Supreme Court of Croatia. Courts are classified in ‘ordinary’ courts (municipal and county courts), ‘specialised’ courts (commercial, administrative, misdemeanour courts, High Misdemeanour Court, High Commercial Court, High Administrative Court), and the Supreme Court. In principle, High Misdemeanour Court, High Commercial Court, High Administrative Court, and the county courts are second instance courts. There are 158 courts in Croatia altogether³⁰⁸. On 31 December 2011, 1,924 judges worked in the court system, with 588 court counsellors and administrative associates, 75 judicial trainees and 6251 court administrative staff³⁰⁹.

The organisation of justice system, the scope of competence of courts, their internal organisation and other relevant issues are regulated by the Act on Courts³¹⁰. Seat and territorial jurisdiction (*mjesna nadležnost*) of the courts is regulated by the Act on Areas and Seats of Courts³¹¹.

³⁰⁸ Supreme Court of the Republic of Croatia, information available at: <http://www.vsrh.hr/EasyWeb.asp?pcpid=30>.

³⁰⁹ Ibid.

³¹⁰ *Zakon o sudovima*, Narodne novine no. 28/2013.

³¹¹ *Zakon o područjima i sjedištima sudova*, Narodne novine no. 144/2010, 84/2011.

The High Administrative Court is exclusively competent to adjudicate judicial review cases in competition cases³¹². In this case the plaintiff (*tužitelj*) must file a claim (*tužba*) by which an administrative dispute (*upravni spor*) is initiated.

The territorial competence of the High Administrative Court is defined as the territory of Croatia. It has its seat in Zagreb. This court has national competence but can also apply European rules under the EU *acquis*. Namely, the Constitution stipulates that Croatian courts must protect subjective rights based on the EU *acquis*, and that State bodies must directly apply EU law³¹³.

The High Administrative Court has 26 judges (FTE 1.0) and 82 judicial and administrative staff members³¹⁴.

The High Administrative Court of Croatia was established on 1 January 2012 as a second instance court in administrative cases³¹⁵. There are four first instance, regionally organised administrative courts (in Zagreb, Split, Rijeka and Osijek). Competition cases are exception from the rule that administrative cases must first go to the first instance administrative courts. The High Administrative Court can rule on law and facts in such a case³¹⁶. However, the High Administrative Court decides only on the basis of the facts presented during the administrative proceedings before the Competition Agency, and in his/her claim submitted to the court the plaintiff may not present new facts, but may however propose new evidence which relate to the facts which he/she has presented as evidence during the proceedings. New facts may be presented only under the condition that the plaintiff provides evidence that he/she did not have or could not have had knowledge of these facts during the proceedings³¹⁷.

There is an extraordinary legal remedy available against final (*res iudicata*) decisions of the High Administrative Court, called 'request for extraordinary review of legality of final (*res iudicata*) judgment' (*zahtjev za izvanredno preispitivanje zakonitosti pravomoćne presude*)³¹⁸. This request must be submitted by the parties in the administrative dispute to the State Attorney Office of Croatia (*Državno odvjetništvo Republike Hrvatske*) on the grounds of breach of law. The State Attorney Office then may submit such a request before the Supreme Court within six months from the date of delivery of the final (*res iudicata*) judgment to the parties. The request is decided upon by the Supreme Court, in a panel of five judges. If the Supreme Court accepts the request, it may rescind the judgment and return the case for repeated adjudication or it may change the judgment. Whilst the relevant provision³¹⁹ is silent on whether the Supreme Court can rule on both law and facts in these cases, it stems from the case law³²⁰ that only facts discussed in the decisions of the lower courts will be taken into account, and that the final judgment may not be contested on the basis of falsely and incompletely determined facts.

As regards the follow-on cases, the competent courts to adjudicate these cases are exclusively the commercial courts³²¹. Commercial courts are first-instance, regionally located

³¹² Article 67, paragraph 1 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³¹³ Article 141 c of the Constitution.

³¹⁴ Data valid as of 31 December 2013. Information obtained by email from the Ministry of Justice on 30 January 2014.

³¹⁵ Before 1 January 2012, in the one-tier-administrative justice system then, this court was called the Administrative Court of the Republic of Croatia. This court, as only instance administrative court, dealt with judicial review competition cases.

³¹⁶ See Article 33 paragraph of the Administrative Disputes Act: "The court takes into account the facts established in the proceedings in which the disputed decision has been reached, and the court is not bound by those facts, but also it takes into account the facts that it established on its own".

³¹⁷ Article 68 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³¹⁸ Article 78 of the Administrative Disputes Act.

³¹⁹ Article 78 of the Administrative Disputes Act.

³²⁰ From the case law of the Supreme Court applying both the Act on Administrative Disputes and the Act on Civil Procedure.

³²¹ Article 69.a of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

courts. There are seven commercial courts in Croatia (in Bjelovar, Osijek, Rijeka, Split, Varaždin, Zadar, and Zagreb) with territorial competence within the relevant counties³²². Against the decision of the first instance commercial courts, an appeal is available before the High Commercial Court. The territorial competence of the High Administrative Court is defined as the territory of Croatia. It has its seat in Zagreb. This court has national competence but can also apply European rules under the EU *acquis*. Namely, the Constitution stipulates that Croatian courts must protect subjective rights based on the EU *acquis*, and that State bodies must directly apply EU law³²³.

The commercial courts and the High Commercial Court rule on the basis of civil procedural rules³²⁴ unlike the High Administrative Court which rules on the basis of the administrative procedural rules³²⁵. The first instance commercial courts can rule on law and facts³²⁶. As regards the appellate court, the High Commercial Court may also rule both on law and facts but taking into account the limitations related to the admissible grounds of appeal provided by the Civil Procedure Act³²⁷.

The number of judges working at the commercial courts is 125 (FTE 1.0) and also 554 judicial and administrative staff members work there³²⁸.

The number of judges working at the High Commercial Court is 32 (FTE 1.0) and also 50 judicial and administrative staff members work there³²⁹.

An extraordinary remedy (*izvanredni pravni lijek*) is available against the final (*res iudicata*) decisions of Croatian courts before the Supreme Court³³⁰. This means that a revision (*revizija*) is available before this court against a final decision of commercial courts in competition cases³³¹. However, in commercial cases a revision is only allowed if the value of the object of litigation (*vrijednost predmeta spora*), to which the contested part of the second instance final judgment relates, is more than HRK 500,000 (EUR 65,573)³³². In such a case, the Supreme Court can rule on law, and to a limited extent on facts³³³.

The number of judges working at the Supreme Court is 40 (FTE 1.0) and also 64 judicial and administrative staff members work there³³⁴.

³²² See Article 4 of the Act on Areas and Seats of Courts.

³²³ Article 141.c of the Constitution.

³²⁴ *Zakon o parničnom postupku*, Narodne novine no. 148/2011 (consolidated text), 25/2013.

³²⁵ *Zakon o upravnim sporovima*, Narodne novine no. 20/2010, 143/2012, *Zakon o općem upravnom postupku*, Narodne novine no. 47/2009.

³²⁶ The first instance commercial courts rule on the basis of facts brought up by the parties and on the basis of the facts it determined on its own (Article 7 of the Civil Procedure Act).

³²⁷ One of the admissible grounds of appeal to the High Commercial Court is false or incomplete determination of facts (Article 353 of the Civil Procedure Act), which is deemed to exist when the first instance court falsely established a decisive fact, or when it failed to establish a decisive fact (Article 355 of the Civil Procedure Act). In addition, another admissible grounds for appeal is false application of substantive law (Article 353 of the Civil Procedure Act). In addition, the appellant may not, in his/her appeal, invoke new facts or propose new evidence, save if they relate to the admissible grounds of the appeal (Article 352 of the Civil Procedure Act).

³²⁸ Data valid as of 31 December 2013. Information obtained by email from the Ministry of Justice on 30 January 2014.

³²⁹ Data valid as of 31 December 2013. Information obtained by email from the Ministry of Justice on 30 January 2014.

³³⁰ Article 20 of the Act on Courts.

³³¹ Articles 382-400 of the Civil Procedure Act.

³³² Article 497.a of the Civil Procedure Act.

³³³ Incompletely or falsely established facts are not one of the admissible grounds for a revision, and the revision court will take into account only facts determined by the lower courts. However the Supreme Court will accept the revision remedy if facts have been incompletely established due to false application of substantive law (Articles 385 and 395 of the Civil Procedure Act).

³³⁴ Data valid as of 31 December 2013. Information obtained by email from the Ministry of Justice on 30 January 2014.

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings related to breaches of competition law rules in Croatia.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in Croatia is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	A party to the proceedings before the Competition Agency which is not satisfied with the outcome of the proceedings ³³⁵ . A person who filed the initiative to open proceedings, and a person who was granted by a decision of the Agency the same procedural rights as a person who filed the initiative to open proceedings ³³⁶ .	Any natural or legal person.
How can an action be filed?	By filing a claim before the High Administrative Court. The claim may be filed in writing/in person.	By filing an action before the commercial court. The action may be filed in writing/in person.
With which authorities can the action be filed?	High Administrative Court.	Commercial court.
Burden of proof	The burden of proof rests with the plaintiff.	The burden of proof rests with the plaintiff.

5.2 Judicial Review Proceedings

This Section presents judicial review proceedings in Croatia for competition law cases.

5.2.1 Rules applicable to the judicial review of NCA decisions

As already mentioned, the High Administrative Court is exclusively competent to adjudicate judicial review cases in the competition field³³⁷. The procedure is determined by the specific rules of the Competition Protection Act and the general rules of the Act on Administrative Disputes.

To start a judicial review case against a decision of the Competition Agency the plaintiff must file a claim before the High Administrative Court by which an administrative dispute is initiated. The court sits in the panel of three judges. The claim against the decision of the Competition Agency may be submitted on the grounds of breach of substantive competition law, significant breach of procedural rules, falsely or incompletely determined factual

³³⁵ Action is filed against the decision of the Agency finding a breach of the Act or breach of Articles 101 or 102 of the TFEU or against the decision on fines. See Article 67, paragraph 5 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³³⁶ Action is filed against the decision of the Agency finding no distortion of competition or against the decision to suspend proceedings. See Article 67, paragraph 5 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³³⁷ Article 67, paragraph 1 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

situation or false decision on the fine and other issues decided upon by the Agency³³⁸. The claim against the decision of the Agency has no suspensive effect. No initiation of an administrative dispute is available against conclusions (*zaključak*) of the Agency on procedural matters. However, a conclusion of the Agency may be contested by the claim by which an administrative dispute is initiated before the High Administrative Court against a decision of the Agency which rules on the administrative matter³³⁹. Administrative dispute procedure before the High Administrative Court in competition cases is urgent³⁴⁰.

5.2.2 Competent Court

The decision of the Competition Agency may be challenged before the High Administrative Court (one instance). However, an extraordinary legal remedy may be filed to the Supreme Court against the final judgment of the High Administrative Court.

5.2.3 Timeframe

The decision of the Competition Agency must be challenged before the High Administrative Court within 30 days of the decision being delivered³⁴¹.

The procedure before the High Administrative Court is urgent.

The appeal-filing period for the extraordinary legal remedy before the Supreme Court is six months from the date of delivery of the final judgment to the parties.

5.2.4 Admissibility of Evidence

The parties in the proceedings can propose to the High Administrative Court to hear the parties, witnesses and experts, to inspect relevant documents, and inspect other evidence; however, the court is not bound by their proposal³⁴². The court can also hear witnesses and experts, as well as examine other evidence on its own motion. The relevant rules on admissibility of evidence provided by the Civil Procedure Act apply³⁴³.

The panel of judges of the High Administrative Court discusses and decides on the basis of the facts presented during the proceedings, and in his/her claim the plaintiff may not present new facts, but may however propose new evidence which relate to the facts which he/she has presented as evidence during the proceedings. New facts may be presented only under the condition that the plaintiff provides evidence that he/she did not have or could not have had knowledge of these facts during the proceedings³⁴⁴.

5.2.5 Interim Measures

The High Administrative Court may, on the proposal of a party, order interim measures, if this is necessary to avoid serious and irreparable damage³⁴⁵. The Court then adopts a decision (*rješenje*) to this effect. An appeal may be filed against this decision.

5.2.6 Rulings of the court

The High Administrative Court may either deny the claim (*odbijanje tužbenog zahtjeva*) if it finds that it is unfounded or accept the claim (*usvajanje tužbenog zahtjeva*) if it finds that the decision of the Agency is unlawful³⁴⁶.

³³⁸ Article 67, paragraph 1 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³³⁹ Article 67, paragraph 3 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³⁴⁰ Article 69 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³⁴¹ Article 67, paragraph 1 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³⁴² Article 33 of the Administrative Disputes Act.

³⁴³ Article 33, paragraph 5 of the Administrative Disputes Act.

³⁴⁴ Article 68 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³⁴⁵ Article 47 of the Administrative Disputes Act.

³⁴⁶ Articles 57 and 58 of the Administrative Disputes Act.

The High Administrative Court decides in administrative disputes on the basis of ‘oral, immediate and public hearings’³⁴⁷. Only in cases stipulated by law the court may decide solely on the basis of a written procedure³⁴⁸.

The court judgment is adopted and proclaimed in the name of the Republic of Croatia³⁴⁹. It is publicly pronounced in the oral hearing in which the procedure has been closed with the President of the panel or the sole judge reading the dispositive of the judgment publicly and briefly providing reasons for such a decision³⁵⁰. In situations where the court cannot adopt the decision immediately after the procedure has been closed (due to the complexity of the matter) the pronouncing of the judgment may be postponed for maximum eight days after the proceedings have been closed, and the date of pronouncing of the judgment must be determined immediately³⁵¹.

5.3 Follow-on Proceedings (private enforcement)

This Section presents follow-on proceedings in Croatia for competition law cases.

5.3.1 Rules applicable to follow-on procedures

Undertakings which have violated the provisions of the Competition Act or Article 101 or 102 of the TFEU are liable for damages caused therefrom³⁵². As regards substantive rules to establish whether the claim for damages is founded, the commercial court applies the Obligations Act, and as procedural rules it applies the Civil Procedure Act.

The competent commercial court must in particular take into account, when deciding on damages, the final decision of the Agency finding breach of the provisions of the Competition Act or Articles 101 or 102 of the TFEU, or the final decision of the European Commission finding breach of Articles 101 or 102 of the TFEU³⁵³. It has been argued, taking into account the provision of paragraph 1 of Article 12 of the Civil Procedure Act, which regulates the notion of prejudicial question³⁵⁴ and other relevant provisions of the Civil Procedure Act, that civil courts are bound by a *res iudicata* decision of the Agency and by a *res iudicata* judgment of the High Administrative Court finding a breach of competition rules³⁵⁵. Namely, if the court decides not to resolve the prejudicial question on its own (i.e. whether there has been a breach of competition law), it must suspend its proceedings until a *res iudicata* becomes available from the competent authority which deals with the issue, or until the court finds that there is no longer a reason to wait for such external proceedings to come to an end³⁵⁶. Alternatively, the court can solve the prejudicial question on its own³⁵⁷. The position that only *res iudicata* administrative decisions (which includes also the decisions of the

³⁴⁷ Article 7 of the Administrative Disputes Act.

³⁴⁸ See Articles 7 and 36 of the Administrative Disputes Act. The reasons for written procedure only include the situation where the defendant fully accepts the claim of the plaintiff, if the parties expressly agree on written procedure only and the court holds that no new evidence has to be inspected.

³⁴⁹ Article 55, paragraph 2 of the Administrative Disputes Act.

³⁵⁰ Article 61 of the Administrative Disputes Act.

³⁵¹ Article 61, paragraph 5 of the Administrative Disputes Act.

³⁵² Article 69.a, paragraph 2 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³⁵³ Article 69.a, paragraph 3 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³⁵⁴ In a follow on case, the prejudicial question for the commercial court deciding on damages is whether there has been a breach of competition law. The court may decide this question on its own and if the allegation is founded, rule on the damages claimed by the plaintiff.

³⁵⁵ For a detailed discussion see: J. Pecotić Kaufman, How to facilitate damage claims? Private enforcement of competition rules in Croatia – domestic and EU perspective, Yearbook of Antitrust and Regulatory Studies, Vol. 7, No. 5, 2012, available at SSRN: <http://ssrn.com/abstract=2277147>.

³⁵⁶ See Article 12, paragraph 2, Article 213, paragraph 1, and Article 215, paragraph 3 of the Civil Procedure Act.

³⁵⁷ Article 12, paragraph 1 of the Civil Procedure Act.

Competition Agency) have binding effect as regards civil courts deciding on damages has been confirmed by jurisprudence of the Croatian courts³⁵⁸.

The commercial court must immediately inform the Competition Agency of any damage claims submitted on grounds of breach of the Competition Act or Articles 101 or 102 of the TFEU³⁵⁹.

5.3.2 Competent Court

The competent courts are the commercial courts (first instance), High Commercial Court (second instance) and the Supreme Court (extraordinary legal remedy – revision).

5.3.3 Timeframe

Limitation periods for follow on damage claims are the general ones provided by the Obligations Act. The subjective limitation period is three years from the time the injured party became aware of the damage or of the person causing the damage. The objective limitation period is set five years from the moment the damage occurred³⁶⁰.

As regards the deadline for submitting an appeal against the first instance commercial court judgment to the High Commercial Court, the deadline is eight days from the date of receipt of the judgment³⁶¹.

As regards the deadline for submitting an application for an extraordinary remedy against the judgment of the High Administrative Court before the Supreme Court, the State Attorney Office may submit it within six months from the date of delivery of the final (*res iudicata*) judgment to the parties.

5.3.4 Admissibility of evidence

The parties in the proceedings can propose to the court to hear the parties, witnesses and experts, to inspect relevant documents, and inspect other evidence. However, the court is not bound by their proposal. The court can also hear witnesses and experts, as well as examine other evidence on its own motion. The relevant rules on admissibility of evidence provided by the Civil Procedure Act apply³⁶².

The commercial court decides within limits of the claim as submitted by the plaintiff³⁶³. The court decides which facts to consider as proved. It is done upon careful examination of each piece of evidence taken individually and of all evidence taken as a whole³⁶⁴.

Any party must put forward facts and propose evidence on which it bases its claim or with which it refutes claims and evidence of its adversary³⁶⁵. The court decides which of the proposed evidence it will accept for determining the key facts³⁶⁶.

³⁵⁸ See J. Pecotić Kaufman, How to facilitate damage claims? Private enforcement of competition rules in Croatia – domestic and EU perspective, Yearbook of Antitrust and Regulatory Regulatory Studies, Vol. 7, No. 5, 2012, available at SSRN: <http://ssrn.com/abstract=2277147>, p. 11.

³⁵⁹ Article 69.a, paragraph 5 of the Competition Protection Act, Narodne novine no. 79/2009, 80/2013.

³⁶⁰ Article 203, paragraphs 1 and 2 of the Obligations Act. The general limitation periods do not seem suitable for antitrust damages actions. For a detailed discussion see: J. Pecotić Kaufman, How to facilitate damage claims? Private enforcement of competition rules in Croatia – domestic and EU perspective, Yearbook of Antitrust and Regulatory Regulatory Studies, Vol. 7, No. 5, 2012, available at SSRN: <http://ssrn.com/abstract=2277147>.

³⁶¹ Article 500 of the Civil Procedure Act.

³⁶² See Articles 219-271 of the Civil Procedure Act.

³⁶³ Article 2, paragraph 1 of the Civil Procedure Act.

³⁶⁴ Article 8 of the Civil Procedure Act.

³⁶⁵ Article 219, paragraph 1 of the Civil Procedure Act.

³⁶⁶ Article 220, paragraph 2 of the Civil Procedure Act. For detailed rules on evidence see Articles 219-276 of the Civil Procedure Act.

In its appeal before the High Commercial Court the party may not invoke new facts nor propose new evidence except those which relate to significant breach of civil procedure rules which allow for an appeal to be submitted³⁶⁷.

5.3.5 Interim Measures

In civil proceedings before commercial courts interim measures are available for securing the claim for plaintiff. The relevant rules are provided in the Act on Compulsory Execution³⁶⁸. Interim measures may be requested before the initiation of civil proceedings, or after their initiation. In the first case the competent court is the court which decides on a compulsory execution proposal and in the second case the court before which the civil action is initiated³⁶⁹. Interim measures may, for example, include a ban on alienation of property, repossession of money or securities and their placement with a judge or public notary, or an order to a bank not to allow payments from the defendant's account³⁷⁰.

5.3.6 Rulings of the court

The commercial court may adopt the claim for damages on the basis of the decision of the Agency or the European Commission, or it may reject the claim for damages.

The commercial court decides 'as a rule' on the basis of 'oral, immediate and public hearings'³⁷¹. Thus, as a rule oral hearings take place.

The court judgment is adopted and proclaimed in the name of the Republic of Croatia³⁷². It is publicly pronounced in the oral hearing in which the procedure has been closed with the president of the panel or the sole judge³⁷³. In situations where the court cannot adopt the decision immediately after the procedure has been closed (due to the complexity of the matter), the pronouncing of the judgment may be postponed for maximum 15 days after the proceedings have been closed, and the date of pronouncing of the judgment must be determined at the closing hearing³⁷⁴. If the hearing was not public, the dispositive of the judgment must always be read publicly, and the court has to decide to which extent the public will be excluded from pronouncing the reasons of the judgment³⁷⁵.

5.3.7 Rules applicable to the enforcement of court judgments

If the defendant does not comply voluntarily with the judgment awarding damages on the basis of a follow on claim after the deadline has lapsed and the judgment is final, such judgment is directly enforceable and the plaintiff must submit the judgment to the Financial Agency (FINA) which will execute the judgment by ordering the transfer of funds from the bank account of the defendant to the bank account of the plaintiff. The relevant rules are provided in the Act on Implementation of the Execution on Monetary Means³⁷⁶.

³⁶⁷ Article 352 of the Civil Procedure Act.

³⁶⁸ *Ovršni zakon*, Narodne novine no. 112/2012.

³⁶⁹ Article 340 of the Act on Compulsory Execution.

³⁷⁰ See Article 345 of the Act on Compulsory Execution.

³⁷¹ Article 4 of the Civil Procedure Act.

³⁷² Article 335, paragraph 1 of the Civil Procedure Act.

³⁷³ Article 335, paragraph 3 of the Civil Procedure Act.

³⁷⁴ Article 335, paragraph 4 of the Civil Procedure Act.

³⁷⁵ Article 336, paragraph 3 of the Civil Procedure Act.

³⁷⁶ *Zakon o provedbi ovrhe na novčanim sredstvima*, Narodne novine no. 91/2010, 112/2012,

5.4 Alternative dispute resolution mechanisms

General arbitration and mediation measures are available also for resolution of competition law related disputes³⁷⁷. However, it seems that such mechanisms are not frequently used. Whilst precise numbers are not available due to the secrecy of such proceedings, information from attorneys-at-law representing large corporations indicate that such mechanisms are in fact used in certain cases.

6 Contextual Information

This Section presents contextual information on the judicial system in Croatia.

6.1 Duration and cost of competition law cases

No specific information on the duration of competition law cases is available from statistics. Average duration of judicial review cases is between two and four years (from submission of the action to the court by the plaintiff until the adoption of the court judgment). It seems that the duration has decreased in the more recent cases. This only refers to the application of national competition law rules before Croatia's accession to the EU and thus not EU competition law rules yet.

As regards private enforcement cases, there is no specific information available. Furthermore, the average duration of such cases is not possible to estimate since the number of cases is small and there are no final judgments adopted yet.

The costs include court fees (*sudske pristojbe*), legal fees (attorney-at-law fees) and other relevant costs (for example, cost of expert opinion). The fixed court fee for administrative dispute proceedings is HRK 500 (EUR 65) for the filing of an action and HRK 500 (EUR 65) for the judgment³⁷⁸, and the cost of legal representation in such cases by a lawyer is HRK 2,000 (EUR 262) for the drafting the action and HRK 2,000 (EUR 262) for drafting a response to the action³⁷⁹.

The court fees for damage claim proceedings depend on the value of the dispute; if the value of the dispute is more than HRK 15,000 (EUR 1,967), the court fee for the action and counter-action amounts to minimum HRK 500 (EUR 65) and maximum HRK 5,000 (EUR 655)³⁸⁰. The court fee for the appeal and revision is the above mentioned sum plus 25%.

The cost of legal representation in such cases by a lawyer also depends on the value of the dispute which can vary from HRK 250 (EUR 32) to HRK 5,000 (EUR 655), with maximum HRK 100,000 (EUR 13,115) for a dispute whose value is more than HRK 10 million (EUR 1,311,475)³⁸¹.

³⁷⁷ Act on Arbitration (*Zakon o arbitraži*, Narodne novine no. 88/2001); Act on Mediation (*Zakon o mirenju*, Narodne novine no. 18/2011).

³⁷⁸ *Zakon o sudskim pristojbama* (Act on Court Fees), Narodne novine no. 26/2003 (consolidated text), 125/2011, 112/2012, 157/2013.

³⁷⁹ *Tarifa o nagradama i naknadi troškova za rad odvjetnika* (Bar Association Lawyers' Tariff), Narodne novine no. 91/2004, 37/2005, 59/2007 (in force as of 5 July 2004 until 11 December 2009); *Tarifa o nagradama i naknadi troškova za rad odvjetnika* (Bar Association Lawyers' Tariff), Narodne novine no. 148/2009 (in force as of 11 December 2009 until 19 December 2012); *Tarifa o nagradama i naknadi troškova za rad odvjetnika* (Bar Association Lawyers' Tariff), Narodne novine no. 142/2012 (in force as of 19 December 2012).

³⁸⁰ *Zakon o sudskim pristojbama* (Act on Court Fees), Narodne novine no. 26/2003 (consolidated text), 125/2011, 112/2012, 157/2013.

³⁸¹ *Tarifa o nagradama i naknadi troškova za rad odvjetnika* (Bar Association Lawyers' Tariff), Narodne novine no. 91/2004, 37/2005, 59/2007 (in force as of 5 July 2004 until 11 December 2009); *Tarifa o nagradama i naknadi troškova za rad odvjetnika* (Bar Association Lawyers' Tariff), Narodne novine no. 148/2009 (in force as of 11 December 2009 until 19 December 2012); *Tarifa o nagradama i naknadi troškova za rad odvjetnika* (Bar Association Lawyers' Tariff), Narodne novine no. 142/2012 (in force as of 19 December 2012).

As regards the cost of proceedings before the High Administrative Court, each party bears its own cost³⁸². As regards the cost of proceedings before the commercial courts, each party must bear the cost of the actions in the proceedings which it caused³⁸³. The losing party must compensate the costs to the other party and its intervener³⁸⁴.

6.2 Influencing Factors

Since Croatia became a Member State of the EU on 1 July 2013 and therefore there are no judgments yet where the courts have applied EU competition law rules, it is difficult to comment on the influencing factors.

6.3 Obstacles/Barriers

Among the obstacles and barriers that exist in Croatia in relation to access to justice concerning the application of competition law rules, it is possible to mention the following:

- Very long duration of litigation before commercial courts until a *res iudicata* is reached.
- Higher instance court not solving the case but rather returning the case to the lower court with instructions what must be done by the lower court.

³⁸² Article 79 of the Administrative Disputes Act, Narodne novine no. 20/2010, 143/2012. This rule is in place as of 28 December 2012. Before that the rule was that the losing party bears all the cost.

³⁸³ Article 152 of the Civil Procedure Act.

³⁸⁴ Article 154 of the Civil Procedure Act.

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COUNTRY FACTSHEET - CYPRUS

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Abbreviations used

CPC	Commission for the Protection of Competition
CPR	Civil Procedure Rules
ECN	European Competition Network
EU	European Union
ICN	International Competition Network
NCA	National Competition Authority
TFEU	Treaty on the Functioning of the European Union
TEC	Treaty on the European Community

1 Overview of the National Legal Framework

Cyprus was a British colony until 1960, when the island became an independent republic. Until its independence, Cyprus' legal system was based on the English legal system. The laws enacted for the colony applied the principles of common law and equity. Many of those laws are still in force today.³⁸⁵ After independence in 1960 the English legal system was largely preserved. The laws applicable are the following:

- The Constitution of the Republic of Cyprus
- The laws retained in force by virtue of Article 188 of the Constitution
- The principles of Common Law and Equity
- The Laws enacted by the House of Representatives.

According to Article 1 of the Constitution (Σύνταγμα) 'The State of Cyprus is an independent and sovereign Republic with a presidential regime', based on the principles of legality, the division of authority (executive, legislature and judiciary), the impartiality of the judiciary and respect for and protection of human rights and fundamental freedoms'.³⁸⁶ The Constitution of the Republic of Cyprus was adopted in 1960, when the Republic of Cyprus was declared and, according to Article 179 of the Constitution, it constitutes the Supreme Law of the Republic of Cyprus. Following the accession of Cyprus to the European Union (hereafter 'EU') and the amendment of its Constitution, EU law takes precedence over the internal constitutional order and the rules of law contained in the Constitution must be in line with EU law. The Republic of Cyprus has also adapted and harmonised its national laws to EU law by enacting numerous legislative acts and, at the same time, repealing or amending various provisions of national law.

The administration of justice is organised in two instances: the Supreme Court (Ανώτατο Δικαστήριο), which constitutes the second instance and the various courts of first instance, listed in Section 4 below. The doctrine that applies in Cyprus is that judgments handed down by the Supreme Court are binding on all the lower courts. Therefore, a judgment by the Supreme Court interpreting a rule of law is construed as a source of law. Under Article 30(2) of the Constitution, the establishment, composition and functioning of each court must safeguard the guarantees of due process. Justice is to be administered by courts which are impartial and have jurisdiction under the law in the framework of an unprejudiced public hearing procedure and within a reasonable period.

2 National Legislation establishing competition law rules

This Section provides an overview of national legislation establishing competition law rules. Table 2.1 presents a list of relevant competition law instruments in Cyprus.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
The Protection of Competition Law 13(I)/2008 (Ο Περί Προστασίας του Ανταγωνισμού Νόμος του 2008 - Νόμος υπ' αριθμό 13(I)/2008)	17 April 2008, entry into force 18 April 2008
The Protection of Competition Law 207/89 (Ο Περί Προστασίας του Ανταγωνισμού Νόμος του 1989 - Νόμος υπ' αριθμό 207/1989)	30 November 1989, entry into force 8 June 1990 Abolished and replaced by Law 13(I)/2008

³⁸⁵ Available at http://www.supremecourt.gov.cy/judicial/sc.nsf/DMLLegSystem_en/DMLLegSystem_en?OpenDocument&print

³⁸⁶ Available at https://e-justice.europa.eu/content_member_state_law-6-cy-maximizeMS-en.do?member=1

2.1 General legislation

The applicable provisions prohibiting anti-competitive practices and abuse of dominance are contained in The Protection of Competition Law 13(I)/2008 (hereafter ‘2008 Law’), replacing Law 207/89 (hereafter ‘1989 Law’).

Section 3 of the Law, which mirrors Article 101 TFEU, provides that all agreements between undertakings or associations of undertakings, all decisions of associations of undertakings and any concerted practices, having as their object or effect the elimination, restriction or distortion of competition within the Republic shall be prohibited and shall be void *ab initio*.

In the preliminary provisions of the Law, “undertaking” is defined as any natural or legal person which exercises financial or trade activities irrespective of whether such activities are profitable or not; This definition also includes any undertaking governed by private or public law where the State may exercise, directly or indirectly, due to ownership, financial participation or pursuant to the provisions governing it, decisive influence. “Association of undertakings” is also defined in the Law as any company, partnership, association, society, institution or body of persons having legal personality or not, which represents the trade interests of autonomous undertakings and takes decisions or enters into contracts for the promotion of those interests.

Nevertheless, according to Section 4(1) of the Law, an agreement, decision or concerted practice falling under Section 3(1) of the Law, shall be permissible and not be prohibited, prior to a decision, if all the conditions set below are met:

- a) if it contributes, with the reasonable participation of the consumers, in a resulting benefit, in the development of production or distribution of goods or in the promotion of technical or financial development;
- b) if it does not impose, on the undertakings concerned, restrictions unless they are absolutely necessary for the achievement of the above mentioned purposes; and
- c) If it does not confer to the undertakings, to which the agreement relates, the possibility to eliminate competition from a substantial part of the market product concerned.

Where the Commission for Protection of Competition (hereafter CPC) decides that an agreement, decision and/or concerted practice does not fulfil the conditions set in Section 4(1), above, then the agreement, decision and/or concerted practice is illegal and void on the basis of Section 3 of the Law. Pursuant to Section 5 of the Law, the Council of Ministers, following a previous reasoned opinion of the CPC, may issue an Order, published in the Official Gazette of the Republic, exempting the application of Section 3 of the law to specific categories of practices.

Under Article 5(2), even in collusions for which only national legislation is applicable, Article 101(3) of the TFEU is applied, *mutandis mutandis*, as long as it does not come in conflict with an Order issued on the basis of section 5(1) of the Law. In such case, the practices are legal and valid according to the EU Regulation that regulated the category of practices on the basis of EU competition law. In case it does not fall within the category of agreements provided for by EU Regulation, then the practice falls under Section 3 of the Law and is subject to prohibition and invalidity.

Likewise, Section 6 of the Law reflects Article 102 TFEU. The concept of ‘dominant position’ in relation to an undertaking is defined as the position of market power that an undertaking holds and which allows it to obstruct the maintenance of an effective competition in the market of a particular product. Accordingly to the same definition, this position enables the undertaking to act, in a substantial degree, independently from its competitors, from its customers and finally, from the consumers.

Pursuant to Section 6(1) of the 2008 Law, any abuse by one or more undertakings of a dominant position within the local market or in a substantial part of it shall be prohibited, especially if it affects or may affect:

- the direct or indirect fixing of unfair purchase or selling prices or any other unfair trading conditions;
- limiting production, distribution or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions, thereby placing certain undertakings at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance, by the other parties, of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The 2008 Law applies to actions outside the jurisdiction of Cyprus that have as their object or effect the prevention, restriction or distortion of competition in Cyprus. If the CPC considers an anticompetitive practice that potentially affects trade between Member States, it is bound to apply the provisions of Articles 101 and 102 TFEU in accordance with Council Regulation 1/2003.³⁸⁷

According to Section 7(1)(a) of the 2008 Law the provisions of this Law shall not apply to agreements relating to wages and terms of employment and working conditions.

2.2 Industry-specific legislation

Cyprus has not introduced any competition law rules relating to specific sectors. However, according to Section 7(1)(b) of the 2008 Law the provisions of this Law shall not apply to undertakings entrusted with the operation of services of general economic interest or having the character of state monopoly, in so far as the application of these provisions obstructs the performance in law or in fact, of the particular tasks assigned to them by the State.

3 The National Competition Authority

This Section describes the National Competition Authority (hereafter 'NCA') in Cyprus, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Commission for the Protection of Competition (CPC)

The CPC was established in 1990 with the enactment of the 1989 Law, replaced by the 2008 Law. The 2008 Act designates the CPC as the competition authority of the Republic of Cyprus, responsible for the application of Regulation 1/2003, and of Articles 101 and 102 TFEU, where necessary. The CPC has the exclusive competence for the maintenance of effective competition within the Cypriot market with a view to boost economic growth and social welfare.³⁸⁸

3.2 The reform of the CPC

With the enactment of the 2008 Law, the powers of the CPC were broadened to incorporate the application of competition rules, as provided for in Articles 101 and 102 TFEU (ex Articles 81 and 82 TEC), through its designation as the National Competition Authority of the Republic of Cyprus.

3.3 Composition and decision-making

According to the 2008 Law, the CPC consists of a Chairperson and four Members serving on a full time basis. The term of office of the Chairman and the other four members of the Commission is for a period of five years and may be renewed only once. The Law also

³⁸⁷ Keane T., *Cartel Regulation 2009 - Cyprus*, Getting the Deal Through January 2009, available at <http://new.demetriades.com/publications/Cartel%20Regulation%20in%20Cyprus.pdf>

³⁸⁸ Available at http://www.competition.gov.cy/competition/competition.nsf/aboutcpc_en/aboutcpc_en?OpenDocument

provides for the appointment of four substitute members, one for each member of the Commission. The Chairperson of the Commission should be of high standing and probity, possessing specialised knowledge and experience in Law and well placed to contribute towards the effective application of the Law. The four Members of the Commission are persons with specialised knowledge and experience in Law, Economics, Competition, Accounting, Trade or Industry well placed to contribute towards the effective application of the Law. The Law prohibits the Members of the Commission from having any financial or other interest likely to affect the impartiality of their judgment in the exercise of their functions, powers and duties.³⁸⁹

The Commission is assisted by the Service of the CPC. The Service, following authorisation by the Commission, has the responsibility to duly conduct preliminary investigations, *ex officio* or on the basis of a complaint, to determine whether there have been infringements of the 2008 Law. The Service is also responsible for carrying out secretariat duties to the Commission, collecting all the necessary information in order for the Commission to exercise its competences, holding unannounced on the spot investigations (dawn raids) in the premises of undertakings under investigation, submitting complaints and proposals to the Commission, proceeding with the necessary notifications and publications, evaluating notified concentrations on the basis of the Control of Concentrations of Enterprises of Laws 1999 and 2000, preparing written reports and providing the Commission with all the possible facilitation to carry out its competences, powers and duties.

The Service consists of a Director and the officers, one administrative officer, one accountant, and the secretarial and auxiliary personnel. All of the members of personnel of the Service are public servants and they are appointed in accordance with the rules governing access to the Public Service. One of the members of the CPC Service acts as Secretary to the Commission.

3.4 Cooperation with other entities

CPC is a member of the European Competition Network (ECN) and cooperates with the European Commission. It is also a member of the International Competition Network (ICN). Pursuant to Council Regulation 1/2003, the system of parallel powers means that it is possible for CPC act in parallel with another jurisdiction on an antitrust case. However, the CPC cannot investigate a case on the basis of Article 101 TFEU if the European Commission has already initiated its own investigation.

There are no international agreements or inter-agency agreements in place in Cyprus.

3.5 Investigations

The CPC can decide to initiate the proceedings for the investigation of an infringement, as long as it considers, following a proper preliminary investigation, that an infringement of the provisions of the 2008 Law and/or Articles 101 and/or 102 TFEU is possible. If the CPC eventually decides to open an investigation *ex officio* or on the basis of a complaint, subsequently it will instruct the Service to conduct an investigation. The CPC makes use of its powers in order to obtain the information or data that will enable the Service to carry out the investigation. At the start of the investigation, the CPC addresses written requests to the undertakings under investigation requesting the delivery of relevant information. When sending a request, the Commission has the duty to specify the required information, the provisions of the 2008 Law or of the Regulation (EC) No. 1/2003 on which the request is based, the reasoning of the request, a reasonable time-limit fixed for the provision of information which may not be less than twenty days and the possible sanctions in the event of non compliance with the above obligation for the provision of information.

³⁸⁹ Antoniou A, *Antitrust Regulations – Cartels – Abuse Of Dominance*, Cyprus Law Digest 2012, available at <http://www.cypruslawdigest.com/topics/competition/item/154-antitrust-regulations-%E2%80%93-cartels-%E2%80%93-abuse-of-dominance>

The CPC is obliged to safeguard the rights of the undertakings under investigation, particularly with regard to guarantee secrecy and confidentiality of the provided information. The information received by the Commission in the exercise of its functions may be used only for the purpose for which the inspection is allowed, with the exemption of those cases where this proves necessary for the application of the EU competition law.

Upon conclusion of the preliminary investigation, the Service will prepare a report and if there is a *prima facie* infringement, the CPC will forward a written statement to inform the undertakings or associations of undertakings concerned on the objections raised to their detriment. The undertakings are also allowed to have full access to the case file and to the documents upon which the CPC will base its case.³⁹⁰ Pursuant to Article 17(9) of the 2008 Law, CPC is not bound to communicate to the undertakings, the whole file on the case; however, it shall be bound to communicate all of those documents of the file on which it intends to base its decision, with the exception of those documents constituting business secrets.

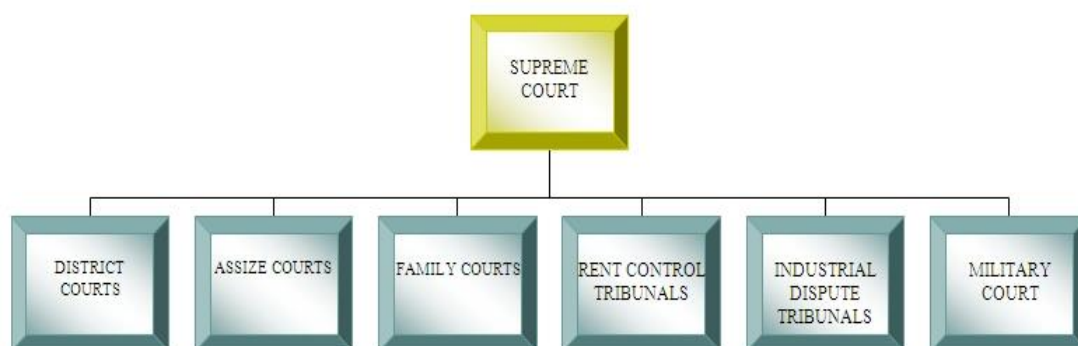
3.6 Decision-making

The proceedings before CPC begin with the submission of written observations which are followed by the oral development of the respective arguments in the context of an oral proceeding before the CPC. Where the undertaking on which the statement of objections was served, omits or refuses to submit any written observations in respect of the objections raised against it within the time-limit set, the Commission may proceed to the issue of a decision. Although there are no formal rules of procedure for cases before the CPC, the rules followed are similar to those applied in the administrative courts. Upon conclusion of the case, the CPC will issue a duly reasoned decision. The decisions of the CPC shall then be communicated to every undertaking or association of undertakings involved and shall be published in the Official Gazette of the Republic, taking effect from the date of their communication. However, a defective communication or publication shall not affect the validity of the decision. A decision of the CPC is subject to appeal by way of recourse before the Supreme Court. The decision of the Supreme Court is final.³⁹¹ Further information on this matter is provided in Section 4 below.

4 Competent courts

This Section provides an overview of the competent courts in Cyprus. Figure 4.1 provides an overview of the court system in Cyprus

Figure 4.1 Court system in Cyprus



Source: Supreme Court's website³⁹²

³⁹⁰ Keane T., *Cartel Regulation 2009 - Cyprus*, Getting the Deal Through January 2009, available at <http://new.demetriades.com/publications/Cartel%20Regulation%20in%20Cyprus.pdf>

³⁹¹ ^ Ibid

³⁹² http://www.supremecourt.gov.cy/judicial/sc.nsf/DMLchart_en/DMLchart_en?OpenDocument

The administration of justice is organised on the basis of two instances in the Republic of Cyprus.

At First Instance, the following courts are in place in Cyprus:

- District Courts (Επαρχιακά Δικαστήρια)
- Assize Courts (Κακουργιοδικεία)
- Family Court (Οικογενειακό Δικαστήριο)
- Rent Control Tribunal (Δικαστήριο Ελέγχου Ενοικιάσεων)
- Industrial Disputes Tribunal (Δικαστήριο Εργατικών Διαφορών) and
- Military Court (Στρατοδικείο).

At Second Instance, the Supreme Court (Ανώτατο Δικαστήριο) rules on all appeals against judgments by a court of first instance. However, The Supreme Court cannot go into the merits of the decision under review and resolve the matter with a decision, on the substance, of its own. For **private enforcement**, District Courts are competent for hearing actions for damages resulting from the violation of competition law rules. The judgment can then be appealed to the Supreme Court. For **public enforcement** actions (judicial review), decisions of the CPC may be appealed by way of administrative recourse action before the Supreme Court.

The courts relevant for Competition Law, which are competent for Article 101 and Article 102 TFEU cases, are described in turn in the subsections below.

4.1 District Courts

The District Courts have jurisdiction to hear at first instance any civil actions (with the exception of admiralty (maritime) cases) and any criminal cases for offences punishable by up to 5 years' imprisonment. There are six District Courts, one for each administrative district of the Republic of Cyprus (Nicosia, Famagusta, Limassol, Larnaca, Paphos and Kyrenia). Cases are heard by a single judge and there is no jury. The District Courts have jurisdiction to hear and determine all civil actions:

- (a) Where the cause of action has arisen wholly or in part within the limits of the district where the Court is established
- (b) Where the defendant at the time of the filing of the action resides or carries business within the limits of the Court.

4.2 Supreme Court

The Supreme Court is composed of thirteen judges, one of whom is the President. The Supreme Court has the following jurisdictions related to competition law cases:

Appellate Court

The Supreme Court hears all appeals from lower courts in civil and criminal matters. As a rule, appeals are heard by a panel of three judges. The hearing of the appeal is based on the record of the proceedings of the lower court (the Supreme Court only hears evidence in exceptional and very rare circumstances). In the exercise of its appellate jurisdiction the Supreme Court may uphold, vary or set aside the decision appealed from or it may order a re-trial.

Review Court

The Supreme Court has exclusive jurisdiction to hear any recourse filed against decisions, acts or omissions by persons or organs exercising administrative authority. The Supreme Court may annul any executive administrative act that is in excess or abuse of power or contrary to the law or the Constitution.

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings related to breaches of Competition Law rules in Cyprus.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in Cyprus is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Any natural or legal person	Any natural or legal person
How can an action be filed?	A person having a legitimate interest may file an appeal against a decision of the CPC by way of administrative recourse action before the Supreme Court. The decision of the Supreme Court is final.	A complaint can be filed to the District Courts which have jurisdiction to hear all civil actions. The Supreme Court of Cyprus in its appellate jurisdiction can hear appeals.
With which authorities can the action be filed?	The Supreme Court exercises both original and appellate jurisdiction.	District Courts; Supreme Court
Burden of proof	The burden of proof rests with the claimant i.e. party appealing the decision to the Supreme Court.	The burden of proof rests with the claimant.

5.2 Judicial Review Proceedings

This Section presents judicial review proceedings for competition law cases in Cyprus.

5.2.1 Rules applicable to the judicial review of NCA decisions

Under Article 146 of the Constitution, the Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of its provisions or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

Pursuant to Article 135 of the Constitution, the Supreme Court is vested with the competence to regulate its practice and procedure by Rules of Court in the exercise of jurisdiction conferred upon it by the Constitution.

5.2.2 Competent Court

The decision of the CPC may be appealed by way of administrative recourse action before the Supreme Court. The Supreme Court exercises both original and appellate jurisdiction. The Supreme Court is composed of thirteen judges, one of which is the president. At first instance, cases are heard by one judge and following an appeal by a bench of at least five. Where the case involves issues of particular importance, it is heard by all of the Supreme Court judges.

5.2.3 Timeframe

A person having a legitimate interest may file an appeal against a decision of the CPC within a period of 75 days from the notification of the decision or from its publication.³⁹³

5.2.4 Admissibility of Evidence

The burden of proof rests with the party appealing the decision to the Supreme Court. Although the Cyprus legal system is adversarial, the Supreme Court in the exercise of its revisional jurisdiction follows the inquisitorial system. Therefore it reviews the administrative actions independently of the participation of the litigants. The Court has the power and responsibility to regulate the production of evidence in accordance with the requirements of the due discharge of its competence under Article 146. Furthermore under Rule 11 of the Supreme Constitutional Rules 1962, the Court has power to summon any person to give evidence or produce documents for the purpose of enabling the court to come to a just decision in the case.³⁹⁴

5.2.5 Interim Measures

In emergency situations an application for a provisional order may be filed under Rule 13 of the Supreme Constitutional Court Rules³⁹⁵ which continue in force under Section 17 of the Administration of Justice (miscellaneous provisions) Law (33/64). It is a cardinal principle of administrative law that a provisional order is granted only if the applicant shows manifest illegality or the likelihood of irreparable damage. There are no summary³⁹⁶ jurisdiction proceedings in the revisional jurisdiction of the Supreme Court. However under Article 134(2) of the Constitution when a recourse appears to be prima facie frivolous the court may, after hearing arguments by or on behalf of the parties concerned, dismiss such recourse without a public hearing if satisfied that such a recourse is prima facie frivolous.

5.2.6 Rulings of the court

Pursuant to Article 134 of the Constitution, the sittings of the Supreme Constitutional Court for the hearing of all proceedings shall be public but the Court may hear any proceedings in the presence only of the parties, if any, and the officers of the Court if it considers that such a course will be in the interest of the orderly conduct of the proceedings or if the security of the Republic or public morals so require.

Upon recourse, the Court may, by its decision:

- a. confirm, either in whole or in part, such decision or act or omission;
- b. declare, either in whole or in part, such decision or act to be null and void and of no effect whatsoever;

³⁹³ Pursuant to Article 146(3) of the Constitution, an administrative recourse against a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority, shall be made within seventy-five days of the date when the decision or act was published or, if not published and in the case of an omission, when it came to the knowledge of the person making the recourse.

³⁹⁴ Administrative Justice in Europe, Report for Cyprus, available at the website of ACA-Europe http://www.juradmin.eu/en/eurtour/i/countries/cyprus/cyprus_en.pdf

³⁹⁵ Section 17 of the Administration of Justice (miscellaneous provisions) Law (33/64)

³⁹⁶ There are proceedings available before the trial for summary judgment and striking out of a claim. In order to obtain a summary judgment the applicant must show that the defendant has no real defence to the action. Pursuant to Order 18(1) of the CPR, " where the defendant appears to a writ of summons specially indorsed under Order 2, Rule 6, the plaintiff may on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply for judgment for the amount so indorsed, together with interest (if any), or for the recovery of the land (with or without rent), or for the delivering up of a specific chattel, as the case may be, and costs. And judgment for the plaintiff may be given thereupon, unless the defendant shall satisfy the Court that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend."

- c. Declare that such omission, either in whole or in part, ought not to have been made and that whatever has been omitted should have been performed.

5.3 Follow-on Proceedings (private enforcement)

This Section presents follow-on proceedings for competition law cases in Cyprus.

5.3.1 Rules applicable to follow-on procedures

In Cyprus, there is a specific provision in the 2008 Law allowing for damages claims. Section 40 of the Act states that any person who has suffered loss and/or financial injury from any acts or omissions of an undertaking or associations of undertakings done in contravention of Sections 3 and/or 6 of the Law and/or Articles 101 and 102 TFEU, has the right to bring an action for damages against the person or entity responsible for such practices. Under Article 47 of the Law, the Supreme Court may make rules of court to be published in the Official Gazette of the Republic for the application of the provisions of sections 32 and 40 of the Law.

5.3.2 Competent Court

The District Courts will have jurisdiction at First Instance to adjudicate on claims for damages. The Supreme Court has jurisdiction to hear and determine all appeals from all inferior courts in civil matters.

5.3.3 Timeframe

'The length of the proceedings varies but if the action goes to a full hearing it can take 2-3 years before judgment is issued.'³⁹⁷ Pursuant to Order 35 of the Civil Procedure Rules, appeals against final judgment must be filed within 42 days. Time limits are treated under Cypriot law as a procedural law issue and give the Defendant right to file a preliminary objection requesting the rejection of the action against him if the claim has not been filed within the specified time limit.³⁹⁸

5.3.4 Admissibility of evidence

The burden of proof rests on the claimant. The burden is to establish one or more breaches of Section 4 and/or 6 of the Law and that such breach directly caused loss or damage to the plaintiff. The standard of proof, as in all civil cases, is the balance of probabilities.

Evidence in Court may be oral or written. Witnesses' cross examination is permissible and the parties are free to summon any witness they wish even from other jurisdictions. Witnesses normally give oral evidence usually on oath or affirmation. A witness can also make a written witness statement. Witnesses giving evidence at trial are cross-examined before the court by the opposite party and re-examined by the party calling him, and after reexamination, they may be questioned by the Court.³⁹⁹ Pursuant to Section 8 of Civil Procedure Law the Court can order the taking of evidence on oath before any person in or outside Cyprus or request a Foreign Court to take such evidence. Expert evidence is also

³⁹⁷ Eliades M., *Study on the conditions of claims for damages in case of infringement of EC competition rules - Cyprus Report*, available at the following link:

http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/cyprus_en.pdf

³⁹⁸ Georgiades Y., *Introduction To The Cypriot Legal System & Civil Procedure*, 11 November 2011: "The Limitation of Actions Law, Cap. 15, sets down various limitation periods depending on the nature of the claim. This Law provides a limitation period of fifteen years with regard to claims in respect of bonds and mortgages; twelve years with regard to claims to estate; six years for claims with regard to bank debts and for any other cause of action, a period six years. With regard to torts, the Civil Wrongs Law provides for a three-year limitation period" The Article is available at the following link:

<http://www.mondaq.com/x/152682/Offshore+Centres/Introduction+To+The+Cypriot+Legal+System+Civil+Procedure>

³⁹⁹ *Ibid*

admissible in the hearing of the case in either oral or written form. It is up to the Judge to decide the reliability weight of the submitted evidence in the light of the respective case.

5.3.5 Interim Measures

Section 40 (2) of the Law establishes a statutory right for the person who has suffered any damage under subsection (1) to apply to the Court for making an injunction in order to obstruct the continuance of the contravention of Sections 3 and/or 6 of this Law and/or Articles 101 and 102 TFEU.

5.3.6 Rulings of the court

The claimant can recover any loss or damage suffered as a direct result of a breach of the law. The basis is the actual loss or damage suffered by the plaintiff but may also include loss of profit that must however be reasonably foreseeable. Loss of profit may in theory include the loss of a business opportunity although proving damages for such loss will be very difficult. The gain to the defendant is not taken into account in calculating the loss to the claimant. Non-material loss is extremely hard to prove but in theory may be claimed as a head of damage. The norm is that the hearings of all courts shall be public, except in special cases. However, third parties and the public do not have access to court files, unless it is specifically authorised by the court.

5.3.7 Rules applicable to the enforcement of court judgments

Where any person is by any judgment or order directed to pay any money, or to deliver or transfer any property movable or immovable to another, it shall not be necessary to make any further demand. Any person against whom a judgment is given must comply with and fully satisfy it. If a party fails to obey a judgment made against him, measures can be taken for the execution and enforcement of the judgment so that the successful party will obtain the remedy to which he is entitled. 'Applicable methods to the enforcement of judgments are:⁴⁰⁰

- **Order for payment of the debt by monthly instalments⁴⁰¹**

The Court may, if it thinks fit, during or after an investigation, direct that the sum due under the Judgment shall be paid by instalments at such times and in such amounts as it may think proper. If the debtor fails to pay as above, then it is possible for the creditors to proceed with the filing of a criminal case.

- **Writ of movables**

A writ of movables is an order of the Court allowing the Court Bailiffs to take possession of movables and sell them by private auction for the benefit of the Creditors.

- **Writ for the sale of land (memo for the sale of immovable property)**

Creditors have also the choice and right to proceed against immovable property of the judgment debtor registered in his name. A judgment creditor may register the judgment issued against the debtor at the District Lands Office as a security for the payment of the debt.⁴⁰² This is done by filing a Memo on the registration which is valid for 6 years.

- **Writ of attachment**

In a case where a judgment debtor has no movable or immovable property, there is an alternative way to execute a judgment, called "writ of attachment", which is applicable where a judgment debtor may be interested in any money in the hands of other persons, not parties

⁴⁰⁰ Karatsis K., *Methods of Enforcement of Judgments in Cyprus for the collection of debts*, April 2012 available at <http://www.pirilides.com/publication-detail.php?id=41>

⁴⁰¹ Article 90 of the Civil Procedure Law (Cap.6)

⁴⁰² Article 53 of the Civil Procedure Law (Cap.6)

necessary to the proceedings.⁴⁰³ The writ of attachment shall render the property of the judgment debtor, which is in the hands of such other person, for the satisfaction of the judgment debt.'

5.4 Alternative dispute resolution mechanisms

Mediation is a recently available alternative dispute resolution mechanism introduced by the Law on Certain Aspects of Mediation in Civil Matters 159(I)/2012, which transposed Directive 2008/52/EC into national law. The court before which an action is brought may inform the parties as to the use of mediation and invite them to use mediation to settle their dispute at any stage of the process before the delivery of its judgment. The success of mediation depends on the consensus of all parties which are seeking to reach a settlement agreement.⁴⁰⁴

Arbitration is also an available alternative mean of dispute resolution which is most frequently used in the real estate and shipping sectors. The parties are free to agree the process of appointment of the arbitrator who will only decide on issues that the parties agree to leave to his judgement. Pursuant to Order 49(1) of the Civil Procedure Rules, the consent of the parties to refer an action to arbitration shall be signified in writing signed by the parties themselves in the presence of a Judge, Registrar, certifying officer, or notary public. If the consent is on separate documents, such documents shall be identical in all material respects. The document or documents of consent shall be filed.

The institution of the ombudsman is a method of non judicial control in the settlement of administration disputes. He reports on complaints submitted to him and he suggests ways of redressing the injustice. In the event of non compliance, he may submit a report to the Council of Ministers and to the House of Representatives.

6 Contextual Information

This Section presents contextual information on the judicial system in Cyprus

6.1 Duration and cost of competition law cases

6.1.1 Duration of cases

'In Cyprus, the length of the judicial proceedings varies but if the action goes to a full hearing it can take 2-3 years before judgment is issued. In theory a claimant could apply for a summary judgment at any time after the filing of his statement of claim but for this to be successful it would be necessary to prove that there is a complete absence of a defence. There is no other way of accelerating proceedings.'⁴⁰⁵

Rules of Procedure of 1986, issued by the Supreme Court provide that no judgment shall be reserved for a period exceeding 6 months. On the application of any party, after the elapse of the above period or ex proprio motu, after the elapse of 9 months, the Supreme Court may:

- (i) order the retrial of the case by a different court,
- (ii) make an order for the issue of judgment within a time limit,
- (iii) issue any other necessary order.

⁴⁰³ Pursuant to Order 43 of the CPR, "whenever in any proceedings to obtain an attachment under Part 7 of the Civil Procedure Law, Cap. 7, it is suggested by the garnishee that the debt or property sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or Judge may order such third person to appear and state the nature and particulars of his claim upon such debt or property."

⁴⁰⁴ Neocleous P., Stamatiou C., *Dispute Resolution - Cyprus*, Getting the Deal Through, July 2013 available at: <http://www.mondaq.com/x/254032/Civil+Law>

⁴⁰⁵ Eliades M., *Study on the conditions of claims for damages in case of infringement of EC competition rules - Cyprus Report*, available at the following link:

http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/cyprus_en.pdf

6.1.2 Cost of cases

According to Article 163(2) of the Constitution, the Supreme Court may "make rules for prescribing forms and fees in respect of proceedings in the courts and regulating the costs of, and incidental to, any such proceedings".

The Cyprus Courts apply a scale allocation system in which the actions before the Courts are allocated according to the value of the claim. The scale allocation system currently in force is available at the official website of the Supreme Court.⁴⁰⁶

Upon administrative recourse, the Court Fees Order provides that the fees of the Courts are to be taken by means of revenue stamps. Stamp duty for filing an application for annulment is currently approximately €85.⁴⁰⁷ The Respondent and the interested party pay approximately a fee of € 35 in order to file an appearance. Upon Appeal, the Appellant pays a fee of approximately € 120 in order to file his appeal. The Respondent will pay approximately a fee of € 52 in order to file an appearance.⁴⁰⁸ The legal costs vary and depend upon the subject matter and the nature of each case. The Judge has discretion in the apportionment of the costs. Usually the costs follow the outcome of the case. As a rule, the party that loses the case has to bear the legal costs. However, under special circumstances, the court may order that each party bear its own costs.

6.2 Influencing Factors

No specific factors were identified in Cyprus which influence the application of (EU) competition law rules.

6.3 Obstacles/Barriers

The potential length of competition proceedings is considered as a disincentive to potential claimants. Reduction of the length of proceedings would clearly reduce this obstacle.⁴⁰⁹

⁴⁰⁶ Available at the following link of the official website of the Supreme Court:

<http://www.supremecourt.gov.cy/Judicial/SC.nsf/All/069338866AC81FF6C22575FB00225BE0?OpenDocument>

⁴⁰⁷ Administrative Justice in Europe, Report for Cyprus, available at the website of ACA-Europe http://www.juradmin.eu/en/eurtour/i/countries/cyprus/cyprus_en.pdf

⁴⁰⁸ Valiantis G., *Administrative Law & Procedures*, Cyprus Law Digest, 12 December 2012 available at: <http://www.cypruslawdigest.com/topics/judicial-system/item/134-administrative-law-procedures>

⁴⁰⁹ Waelbroeck D., Slater D. and Even-Shoshan G., *Study on the conditions of claims for damages in case of infringement of EC competition rules*, Comparative report published by Ashurst 2004 available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

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- Civil Procedure Rules
- Civil Procedure Law (Cap.6)
- Administration of Justice Law 33/64
- The Protection of Competition Law 207/89
- Council Regulation 1/2003
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http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

Data sources

- Commission for the Protection of Competition Website: <http://www.competition.gov.cy>
- Supreme Court Website: <http://www.supremecourt.gov.cy>
- Presidency of the Republic of Cyprus Website: <http://www.presidency.gov.cy>
- Ministry of Justice Website: <http://www.mjpo.gov.cy>

COUNTRY FACTSHEET -CZECH REPUBLIC

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Abbreviations used

APC	Act no. 143/2001 Coll., on Protection of Competition
CAJ	Act no. 150/2002 Coll., the Code on Administrative Justice
CPC	Act no. 99/1963 Coll., the Civil Procedure Code
CTO	Czech Telecommunication Office
ERO	Energy Regulatory Office
EU	European Union
TFEU	Treaty on the Functioning of the European Union
UOHS	Office for the Protection of Competition

1 Overview of the National Legal Framework

The legal order of the Czech Republic is derived from the Civil Law system and belongs to the Germanic legal culture. Written law is supposed to be the only source of law. The system is hierarchical; the sources of law create a pyramid structure according to their legal force. The sources of law, in hierarchical order, are: the Constitution and constitutional acts; international treaties (once they are ratified by the Parliament and promulgated); statutes adopted by the Parliament; delegated legislation (orders of the government, notifications of ministries); and legislative acts of self-regulated entities. Since the accession to the EU in 2004, EU law is also a source of law and has supremacy over national law⁴¹⁰.

The highest source of law is the Constitution (*Ústava*) which was adopted on 16 December 1992 and came into force on 1 January 1993. It is composed of 113 articles which are divided into 8 chapters. The fundamental provisions which set the principles of democracy and rule of law are followed by chapters on the legislature, the executive power, and the judiciary. Other chapters include provisions on the Supreme Audit Office, the Czech National Bank, the territorial self-regulated entities (i.e. the 14 regions the Czech Republic is divided into). The Constitution, the Charter of Fundamental Rights and Liberties (*Listina základních práv a svobod*) and other constitutional acts create together the so-called 'constitutional order' of the Czech Republic.

The provisions regulating the judiciary are provided in Chapter IV of the Constitution. The court system comprises the Supreme Court and the Supreme Administrative Court on the top of the hierarchy, high courts, regional courts and district courts. Judgments of these courts are binding only in the case concerned. The Constitutional Court (*Ústavní soud*) is a judicial body outside the court structure; it is responsible to ensure the constitutionality of the Czech legal order and to protect the fundamental rights of individuals.

Further information about the court system is to be found in Section 4.

2 National Legislation establishing competition law rules

This Section provides an overview of the national legislation establishing competition law rules. Table 2.1 presents a list of relevant competition law instruments in the Czech Republic.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
Act no. 143/2001 Coll., on the Protection of Competition (<i>Zákon č. 143/2001 Sb., na ochranu hospodářské soutěže</i>)	4 April 2001
Act no. 273/1996 Coll., on the Scope of Competence of the Office for the Protection of Competition (<i>Zákon č. 273/1996 Sb., o působnosti Úřadu na ochranu hospodářské soutěže</i>)	11 October 1996

2.1 General legislation

Act no. 143/2001 Coll., on Protection of Competition of 4 April 2001 (hereinafter 'APC') provides for the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) by the Czech authorities. It regulates certain issues concerning the cooperation of the Czech authorities with the European Commission and other national

⁴¹⁰ When acceding to the EU, the Czech Republic committed to respect the supremacy of EU law in specific fields. However, from a constitutional perspective, EU law cannot prevail over the Constitution and constitutional acts.

competition authorities in the EU, according to Council Regulation no. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty establishing the European Community and Council Regulation no. 139/2004, on the control of concentrations between undertakings.

According to Article 1, the APC serves to protect competition in the market of goods and services against its elimination, restriction, other distortion or imperilment caused by:

- a) Agreements between undertakings
- b) Abuse of dominant position by undertakings
- c) Concentrations of undertakings.

The Act applies also to undertakings which provide services of general economic interest on the basis of a special act or a decision. As undertakings are considered natural persons as well as legal entities, their associations, associations of such associations and other groupings, provided that they take part in competition or may influence competition even if they are not entrepreneurs on the basis of law⁴¹¹.

The principle of extraterritoriality is reflected in the APC. Accordingly, the APC applies to actions of undertakings which occurred abroad if they distort or may distort competition within the Czech Republic. On the other hand, the Act excludes from its scope those actions which have effects solely in foreign markets, unless an international treaty provides otherwise⁴¹².

The APC prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, mirroring the provisions of Article 101 TFEU⁴¹³. Furthermore, it contains provisions related to the abuse of dominant position, as prohibited by Article 102 TFEU⁴¹⁴. Finally, it exercises control over concentrations of undertakings⁴¹⁵.

Actions for damages for breaches of competition law are governed by the liability provisions of the Czech Civil Law. According to the Civil Code (*Občanský zákoník*), anyone who caused a damage by breaching a legal duty is liable to compensation⁴¹⁶. The new Civil Code which entered into force on 1 January 2014 also provides for liability for damages⁴¹⁷.

2.2 Industry-specific legislation

In addition to the general legislation mentioned above, there are also industry-specific rules in the Czech Republic related to the protection of competition. The regulated industries are mainly telecommunications, the energy sector and agriculture.

Act no. 127/2005 Coll., on Electronic Communications (*Zákon o elektronických komunikacích*), which implements 13 EU Directives, includes provisions regulating competition in this sector with the aim of creating conditions of fair competition and of protecting users and other participants in the market. The Czech Telecommunication Office (*Český telekomunikační úřad*, 'CTO') is the central authority to regulate competition in this sector.

Competition in the energy markets is regulated by Act no. 458/2000 Coll., on Business Conditions and a Public Administration in the Energy Sectors and on Amendment of other Laws (so-called 'Energy Act', *Energetický zákon*), which implements 4 EU Directives and refers to 5 EU Regulations. The Energy Regulatory Office (*Energetický regulační úřad*, hereinafter referred to as the 'ERO') is, according to this act, responsible to ensure

⁴¹¹ Article 2(1) of APC.

⁴¹² Article 1(6) of APC.

⁴¹³ Articles 3 – 7 of APC.

⁴¹⁴ Articles 10 – 12 of APC.

⁴¹⁵ Articles 12 - 19 of APC.

⁴¹⁶ Article 420 of the Act no. 40/1964 Coll., the Civil Code (*Občanský zákoník*).

⁴¹⁷ Article 2894 of the Act no. 89/2012 Coll., the (New) Civil Code (*Občanský zákoník*).

competition in the energy market and to protect consumers' interests in those areas of the energy sector where competition is impossible.

Both these acts do not prevent the Office for the Protection of Competition (UOHS) from performing its competences in the related sectors.

In the field of agriculture, the Czech Republic adopted Act no. 395/2009 Coll., on Significant Market Power in the Sale of Agricultural and Food Products and Abuse thereof (*Zákon o významné tržní síle při prodeji zemědělských a potravinářských produktů a jejím zneužití*) which contains strict national rules concerning unilateral conduct in the food sector. The rules go beyond the classical dominance test according to Article 102 TFEU.

The ERO as well as the CTO cooperate with the UOHS.

The ERO and the UOHS make to each other suggestions, provide information and engage in other forms of cooperation to ensure fulfilment of their tasks⁴¹⁸. The ERO informs the UOHS on activities of market actors which presumably restrain or limit competition and on restrictive or unfair clauses in agreements concluded in the electricity, gas or in the heating markets, as well as on how prices in these markets are determined⁴¹⁹.

The CTO drafts market analyses in cooperation with the UOHS⁴²⁰. Both Offices make to each other suggestions, provide information and engage in other forms of cooperation. They mutually send opinions before they issue a decision. When the CTO is going to impose a fine on undertakings, it must first consult the UOHS⁴²¹.

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in the Czech Republic, the Office for the Protection of Competition (UOHS), detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Office for the Protection of Competition

The Office for the Protection of Competition (*Úřad na ochranu hospodářské soutěže*,) was established by Act no. 173/1991 Coll. of 26 April 1991, and started its activity on 1 July 1991. Although usually the seats of national authorities are located in the capital, Prague, the headquarters of the UOHS are located in Brno. This aims at guaranteeing the independence of the decision-making process of the UOHS. In 1992, the Office was replaced by the Ministry of Competition. The present UOHS started its activity with its current name on 1 November 1996 and continued the activity of the former Ministry of Competition.

3.2 The reform of the Office for the Protection of Competition

The role and competences of the UOHS are defined in Act no. 273/1996 Coll., on the Scope of Competence of the Office for the Protection of Competition. The UOHS must support and protect competition and supervise the fields of public procurement and State aid. As mentioned in Section 3.1, the UOHS succeeded in 1996 the Ministry of Competition.

In order to comply with the trend of the effects-based approach to competition law, the UOHS established in 2009 the unit of the chief economist which may help relevant case - teams to deal with economic questions. For further information see Section 3.5 below.

⁴¹⁸ Article 17c(1) of the Energy Act.

⁴¹⁹ Article 17c(2) of the Energy Act.

⁴²⁰ Article 51(4) of the Electronic Communications Act.

⁴²¹ Article 111 of the Electronic Communications Act.

3.3 Composition and decision-making

The UOHS is a central administrative authority and is independent in its decision-making process. It is headed by a Chairman appointed for a term of six years (renewable once) by the President of the Czech Republic on the proposal of the Government. The UOHS is divided into five sections: (1) Section of Public Regulation and Administration; (2) Section of Public Procurement; (3) Competition Section; (4) Section of Legislation, Economics and International Affairs; and (5) Section of the Second Instance Decision-Making.

The UOHS is explicitly empowered to apply Articles 101 and 102 TFEU by requiring that an infringement be brought to an end, ordering interim measures, accepting commitments and imposing fines. These tasks are undertaken by the Competition Section of the UOHS which is divided into several units: the unit of dominance and vertical agreements; the unit of cartels; the unit of mergers; and the unit of the chief economist.

The chief economist unit has significantly reinforced the work of the UOHS as it cooperates with other units in the investigation of more complex cases (where economic or econometric analyses are necessary) and provides its expert opinion in the cases investigated by the UOHS. It performs analytical tasks needed for the investigation, identifies and applies suitable economic methods and tests, identifies, processes and interprets market data, etc.

The final decision is thus prepared by a relevant unit with the cooperation of the chief economist unit when necessary. The decision is then issued as an individual administrative act by the UOHS as a whole.

3.4 Cooperation with other entities

The UOHS has been explicitly granted with the competence to cooperate with the European Commission as well as with other national competition authorities. The mechanism for this cooperation is contained in Article 20a of the APC and includes a list of the actions the UOHS can proceed to, as well as a list of its obligations. As such, the UOHS can: request the Commission to provide it with copies of documents necessary for the assessment of a case; consult with the Commission; exchange information with the Commission and other NCAs; submit observations on issues relating the application of Articles 101 and 102 TFEU to courts and request the competent court to transmit any documents necessary for the assessment of the case; conduct investigations upon the request of another NCA, etc..

Moreover, the UOHS is obliged to inform the Commission and other NCAs about the initiation of proceedings based on Articles 101 and 102 TFEU, and to provide the Commission with a summary of the case, the envisaged decision and other documents no later than 30 days before the adoption of the decision.

The UOHS also cooperates with sector regulators, such as the Czech Telecommunication Office (CTO) and the Energy Regulatory Office (ERO), as already discussed in Section 2.2.

3.5 Investigations

Investigations are governed by the APC and, complementary, by Act no. 500/2004 Coll., the Administrative Procedure Code. The UOHS initiates investigations on its own motion. Only merger cases are initiated on the basis of a notification. The APC does not contain detailed provisions on the investigations and the conditions thereof, except for the duty of a competitor to provide the UOHS with all necessary information⁴²².

The APC does not explicitly refer to the possibility of third parties to submit suggestions and complaints with respect to violations of Articles 101 and 102 TFEU. The UOHS takes them into account but only as incentives to initiate investigations. However, it has a margin of discretion to initiate an investigation or not. The APC does not stipulate any time limit within which the UOHS should deal with the suggestions or complaints.

⁴²² Article 20a (7) of the APC.

There are no special forms or templates to submit a complaint. Nonetheless, the website of the UOHS contains some guidelines for complainants⁴²³. Anyone can file a complaint with the UOHS and deliver it by post, by electronic post or orally to the protocol at the seat of the UOHS. The complaint must clearly indicate: who is the complainant; what is the complaint about; what the complainant suggests; and what is the supporting evidence. An anonymous action without a claim to be answered may be submitted as well. Then the UOHS decides whether it will initiate proceedings or not.

The investigation is initiated once a notice is delivered to the concerned undertakings. Even before the investigation commences, the UOHS may require information from competitors. When conducting investigations, the powers of the UOHS are similar to those of the Commission according to Articles 19 and 20 of the Regulation no. 1/2003.

During the proceedings, the investigated undertakings have the right to make suggestions, to comment on evidence, to access the file and to be heard in an oral hearing.

More specifically, the right to be heard allows the investigated undertaking to comment on the subject matter of the proceedings and on the reasons for initiating the proceedings. It may comment on the factual and legal assessment of the case and submit its opinion on all related issues.

Concerning the right to access the file, the investigated undertaking may see all documents and evidence which the UOHS considers to be decisive for its final decision and submit its views concerning these documents.

In general, the investigation takes place in writing. However, a participant may ask for an oral hearing. The UOHS may also decide on its own motion that an oral hearing is necessary.

3.6 Decision-making

The UOHS investigation proceedings are terminated with the issuance of a decision. The decision must be in compliance with the principle of material truth and must be based on proven evidence. The decision may impose obligations to the investigated undertaking (substantive decision), terminate the investigation or interrupt the proceedings. In particular, the substantive decision prohibits the conduct in question and imposes obligations, such as the removal of the objectionable part of the agreement and the removal of the restraints on competition. The UOHS may also impose fines or other remedies.

The decision is sent to the parties to the proceedings and is usually published on the website of the UOHS.

The decision may be challenged within 15 days from its delivery, before the Chairman of the UOHS. The decision of the Chairman may then be challenged within two months from its delivery before the administrative courts.

4 Competent courts

The judicial process in the Czech Republic is adversarial, meaning that there are two parties before a judge or a chamber composed of several judges or a judge and lay judges. The judicial system is divided into two branches: the 'judicial judiciary' (commercial division, civil division, criminal division) and the administrative judiciary.

The Czech Republic has a four-tier system of courts which means that, hierarchically there are four levels of courts: district courts, regional courts, high courts and supreme courts. However, the proceedings are two-instance proceedings. In practice this means that, according to the subject-matter of a case, the first instance is either the district court or the regional court (commercial issues, severe crimes, administrative judiciary etc.).

⁴²³ Available at: <http://www.uohs.cz/cs/hospodarska-soutez/zakazane-dohody-a-zneuziti-dominance/podani-podnetu.html>.

In the judicial judiciary the division of the work of courts is as follows: if the first instance court is a district court, the second instance court is a regional court. If the first instance is a regional court, then the second instance proceedings are held before high courts. The appeals in cassation against judgments of the second instance courts may be lodged to the Supreme Court.

Within the administrative judiciary, the first instance court is a regional court (specialised administrative law units), and an appeal in cassation against its judgment may be lodged to the Supreme Administrative Court.

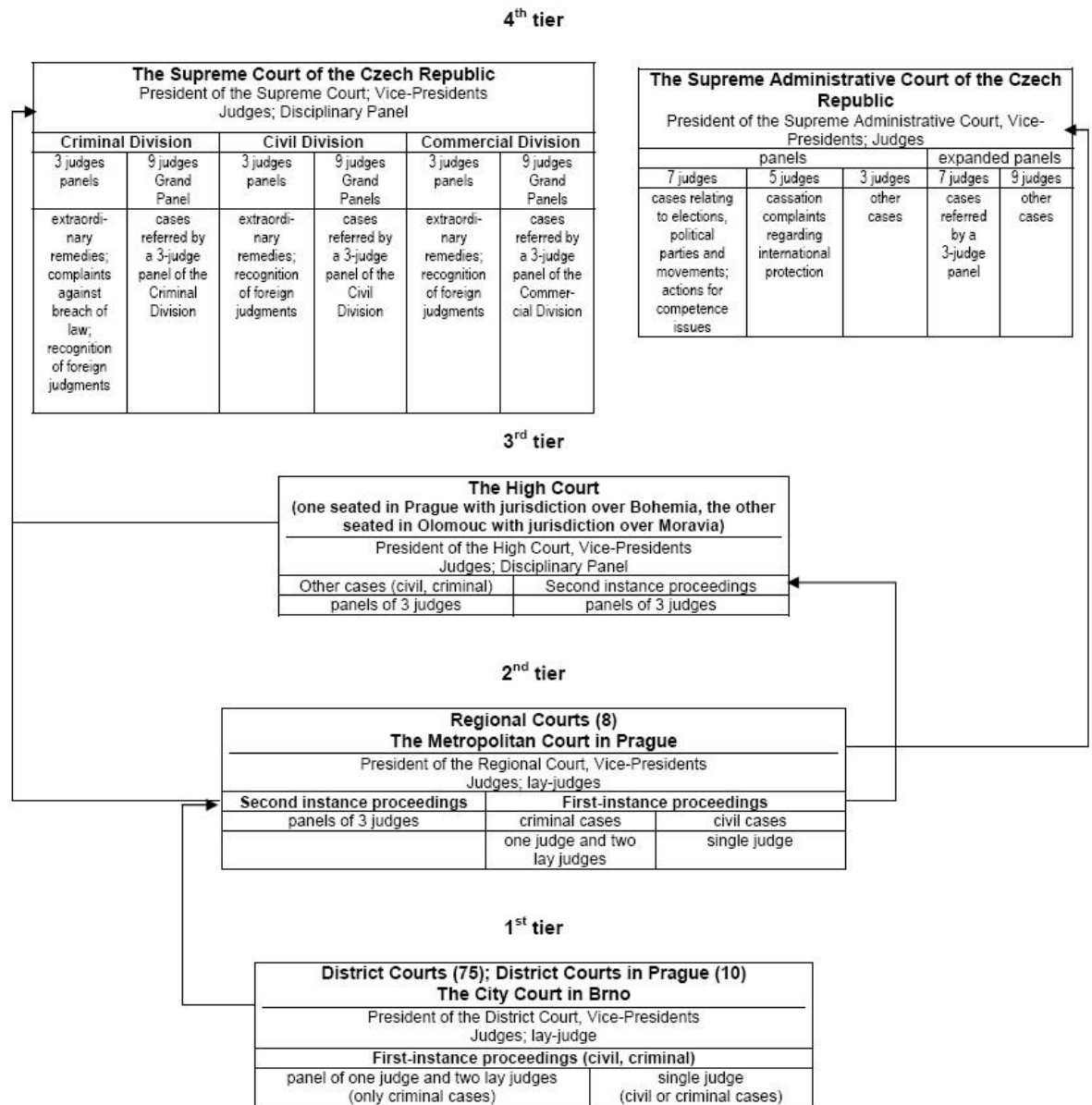
The Constitutional Court is separate to the general court structure and safeguards that the drafting as well as the application of the legislation is in compliance with the Czech constitutional order.

No specialised competition courts exist in the Czech Republic. Competition law cases are dealt with by the administrative judiciary (public enforcement) or by civil (commercial) courts (private enforcement).

See Figure 4.1 which provides an overview of the judicial system in the Czech Republic.

Figure 4.1 Court System in the Czech Republic

The System of Courts in the Czech Republic
(four-tier system of courts; two-instance proceedings)



Source: *European Judicial Atlas*⁴²⁴

The decisions of administrative authorities are reviewed at first instance by the administrative law sections of regional courts. The territorial competence of regional courts is determined by the seat of the administrative authority which issued the decision under review. Therefore, decisions of the UOHS are reviewed by the administrative law unit of the Regional Court in Brno (*Krajský soud v Brně*). The chamber of the Regional Court in Brno which adjudicates public enforcement competition law cases is generally composed of three judges and, exceptionally, by seven judges.

At second instance, an appeal in cassation may be filed with the Supreme Administrative Court (*Nejvyšší správní soud*) in Brno, which is on the top of the administrative judiciary in the Czech Republic.

⁴²⁴ Available at: http://ec.europa.eu/civiljustice/org_justice/org_justice_cze_en.htm.

There are about 30 judges at the Supreme Administrative Court and all of them may be assigned to decide on a competition case. Every judge has one or two assistants (*referendaires*), however, there are no statistics on the total number of legal practitioners involved in competition law cases.

Follow-on actions for damages may be brought before civil courts; the commercial sections of regional courts (*krajské soudy*) are competent to decide at first instance. There are eight regional courts in the Czech Republic and their competences are divided according to the territories of so-called judicial regions (which are different from the territories of regions as territorial self-regulated entities). The decisions of regional courts may be appealed before high courts (*vrchní soudy*). There are two high courts: the High Court in Prague, which covers six regional courts, and the High Court in Olomouc, which covers only two regional courts. Consequently an appeal in cassation may be filed with the Supreme Court (*Nejvyšší soud*) in Brno.

District courts, regional courts and high courts deal both with factual questions and questions of law. The Supreme Court and the Supreme Administrative Court are competent only to decide on questions of law.

The number of judges/legal practitioners differs significantly from court to court while there is no information on the number of legal practitioners involved in the private enforcement of competition law.

5 Proceedings related to breaches of Competition Law rules

This Section presents the proceedings related to breaches of competition law rules in the Czech Republic.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in the Czech Republic is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	A natural person or a legal entity claiming that his/her rights were violated by an action performed by an administrative authority (including the UOHS) which established, amended or cancelled his/her rights	A natural person or a legal entity claiming that they suffered damage due to a breach of competition law by an undertaking
How can an action be filed?	By submitting an action against the decision of the UOHS (the appellate decision of the Chairman) to the Regional Court in Brno	By submitting an action for damages to a regional court (at first instance)
With which authorities can the action be filed?	At first instance, the Regional Court in Brno (<i>Krajský soud v Brně</i>); at second instance, the Supreme Administrative Court	At first instance, a regional court (<i>krajský soud</i>); at second instance, a high court; at third instance, the Supreme Court
Burden of proof	The burden of proof rests with the UOHS	The burden of proof rests with the applicant

5.2 Judicial Review Proceedings

This Section presents the judicial review proceedings in the Czech Republic.

5.2.1 Rules applicable to the judicial review of NCA decisions

The judicial review of the UOHS decisions is governed by Act no. 150/2002 Coll., the Code on Administrative Justice (*Soudní řád správní*, hereinafter referred to as 'CAJ').

The APC itself does not contain an explicit provision on the judicial review of UOHS decisions but this right stems directly from the Charter of Fundamental Rights and Liberties⁴²⁵ and from the competence of administrative courts to review any decisions issued by administrative authorities, except for those specifically excluded⁴²⁶.

5.2.2 Competent Court

The review is performed at first instance by the Regional Court in Brno. The court either rejects the claim and thus confirms the UOHS decision, or cancels the UOHS decision as illegal or due to procedural inaccuracies and returns the case back to the UOHS which needs to decide again on the case. In the new proceedings, the UOHS is bound by the Regional Court's decision.

A cassation appeal against the judgment of the Regional Court may be lodged with the Supreme Administrative Court. It must be based on the reasons enumerated in the CAJ (wrong application of law; procedural failures; inadequate statement of reasons; and in cases where the appeal is lodged against a decision by which the court refused to deal with a case or terminated proceedings)⁴²⁷. The Supreme Administrative Court is competent to review only the way the Regional Court in Brno applied the legislation.

5.2.3 Timeframe

The administrative action to the Regional Court in Brno must be lodged within two months after the decision of the UOHS Chairman is delivered to the undertaking concerned.

The cassation appeal must be lodged within two weeks from the delivery of the judgment of the Regional Court.

5.2.4 Admissibility of Evidence

In general, the Regional Court in Brno decides without an oral hearing⁴²⁸. It has to assess the factual and legal situation which existed at the time that the UOHS decided on the case⁴²⁹. However, the Court is not bound by the evidence collected during the investigation by the UOHS and may request additional evidence if necessary to decide on the case⁴³⁰. The Supreme Administrative court decides usually without and oral hearing and as a rule does not examine factual evidence⁴³¹.

5.2.5 Interim Measures

If there is a threat of a serious harm to parties to a judicial proceeding, the court may order interim measures, such as an obligation to act, to refrain from acting or to endure an action⁴³².

⁴²⁵ Article 36(2) of the Charter of Fundamental Rights and Liberties.

⁴²⁶ Article 4 of the CAJ.

⁴²⁷ Article 103 of the CAJ.

⁴²⁸ Article 51 of the CAJ.

⁴²⁹ Article 75 of the CAJ.

⁴³⁰ Article 77 of the CAJ.

⁴³¹ Article 109(2) of the CAJ.

⁴³² Article 38 of the CAJ.

5.2.6 Rulings of the court

In general, proceedings before both the Regional Court and the Supreme Administrative Court are in writing. The court may order oral hearings if it is necessary or suitable for the case in question. The judgment shall be pronounced in public⁴³³.

If the Regional Court in Brno finds that the decision of the UOHS is correct, it upholds the decision. If the decision is not correct due to illegality or procedural failures, the Court cancels it and sends the case back to the UOHS to decide again on the case. In these proceedings, the UOHS is bound by the decision of the Regional Court.

Within the cassation appeal, the Supreme Administrative Court either rejects the claim or cancels the judgment of the Regional Court and orders it to resume its proceedings. The Regional Court is then bound by the decision of the Supreme Administrative Court.

5.3 Follow-on Proceedings (private enforcement)

This Section provides an overview of follow-on proceedings in the Czech Republic.

5.3.1 Rules applicable to follow-on procedures

The procedure in follow-on cases is governed by Act no. 99/1963 Coll., the Civil Procedure Code (*Občanský soudní řád*, hereinafter referred to as 'CPC').

5.3.2 Competent Court

In the first instance, regional courts (commercial law sections) are competent to adjudicate actions for damages caused by competition law infringements. Regional court decisions may be challenged before the high courts, and an appeal in cassation may be submitted to the Supreme Court. An appeal in cassation is generally admissible against second instance judgments which include a question of law that has not been resolved by the Supreme Court yet or that is being answered inconsistently. It is also possible to bring an appeal in cassation where the law is applied in a way that deviates from the settled case-law of the Supreme Court.

5.3.3 Timeframe

As a general rule, an action must be lodged within three years after the claimant learns or may have learned about the damage and the responsible party⁴³⁴. The appeal against the first instance judgment must be lodged within 15 days from the day the judgment was delivered to the party⁴³⁵. The time limit for lodging an appeal in cassation with the Supreme Court is two months after delivery of the judgment⁴³⁶.

Courts should resolve the case within a reasonable period of time to guarantee an effective protection of individual rights.

5.3.4 Admissibility of evidence

According to Article 120 of the CPC, parties to judicial proceedings are obliged to furnish the evidence substantiating their claims in court. The court then decides which of the evidence will be accepted during the evidentiary process (e.g. whether a witness will be heard, whether a document will be read in the courtroom, etc.). In the second instance proceedings, new evidence is inadmissible unless it refers to procedural failures of the first instance proceedings (e.g. if the participant was not correctly informed by the court), or in case the

⁴³³ Article 49(9) of the CAJ.

⁴³⁴ Articles 619 and 629 of Act no. 89/2012 Coll., the (New) Civil Code (*Občanský zákoník*). After expiry of this period, the defendant may raise objections that the limitation period has expired, and the claim for damages will not be granted.

⁴³⁵ Article 204 of the CPC.

⁴³⁶ Article 240 of the CPC.

new evidence became available after the issuance of the first instance judgment⁴³⁷. Before the Supreme Court, submission of new evidence is not possible⁴³⁸.

5.3.5 Interim Measures

The court may impose interim measures if there is a reasonable fear that execution of the judgment may be threatened or in case the relations between the parties must be temporarily regulated⁴³⁹. The court may thus impose a prohibition on the disposal of property or rights, an obligation to deposit funds or goods into the court's deposit, or an obligation to act, to refrain from acting or to endure an action⁴⁴⁰.

5.3.6 Rulings of the court

The regional court (court of first instance) may grant damages to the claimant if his/her claim is substantiated. The court determines the amount of compensation based on the evidence provided by the claimant. Both the actual loss and the loss of profit may be claimed and recovered. Exemplary damages or punitive damages are not allowed under Czech Law.

The high court (court of second instance) may reject the appeal, confirm, amend or cancel the regional court decision.

In general, there are oral hearings in both instances. The judgment is always pronounced orally in public⁴⁴¹.

The Supreme Court deals only with legal questions and may reject the cassation appeal (*dovolání*), confirm, cancel or reject the high court judgment.

The Supreme Court decides, in general, without an oral hearing. It may order oral hearings if it is necessary or suitable for the case in question⁴⁴². The judgment shall be pronounced in public.

5.3.7 Rules applicable to the enforcement of court judgments

The enforcement of court judgments is either governed by the CPC (Articles 251 - 351) or it may be performed by means of execution by the judicial executor under Act No 120/2001 Coll., on Judicial Executors and Action in Execution (*Exekuční řád*). The creditor is free to choose among these two regimes.

Within the procedure governed by the CPC, an action for enforcement is addressed to the district court which is territorially competent according to the place of residence/seat of the debtor. The applicant himself/herself must determine which property of the debtor should be affected. The court decides upon the enforcement which is then performed by employees of the court (bailiffs).

According to the Act on Judicial Executors, the applicant lodges a proposal to initiate execution with an executor (executors are not employees of any courts; they are associated in the Chamber of Executors). The executor addresses the proposal to a court of execution which consequently issues an order to perform the execution. The executor then seeks for the property of the debtor and is entitled, contrary to the regime under the CPC, to perform more ways of execution at the same time (seizure and sale of movable properties, sale of real estates, deductions from wages etc.). Therefore, in general, this type of executions is deemed to be more efficient.

⁴³⁷ Article 205a of the CPC.

⁴³⁸ Article 241a(6) of the CPC.

⁴³⁹ Article 74 of the CPC.

⁴⁴⁰ Article 76 of the CPC.

⁴⁴¹ Article 156 of the CPC.

⁴⁴² Article 243a of the CPC.

5.4 Alternative dispute resolution mechanisms

No special alternative dispute resolution mechanisms for competition law disputes exist in the Czech Republic. Parties to private enforcement disputes may agree that their dispute will be submitted to one or more arbitrators according to Act no. 216/1994 Coll., on Arbitration Proceedings and Enforcement of Arbitration Awards (*Zákon o rozhodčím řízení a výkonu rozhodčích nálezů*). They may also decide to choose that their dispute be resolved under international arbitration rules. There are no special rules about mediation or conciliation in competition law cases.

6 Contextual Information

This Section provides contextual information relating to the judicial system in the Czech Republic.

6.1 Duration and cost of competition law cases

The average duration of commercial law cases is 20 months⁴⁴³. However, competition law cases normally require much more time due to their complexity. Within the private enforcement proceedings, parties often decide to terminate the dispute by a mutual settlement. The data on the average length of judicial review procedures are not available.

6.2 Influencing Factors

No influencing factors were identified.

6.3 Obstacles/Barriers

One of the problems concerning the application of competition law rules is that the relevant disputes are adjudicated by 'generalist' judges who do not have an expertise in competition law, especially in private enforcement cases. . Thus, competitors seeking damages and/or their lawyers do not trust judges. Very often, such cases are resolved through out-of-court settlements.

⁴⁴³ Data of the Czech Statistical Office, available at http://www.czso.cz/csu/2012edicniplan.nsf/kapitola/0001-12-r_2012-2700.

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- Act no. 143/2001 Coll., on Protection of Competition
- Act no. 120/2001 Coll., on Judicial Executors and Action in Execution
- Act no. 458/2000 Coll., on Business Conditions and a Public Administration in the Energy Sectors and on Amendment of other Laws
- Act no. 273/1996 Coll., on the Scope of Competence of the Office for the Protection of Competition
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COUNTRY FACTSHEET - GERMANY

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Abbreviations used

AG	<i>Amtsgericht</i> (Local Court (<i>Amtsgericht</i>))
ARC	Act against Restraints of Competition (<i>Gesetz gegen Wettbewerbsbeschränkungen – GWB</i>)
BGH	Federal Court of Justice (<i>Bundesgerichtshof</i>)
EU	European Union
FCO	Federal Cartel Office (<i>Bundeskartellamt</i>)
LG	Regional Court (<i>Landgericht</i>)
OLG	Higher Regional Court (<i>Oberlandesgericht</i>)
OWiG	Act on Regulatory Offences (<i>Ordnungswidrigkeitengesetz</i>)
TFEU	Treaty on the Functioning of the European Union

1 Overview of the National Legal Framework

The national legal system in the Federal Republic of Germany (hereafter 'Germany') is derived from the Civil Law system.

In Germany, a Federal Law system exists. Therefore laws exist both at federal level and at the level of the Länder. Germany is made up of sixteen Länder, which are the partly sovereign constituent states of the Federal Republic of Germany.

The division of the legislative competence of the Federal State on the one hand and of the Länder on the other hand is established in the Federal Constitution (Articles 70-74 *Grundgesetz*). These provisions lay down the domains of concurrent and exclusive legislative competences of these two legislatures levels.

The principle of hierarchy of law prevails in the German legal system. The highest source of law in the pyramid of norms is the EU law. It has a primacy in application (*Anwendungsvorrang*), but it has not an absolute priority over constitutional law (*Geltungsvorrang*). Subsequently there are the Federal Constitution (*Grundgesetz*), Acts of Parliament (*Parlamentsgesetze*), Regulations (*Rechtsverordnungen*), Articles of association (*Satzungen*), Administrative Regulations (*Verwaltungsvorschriften*) and Individual Acts (*Einzelakte*). This hierarchy also applies to the laws of the Länder. The Constitutions of the Länder are called *Landesverfassungen*.

The administration of justice for Federal Courts is provided in Chapter IX of the Federal Constitution.

2 National Legislation establishing competition law rules

This section provides an overview of national legislation establishing competition law rules. Table 2.1 presents a list of relevant competition law instruments in Germany.⁴⁴⁴

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
Act Against Restraints of Competition (<i>Gesetz gegen Wettbewerbsbeschränkungen – ARC</i> , 8 th amendment of the ARC) ⁴⁴⁵	Adopted on 29 June 2013, entry into force 30 June 2013 (Article 2 on 1 January 2018)
Act Against Restraints of Competition (<i>Gesetz gegen Wettbewerbsbeschränkungen – ARC</i> 7 th amendment of the ARC)	Adopted on 12 July 2005, entry into force 1 July 2005
Act Against Restraints of Competition (<i>Gesetz gegen Wettbewerbsbeschränkungen – ARC</i> , 6 th amendment of the ARC)	Adopted on 26 August 1998, entry into force 1 January 1999

2.1 General legislation

Section 22 of the Act Against Restraints of Competition (hereafter 'ARC') contains a provision regarding the relationship between the application of the ARC and Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereafter 'TFEU').

2.1.1 Prohibition of agreements restricting competition

Sections 1 and 2 ARC enforce Article 101 TFEU. German competition law has been continually adapted to European competition law rules. Since the 6th amendment of the ARC from 1998, not only agreements between undertakings, but also decisions by associations of undertakings and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition shall be prohibited according to Section

⁴⁴⁴ Please find the different versions of the ARC from 1998 to 2013 under: <http://lexetius.com/leges/GWB/Inhalt;jsessionid=wf0jzgwhiyt71aw5mdo5smr7g?0>.

⁴⁴⁵ <http://www.gesetze-im-internet.de/gwb/BJNR252110998.html>.

1 ARC. In German competition law, the definition of an undertaking covers any independent entity engaged in an economic activity. Contrary to Article 101 (1) TFEU the German provision does not contain an enumeration of prohibited behaviour.

With regard to the appreciability of agreements, decisions and practices, the Federal Cartel Office (*Bundeskartellamt*) (hereafter 'FCO') released a de-minimis notice (*Bagatellbekanntmachung*)⁴⁴⁶ on 13 March 2007. For horizontal agreements without a hardcore restriction, proceedings will not be instituted if the combined market share is below 10%. The same is valid for vertical agreements, if the combined market share is below 15%.

Before the 7th amendment of the ARC in 2005, numerous exceptions were characteristic of German competition law. With the reform, they have mostly been replaced by the general provision of Section 2 ARC which provides exemptions to Section 1 ARC, comparable to those provided in Article 101 (3) TFEU. Apart from that general provision, exemptions exist for cartels of small or medium-sized enterprises⁴⁴⁷, in the agricultural sector⁴⁴⁸, in the press sector⁴⁴⁹ and for the water supply business⁴⁵⁰. For more information on industry-specific legislation see below section 2.2.

Side agreements that are capable of restricting competition in neutral agreements (e.g. non-competition clause in a contract of employment) are not generally exempted from Section 1 ARC. The Federal Court of Justice (*Bundesgerichtshof*) (hereafter 'BGH') analyses if there is a legitimate interest for the clause restricting competition.⁴⁵¹

2.1.2 Abuse of dominant position

The rules concerning market dominance and restrictive practices are more detailed in the ARC than in the TFEU (Article 102 TFEU). In the framework of the reform in 2013 (8th amendment of the ARC) the systematic of the provisions regarding the abuse of dominant position has been modified. Now, the newly added Section 18 ARC provides the definition of dominant position (which used to be in Section 19). An important modification is that since the reform a single entity is presumed to be dominant if it has market shares of at least 40 % (previously 30%).

The rules regarding the abuse of a dominant position are laid down in Section 19 ARC. Section 20 ARC contains provisions prohibiting certain conduct of undertakings with relative or superior market power. Section 21 ARC contains the prohibition of boycott and other restrictive practices.

2.1.3 Claims for injunctions, liability for damages

a) Claims for injunctions

According to Section 33 (1) ARC, whoever violates a provision of the ARC, Articles 101 or 102 TFEU or a decision taken by the cartel authority, shall be obliged to remedy the harm caused to the person affected and, in case of danger of recurrence, to refrain from his conduct. A claim for injunction already exists if an infringement is foreseeable. Affected persons can be competitors or other market participants impaired by the infringement.

b) Liability for damages

⁴⁴⁶ *Bekanntmachung Nr. 18/2007 des Bundeskartellamtes über die Nichtverfolgung von Kooperationsabreden mit geringer wettbewerbsbeschränkender Bedeutung*
http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/07Bagatellbekanntmachung.pdf.

⁴⁴⁷ Section 3 ARC.

⁴⁴⁸ Section 28 ARC.

⁴⁴⁹ Section 30 ARC.

⁴⁵⁰ Section 131 (6) ARC.

⁴⁵¹ BGH LM Section 1 GWB Nr. 47, NJW 1997, 2324, JuS 1998, 272 Nr. 11; LM Section 1 GWB Nr. 47a, NJWE-WettbR 1997, 211, WuW/E BGH 3121 (3124 et seq.); fundamental: BGHZ 154, 21 (26 et seq.), WuW/E DE-R 1119.

According to Section 33 (3) ARC, whoever intentionally or negligently violates a provision of the ARC, Articles 101 or 102 TFEU or a decision taken by the cartel authority shall be liable for the damages arising there from.

For further information on claims for injunctions and liability for damages please see Section 5.3.1. below.

2.1.4 Scope of application of national competition law

The ARC applies to all restraints of competition, having an effect within Germany, also if they were caused abroad (so called *Auswirkungsprinzip i.e. Effects Principle*).⁴⁵² In order to establish the required domestic nexus for the application of national competition law, it is necessary, that the restraints of competition caused abroad affect directly an interest which is protected by the ARC in an appreciable manner (e.g. an import cartel to Germany agreed on abroad). With regard to the causality, it has not been conclusively decided yet if these domestic effects need to occur in fact or if the adequacy is sufficient for the application of the ARC. In any event, Articles 101 TFEU and 102 TFEU are applicable to agreements or behaviour affecting EU trade.

2.2 Industry-specific legislation

Exemptions for specific industrial sectors have been continuously reduced through the reforms of the ARC. For example, the exemption for the network-based energy sector was abolished in 1998. With the 7th amendment of the ARC the exemption regulations for the credit and insurance industry, the sports sector and copyright collecting societies were also abolished.

Exemptions to Section 1 ARC still exist for cartels of small or medium-sized enterprises⁴⁵³⁴⁵⁴, in the agricultural sector⁴⁵⁵ and in the press sector⁴⁵⁶. According to Section 31 (1) ARC, Section 1 ARC does not apply to agreements between undertakings of the public water supply business. Nevertheless, an abuse of their market position is prohibited by Section 31 (3) and (4) ARC. Section 31 (a) and (b) ARC lay down the provisions regarding the obligation of notification, the competence of the FCO and the fines.

Undertakings with a superior market power in relation to small and medium sized competitors shall not use their market power in order to impede unreasonably such competitors directly or indirectly.⁴⁵⁷ An unreasonable impediment is notably established if an undertaking offers foodstuff below the cost price.⁴⁵⁸

Section 29 ARC sets the rules with regard to the energy sector. An undertaking, which is a supplier of electricity or pipeline gas (public utility company) on a market in which it, either alone or together with other public utility companies, has a dominant position, is prohibited from abusing such position.

The application of the competition rules to health insurance companies has been an extremely controversial subject during the negotiations of the 8th amendment of the ARC. Finally, it has been decided that the cartel ban and the control of abusive practices will not apply to health insurances among themselves and in relation to the insured persons.

3 The National Competition Authority

This Section describes the FCO in Germany, detailing its competences and structure, as well as the procedures in place.

⁴⁵² Section 130 (2) ARC

⁴⁵³ Section 3 ARC

⁴⁵⁴ Information leaflet of the Bundeskartellamt on the possibilities of cooperation for small and medium-sized enterprises: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/0711KMU_Merkblatt_Logo.pdf

⁴⁵⁵ Section 28 ARC

⁴⁵⁶ Section 30 ARC

⁴⁵⁷ Section 20 (3) ARC

⁴⁵⁸ Section 30 (3) no.1 ARC

In Germany, the FCO is not the only competition authority. According to Section 48 (1) ARC, the cartel authorities are:

- the Bundeskartellamt,
- the Federal Ministry of Economics and Technology, and
- the supreme Land authorities competent according to the laws of the respective Land.

The Bundeskartellamt is always the competent authority for enforcing the ban on cartels and exercising abuse control if the anti-competitive effects of such practices extend beyond the territory of one federal Land. Otherwise the Land competition authorities are competent.⁴⁵⁹ At Länder level, the competition authorities of the Länder, set up at the Land economics ministries, are responsible for the protection of competition.

The ARC also provides for the possibility of the so-called “ministerial authorisation”. This means that companies, whose merger projects have been prohibited by the Bundeskartellamt can apply to the Federal Ministry of Economics and Technology for authorisation. The requirement for the issue of an authorisation is that the restraint of competition in the particular case is outweighed by advantages to the economy as a whole resulting from the concentration, or that the concentration is justified by an overriding public interest.⁴⁶⁰ This “ministerial authorisation” is limited to merger cases and is therefore not relevant for the scope of the study.

Since the study is limited to the application of EU competition law, which implies that anticompetitive cartel agreements or abusive practices are likely to affect trade between the EU Member States, this section will only focus on the FCO and not on the Land competition authorities.

3.1 The establishment of the Federal Cartel Office (*Bundeskartellamt*)

Since 1 October 1999 the FCO has been located in Bonn, after operating for 40 years from Berlin after its establishment on 1 January 1958.

The Bundeskartellamt is an independent higher federal authority assigned to the Federal Ministry of Economics and Technology.

3.2 Composition and decision-making

Since 2009 the President of the FCO is Andreas Mundt. He has been appointed on a proposal from the Federal Minister of Economics and Technology and after the consent of the Federal Cabinet.

Central Division

The Central Division is responsible for the internal administration of the Bundeskartellamt (in particular budget management, human resources) The Bundeskartellamt has around 330 staff, approx. 150 of which are legal or economic experts.⁴⁶¹

Decision Divisions

Decisions on cartels, mergers and abusive practices are taken by a total of twelve Decision Divisions. The divisions are mainly organised according to sectors of the economy; three divisions deal exclusively with the cross-sector prosecution of cartels. In the Decision Divisions, each case is decided upon by a collegiate body consisting of the respective Division's chairman and two associate members. All decisions have to be majority decisions. The Decision Divisions are autonomous and not subject to instructions in their decision-taking.

⁴⁵⁹ Section 48 (2) ARC.

⁴⁶⁰ Section 42 (1) of the ARC.

⁴⁶¹ http://www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/Organisation/organisation_node.html.

General Policy Division

The General Policy Division advises the Decision Divisions in specific competition and economic issues, represents the Bundeskartellamt in the decision-making bodies of the European Union, is involved in competition law reforms at national and European level and coordinates cooperation between the Bundeskartellamt and foreign competition authorities as well as international organisations.

Litigation and Legal Issues Division

The Litigation and Legal Issues Division advises the Bundeskartellamt on legal matters, prepares court appeal proceedings before the Düsseldorf Higher Regional Court and represents the Bundeskartellamt before the Federal Court of Justice in Karlsruhe. The Litigation and Legal Issues Division also includes the Special Unit for Combating Cartels (SKK). The SKK assists the Decision Divisions in the preparation, execution and evidence assessment of search operations in cartel proceedings. It is also the contact point for companies wishing to apply for leniency in cartel proceedings.

Federal Public Procurement Tribunals

The Federal Public Procurement Tribunals are also located at the Bundeskartellamt. They provide legal protection for bidders in the award of public contracts falling within the Federal Government's area of responsibility.

3.3 Cooperation with other entities

Violations of the ban on cartels or abusive practices, the effects of which are limited to one Land, are prosecuted by the respective Land competition authority (see above). In order to ensure an appropriate division of responsibilities, the ARC provides for the possibility to refer cases between the authorities should the circumstances of the individual case require this.

Collaboration within the competition authorities, with the European Commission, other public authorities and the cooperation within the Network of European Competition Authorities are provided for in Section 49 to 50c ARC.

In order to ensure a competitive formation of the wholesale prices of electricity and gas a Market-Transparency-Agency (Markttransparentstelle) has been established at the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway. It also deals with competition issues. The FCO and the Federal Network Agency fulfil the mission of the Market-Transparency-Agency together.⁴⁶²

3.4 Investigations

The competition authorities can request information from undertakings and associations of undertakings.⁴⁶³ The right to request information requires a concrete initial suspicion for competition restraints. The request for information is issued by individual order (for those requests for information made by the Federal Ministry of Economics and Technology or the supreme Land authority) or a decision (for those requests for information made by the FCO).⁴⁶⁴ The concerned entities can appeal this request.⁴⁶⁵

In application of Section 57 ARC, the cartel authority may conduct any investigation and collect any evidence required (inspection, testimony of witnesses, and experts; detention shall not be ordered).

The competition authorities also have the right to inspect and examine business documents, if the Local Court judge (*Richter am Amtsgericht*) in whose district the search is to be made issued such order. Searches are permissible if it is to be assumed that documents are located in the relevant premises which may be inspected and/or examined, and the

⁴⁶² Section 47a ARC.

⁴⁶³ Section 59 ARC.

⁴⁶⁴ Section 59 (6) and (7) ARC.

⁴⁶⁵ Section 63 ARC.

surrender of which may be requested. If there is imminent danger, a necessary search may be conducted during business hours without judicial order. A record of the search and its essential results shall be prepared on the spot, showing, if no judicial order was issued, also the facts which led to the assumption that there would be imminent danger.⁴⁶⁶

The cartel authority may seize objects which may be of importance as evidence in the investigation. The person affected by the seizure shall be informed thereof without delay. Within three days of the seizure, the cartel authority shall seek judicial confirmation by the Local Court in whose district the seizure took place, if neither the person affected nor any relative of legal age was present at the seizure or if the person affected or, in his absence, a relative of legal age explicitly objected to the seizure.⁴⁶⁷

Since the ARC reform in 2005, sector inquiries can be conducted to gain an impression of the competition situation in certain economic sectors if rigid price structures or other circumstances give reason to assume that competition in these sectors may be restricted or distorted.

3.5 Decision-making

There are two possibilities for the competition authority to act against anticompetitive agreements and abusive conduct. Firstly, by means of administrative proceedings, the authority can impose an order to discontinue the conduct objected to. Secondly, it can impose fines in administrative offence proceedings. The competition authority opens administrative offence proceedings particularly in cases of cartel agreements which lead to particularly severe distortions of competition.

The cartel authority can either act on its own initiative (*ex officio*) or upon request to institute proceedings.⁴⁶⁸

The parties to the proceedings are defined in Section 54 (2) ARC.⁴⁶⁹

In the framework of the proceedings the parties must have an opportunity to comment.⁴⁷⁰ The cartel authority may, acting *ex officio* or upon request of a party, hold a hearing.⁴⁷¹

By means of administrative proceedings, the competition authority can require companies to end an infringement of the ARC or of Articles 101 or 102 TFEU.⁴⁷² For this purpose, it may impose on the companies all measures which are necessary to effectively bring the infringement to an end and proportionate to the infringement established. Furthermore, in urgent cases the competition authority may order interim measures *ex officio* if there is a risk of serious and irreparable damage to competition.⁴⁷³ In proceedings under Section 32 of the ARC the companies may offer to enter into commitments which are capable of dispelling the competition authority's concerns. The competition authority may by way of a decision declare those commitments to be binding on the companies.⁴⁷⁴

If an undertaking has intentionally or negligently violated a provision of the ARC, Article 101 or 102 TFEU or a decision of the cartel authority and thereby gained an economic benefit,

⁴⁶⁶ Section 59 (4) ARC.

⁴⁶⁷ Section 58 (1) and (2) ARC.

⁴⁶⁸ Section 54 (1) ARC.

⁴⁶⁹ Parties to the proceedings before the cartel authority are: 1. those who have applied for the institution of proceedings; 2. cartels, undertakings, trade and industry associations or professional organisations against which the proceedings are directed; 3. persons and associations of persons whose interests will be substantially affected by the decision and who, upon their application, have been admitted by the cartel authority to the proceedings; the interests of consumer advice centers and other consumer associations supported by public funds are substantially affected also in cases in which the decision has effects on numerous consumers and in which therefore the interests of consumers in general are substantially affected.

⁴⁷⁰ Section 56 (1) ARC.

⁴⁷¹ Section 56 (3) ARC.

⁴⁷² Section 32 ARC.

⁴⁷³ Section 32a ARC.

⁴⁷⁴ Section 32b ARC.

the cartel authority may order the skimming off of the economic benefit and require the undertaking to pay a corresponding amount of money.⁴⁷⁵ However, this provision shall not apply if the economic benefit has been skimmed off by the payment of damages, or the imposition of a fine, or an order of forfeiture.⁴⁷⁶

According to Section 60 ARC, the cartel authority may issue preliminary injunctions to regulate matters on a temporary basis until a final decision is taken e.g. Section 30 (3) ARC or 34 (1) ARC.

Within the framework of administrative offence proceedings the Bundeskartellamt can impose fines for violations of prohibitions under the ARC. The 7th amendment of the ARC of July 2005 raised the level of fines imposed for violations of competition law to amounts of up to € 1 million. In addition, certain violations can be punished by a fine of up to 10 per cent of the company's total turnover. German law has thus been harmonised with European law, and the former level of fines, which was based on a maximum level of three times the additional proceeds generated by the infringement, has been abolished. The fines are allocated to the general public budget.

In 2006, with its notice no. 38/2006, the Bundeskartellamt issued guidelines⁴⁷⁷ on the setting of fines. These specify how the Bundeskartellamt applies the new provisions on fines. In setting the amount of a fine both the gravity and the duration of the infringement must be taken into account. On this basis further criteria such as deterrence and aggravating or extenuating circumstances are also considered.

In 2006, the Bundeskartellamt revised its Leniency Programme fundamentally.⁴⁷⁸ Depending on their contribution to uncovering the cartel, members of a cooperative cartel can be granted a reduction of up to 100 per cent of the fine imposed. However, immunity from fines can only be granted to the company which is the first to notify the Bundeskartellamt. Exempted from immunity is the ringleader of the cartel as well as those who coerced others into joining the cartel.

4 Competent courts

This Section provides an overview of the courts competent for competition law rules in Germany.

Table 4.1 Court system in Germany

Federal Constitutional Court & Constitutional Courts of the <i>Länder</i>					
Federal Patent Court	Federal Court of Justice for civil and criminal matters	Federal Administrative Court	Federal Finance Court	Federal Labour Court	Federal Social Court
Higher Regional Court		Higher Administrative Court	Finance Court	Higher Labour Court	Higher Social Court
Regional Court		Administrative Court		Labour Court	Social Court
Local Court					

⁴⁷⁵ Section 34 (1) ARC.

⁴⁷⁶ Section 34 (2) ARC.

⁴⁷⁷ <http://www.bundeskartellamt.de/wEnglisch/download/pdf/Bussgeldleitlinien-E-June2013.pdf>

⁴⁷⁸ http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/06_Bonusregelung_e_Logo.pdf

Ordinary jurisdiction	Administrative jurisdiction	Fiscal jurisdiction	Labour jurisdiction	Social jurisdiction
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In Germany, the court structure is divided between ordinary jurisdiction and specialised courts. The ordinary jurisdiction consists of the civil and criminal jurisdiction. The specialised courts are the administrative courts, the finance courts, the labour courts and the social courts. In addition, there is the constitutional jurisdiction, which consists of the Federal Constitutional Court and the Constitutional Courts of the Länder.

Jurisdiction is exercised by Local Courts (*Amtsgerichte*), Regional Courts (*Landgerichte*), Higher Regional Courts (*Oberlandesgerichte*) and Federal Courts (*Bundesgerichtshöfe*), Constitutional Courts (*Landesverfassungsgerichte*) in the Länder and the Federal Constitutional Court (*Bundesverfassungsgericht*).

4.1 Competent courts for judicial review

The decisions and orders issued by the competition authorities can be appealed pursuant to Section 63 ARC at first instance. The exclusively competent court at first instance for appeals of decisions by the Bundeskartellamt - which has its seat in Bonn - is the Düsseldorf Higher Regional Court (*OLG Düsseldorf*).⁴⁷⁹

The Düsseldorf Higher Regional Court has four cartel divisions. The first cartel division consists of one chief judge and four judges. The second cartel division consists of one chief judge and three judges (two of the judges are at the same time also in another civil division). The third cartel division has one chief judge and four judges (of which four are at the same time also in another civil division). The fourth cartel division consist of one chief judge and two judges (of which one is also in the first cartel division). In total 16 different judges are working within the four cartel divisions of the Düsseldorf Higher Regional Court.

The decisions on the appeal can be appealed at second instance on points of law to the Federal Court of Justice (*Bundesgerichtshof*), if the Higher Regional Court grants leave to appeal on points of law.⁴⁸⁰ Leave to appeal on points of law shall be granted if:

- A legal issue of fundamental importance is to be decided, or
- A decision by the Federal Court of Justice is necessary to develop the law or to ensure uniform court practice.

At the Federal Court of Justice there is only one cartel division which consists of one chief judge and seven associate judges.

The Federal Court of Justice is bound by the findings of fact in the decision being appealed unless admissible and well founded reasons for an appeal on points of law have been put forth in respect of these findings.⁴⁸¹ In principle, the Federal Court of Justice does not rule on the substance and hence refers cases back to the Higher Regional Court for a new judgment.

In case the Higher Regional Court Düsseldorf does not grant leave to appeal on point of law, this refusal may be challenged separately by way of an appeal from refusal to grant leave at the Federal Court of Justice.⁴⁸²

Therefore, at the Federal Court of Justice, the cartel division is competent for judicial remedies:

- on appeals on points of law from decisions of the Courts of Appeal and
- on appeals from the refusal to grant leave to appeal. Competent courts for follow on cases

⁴⁷⁹ Section 63 (4) ARC and Section 81 ARC.

⁴⁸⁰ Section 74 and 76 ARC.

⁴⁸¹ Section 76(4) ARC.

⁴⁸² Section 75 ARC.

4.2 Competent courts for follow-on

According to Section 87 ARC, regardless of the value of the matter in dispute, the Regional Courts (*Landgerichte*) shall have exclusive jurisdiction in civil actions concerning the application of the ARC, of Articles 101 or 102 TFEU or of Articles 53 or 54 of the Convention on the European Economic Area. This provision shall apply also if the decision in a civil action depends, in whole or in part, on a decision to be taken pursuant to the ARC, or on the applicability of Articles 101 or 102 TFEU or of Articles 53 or 54 of the Convention on the European Economic Area.

There are 115 Regional Courts for ordinary jurisdiction in Germany. For the sake of uniformity of court practice, the Land governments are authorised under Section 89 ARC to refer, by way of ordinances, civil actions for which the Regional Courts have exclusive jurisdiction pursuant to Section 87 ARC to one Regional Court for the districts of several Regional Courts if such centralisation serves the administration of justice in cartel matters. In application of the procedure, approximately 20 Regional Courts have exclusive jurisdiction in civil actions concerning the application of the ARC, of Articles 101 or 102 TFEU or of Articles 53 or 54 of the Convention on the European Economic Area.

According to Section 92 (2) Courts Constitution Act (*Gerichtsverfassungsgesetz*) legal disputes over which the Regional Court has jurisdiction pursuant to Section 87 ARC are commercial matters and are therefore handled in the commercial division (Section 94 Courts Constitution Act).

At second instance, the cartel division of the Higher Regional Court (*Oberlandesgericht*) is competent.⁴⁸³ An appeal may only be based on the decision handed down having been based on a violation of the law, or on the facts and circumstances that should have been used as a basis justifying a different decision (Section 513 Code of Civil Procedure). Therefore, the Higher Regional Court can rule on the law and to a certain extent also on the substance.

The cartel division of the Federal Court of Justice is normally competent at third instance for:

- appeals on points of law from final judgments of the Courts of Appeal including appeals from the refusal to grant leave to appeal⁴⁸⁴, and
- for appeals from decisions of the Courts of Appeal⁴⁸⁵.

The cartel division of the Federal Court of Justice is exceptionally competent at second instance for:

- for a review from final judgments of the District Courts⁴⁸⁶

An appeal on points of law may be lodged only if the court of appeal has admitted its being lodged in the judgment, or the court hearing the appeal on points of law has admitted its being lodged based on a complaint against the refusal to grant leave to appeal on points of law (Section 543 Code of Civil Procedure). The Federal Court of Justice rules only on the law, not on the substance.

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings related to breaches of Competition Law rules in Germany.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in Germany is described in Table 5.1 below.

⁴⁸³ Section 91 ARC.

⁴⁸⁴ Section 94 (1) no. 3 a) ARC.

⁴⁸⁵ Section 94 (1) no. 3 c) ARC.

⁴⁸⁶ Section 94 (1) No.3 b) ARC.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	The parties to the proceeding before the cartel authority (Section 63 (2) ARC). Legal and natural persons can be a party to the proceeding (Section 54 (2) ARC).	Competitors, other market participants directly or indirectly concerned by the infringement, certain associations (Section 33 (2) No.1 ARC), qualified institutions listed in Section 4 of the law for injunctions or in the catalogue of the European Commission according to Article 4 (3) of the Directive 2009/22/EC (Section 33 (2) No.2 ARC), consumers
How can an action be filed?	In writing (Section 66 (1) ARC), with statement of reasons (Section 66 (3) ARC), signed by a lawyer admitted to practice before a German court (Section 66 (5) ARC)	By civil a claim
With which authorities can the action be filed?	With the competition authority, but receipt of the appeal by the Higher Regional Court Düsseldorf within the time limit shall be sufficient. Therefore the action should be filed with the FCO, but can also be filed with the Higher Regional Court Düsseldorf	Regional Courts
Burden of proof	Principle of investigation: The court shall investigate the facts. However, the fundamental establishment of facts rests with the competition authority. The competition authority is allowed to supplement its reasoning if this would not change the character of the decision. This is different if the law imposes the burden of proof upon one party: e.g. Section 18 (4) ARC for the presumption of a dominant position.	Declaratory effect of the decision of the competition authority (this means that the violation of competition law is already established and does not to be proven); for other facts (especially the damage) the burden of proof rests with the applicant; for the passing-on defence the burden of proof rests with the defendant.

5.2 Judicial Review Proceedings

This Section presents the proceedings for judicial review of competition law cases in Germany.

5.2.1 Rules applicable to the judicial review of NCA decisions

Legal and natural persons may appeal against decisions of the competition authority (Section 63 (1) ARC).

Pursuant to Section 69 ARC the principal of oral proceedings prevails at first⁴⁸⁷ and second instance⁴⁸⁸. With the consent of the parties, a decision may be taken without a hearing.⁴⁸⁹

⁴⁸⁷ Section 69 ARC.

The consent can only be valid when the parties had been represented by a lawyer.⁴⁹⁰ In general hearings take place at the proceedings at first instance. At second instance normally one hearing takes place.

The decision on the appeal from refusal to grant leave shall be made by the Federal Court of Justice by decree which shall contain a statement of reasons. This decree may be issued without a hearing.⁴⁹¹ When the Federal Court of Justice decides not to grant leave to appeal, no hearing takes place usually.

5.2.2 Competent Court

For the appeal of decisions of the FCO the Düsseldorf Higher Regional Court is competent (see Section 4 above).

Appeals on points of law against decisions of the Düsseldorf Higher Regional Court and against the refusal to grant leave to appeal can be lodged with the Federal Court of Justice in Karlsruhe (see Section 4 above).

5.2.3 Timeframe

The appeal shall be filed in writing within one month with the cartel authority whose decision is being appealed. That period shall begin upon service of the decision of the cartel authority (Section 66 (1) ARC).

The appeal shall include a statement of reasons to be filed within two months from the service of the decision being appealed (Section 66 (3) ARC).

For an appeal at second instance the time limit is again one month after service of the judgment (Section 76(3) ARC).

5.2.4 Admissibility of Evidence

An appeal may be based also upon new facts and evidence (Section 63 (1) 2 ARC). In return, the appellate court can regard new facts and evidence to the detriment of the appellant.

If the Court decides on the basis of a hearing, the decision can be only based on facts and evidence which were subject to hearing. In application of the principle of investigation, the appellate court shall, acting on its own initiative, investigate the facts (Section 70 (1) ARC). The fundamental establishment of facts rests with the competition authority. The competition authority is allowed to supplement its reasoning if this would not change the character of the decision.

Section 73 No. 2 ARC refers to the Code of Civil Procedure (*Zivilprozessordnung*). Therefore, the admissible evidence is the hearing of witnesses, experts and the parties, the legal inspection and documents. The findings in the decision of the competition authority are only seen as submissions by the competition authority, but not as evidence.

As a consequence of the principle of investigation, no formal burden of proof rests with one party. However, this is different if the law imposes the burden of proof upon one party: e.g. Section 18 (4) ARC – presumption of a dominant position. In these cases the court still has the obligation to reach the establishment of facts, but it is only obliged to take evidence if the party on which the burden of proof rests brings forward a motion. Nevertheless, the principle of investigation still applies (Section 70 (1) ARC).

In all the other cases, where there is no provision regarding the burden of proof, the event of a *non liquet* (which means that the proof cannot be established for the one party or the other in the end) is to the detriment of the competition authority.

⁴⁸⁸ Section 76(5) ARC.

⁴⁸⁹ Section 69 (1) ARC.

⁴⁹⁰ Section 68 ARC.

⁴⁹¹ Section 75(2) ARC.

5.2.5 Interim Measures

On the one hand, the FCO may issue preliminary injunctions to regulate matters on a temporary basis until a final decision is taken on e.g. a decision pursuant to Section 34 (1) ARC (skimming off of benefits, see above Section 3.5).⁴⁹²

In that case, if an appeal is made against this decision the appellate court may order that the appealed decision or a part thereof shall enter into force only upon completion of the appeal proceedings or upon the furnishing of security.

On the other hand, the FCO may order the immediate enforcement of its decision if this is required by the public interest or by the prevailing interest of a party.⁴⁹³

In that case, the appellate court may, upon application, entirely or partly restore the suspensive effect of the appeal if:

1. the conditions for issuing an order were not satisfied or are no longer satisfied, or
2. there are serious doubts as to the legality of the appealed decision, or
3. the enforcement would result for the party concerned in undue hardship not demanded by prevailing public interests.

5.2.6 Rulings of the court

The appellate court decides by decree on the basis of its conclusions freely reached from the overall results of the proceedings. The decree may be based only on facts and evidence on which the parties had an opportunity to comment. The appellate court may proceed differently insofar as, for important reasons, in particular to safeguard operating or business secrets, third parties admitted to the proceedings were not allowed to inspect the files, and the content of the files was not part of the pleadings for these reasons. This shall not apply to such parties admitted to the proceedings who are involved in the disputed legal relationship in such a way that the decision can only be made uniformly also in relation to them.⁴⁹⁴

The decree shall contain a statement of reasons and be served upon the parties together with advice as to the available legal remedies.⁴⁹⁵

The decision on the appeal from refusal to grant leave shall be made by the Federal Court of Justice by decree which shall contain a statement of reasons.

5.3 Follow-on Proceedings (private enforcement)

This Section presents proceedings for private enforcement of competition law cases in Germany.

5.3.1 Rules applicable to follow-on procedures

Claims for injunctions

According to Section 33 (1) ARC, whoever violates a provision of the ARC, Articles 101 or 102 TFEU or a decision taken by the cartel authority, shall be obliged to remedy the harm caused to the person affected and, in case of danger of recurrence, to refrain from his conduct. A claim for injunction already exists if an infringement is foreseeable. Affected persons can be competitors or other market participants impaired by the infringement.

In addition to the affected persons, claims for injunctions may also be asserted by associations with legal capacity for the promotion of commercial or independent professional interests, provided that: (i) they have a significant number of member undertakings selling goods or services of a similar or related type on the same market; (ii) provided they are able, in particular with regard to their human, material and financial resources, to actually exercise

⁴⁹² Section 60 and (3) ARC.

⁴⁹³ Section 65 (1) ARC.

⁴⁹⁴ Section 71 (1) ARC.

⁴⁹⁵ Section 71 (6) ARC.

their statutory functions of pursuing commercial or independent professional interests; and (iii) provided the infringement affects the interests of their members (Section 33 (2) No.1 ARC).

A new provision has been introduced (Section 33 (2) No.2 ARC) by the reform in 2013 which allows the legal standing of qualified institutions listed in Section 4 of the law for injunctions (*Unterlassungsklagengesetz*)⁴⁹⁶ or in the catalogue of the European Commission according to Article 4 (3) of the Directive 2009/22/EC⁴⁹⁷.

Liability for damages

According to Section 33 (3) ARC, whoever intentionally or negligently violates a provision of the ARC, Articles 101 or 102 TFEU or a decision taken by the cartel authority shall be liable for the damages arising there from.

The damage is determined in application of Section 249 to 252 of the Civil Code (*Bürgerliches Gesetzbuch*). Section 33 (3) (2) ARC provides in addition, that if a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service. The so called passing-on rule is applied by the German jurisprudence not only to the direct-purchaser, but also to indirect-purchasers.⁴⁹⁸

The law states in Section 33 (3) (3) ARC that the assessment of the size of the damage may take into account, in particular, the proportion of the profit which the undertaking has derived from the infringement. When assessing the size of the damage, the court shall rule at its discretion and conviction, based on its evaluation of all circumstances pursuant to Section 287 of the Code of Civil Procedure (*Zivilprozessordnung*).

Hearings

With regard to private follow-on claims, in principle, the parties shall submit their arguments regarding the legal dispute to the court of decision orally (Section 128(1) Code of Civil Procedure). However, the court may give a decision without hearing oral argument provided that the parties have consented thereto (Section 128(2) Code of Civil Procedure).

It must be pointed out that unless determined otherwise, decisions of the court that are not judgments may be given without a hearing for oral argument being held according to Section 128(4) Code of Civil Procedure.

5.3.2 Competent Court

Pursuant to Section 87 ARC, the Regional Courts (*Landgerichte*) are exclusively competent for private enforcement actions. In the light of the concentration effect (*Konzentrationswirkung*) established in Section 89 ARC, the Länder determine specific Regional Courts which are competent for follow on cases of competition matters.

At second instance, the cartel division of the Higher Regional Court (*Oberlandesgericht*) is competent, pursuant to Section 91 ARC. The Higher Regional Court is the appellate instance on fact and law.

The cartel division of the Federal Court of Justice can be competent for an appeal on law at second instance or at third instance (see above Section 4.2).

5.3.3 Timeframe

No specific timeframe needs to be respected, but the limitation period of a claim for damages pursuant to the provisions of the Civil Code (*Bürgerliches Gesetzbuch*) applies. According to the general rule, the limitation period is three years.⁴⁹⁹ The limitation period commences at

⁴⁹⁶ <http://www.gesetze-im-internet.de/uklag/BJNR317300001.html>

⁴⁹⁷ Directive 2009/22/EC of the European Parliament and the Council of 23 April 2009 on injunctions for the protection of consumers' interests.

⁴⁹⁸ KG Kartellsenat, 1 Oktober 2009 – 2 U 17/03 and 2 U 10/03, WuW/E DE-R 2773; BGH 28 June 2011 – KZR 75/10 (in regard to Section 823 (2) in conjunction with Article 1 TFEU).

⁴⁹⁹ Section 195, 199 Civil Code.

the end of the year in which the claim arose and the claimant obtains knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or would have obtained such knowledge if he had not shown gross negligence.⁵⁰⁰

According to Section 199(3) Civil Code, other claims for damages become statute-barred:

1. notwithstanding knowledge or a grossly negligent lack of knowledge, ten years after they arise and
2. regardless of how they arose and of knowledge or a grossly negligent lack of knowledge, thirty years from the date on which the act, breach of duty or other event that caused the damage occurred.

The period that ends first is applicable.

For follow-on actions at second instance, Section 517 Code of Civil Procedure states that: "the time limit for filing an appeal shall amount to one month; this is a statutory period and shall begin upon the fully worded ruling having been served, at the latest, however, upon the expiry of five months following pronouncement of the judgment". Therefore, the normal deadline for an appeal is one month after service of the judgment.

Section 548 Code of Civil Procedure contains the same provisions for appeals at third instance.

5.3.4 Admissibility of evidence

Pursuant to Section 33 (4) ARC, where damages are claimed for an infringement of a provision of the ARC or of Article 101 or 102 TFEU, the court shall be bound by a finding that an infringement has occurred, to the extent such a finding was made in a final decision by the cartel authority, the Commission of the European Community, or the competition authority or court acting as such in another Member State of the EU. The same applies to such findings in final judgments resulting from appeals against decisions taken by the cartel authority, the Commission of the European Community, or the competition authority or court acting as such in another Member State of the EU.⁵⁰¹ Pursuant to Article 16(1), sentence 4 of Regulation (EC) No. 1/2003 this obligation applies without prejudice to the rights and obligations under Article 267 TFEU.

With regard to the determination of other facts e.g. the damage, the general rules of the admissibility of evidence according to the Code of Civil Procedure (*Zivilprozessordnung*) apply. This means that the burden of proof especially for the damage rests with the applicant. With regard to the so called passing-on defence the burden of proof rests with the defendant.

5.3.5 Interim Measures

There is the possibility for interim injunctions in case of an infringement according to Section 33 (1) ARC (see above Section 5.3.1). The general provisions for interim injunctions of the Code of Civil Procedure (*Zivilprozessordnung*) apply.

According to Section 935 of the Code of Civil Procedure injunctions regarding the subject matter of the litigation are an available remedy given the concern that a change of the status quo might frustrate the realization of the right enjoyed by a party, or might make its realisation significantly more difficult.

5.3.6 Rulings of the court

Once the legal dispute is ready for the final decision to be taken, the court is to deliver this decision by a final judgment (Section 300 Code of Civil Procedure).

⁵⁰⁰ Section 199(1) Civil Code.

⁵⁰¹ Section 33 (4) Sentence 2 ARC.

5.3.7 Rules applicable to the enforcement of court judgments

Section 704 et seqq. Code of Civil Procedure are applicable to the enforcement of court judgments. Under certain circumstances a judgment is to be declared provisionally enforceable against provision of security (Section 708-710 Code of Civil Procedure).

The enforcement is executed by the bailiff. This implies that there is an enforceable execution copy of the judgement according to Section 724 (1) Code of Civil Procedure. The enforceable copy is issued by the records clerk of the registry of the court of first instance and, should the legal dispute be pending with a court of higher instance, by the records clerk of that court's registry.⁵⁰²

5.4 Alternative dispute resolution mechanisms

General alternative dispute resolution mechanisms, such as mediation and arbitration, are available in the German legal system for competition disputes. The mediation can either be a court mediation, where the mediator is a judge and therefore a court settlement can be reached through mediation. The mediation could also be an out-of-court mediation (see Act on mediation⁵⁰³).

Concerning the use of out of court mechanism, it needs to be emphasised, that for private follow-on cases, Section 278 of the Code of Civil Procedure applies. It states *inter alia* that: "In all circumstances of the proceedings, the court is to act in the interests of arriving at an amicable resolution of the legal dispute or of the individual points at issue. For the purposes of arriving at an amicable resolution of the legal dispute, the hearing shall be preceded by a conciliation hearing unless efforts to come to an agreement have already been made before an out-of-court dispute-resolution entity, or unless the conciliation hearing obviously does not hold out any prospects of success. In the conciliation hearing, the court is to discuss with the parties the circumstances and facts as well as the status of the dispute thus far, assessing all circumstances without any restrictions and asking questions wherever required. The parties appearing are to be heard in person on these aspects." (Section 278(1) and (2) Code of Civil Procedure). Therefore, the parties are in principle always asked if conciliation would be possible at least before the parties are filing their petitions with the court.

6 Contextual Information

This Section provides contextual information on the judicial system in Germany.

6.1 Duration and cost of competition law cases

Table 6.1 Duration of litigation at the Federal Court of Justice's Cartel Senate⁵⁰⁴

Months	Duration of proceedings when the appeal has been granted by the appellate court					Duration of proceedings for appeals from the refusal to grant leave to appeal					Duration of proceedings when the appeal has been granted by the Federal Court of Justice				
	0-6	6-12	12-18	18-24	> 24	0-6	6-12	12-18	18-24	> 24	0-6	6-12	12-18	18-24	> 24
Cases 2013 ⁵⁰⁵	0	2	0	3	1	0	12	3	2	0	0	1	0	0	0

⁵⁰² Section 724(2) Code of Civil Procedure.

⁵⁰³ Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung, 21 Juli 2012.

⁵⁰⁴ Statistical data from 2004 to 2009:

http://www.bundesgerichtshof.de/DE/BGH/Statistik/StatistikZivil/statistikZivil_node.html;jsessionid=6FBE21AAE7209412E67B067145E4F1B2.2_cid344

⁵⁰⁵ http://www.bundesgerichtshof.de/DE/BGH/Statistik/StatistikZivil/StatistikZivil2013/statistikZivil2013_node.html

Cases 2012 ⁵⁰⁶	0	0	1	1	0	0	4	15	1	0	0	0	0	0	1
Cases 2011 ⁵⁰⁷	0	0	2	1	0	0	11	1	1	0	0	0	1	1	2
Cases 2010 ⁵⁰⁸	0	5	0	0	5	0	6	4	1	3	0	0	1	0	7

For other German courts, no specific data concerning the duration of competition proceedings could be located. However, the figures⁵⁰⁹ for civil proceedings can serve as an indication:

- Average duration of civil proceedings at German Regional Courts (as first instance) in 2011: 8,3 months
- Average duration of civil proceedings at German Regional Courts (as second instance) in 2011: 6,0 months
- Average duration of civil proceedings at German Higher Regional Courts in 2011: 8,2 months

6.2 Influencing Factors

No specific factors which influence the application of competition law rules in Germany were identified.

6.3 Obstacles/Barriers

No obstacles and barriers existing in Germany were identified in relation to access to justice concerning the application of competition law rules.

⁵⁰⁶

http://www.bundesgerichtshof.de/DE/BGH/Statistik/StatistikZivil/FruereJahre/StatistikZivil2012/statistikZivil2012_node.html

⁵⁰⁷

http://www.bundesgerichtshof.de/DE/BGH/Statistik/StatistikZivil/FruereJahre/StatistikZivil2011/statistikZivil2011_node.html

⁵⁰⁸

http://www.bundesgerichtshof.de/DE/BGH/Statistik/StatistikZivil/FruereJahre/StatistikZivil2010/statistikZivil2010_node.html

⁵⁰⁹

Average duration of proceedings in 2011: [www.jum.baden-wuerttemberg.de/pb/site/jum/get/documents/jum1/JuM/import/justizministerium%20baden-wuerttemberg/pdf/br/Broschre%202013_Justiz_in_Zahlen_web\(1\).pdf](http://www.jum.baden-wuerttemberg.de/pb/site/jum/get/documents/jum1/JuM/import/justizministerium%20baden-wuerttemberg/pdf/br/Broschre%202013_Justiz_in_Zahlen_web(1).pdf)

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COUNTRY FACTSHEET - DENMARK

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Abbreviations used

EU	European Union
NCA	National Competition Authority
TFEU	Treaty on the Functioning of the European Union

1 Overview of the National Legal Framework

The national legal system in the Kingdom of Denmark (hereafter ‘Denmark’) is a mix of Common and Civil Law. The Constitution is the highest source of law in the national legal order followed by statutes, regulations and departmental notices. The latter does, however, only govern public institutions and can neither limit nor direct private individuals.

The current Constitution of Denmark, adopted in 1953, is a written document consisting of 89 sections. In addition to governing the fundamentals of the State and the various governmental bodies, the Constitution stipulates a separation of powers and guarantees a number of fundamental rights. There are only few provisions in the Constitution of relevance for the judiciary, which is primarily governed by the Danish Administration of Justice Act (*retsplejeloven*)⁵¹⁰.

The Danish courts are composed of the Supreme Court (*Højesteret*), the two high courts (*Østre & Vestre Landsret*), the Maritime and Commercial Court (*Sø- & Handelsretten*), 24 district courts (*byretter*) and a number of courts with specific or limited jurisdiction made of the Land Registration Court, the courts of the Faroe Islands and Greenland, the Appeals Permission Board, the Special Court of Indictment and Revision, the Danish Judicial Appointments Council and the Danish Court Administration. In principle, a case would start at a district court with appeal to the higher court and eventually end at the Supreme Court. However, the latter has been made subject to restrictions and consequently requires special permission from the court. Furthermore, some cases e.g. on competition law issues can be lodged before the Maritime and Commercial Court, as an alternative to the local district court, and subsequently appealed directly to the Supreme Court⁵¹¹.

Danish courts are not directly bound by precedents as seen in many Common Law systems, thus allowing judges to make specific decisions based on the particulars of the case. However, from a more practical perspective, precedents from higher courts seem to be voluntarily followed by lower courts.

2 National Legislation establishing competition law rules

This Section provides an overview of national legislation establishing competition law rules. Table 2.1 presents a list of relevant competition law instruments in Denmark.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
The Act on Competition (<i>Lovbekendtgørelse nr. 700 af 18 juni 2013 af Konkurrenceloven</i>)	18 June 2013

2.1 General legislation

The Danish Act on Competition (hereafter ‘the Competition Act’)⁵¹² was adopted in 1997 and has subsequently been subject to amendments and consolidations. The current consolidated act was passed on 18 of June 2013, providing for the enforcement of Articles 101 and 102 of the TFEU and their Danish equivalence, i.e. sections 6 and 11 of the Competition Act. Furthermore, according to the preparatory work, national provisions mirror Articles 101 and 102 of the TFEU.

⁵¹⁰ Consolidated Act No. 1139 of 24 September 2013.

⁵¹¹ Article 225, subsection 2 (4) of the Danish Administration of Justice Act.

⁵¹² An English version can be found at: <http://en.kfst.dk/Competition/~media/KFST/English%20kfstdk/Competition/Legislation/Engelsk%20udgave%20af%20lovbekendtgørelse%207002013.pdf>.

The Competition Act applies to all sectors and activities unless specific derogation has been adopted. The latter is e.g. the case for a number of specific issues within newly liberalised sectors such as access to the infrastructure where special (competition) regulation applies and designated sector agency is established. Furthermore, a number of services provided by the public sector are precluded from scrutiny under competition law regardless of any potential impediment to competition. Derogation has also been provided for what would narrowly relate to labour related issues in the same manner as established under Articles 101 and 102 of the TFEU. In respect to entities governed by the Competition Act, there are no limitations. Undertakings, individuals, corporations as well as associations, trade unions and professional organisations are subject to the provisions of the Act provided they are engaged in economic activities⁵¹³.

More specifically, section 6 prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition within a market, in accordance with the provisions of Article 101 of the TFEU. Article 11 prohibits abuse of dominant position in the same manner as Article 102 of the TFEU.

The Competition Act applies a principle of extraterritoriality making all agreements, concerted practices or abuse having (potential) effect in Denmark subject to the Act. Consequently, the NCA can in theory act against any behaviour or actions affecting competition in Denmark. Enforcement could, however, complicate the matter from a more practical point of view. Moreover, territory of Denmark covers also Faroe Islands and Greenland. The Competition Act, however, does not apply to the Faroe Islands and Greenland⁵¹⁴. These territories have adopted their own competition acts that are not analysed in this study.

Damages for breach of competition law can be granted as contractual liability, tort or compensation of loss, including loss of opportunity. There are no special provisions governing this issue in Denmark and Danish courts award compensation following the establishment of an underlying infringement and its link with the damages caused.

2.2 Industry-specific legislation

In addition to the generally applicable legislation mentioned above, Denmark has introduced specific competition law rules applying only to limited sectors, e.g. telecommunication and energy⁵¹⁵. Most of these follow directly from the underlying EU regulations and only apply to limited sectors.

Earlier a number of laws regulated formal cooperation between sector specific regulators e.g. within the telecom sector, and the NCA. These laws have gradually been revoked and thus at the moment there is no formal cooperation mechanism in place.

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in Denmark, detailing its competences and structure, as well as the procedures in place.

⁵¹³ The covered concepts are identical to the equivalent concept of an 'undertaking' under the EU law, covering any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed. See Case C-41/90, Höfner and Elser v Macrotron [1991] ECR I-1979, [1993] 4 CMLR 306 and Case T-319/99 Fenin v Commission, [2003] ECR IT-357.

⁵¹⁴ Article 29 of the Competition Act.

⁵¹⁵ See e.g. Telecommunications Act (*Lov nr. 169 af 3. marts 2011 elektroniske kommunikationsnet og – tjenester*).

3.1 The establishment and structure of the Competition Council

The Competition Act in 1997 established the Competition Council (*Konkurrencerådet*) and the Danish Competition and Consumer Authority (*Konkurrence- og Forbrugerstyrelsen*), where the latter is the executive arm of the first. Consequently, while the Competition Council is the principle enforcer of competition rules in Denmark, the Danish Competition and Consumer Authority does in practice handle most of the cases, including cooperation with NCAs from other countries and the European Commission. The Authority does not merely prepare cases, but it also exercises the inspectoral powers e.g. initiating dawn raids, preparing draft decisions and making decisions on minor or routine cases. Cases considered by the Danish Competition and Consumer Authority are tabled before and decided by the Competition Council in accordance with their internal rules of procedure and the division of competences between the two bodies.

The Competition Council is an independent collective authority consisting of 18 members drafted from a combination of (competition) experts and appointees. The latter are representatives of different trade and professional organisations, consumer NGOs and public bodies and are supposed to bring-in sector specific knowledge. There is a well-established tradition in Denmark for setting up regulatory bodies in this manner and it is perceived that the extra knowledge brought by these representatives outweighs any disadvantages caused by the potential link between the members appointed from e.g. trade organisations and an infringer of competition rules.

The two bodies mentioned above, should jointly be considered as the Danish NCA.

3.2 The reform of the Competition Council

There have not been any material reforms of the competition agencies in Denmark in recent years. However, a process of gradual increase in their powers has been initiated, warranting adjustments of the Competition Act approximately every second year. The most prominent adjustments entail the adoption of the following provisions introducing:

- prison for horizontal cartels and a general increase of the fines for any infringement (section 23) in 2012;
- temporary relief measures imposed by the Competition Council (section 18b) in 2012;
- a designated body (Consumer Ombudsman) for class action involving claim for compensation (section 26) in 2010;
- leniency for infringements (section 23a) in 2007;
- commitments as an instrument for closing a case without a formal decision (section 16a) in 2004;
- remedies against potential abusive behaviour without making a formal decision on the matter (section 10a) in 2004;
- access to making electronic copies of data identified during an inspection (section 18, subsection 4) in 2002.

As can be seen, many of the principles incorporated into the enforcement system are inspired by the powers vested in the European Commission under Regulation (EC) No 1/2003⁵¹⁶.

3.3 Composition and decision-making

The Competition Council consists of 18 members with a Chairman and a Vice Chairman who jointly offer a combination of legal and economic expertise⁵¹⁷.

⁵¹⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 of 4.1.2003.

⁵¹⁷ Article 15 of the Competition Act.

Traditionally, the Competition Council makes prohibition decisions. However, in recent years, an increased number of cases is closed by commitment decisions mirroring the mandate vested in the European Commission under Article 9 of Regulation (EC) No 1/2003. Furthermore, the NCA has recently (re)adopted a policy of issuing non-binding guidance on specific issues considered complicated.

Following a formal decision an administrative appeal can be lodged before the Competition Appeal Tribunal (*Konkurrenceankenævnet*) consisting of five members, of which the Chairman is a Supreme Court judge and the others members are legal and economic experts (professors).

3.4 Cooperation with other entities

The NCA can cooperate with antitrust authorities in other jurisdictions as well as the European Commission. A mechanism for cooperation allows for the exchange of information with other competition agencies⁵¹⁸. The Council has also the right to request information, including confidential information, from other regulatory bodies, public institutions, administrative bodies as well as undertakings or individuals⁵¹⁹. Additionally, in order to enforce the obligations the Council may initiate administrative inspections⁵²⁰, including inspection on the behalf of the European Commission or other NCAs.

3.5 Investigations

The NCA has the competence to begin investigation either on its own initiative or on the basis of a complaint lodged by an individual or referred from the European Commission. There are no designated templates for complaints and consequently they can be submitted in the most informal way, including as anonymous tips. A special hotline and e-mail has been established for this purpose⁵²¹.

Following a preliminary investigation into an issue, the NCA can either close the file or continue its investigation. If decided to continue investigation, the NCA can either ask for information from the relevant undertakings or their employees⁵²², including initiating (unannounced) inspections, or hand the case over to the public prosecutor to evaluate if criminal investigation should be initiated. This is relevant if the infringement constitutes a serious breach of competition rules.

If the NCA finds that there are sufficient grounds to pursue the matter further they must issue a (short) memorandum of concerns specifying the potential infringement and the relevant market⁵²³. This should in principle be done when the case translates from a preliminary investigation into a full case and would normally be followed by a meeting between the team responsible for the case and the undertaking(s) subject to investigation, and, if relevant, the submission of their comments. Later a formal statement of objection is issued explaining the infringement in much more detail and a new meeting is scheduled, followed by the submission of further observations and comments. In between these more formal documents, a document summarising the facts might be drafted and submitted to the entities under inspection for comments. The legal value of these documents is unclear. It would, however, be plausible that to some extent it would, if not directly, confine the NCA's investigation or at least guide it. The undertaking(s) subject to investigation can request access to the case file at any time⁵²⁴. The plaintiffs and other stakeholders would be

⁵¹⁸ Article 18a of the Competition Act.

⁵¹⁹ Articles 17 and 18 of the Competition Act.

⁵²⁰ Article 18 of the Competition Act.

⁵²¹ E-mails can be sent to tipos@kfst.dk and calls be made to (+45) 419 394 95.

⁵²² Articles 17 and 18 of the Competition Act.

⁵²³ Article 15a of the Competition Act.

⁵²⁴ Article 9 of the Danish Public Administration Act.

provided with non-confidential versions and factual documents as well as with an invitation to submit comments⁵²⁵.

Following a formal decision of the authority an appeal can be lodged before the Competition Appeal Tribunal within four weeks. It is an administrative body reviewing decisions made by the NCA. Furthermore, such review by the Competition Appeal Tribunal is a precondition for the admissibility of the application for a judicial review. Only following a decision of the Tribunal, a request can be lodged for a judicial review. The appeal-filing period is eight weeks⁵²⁶.

As explained above, the NCA should in principle decide to end its investigation and hand the case over to the public prosecutor if the infringement is considered serious enough to warrant a criminal investigation. In practice, it is, however, often seen that full administrative decision is adopted before a criminal investigation is opened thereby potentially creating conflicts with the fundamental rights of undertakings and individuals, including the right to remain silent. The latter is e.g. not a right guaranteed in an administrative case. However, it appears that the NCA attempts to avoid provoking conflicts. Furthermore, following the introduction of imprisonment as a sanction for forming a cartel, it seems likely that even more consideration will be given to this matter.

3.6 Decision-making

Following a preliminary investigation, the NCA will either decide to close the case or pursue it further. If it is decided to pursue the case, it will be tabled before the Competition Council for the adoption of the final decision⁵²⁷. Prior to this, the defendant and the plaintiff will be given a chance to comment on the draft decision, correct factual and legal misunderstandings and will have the opportunity to make an oral statement for up to 15 minutes before the Council. Subsequently, the Council will deliver its decision.

If facts of the case warrant criminal sanctions, the NCA will either send the case to the public prosecutor or, if clear precedents can be found, offer the closing of the case with an administrative fine⁵²⁸. The latter does, however, require that the infringer accepts the case being closed with a fine. Hence, only minor (and standard) cases are closed this way.

The introduction⁵²⁹ of commitments in the Danish competition law, inspired by Article 9 of Regulation (EC) No 1/2003, has allowed the NCA to close a case without the adoption of a formal decision. There are no specific procedural rules that govern this procedure. However, the NCA has indicated that the moment the Authority issues the memorandum of concern, as explained in Section 3.5, would be the appropriate time to open commitment discussions⁵³⁰. When the commitment discussions end with an agreement, third parties are invited to submit their comments. After this stage, the Competition Council adopts a decision making the commitments legally binding.

With regard to evidence, this can take the form of written documents, whether official or private, affidavits or testimonies. As the Competition Council is an administrative body it does not hear oral statements or witnesses, save from the short oral statement immediately before the adoption of final decisions. Hence, all statements and submitted evidence must be put in writing but could, if relevant, be simply recorded in the minutes of meetings⁵³¹.

Following the adoption of the administrative (final) decision, a non-confidential version of this decision will be published on the domain address of the NCA: www.kfst.dk. In addition to

⁵²⁵ *Processer i konkurrencesager – vejledning*, Konkurrence & Forbrugerstyrelsen 2013, p. 11.

⁵²⁶ Article 20, subsection 3 of the Competition Act.

⁵²⁷ Except if the case is considered to be simple.

⁵²⁸ Article 23b of the Competition Act.

⁵²⁹ Article 16a of the Competition Act, which regulates this matter, was introduced in 2004.

⁵³⁰ *Processer i konkurrencesager – vejledning*, Konkurrence & Forbrugerstyrelsen 2013, p. 11.

⁵³¹ This follows from the general Danish administrative law requiring public authorities to make notes of meetings and to provide factual information therein if relevant for the case.

providing general information on the working of the NCA, publishing of decisions is specifically done in order to facilitate follow on litigation.

4 Competent courts

In Denmark, a competition infringement, including of Articles 101 and 102 of the TFEU, is considered a criminal offence making the infringer subject to criminal penalty provided the infringement is serious⁵³². The definition of the latter is an individual assessment but in essence it is a question of intent and the damage caused. If the infringement of competition law is not considered as serious, the case will be closed by the NCA without sanctions and thus not tabled before the courts unless the infringer disagrees with the findings.

Hence, the judicial system is divided between civil and criminal enforcement where the first covers direct actions, thus also judicial review, as well as follow on proceedings and the second covers criminal cases and the imposition of sanctions. As the NCA is precluded from handling cases of criminal nature, such cases normally will not involve a decision from the NCA. The courts and the public prosecutor will instead act as the enforcer of competition rules, and hence, will act as the NCA⁵³³.

No specialised courts exist in Denmark to which competition law cases are assigned automatically. In contrast, all courts cover both civil and criminal cases and both under the Danish and EU competition law. Plaintiffs can either request a civil case to be referred to the Maritime and Commercial Court, if the case involves questions of competition law, or lodge the case directly before it. The first is done presuming that the Maritime and Commercial Court is more competent to assess the plaintiff's claim, and therefore the plaintiff has to ask the court, where the original claim is filed, to refer the case to the Maritime and Commercial Court. A case can also be filed directly before this more specialised court at the discretion of the plaintiff.

Figure 4.1 provides an overview of the court system in Denmark.

Figure 4.1 Court system in Denmark



The Danish courts are composed of the Supreme Court, the two high courts, the Maritime and Commercial Court, the Land Registration Court, 24 district courts, the courts of the Faroe Islands and Greenland, the Appeals Permission Board, the Special Court of Indictment and Revision, the Danish Judicial Appointments Council and the Danish Court

⁵³² Chapter 8 of the Competition Act.

⁵³³ *Processer i konkurrencesager – vejledning*, Konkurrence & Forbrugerstyrelsen 2013, p. 10.

Administration. However, normally only the Supreme Court, the two high courts, the Maritime and Commercial Court, the 24 district courts and the courts of Faroe Islands and Greenland would be attributed to the judicial branch as the other courts have limited tasks or jurisdiction. The Competition Act does not apply to Faroe Islands and Greenland.

The judicial system in Denmark is an integrated system covering administrative, civil and criminal cases⁵³⁴. Furthermore, no distinction is made between cases involving judicial review and follow on litigation. Hence, all cases would start at a district court unless special provisions provide for other options.

The 24 district courts are each covering a designated circuit (administrative country subdivision), while the Maritime and Commercial Court covers specific cases, thus, matters involving maritime and commercial issues, including competition law⁵³⁵. In civil and commercial cases, the plaintiff can either lodge a case before the relevant district court or the Maritime and Commercial Court depending on his/her choice. Furthermore, cases upon the request of the parties can either be referred to the latter by a district court or the high courts. In contrast a criminal case would remain with the district courts.

Rulings of lower courts can be appealed. The high courts are divided into two territorial branches: Western and Eastern High Court (*Vestre- & Østre Landsret*) covering Western Denmark (*Jutland*) and Eastern Denmark (*Fyn, Zeeland* and surrounded islands). There is no division within the Supreme Court. All courts are entitled to conduct a full review of facts and law. However, normally the Supreme Court will not accept witnesses⁵³⁶.

One judge will decide in district court cases and three judges would deal with a case in the high court. In the Maritime and Commercial Court three to seven judges are involved and a case before the Supreme Court would be dealt with by a minimum of five judges. Save from the judges at the Maritime and Commercial Court, all judges are fulltime employees. In contrast, the Maritime and Commercial Court operates a system where two to four (of the three to seven) judges will have a non-legal background and will be appointed *ad hoc* for the specific case⁵³⁷. Instead of legal background, these judges bring-in e.g. technical or financial expert knowledge providing for a better understanding of the particularities of the case⁵³⁸.

In principle, the judges prepare the case and final ruling on their own. However, in the high courts and the Supreme Court this role is assumed by one of the judges. At the Supreme Court judges are supported by assistant judges.

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings related to breaches of competition law rules in Denmark.

5.1 Legal standing in judicial review and follow-on proceedings

Any natural or legal person has the right to:

1. lodge a claim with the competition authority;
2. lodge a claim directly before the relevant court.

The legal standing in cases of judicial review and follow-on cases is described in Table 5.1 below.

⁵³⁴ Further information can be found at: <http://www.domstol.dk>, which also offers an English section.

⁵³⁵ According to Article 225, subsection 2, (4) of the Danish Administration of Justice Act, the Maritime and Commercial Court holds joint jurisdiction over competition law cases.

⁵³⁶ Article 340, subsections 3 and 4 of the Danish Administration of Justice Act.

⁵³⁷ Pursuant to Chapter 9b of the Danish Administration of Justice Act, it is also possible to appoint expert judges to lower court cases. However, this option is recent and has been utilized only in rare occasions.

⁵³⁸ Article 16 and Chapter 9b of the Danish Administration of Justice Act.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Any natural or legal person	Any natural or legal person
How can an action be filed?	Following the NCA's decision and subsequent administrative appeal, which is a precondition for admissibility of further appeals before the courts, judicial review can be initiated by filing a written appeal before the competent court.	A written claim can be filed to the competent courts.
With which authorities can the action be filed?	The District Court of Copenhagen, as the legal venue of the Competition Council, or the Maritime and Commercial Court.	Any district court or the Maritime and Commercial Court.
Burden of proof	The burden of proof rests with the plaintiff.	The burden of proof rests with the plaintiff.

In Denmark, any natural or legal person who can show a direct and personal interest in the matter may sue for damages before a district court according to its territorial jurisdiction based on the place where the defendant is registered⁵³⁹. Furthermore, any such person may also intervene in a judicial review case that is already tabled. Hence, it is possible to intervene in judicial review cases either in support of one of the parties or with the purpose of requesting compensation.

Anyone with sufficient legal interest can initiate class action for any competition law infringement thereby cumulating different and separate claims⁵⁴⁰. The Consumer Ombudsman is designated as having sufficient legal interest to initiate such proceedings on behalf of all consumers⁵⁴¹.

5.2 Judicial Review Proceedings

This Section presents judicial review proceedings in Denmark.

5.2.1 Rules applicable to the judicial review of NCA decisions

The timeframe and preconditions for initiating a judicial review are set out in the Competition Act⁵⁴². However, the actual case and its proceedings will be governed by the Danish Administration of Justice Act (*retsplejeloven*)⁵⁴³.

5.2.2 Competent Court

The decision of the Competition Council, following an (unsuccessful) administrative appeal to the Competition Appeal Tribunal, may be challenged before the courts. Following the judicial reform in 2006, the District Court of Copenhagen (*Københavns byret*) or the Maritime and Commercial Court would be the competent courts⁵⁴⁴. Subsequent appeals can be filed to either the High Court or the Supreme Court depending on where the case was dealt with first. Namely, the ruling by a lower court must be appealed to the High Court and, if

⁵³⁹ Article 235 of the Danish Administration of Justice Act.

⁵⁴⁰ Chapter 23a of the Danish Administration of Justice Act.

⁵⁴¹ Article 26 of the Competition Act.

⁵⁴² Article 20 of the Competition Act.

⁵⁴³ Consolidated Act No. 1139 of 24 September 2013.

⁵⁴⁴ Prior to 2006, the High Court was the competent court for judicial review of the NCA decisions.

accepted, subsequently to the Supreme Court⁵⁴⁵. Rulings by the Maritime and Commercial Court can be appealed directly to the Supreme Court⁵⁴⁶.

5.2.3 Timeframe

The decision of the Competition Council must be challenged before the courts within eight weeks following the decision taken in the administrative appeal proceedings by the Competition Appeal Tribunal. The decision of courts can be further appealed before a higher court within four weeks if appealed to the High Court and eight weeks if appealed to the Supreme Court⁵⁴⁷.

It is not possible to specify the exact time period that a competition case in Denmark would take from the adoption of the NCA's decision to the final judicial ruling. For instance, the case known as *Post Danmark*⁵⁴⁸ was decided by the Competition Council in 2004, reviewed (and upheld) by the Competition Appeal Tribunal in 2005, logged before the High Court and finally decided in 2007. Following the referral of questions to the European Court of Justice, the Danish Supreme Court handed down its opinion in 2013 finally closing the case. Disregarding the time used to obtain the preliminary ruling from the European Court of Justice, this case took seven years from the administrative decision to its final ruling. However, this case is rather an exception than the norm. Usually, competition cases in Denmark would be solved in a shorter period of time.

5.2.4 Admissibility of Evidence

There are no special provisions regarding the admissibility of evidence before a court. According to general principles, evidence must be submitted by the parties to the dispute. Hence, the court will not independently and on its own initiative request evidence to be submitted. In general, anything can therefore be presented as evidence, including written or oral statements, even if these have not been part of the original case before the NCA. The only exception is expert testimonies. These can only be accepted if submitted in writing before the courts⁵⁴⁹. However, this would not be considered as an expert opinion but rather as a party submission thereby limiting its value.

It is possible for the courts to appoint independent experts to whom the parties can submit written questions, e.g. how to calculate a loss or understand an economic theory.

5.2.5 Interim Measures

Any court in Denmark can impose interim measures, including cease and desist or an order to continue supplies, if the particularities of the case warrant this⁵⁵⁰. However, for practical reasons it would rarely be relevant in competition cases as imposing of interim measures normally would require a clearly identified infringement. Furthermore, in Denmark request for a judicial review does not suspend the validity of the decision of the NCA, unless stated so by the courts, thus further reducing the relevance of the instrument.

5.2.6 Rulings of the court

In cases of judicial review, the decision of the Competition Council will either be upheld or revoked. In such case, the Competition Council will in principle be requested to reopen the case.

Under Danish law, civil cases are open to public, including the hearing where parties argue their case on the basis of their written submissions.

⁵⁴⁵ Article 368, subsections 1 and 2 and Article 371 of the Danish Administration of Justice Act.

⁵⁴⁶ Article 368, subsection 3 of the Danish Administration of Justice Act.

⁵⁴⁷ Article 372 of the Danish Administration of Justice Act.

⁵⁴⁸ C-209/10 – *Post Danmark A/S mod Konkurrencerådet*.

⁵⁴⁹ Court order from the Supreme Court dated 11 October 2012 in case 159/2013.

⁵⁵⁰ Chapter 57 of the Danish Administration of Justice Act.

The court within four to eight weeks after the hearing delivers its decision in writing. The parties are provided with a copy of the judgment directly at the court. Others can require their copy subject to a fee (DKK 175/EUR 23.5)⁵⁵¹.

5.3 Follow-on Proceedings (private enforcement)

This Section presents follow-on proceedings in Denmark.

5.3.1 Rules applicable to follow-on procedures

There are no specific laws or regulations governing follow on litigation in Denmark. Anyone who has suffered damages following an infringement of competition law can initiate legal action requesting compensation⁵⁵².

Denmark has recently introduced a class action. According to the Competition Act, the Consumer Ombudsman has such powers in respect to competition law infringements⁵⁵³. There are, however, no current examples when this right has been exercised.

5.3.2 Competent Court

Any Danish court is competent to deal with follow on cases in relation to competition law regardless of whether it relates to an infringement of the Danish or EU competition rules, provided it holds jurisdiction under Danish or International Private Law.

5.3.3 Timeframe

The time limit for bringing an action before a court for commercial matters, including competition law infringement, is three years⁵⁵⁴. Furthermore, the limit is calculated from the earliest time the plaintiff could have made his/her claim, which in competition law cases would normally be when the Competition Council (or the EU Commission) renders its decision making details of the infringement public. The Danish Supreme Court has confirmed this in a 2013 ruling⁵⁵⁵, where the relevant date was calculated from the publication of the EU Commission's press release (2005) and not the date of infringement (1998).

Following a decision by the lower court, appeals must be made within four weeks to the High Court and within eight weeks to the Supreme Court⁵⁵⁶.

As these time limits are linked to filing of a claim before the courts, special suspension has been provided for complaints that are tabled before the NCA. In absence of this suspension, the timeframe for most claims would have lapsed before the decision would have been rendered by the NCA. Consequently, a plaintiff is given the option to wait for the conclusions of the NCA before claiming compensation⁵⁵⁷. However, this provision does not expand suspension to complaints lodged before the EU Commission indicating a potential lacuna.

5.3.4 Admissibility of evidence

There are no special provisions regarding the admissibility of evidence before a court. According to general principles, evidence is submitted by the parties⁵⁵⁸. Hence, the court will

⁵⁵¹ Article 48 of the Law on Court Fees (*Lov om retsagifter* LBK nr 936 af 08/09/2006).

⁵⁵² There is no specific regulation regarding compensation for infringements of the Competition Act. However, this follows from general Danish law principles and has been accepted in a number of cases. See e.g. *Sø- og Handelsretten - U-10/07 - Tetra Pak Inventing A/S m.fl. mod DONG Generation A/S og DONG Energy Power A/S* where more than 1100 undertakings and end-users claimed compensation exceeding DKK 4400 million (EURO 589 million) from the incumbent energy supplier following the latter condemnation for overcharging.

⁵⁵³ Article 26 of the Competition Act

⁵⁵⁴ Article 25 of the Competition Act.

⁵⁵⁵ *Højesterets dom af 10. september 2013 i sag 217/2012 - Handelsselskabet af 5. januar 2002 A/S mod AstraZeneca.*

⁵⁵⁶ Article 372 of the Danish Administration of Justice Act.

⁵⁵⁷ Article 25, subsections 2 and 3 of the Competition Act.

⁵⁵⁸ Chapter 32 of the Danish Administration of Justice Act.

not independently and on its own initiative request evidence to be submitted. Therefore, anything can be presented as evidence, including written or oral statements, even if these have not been part of the original case before the NCA. The only exception is expert testimonies. These can only be accepted if provided in writing. However, this would not be considered as an expert opinion but rather as a party submission thereby limiting its value.

It is possible for the courts to appoint independent experts to whom the parties can submit written questions, e.g. how to calculate a loss or understand an economic theory⁵⁵⁹. This is highly relevant in follow on cases, e.g. to estimate damages.

5.3.5 Interim Measures

Any court in Denmark can impose interim measures if the particularities of the case warrant this⁵⁶⁰.

5.3.6 Rulings of the court

Under Danish law, all civil cases are open to the public and proceedings are conducted orally and on the basis of written submission and pleas. When the court is ready to deliver its decision, it provides the parties with a written copy and in principle reads out the conclusions⁵⁶¹. In practice, lower courts tend not to announce their judgments in a hearing, but limit themselves to sending the ruling to the parties via mail.

Pursuant to a 2009 High Court ruling⁵⁶² infringements of competition law, including Articles 101 and 102 of the TFEU, create a strong but rebuttable presumption of liability. Hence, it falls upon the defendant rather than the plaintiff in a follow on litigation to establish that compensation should not be awarded.

Furthermore, pursuant to a 2005 High Court ruling⁵⁶³, failing to lodge an appeal before the Competition Appeal Tribunal precludes the defendant in a follow on litigation to dispute the Competition Council's finding of an infringement.

5.3.7 Rules applicable to the enforcement of court judgments

Judgments take effect unless appealed. Subsequently, it can be enforced by the bailiff's court on the request of the winning party and any awarded compensation or rights collected and enforced in the same manner as any other debt or rights⁵⁶⁴.

5.4 Alternative dispute resolution mechanisms

In Denmark, parties have the option to conclude a settlement agreement without the permission of the court, even during the course of the trial. This is a general principle and consequently also applies to competition law cases.

Furthermore, as an alternative to judicial proceedings most parties incorporate arbitration clauses into their agreements making competition law cases rare at the courts. Most cases tabled before the courts are consequently either judicial reviews or follow on litigations where the victims of competition law infringements demand compensation.

Denmark has opted-out from the Maastricht Treaty concerning Justice and Home Affairs and thus is not bound by the Mediation Directive 2008/52/EC. However, it has enacted legislation on court mediation. The system of court mediation is regulated in the Danish Administration

⁵⁵⁹ Chapter 19 of the Danish Administration of Justice Act.

⁵⁶⁰ Chapter 57 of the Danish Administration of Justice Act.

⁵⁶¹ Article 219, subsection 5 of the Danish Administration of Justice Act.

⁵⁶² *Østre Landsrets dom af 20. Maj 2009 i B-3355-06 – Forbruger Kontakt a/s mod Post Danmark A/S.*

⁵⁶³ *Østre Landsrets kendelse af 28. oktober 2005 i B-3829-02 – metroXpress Danmark A/S mod Berlingske Gratisaviser A/S.*

⁵⁶⁴ Article 478, subsection 1 of the Danish Administration of Justice Act.

of Justice Act, which governs court procedures in general. There is no information available on whether court mediation has been used to settle competition cases in Denmark.

6 Contextual Information

This Section presents contextual information relating to the judicial system in Denmark.

6.1 Duration and cost of competition law cases

With regard to the recovery of costs, legal costs are borne by the party which has lost the case unless the court holds otherwise. However, as it is up to the court to assess the costs, the allotted amount might not always cover the endured costs.

No information is currently available on the duration or costs of competition law cases. However, in 2013 on average it took 11,2 months for the district court to render a decision in civil cases and between 11,6 and 13,1 months for the High Courts to review a case⁵⁶⁵. No information is available in respect to the Maritime and Commercial Court. Additionally, the figures provided are average numbers that include simple cases indicating that a competition law case presumably will take longer than the two years. As mentioned before, the duration of a recent high profile EU competition case, *Post Danmark*⁵⁶⁶, was over eight years. The case was logged before the Danish judiciary in 2005 and finally closed in 2013. Furthermore, the plaintiff challenging the NCA's decision was awarded DKK 1,002,000 (EUR 134,497) in costs, most likely covering only a fraction of the actual costs. It should be noted, however, that this case is rather an exception than the norm.

6.2 Influencing Factors

In principle, there are no specific factors which influence the application of (EU) competition law rules in Denmark.

6.3 Obstacles/Barriers

There do not seem to be any significant obstacles or barriers in relation to access to justice concerning the application of competition law rules in Denmark. That, however, is not the same as concluding that there is no room for improvement.

A competition law case would often involve complex economic theories and evidence that can be difficult for the courts to review. Moreover, as the Competition Council and the Competition Appeal Tribunal consist of experts, including economic experts, it is unlikely that any court would overturn their decision unless manifest errors are identified.

The Maritime and Commercial Court has been established with the specific purpose of reviewing complex commercial and technical cases and it incorporates a system where non-lawyers support legal judges on *ad hoc* basis. Hence, a way to enhance efficiency could be to include economic experts in the judge panel in the same manner as accountants or technical experts occasionally are called upon to involve. That could also be an instrument to overcome any potential shortcomings in relation to the inability to use expert witnesses in Danish competition law cases.

Another point for consideration is the often cited claim from the plaintiffs in follow on litigations that it is too easy for the defendant to derail or delay the case by inflating the questions and submissions. Hence, a more active involvement by the courts and judges in accelerating adjudication of cases would be desired.

⁵⁶⁵ The information has been obtained from the Danish Court Administration (*Domstolsstyrelsen*) domain address: www.domstol.dk.

⁵⁶⁶ C-209/10 – *Post Danmark A/S mod Konkurrencerådet*.

Finally, it needs to be clarified that there is a gap in the Danish legislation on the special suspension on limitation of time that has been provided for complaints that are tabled before the NCA. Such suspensions are only offered in cases lodged before Danish authorities and not e.g. the EU Commission.

Annex 1 Bibliography

Legislation

- Competition Act (*LBK 700 af 18/6-2013 – Konkurrenceloven*)
- Administration of Justice Act (*LBK nr. 1139 af 24/9-2013 om rettens pleje*)
- Telecommunications Act (*Lov nr. 169 af 3. marts 2011 elektroniske kommunikationsnet og –tjenester*)
- Public Administration Act (*LBK nr 988 af 09/10/2012 forvaltningsloven*)
- Law on Court Fees ((*Lov om retsagifter LBK nr 936 af 08/09/2006*))

Books and Articles

- *Processer i konkurrencesager – vejledning*, Konkurrence & Forbrugerstyrelsen, 2013.

Data sources

- The Competition and Consumer Authority, information available at: <http://www.kfst.dk>.
- The Danish Court Administration, information available at: www.domstol.dk.

COUNTRY FACTSHEET - ESTONIA

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Abbreviations used

ECA	Estonian Competition Authority
ECB	Estonian Competition Board
EU	European Union
NCA	National Competition Authority
NRA	National Regulatory Authority

1 Overview of the National Legal Framework

According to the classic approach the Estonian legal system belongs to the Continental (Civil Law) European legal tradition, Romano-Germanic family with strong historical links with the German legal system (especially in the field of civil/private law).⁵⁶⁷

The Estonian legal system is formally norm-based i.e. statutory law is the primary source of law. It should be noted, however, that the influence of EU law on the development of the Estonian legal system strengthened the role of the precedents, particularly those of the Supreme Court (*Riigikohus*), which is empowered to interpret legal rules, especially in cases of legal *lacunae*, and to carry out constitutional review of the legislation. The hierarchy of laws is as follows: the Constitution, EU law, international agreements, Acts and Decrees of the Parliament (*Riigikogu*), Government's Regulations and Regulations issued by Ministers.⁵⁶⁸

Justice in Estonia is administered solely by the courts established and operated according to the provisions of the Courts Act.⁵⁶⁹ The Estonian Constitution⁵⁷⁰ provides for a court system comprised of three instances: county and administrative courts (first instance), circuit courts (second instance) and Supreme Court (third instance).⁵⁷¹ The first and second instance courts are financed and administered by the Ministry of Justice (*Justiitsministeerium*) and the Council for Administration of Courts.⁵⁷² The Supreme Court as an independent institution administers itself and is financed directly from the state budget.⁵⁷³

2 National Legislation establishing competition law rules

This Section provides an overview of national legislation establishing competition law rules. Table 2.1 presents a list of relevant competition law instruments in Estonia.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
Competition Act	05.06.2001
Regulation No 197 "Grant of Permission to Enter into Specialisation Agreements Which Restrict or May Restrict Free Competition (group exceptions)"	30.12.2010
Regulation No 60 "Grant of Permission to Enter into Vertical Agreements Which Restrict or May Restrict Free Competition (group exceptions)"	27.05.2010
Regulation No 66 "Grant of Permission to Enter into Motor Vehicle Distribution and Servicing Agreements Which Restrict or May Restrict Competition (Block exemption)"	03.06.2010
Penal Code	01.09.2002

⁵⁶⁷ See K. Miil, J. Kuusik, and M. Ruttu, UPDATE: Guide to Estonian Legal System and Legal Research, <http://www.nyulawglobal.org/globalex/estonia1.htm>.

⁵⁶⁸ See https://e-justice.europa.eu/content_member_state_law-6-ee-en.do.

⁵⁶⁹ Courts Act, passed 19.06.2002, RT I 2002, 64, 390, entry into force 29.07.2002.

⁵⁷⁰ The Constitution of the Republic of Estonia, passed 28.06.1992, RT 1992, 26, 349, entry into force 03.07.1992, Article 148.

⁵⁷¹ Estonian court system, <http://www.nc.ee/?id=188>.

⁵⁷² Courts Act, Chapter 6.

⁵⁷³ Courts Act, para 43(4).

2.1 General legislation

The national equivalents of Articles 101 and 102 TFEU are contained in the Competition Act (*Konkurentsiseadus*),⁵⁷⁴ which has been in force since 2001 with the most recent amendments taking place in July 2013. The relevant provision of the Competition Act mirrors Article 101 TFEU also adding anti-competitive exchanges of information to the list of the prohibited anti-competitive practices.⁵⁷⁵

The prohibition of abuse of dominant position in the Competition Act follows the structure of Article 102 TFEU also adding the following to the list of abuses of dominant position: forcing an undertaking to concentrate, enter into an agreement which restricts competition, engage in concerted practices or adopt a decision together with the undertaking or another undertaking; unjustified refusal to sell or buy goods.⁵⁷⁶

Until the most recent legislative amendments that entered into force in July 2013, the concept of dominant undertaking covered also undertakings with special or exclusive rights and undertakings in control of essential facilities.⁵⁷⁷ According to the new rules, undertakings with special or exclusive rights are no longer automatically considered dominant and their special obligations have been abolished except for the obligation to keep separate accounting of revenue and expenditure related to each product or service.⁵⁷⁸

The Competition Act also provides for various categories of exemptions from application of the national equivalent of Article 101 TFEU: *de minimis* exemptions⁵⁷⁹, individual exemptions⁵⁸⁰ in line with Article 101(3) TFEU and a set of block exemptions specified in the Government's regulations on the proposal of the Minister of Economic Affairs and Communications.⁵⁸¹

Certain violations of competition rules are considered criminal offences under the Penal Code and prosecuted in criminal proceedings initiated by the Prosecutor's Office upon request of the ECA: repeated abuse of dominant position;⁵⁸² agreements, decisions and concerted practices prejudicing free competition;⁵⁸³ repeated failure to perform obligations of undertakings in control of essential facilities.⁵⁸⁴ Other infringements of competition rules are regarded as misdemeanors and prosecuted under the Code of Misdemeanour Procedure:⁵⁸⁵ abuse of dominant position, implementation of concentration without permission, and the non-performance of obligations by the undertakings in control of essential facility.⁵⁸⁶

The competition rules laid down in the Competition Act apply to all sectors of the economy except the labour market⁵⁸⁷: extraction of natural resources, manufacture of goods, provision of services and sale and purchase of products and services.⁵⁸⁸ The competition rules are applied to undertakings that are determined according to the functional approach related to the exercise of economic activity: "a company, sole proprietor, any other person engaged in economic or professional activities, an association which is not a legal person, or a person acting in the interests of an undertaking".⁵⁸⁹ Following this approach, state, local

⁵⁷⁴ Competition Act (*Konkurentsiseadus*), passed 05.06.2001, RT I 2001, 56, 332, entry into force 01.10.2001.

⁵⁷⁵ Competition Act, para 4(1)(4).

⁵⁷⁶ Competition Act, para 16(5) and (6).

⁵⁷⁷ Competition Act, paras 14 and 15. See also Tamm, E., Paas, K., 'The Concept of Dominance in Estonian Competition Law' (2007) XII *Juridica International*.

⁵⁷⁸ Competition Act, para 18. See also Paas-Mohando, K., 'Estonia: general - legislative amendments' (2013) 34(11) *European Competition Law Review*.

⁵⁷⁹ Competition Act, para 5.

⁵⁸⁰ Competition Act, para 6.

⁵⁸¹ See Table 2.1.

⁵⁸² Penal Code, para 399(1).

⁵⁸³ Penal Code, para 400.

⁵⁸⁴ Penal Code, para 402.

⁵⁸⁵ Code of Misdemeanour Procedure, passed 22.05.2002, (RT¹ I 2002, 50, 313).

⁵⁸⁶ Competition Act, para 73⁹.

⁵⁸⁷ Competition Act, para 1(3).

⁵⁸⁸ Competition Act, para 1(1).

⁵⁸⁹ Competition Act, para 2(1).

governments, legal persons in public law and other persons performing administrative duties can be treated if undertakings they participate in a goods market.⁵⁹⁰

The agricultural sector is subject to competition rules only to the extent determined on the basis provided for in Article 42 TFEU.⁵⁹¹ The geographical scope of application extends beyond the territory of Estonia when acts or omissions committed outside have a restrictive effect within the territory of Estonia.⁵⁹²

2.2 Industry-specific legislation

Certain economic sectors are subject to market regulation and the relevant legislation contains provisions aimed at protecting and promoting competition in those sectors. For example, in the telecommunications sectors the relevant legislation addresses potential abuses of dominant position by imposing a wide range of conduct obligations on the undertakings assigned with the 'Significant Market Power' status.⁵⁹³ In the postal sector the conduct of the universal postal service provider is placed under the supervision of the Communications Regulatory Division of the ECA.⁵⁹⁴ The Natural Gas Act,⁵⁹⁵ enforced by the ECA imposes special obligations on the gas undertaking in dominant position on the market: publication of the terms and conditions of the sale of gas and the principles of formation of the selling price; prohibition to refuse to sell gas to a household customer if the customer so requests.⁵⁹⁶ The sector specific rules applicable in the railway sector⁵⁹⁷ allow infrastructure managers and railway undertakings to submit complaints to the ECA if the former were treated "in a discriminatory or otherwise unfair manner in the approval of the notice concerning a railway network, distribution of capacity, organisation of the co-ordination procedure, declaration of capacity to be depleted⁵⁹⁸, preparation of a timetable or determination of user fees".⁵⁹⁹

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in Estonia, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Estonian Competition Authority

The first Estonian NCA – Estonian Competition Board (*Konkurentsitenistus*) (ECB) – was set up on 21 October 1993 within the Ministry of Finance to supervise the implementation of the 1993 Competition Act. The ECB was headed by the Director General appointed and removed from office by the Minister of Finance. In 1998 the Competition Board continued its activities under the newly adopted 1998 Competition Act, which entered into force on 1 October 1998. The next phase in the Competition Board's history came on 1 October 2001 when the current 2001 Competition Act entered into force. The Competition Board's structure reflected its workload: three supervisory departments dealing with anti-competitive agreements and abuses of dominant position in various economic sectors and a merger control department exercising control over concentrations in all economic sectors. Thus, initially the organisational structure and the powers of the ECB reflected those of the Directorate General Competition of the EU Commission.

⁵⁹⁰ Competition Act, para 2(2).

⁵⁹¹ Competition Act, para 4(2).

⁵⁹² Competition Act, para 1(2).

⁵⁹³ Electronic Communications Act (*Elektroonilise side seadus*), passed 08.12.2004, RT I 2004, 87, 593, entry into force 01.01.2005.

⁵⁹⁴ Postal Act (*Postiseadus*), passed 6.04.2006, RT I 2006, 18, 142, entered into force 1.07.2006.

⁵⁹⁵ Natural Gas Act (*Maagaasiseadus*), passed 29.01.2003, RT I 2003, 21, 128, entry into force 01.07.2003.

⁵⁹⁶ Natural Gas Act, para 9¹.

⁵⁹⁷ Railways Act (*Raudteeseadus*), passed 19.11.2003, RT I 2003, 79, 530, entry into force 31.03.2004.

⁵⁹⁸ This is where the railway infrastructure company is unable, for technical reasons, to attribute railway capacity to the undertakings requesting it.

⁵⁹⁹ Railways Act, para 64¹.

3.2 The reform of the Estonian Competition Authority

In 2007 the Estonian NCA has experienced a major organisational reform. In order to increase the efficiency of State regulation of the economy it was decided that the NCA should also combine the functions of a national regulatory authority (NRA) in various economic sectors. This resulted in the merger of the ECB with the Energy Market Inspectorate and Communication Board. As a result of the merger the newly established ECA combined the functions of a competition authority and market regulatory authority in the energy, communications and railway sectors. The ECA commenced its activities under the reformed structure on 1 January 2008. It included three divisions: Competition Division, Communications Regulatory Division and Railway and Energy Regulatory Division.

The year of 2010 brought further structural changes to the ECA, which included changing the names of structural units and to some extent the reallocation of tasks. The re-organised ECA had the following structure since November 2010: Competition Division, Railway and Communications Regulatory Division, Energy and Water Regulatory Division.⁶⁰⁰

In 2012 the ECA was attributed new competences in supervising the aviation sector. This led to further re-organisation of the ECA's structure: Railway and Communications Regulatory Division, which absorbed the new tasks has been re-named the Communications Regulatory Division, which reflects the primary subject of its current activities.⁶⁰¹ Thus, at the end of 2012 the ECA with a budget of 1.83 million euros employed 61 persons in the following organisational units: External and Public Relations Department: 6; Competition Division: 21, Energy and Water Regulatory Division: 21, Communications Regulatory Division: 13.

Currently the Government is considering a proposal to exclude regulation of communications market from the competences of the ECA and to attribute them to the Technical Surveillance Authority (*Tehnilise Järelevalve Amet*).⁶⁰² If approved, these changes might take effect in 2014.

3.3 Composition and decision-making

The ECA is a government agency which operates under the responsibility of the Ministry of Economic Affairs and Communications (*Majandus- ja kommunikatsiooniministerium*).⁶⁰³ The Minister approves and amends the ECA's annual budget, oversees its implementation, approves the staff and structure of the ECA upon a proposal of the Director General. The ECA includes three field-based divisions: the Competition Division, the Energy and Water Regulatory Division and the Communications Division.⁶⁰⁴ Technical support and communications are ensured by the External and Public Relations Department. The ECA is headed by the Director General while heads of the structural divisions carry the rank of Deputy Directors General. The Director General is authorised to issue administrative acts independently in accordance with legislation and to authorise the Deputy Directors General to issue administrative acts for the performance of functions in state supervision proceedings.

3.4 Cooperation with other entities

Being a competition authority that is responsible for the application of Articles 101 and 102 TFEU within the meaning of Article 35 of Council Regulation 1/2003⁶⁰⁵ the ECA is authorised to assist the EU Commission in competition supervision and performance of on-site

⁶⁰⁰ ECA 2010 annual report, p. 6.

⁶⁰¹ ECA 2012 annual report, p. 6.

⁶⁰² <http://www.tja.ee/>.

⁶⁰³ <http://www.mkm.ee/>.

⁶⁰⁴ The internal structure and organization of the ECA is regulated in the Statutes of Estonian Competition Authority, Approved by Regulation No. 101 of the Minister of Economic Affairs and Communications of 17.12.2007 (RTL1 2007, 97, 1628), entered into force 01.01.2008.

⁶⁰⁵ Council Regulation 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 04.01.2003, p. 1–25).

inspections.⁶⁰⁶ Being a member of the European Competition Network⁶⁰⁷, the ECA also cooperates with NCAs of other EU Member States in the application of the EU competition rules.⁶⁰⁸ Besides the function of the NCA the ECA combines the functions of several sector regulators carried out by its Energy and Water Regulatory Division (electricity, natural gas, district heating, liquid fuels) and Communications Regulatory Division (electronic communications, postal services, railways). This unique combination leads to the high degree of coordination of the competition enforcement and regulatory activities in the specified markets.

3.5 Investigations

The ECA can initiate an investigation *ex officio* or following a complaint submitted by a third party (any natural or legal person including associations which are not legal persons).⁶⁰⁹ The ECA must refuse to initiate an investigation if (1) the application is clearly unjustified; (2) an action concerning the same matter has been filed with the EU Commission or a decision of the EU Commission concerning the same matter has entered into force; (3) it is not possible to identify the applicant on the basis of information contained in the application;⁶¹⁰ (4) the application contains deficiencies and the applicant has failed to eliminate the deficiencies by the term set by the ECA.⁶¹¹

Under the rules of criminal procedure, the ECA has the status of an independent investigative body, which is empowered to carry out a series of investigative pre-trial activities.⁶¹² Thus the ECA is empowered to commence a criminal investigation and has an obligation to notify the Prosecutor's Office.⁶¹³ Due to the specifics of antitrust enforcement in Estonia (criminalisation of cartels), which requires substantial evidentiary support, the ECA has been invested with a wide range of investigatory powers and competences. The ECA can request natural or legal persons, including state authorities, to provide information or explanations in writing,⁶¹⁴ to submit materials requested by the ECA,⁶¹⁵ or to summon the natural persons to the ECA's premises to provide information or explanations.⁶¹⁶ The ECA can also initiate and conduct dawn raids at the seat or place of business during the working hours or whenever the place of business is used.⁶¹⁷ In such cases the search is conducted on the basis of an order issued by the preliminary investigation judge. In cases where dawn raids are to be carried out on request of the EU Commission pursuant to the procedure provided by Articles 20 and 21 of the Regulation 1/2003, the ECA submits a reasoned written opinion to the Chairman of the Tallinn Administrative Court or an administrative judge of that court appointed by the Chairman.⁶¹⁸ The investigative actions of the ECA can be contested by the parties concerned before the Prosecutor's Office and preliminary investigation judge.⁶¹⁹ Once the ECA is convinced that sufficient evidence has been collected in a criminal matter it sends the criminal file to the Prosecutor's Office.⁶²⁰ The

⁶⁰⁶ Competition Act, para 56(1).

⁶⁰⁷ http://ec.europa.eu/competition/ecn/index_en.html.

⁶⁰⁸ Competition Act, para 56(2).

⁶⁰⁹ Competition Act, Article 63.

⁶¹⁰ On the basis of a reasoned request from the person submitting the application, the name of the person may, by a decision of the ECA, be declared not to be subject to disclosure to other persons. Competition Act, Article 63¹(3).

⁶¹¹ Competition Act, para 63²(1).

⁶¹² Code of Criminal Procedure, paras 31(1), 212(2)(5).

⁶¹³ Code of Criminal Procedure, para 193(2).

⁶¹⁴ Competition Act, para 57.

⁶¹⁵ Competition Act, para 59.

⁶¹⁶ Competition Act, para 58.

⁶¹⁷ Competition Act, para 60(1).

⁶¹⁸ Competition Act, para 63⁵.

⁶¹⁹ Code of Criminal Procedure, paras 228-232.

⁶²⁰ Code of Criminal Procedure, para 222.

Prosecutor Office prepares the statement of charges and sends it together with the criminal file to the defence counsel.⁶²¹

3.6 Decision-making

The Competition Act provides for various types of actions/decisions that the ECA can adopt in exercise of its competition supervision activities. In relation to the conduct of state authorities the ECA can issue recommendations to improve competitive situations with an obligation on the addressees of such recommendations to inform the ECA about the measures taken pursuant to the said recommendations.⁶²² If the state authority does not comply with the recommendations, it should provide the ECA with reasons upon request of the latter.⁶²³

In case of anti-competitive agreements, abuses of dominant position, violations of merger control rules or any procedural provisions of the Competition Act (i.e. failure to supply the ECA with requested information, interference with dawn raids, failure to appear when summoned, etc.) the ECA can issue an order requiring the natural or legal person concerned to: 1) perform the act required by the order; 2) refrain from a prohibited act; 3) terminate or suspend activities which restrict competition; 4) restore the situation prior to the offence.⁶²⁴ If a person fails to comply with the order, the ECA may impose penalty payments of up to EUR 3,200 on natural persons and up to EUR 6,400 on legal persons pursuant to the procedure regulated in the Substitutive Enforcement and Penalty Payment Act.⁶²⁵

Recent legislative amendments that entered into force in July 2013 have authorised the ECA in line with the powers of the NCAs laid down in the Regulation 1/2003 to issue orders in cases where “there is a risk of significant and irreparable damage to competition due to violation of the provisions of Article 101 or 102 TFEU”.⁶²⁶ The term of such orders is up to three months (with the possibility of extension by the ECA for up to one year). Also, the ECA has been authorised to accept commitments from the undertakings suspected in violation of Articles 101 or 102 TFEU (or their national equivalents).⁶²⁷ If the undertaking concerned failed to comply with the assumed obligations, the ECA may on its own initiative or on the basis of an application of a third party, resume the infringement proceedings terminated upon the assumption of obligations.⁶²⁸

In relation to violations of competition rules that are treated as misdemeanours by the Penal Code, the ECA conducts the proceedings and imposes pecuniary penalties: refusals to submit information or submission of false information (up to 300 fine units⁶²⁹ for natural person and up to 3,200 euros for legal person); abuse of dominant position (up to 300 fine units for natural person and up to 32,000 euros fine for legal persons); enforcement of concentration without permission to concentrate (up to 300 fine units for natural person and up to 32,000 euros fine for legal persons); non-performance of obligations by undertakings in control of essential facilities (up to 300 fine units for natural person and up to 32,000 euros fine for legal persons); failure to comply with special requirement concerning accounting (up to 300 fine units for natural person and up to 32,000 euros fine for legal persons).⁶³⁰

In relation to leniency matters, the ECA has a very limited authority due to the fact that antitrust violations are criminalised and sanctioned in the criminal procedure before the court. Under the relevant provisions of the Competition Act the ECA must confirm the receipt

⁶²¹ Code of Criminal Procedure, para 226.

⁶²² Competition Act, para 61(1).

⁶²³ Competition Act, para 61(2).

⁶²⁴ Competition Act, para 62(2).

⁶²⁵ Competition Act, para 62(3).

⁶²⁶ Competition Act, para 63⁶.

⁶²⁷ Competition Act, para 63⁷.

⁶²⁸ Competition Act, para 63⁷(6).

⁶²⁹ A fine unit is a base amount of a fine and is equal to four euros. Penal Code, para 47(1).

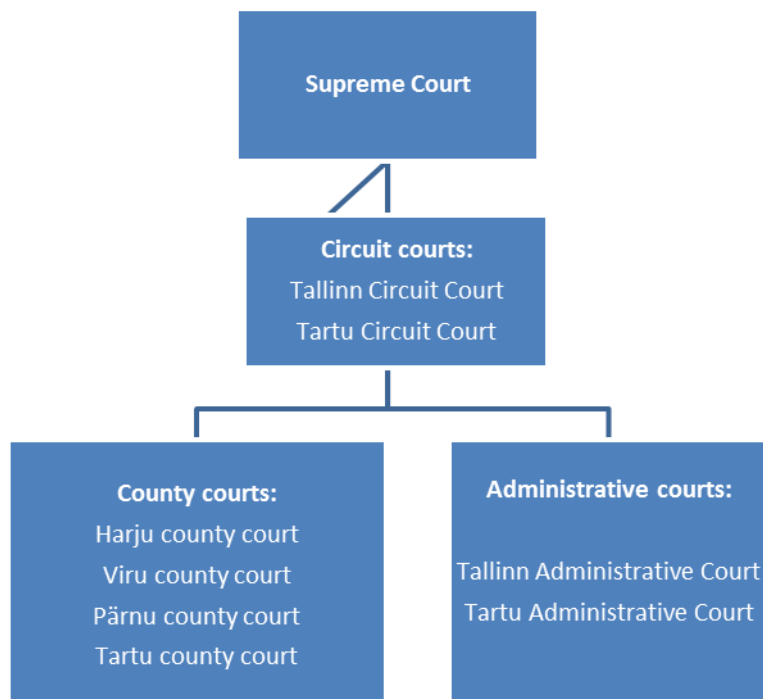
⁶³⁰ Competition Act, paras 73¹ 73⁵ - 73⁸.

of leniency applications and forward them to the Prosecutor's Office that is heading the criminal prosecution.⁶³¹

4 Competent courts

This Section provides an overview of the competent courts in Estonia. Figure 4.1 firstly presents a graphic overview of the court system.

Figure 4.1 Court system in Estonia⁶³²



The judicial review of the ECA's decisions (administrative decisions establishing violations of Articles 102 and 102 TFEU and their national equivalents, orders issued to the undertakings found in violation of competition rules and misdemeanour procedures conducted by the ECA for imposition of pecuniary penalties on the undertakings found in violation of competition rules) falls under competence of the administrative courts.

The administrative courts, as well as general jurisdiction courts, are organised in a three-level system reflecting the possibilities of appeal against the court decisions. As reproduced in Table 3.1 above, there are two administrative courts (first instance), two circuit courts (second instance) and the Supreme Court (third and final instance).

The administrative justice system is organised regionally with the first and second instance courts located in the two major cities: Tallinn and Tartu. Each of the two administrative courts is divided into two courthouses, which facilitates access to justice by natural and legal persons. Tallinn Administrative Court (*Tallinna Halduskohus*) has courthouses in Tallinn (*Tallinna kohtumaja*) (16 justices assisted by 20 legal consultants)⁶³³ and Pärnu (*Pärnu kohtumaja*) (2 justices assisted by 2 legal consultants).⁶³⁴ Tartu Administrative Court (*Tartu Halduskohus*) has courthouses in Tartu (*Tartu kohtumaja*) (6 justices assisted by 14 legal consultants)⁶³⁵ and Jõhvi (*Jõhvi kohtumaja*) (4 justices assisted by 6 legal consultants).⁶³⁶ Thus, the first level of administrative courts' system is comprised of 28 justices.

⁶³¹ Competition Act, para 78¹.

⁶³² <http://www.nc.ee/?id=188>.

⁶³³ <http://www.kohus.ee/et/tallinna-halduskohus/kontaktandmed>.

⁶³⁴ <http://www.kohus.ee/et/tallinna-halduskohus/kontaktandmed>.

⁶³⁵ <http://www.kohus.ee/et/tartu-halduskohus/kontaktandmed>.

⁶³⁶ <http://www.kohus.ee/et/tartu-halduskohus/kontaktandmed>.

The review of judgments issued by the administrative courts is exercised by the Tallinn Circuit Court (*Tallinna Ringkonnakohus*) (7 justices of the Administrative Chamber assisted by 24 legal consultants assigned to the whole court)⁶³⁷ and Tartu Circuit Court (*Tartu Ringkonnakohus*) (15 justices assisted by 18 legal consultants).⁶³⁸ Thus, the second level of administrative courts' system is comprised of 43 justices.

The Supreme Court (*Riigikohus*) is located in Tartu. Its work is organised through chambers specialising in various areas of law: constitutional review, civil law, criminal law, administrative law. The Administrative Chamber is composed of 5 justices assisted by 15 legal consultants.⁶³⁹

The private enforcement of competition law in Estonia is not constrained to follow-on actions: the parties concerned can initiate damage claims caused by the violation of the Competition Act without the need to have an ECA decision.⁶⁴⁰ In case of any claim for damages caused by acts prohibited by the Competition Act the parties should follow the civil procedure applicable in any case of damages claims. Such damages claims should be litigated in the courts of general jurisdiction as reproduced in Table 3.1 above. Under that system, the first instance is composed of four county courts (*maakohud*) with the total of 152 justices: *Harju Maakohustus* (66 justices), *Viru Maakohustus* (30 justices), *Pärnu Maakohustus* (21 justices), *Tartu Maakohustus* (35 justices).⁶⁴¹

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings related to breaches of competition law rules in Estonia.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in Estonia is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Any natural or legal person whose rights or freedoms have been restricted, or who has legitimate interest in the matter	Any natural or legal person who sustained damages as a result of violation of competition rules
How can an action be filed?	An action can be filed directly before the court by the person concerned	An action can be filed directly before the court by the person concerned (damages actions are not limited to follow-on claims)
With which authorities can the action be filed?	Administrative courts, circuit courts, Administrative Chamber of the Supreme Court	County courts, circuit courts, the Civil Chamber of the Supreme Court
Burden of proof	The burden of proof rests with the applicant that challenges the legality of the ECA's decision	The burden of proof rests with the plaintiff

⁶³⁷ <http://www.kohus.ee/et/tallinna-ringkonnakohus/kontaktandmed>.

⁶³⁸ <http://www.kohus.ee/et/tartu-ringkonnakohus/kontaktandmed>.

⁶³⁹ <http://www.riigikohus.ee/?id=133>.

⁶⁴⁰ Competition Act, para 78.

⁶⁴¹ <http://www.kohus.ee/et/eesti-kohtusustem/maakohud>.

5.2 Judicial Review Proceedings

This Section presents judicial review proceedings in Estonia for competition law cases.

5.2.1 Rules applicable to the judicial review of NCA decisions

The review of the ECA's decisions is carried out by the competent courts pursuant to the rules contained in the Code of Administrative Court Procedure.⁶⁴² The infringement decisions on misdemeanours delivered by the ECA in capacity of the extra-judicial body are reviewed by the competent courts pursuant to the rules contained in the Code of Misdemeanour Procedure.⁶⁴³

5.2.2 Competent Court

There are three instances of courts that carry out the review of the ECA's administrative decisions: administrative courts (first instance), circuit courts (second instance) and the Administrative Chamber of the Supreme Court (third instance). There are three instances of courts that carry out the review of the ECA's misdemeanour infringement decisions: county courts, circuit courts and the Supreme Court.

5.2.3 Timeframe

The decisions of the ECA can be challenged for annulment before the administrative court within thirty days after the date on which the decision was notified to the applicant.⁶⁴⁴ An appeal against a judgment of the administrative court can be lodged before the circuit court within thirty days as of the day on which the judgment was publicly pronounced.⁶⁴⁵ An appeal in cassation of the judgment of the circuit court can be lodged before the Supreme Court within thirty days as of the public pronouncement of the judgment.⁶⁴⁶ The preliminary proceedings are followed by a court session, which under normal circumstances should be held not earlier than 30 days from the date of delivery of the action to the respondent.⁶⁴⁷ The case should be heard by the court within a reasonable time. The judgments should be made public within 30 days from the date of the last court session, unless exceptional circumstances justify the delay of announcement up to 60 days.⁶⁴⁸ Misdemeanour infringement decisions of the ECA can be appealed by the parties before the county court within 15 days as of receipt of the contested decision.⁶⁴⁹

5.2.4 Admissibility of Evidence

As a general rule, the evidence admissible in the administrative review proceedings is any evidence permitted in the civil procedure.⁶⁵⁰ Evidence may consist of the testimony of a witness, statements of a party or third party, documentary evidence, physical evidence, an on-the-spot visit of inspection or an expert opinion.⁶⁵¹ The Evidence should be presented by the parties within the time-limit set by the court in preliminary proceedings.⁶⁵² The parties can also make requests to the court seeking the taking of evidence. The court can refuse to accept an evidentiary item if: (1) it is not material to the case at hand; (2) it has been obtained as a result of commission of a criminal offence or breach of fundamental right; (3) it is not accessible; (4) no reasons have been given for the need to present or take the

⁶⁴² Code of Administrative Court Procedure, passed 27.01.2011, RT I, 23.02.2011, 3, entry into force 01.01.2012.

⁶⁴³ Code of Misdemeanour Procedure, para 13.

⁶⁴⁴ Code of Administrative Court Procedure, para 46(1).

⁶⁴⁵ Code of Administrative Court Procedure, para 181.

⁶⁴⁶ Code of Administrative Court Procedure, para 212.

⁶⁴⁷ Code of Administrative Procedure, para 127.

⁶⁴⁸ Code of Administrative Procedure, para 173(3).

⁶⁴⁹ Code of Misdemeanour Procedure, para 114.

⁶⁵⁰ Code of Administrative Court Procedure, para 56.

⁶⁵¹ Code of Civil Procedure, para 90(2).

⁶⁵² Code of Administrative Court Procedure, para 62(1).

evidence.⁶⁵³ Under misdemeanour review proceedings, the burden of proof and collection of evidence is regulated in line with the rules of criminal procedure with certain exceptions. For example, the evidence cannot be obtained by surveillance activities and the anonymity of witnesses is not guaranteed.⁶⁵⁴

5.2.5 Interim Measures

Interim relief is available to the applicants upon the request to the court, which will temporarily suspend the application of the ECA's decision.⁶⁵⁵ The ruling for interim relief or the ruling concerning refusal of interim relief may be appealed to the higher court (the ruling of the circuit court concerning the appeal is not subject for further appeal).⁶⁵⁶

5.2.6 Rulings of the court

The result of the administrative review procedure will be the decision on the lawfulness of the ECA's decision, which could be either upheld or annulled. The courts will not engage in an exercise of the discretionary power in the place of the ECA and will thus only rule on the legality of the administrative decision – it will not substitute the decision.⁶⁵⁷

5.3 Follow-on Proceedings (private enforcement)

This Section presents follow-on proceedings in Estonia for competition law cases.

5.3.1 Rules applicable to follow-on procedures

The Code of Civil Procedure applies to follow-on procedures as claims for damages caused by the infringements of competition rules where the ECA's decision confirms the infringement.

5.3.2 Competent Court

There are three instances of courts competent to hear follow-on claims: county courts (first instance) at the place of residence of the defendant,⁶⁵⁸ circuit courts (second instance) and the Civil Chamber of the Supreme Court (third instance).

5.3.3 Timeframe

The general time for filing an appeal against the judgment of a county court before the circuit court is twenty days from the day when the judgment becomes public, provided that the plaintiff has notified the court that adjudicated of its intention to file an appeal within ten days from the date of publication of the judgment.⁶⁵⁹ The judgments of the circuit courts can be appealed to the Supreme Court in cassation within thirty days after the judgment becomes public or is communicated to the party concerned.⁶⁶⁰ The preliminary hearing should be held within two months after the filing of the statement of claim.⁶⁶¹ Under the Code of Civil Procedure the court is required to hold the court session within three months after the filing of a statement of claim.⁶⁶²

⁶⁵³ Code of Administrative Court Procedure, para 62(3).

⁶⁵⁴ Code of Misdemeanour Procedure, paras 32, 33.

⁶⁵⁵ Code of Administrative Court Procedure, para 251.

⁶⁵⁶ Code of Administrative Court Procedure, para 252(7).

⁶⁵⁷ Code of Administrative Court Procedure, para 158.

⁶⁵⁸ Code of Civil Procedure, para 138(1).

⁶⁵⁹ Code of Civil Procedure, para 300(2).

⁶⁶⁰ Code of Civil Procedure, para 341.

⁶⁶¹ Code of Civil Procedure, para 169.

⁶⁶² Code of Civil Procedure, para 170(3).

5.3.4 Admissibility of evidence

There are no specific restrictions on admissibility of evidence in the private enforcement cases. The following types of evidence can be considered in civil matters: testimony of a witness, statements of a party or third party, documentary evidence, physical evidence, an on-the-spot visit of inspection or an expert opinion.⁶⁶³ As a rule, the evidence should be submitted by the parties in preliminary proceedings. During the pre-trial proceedings the court also examines the parties' requests for expert opinions, on-the-spot inspection visits, hearing of the witnesses, etc.⁶⁶⁴ After holding a preliminary hearing with the participation of the parties the court decides which evidence submitted by the parties shall be accepted for examination in the main proceedings.⁶⁶⁵ The parties can also request the court to order the production of documents by the other party or any third party.⁶⁶⁶ The court assesses the relevance to the case of the requested documents and either orders production or issues a reasoned refusal.⁶⁶⁷ In relation to follow-on actions specifically, it should be noted that infringement decisions of the ECA do not have a pre-determined binding power on the court seized in private enforcement matter. Such decisions will be treated as documentary evidence and the court will assess whether and what relevance it has to the case.⁶⁶⁸

5.3.5 Interim Measures

Various forms of interim relief are available to the plaintiff. Measures for securing action are ordered by the court upon examination of the plaintiff's written reasoned petition, but not earlier than one month before the filing of the action.⁶⁶⁹ The measures for securing action include: judicial mortgage on immovable property, prohibition on disposal of property, seizure of movable property, prohibition on the defendant from carrying out certain transactions or performing certain acts, etc.⁶⁷⁰ The ruling on the measures for securing action can be appealed to the circuit court. The rulings made by the circuit court can be appealed to the Supreme Court. The rulings on appeal issued by the circuit court or the Supreme Court are not subject to further appeal. The appeal does not suspend the implementation of measures for securing action.⁶⁷¹

5.3.6 Rulings of the court

The first instance court decides the case on the merits i.e. establishes the eligibility for damages and quantifies their amount. The court of first instance can uphold the judgment, amend or annul it in full or in part and terminate the proceeding or send the judgment for a new hearing at the first instance court.⁶⁷² The Supreme Court has similar authority in relation to appeals in cassation lodged against the judgments of the circuit courts.⁶⁷³

5.3.7 Rules applicable to the enforcement of court judgments

The rules applicable to the enforcement of court judgments (the proceedings initiated by the winning party when the losing party does not immediately fulfil the obligations imposed by the court in the decision) are regulated in the Code of Enforcement Procedure.⁶⁷⁴ The forced execution of judgments is carried out by bailiffs upon the application for enforcement lodged by the winning party. Enforcement costs including the bailiff's fee and the costs necessary

⁶⁶³ Code of Civil Procedure, para 90(2).

⁶⁶⁴ Code of Civil Procedure, para 165.

⁶⁶⁵ Code of Civil Procedure, para 169.

⁶⁶⁶ Code of Civil Procedure, para 119.

⁶⁶⁷ Code of Civil Procedure, para 119(3).

⁶⁶⁸ Code of Civil Procedure, para 117.

⁶⁶⁹ Code of Civil Procedure, para 155(2).

⁶⁷⁰ Code of Civil Procedure, para 156.

⁶⁷¹ Code of Civil Procedure, para 161.

⁶⁷² Code of Civil Procedure, para 334.

⁶⁷³ Code of Civil Procedure, para 362.

⁶⁷⁴ Code of Enforcement Procedure, passed 20.04.2005, RT I 2005, 27, 198, entry into force 01.01.2006.

for enforcement proceedings are collected by the bailiff from the debtor.⁶⁷⁵ In case of financial claims, the property of the debtor is seized and the creditor is satisfied from the proceeds of the sale realised in the course of an electronic public auction.⁶⁷⁶ Complaints against the actions or decisions of a bailiff should be first submitted to the bailiff. If the participant in the enforcement proceedings is not satisfied with the bailiff's decision, it can contest it before the country court in the jurisdiction where the bailiff's office is located within 10 days of the delivery of the decision.⁶⁷⁷ Such appeals are heard by the court within 15 days as of the filing of the appeal. The court takes the decision on the suspension of enforcement measures for the period of adjudication of the appeal.

5.4 Alternative dispute resolution mechanisms

There are no specific dispute resolution mechanisms for competition law related disputes. Although the law does not provide for an internal dispute resolution procedure within the ECA, in practice the Estonian NCA conducts informal consultations with the parties, which might address and resolve certain issues. Nevertheless, these consultations are not regulated and do not have any binding force on either ECA or the parties concerned.

As mentioned above, recent legislative amendments have specifically empowered the ECA to accept commitments (assumption of obligations) that would allow the parties to avoid the infringement decisions under Articles 101 and 102 TFEU and their national equivalents.⁶⁷⁸

There is also a general possibility of recourse to the Chancellor of Justice (*Õiguskantsler*), who is authorised to mediate and settle the disputes related to the equal treatment of persons.⁶⁷⁹ The Chancellor of Justice can also issue suggestions or proposals to the administrative agencies concerning fundamental rights and freedoms and good administrative practice.⁶⁸⁰ The agencies concerned have an obligation to inform the Chancellor of Justice whether such suggestions or proposals have been implemented.⁶⁸¹

In relation to the private enforcement of competition rules in Estonia, the scarcity of court practice has been partially explained by the fact that most cases of competition-related damage claims are solved in out-of-court settlements.⁶⁸² This might imply that bilateral negotiations are often used to resolve damage claims issues. There is no evidence that damages for the breach of competition rules have been claimed in an arbitration procedure. It should also be noted that the Competition Act⁶⁸³ can be construed in a way that would render such claims as incapable of being settled in arbitration outside of the state court system.

6 Contextual Information

This Section provides a contextual overview of the judicial system in Estonia.

⁶⁷⁵ Code of Enforcement Procedure, para 37.

⁶⁷⁶ Code of Enforcement Procedure, paras 52, 78.

⁶⁷⁷ Code of Enforcement Procedure, para 218.

⁶⁷⁸ Competition Act, para 63⁷.

⁶⁷⁹ <http://oiguskantsler.ee/en/tasks-and-jurisdiction-of-the-chancellor-of-justice>.

⁶⁸⁰ Chancellor of Justice Act, passed 25.02.1999, RT I 1999, 29, 406, entry into force 01.06.1999.

⁶⁸¹ Chancellor of Justice Act, para 35².

⁶⁸² Sein, K., 'Private Enforcement of Competition Law – the Case of Estonia' (2013) 6(8) *Yearbook of Antitrust and Regulatory Studies*, p. 135.

⁶⁸³ Competition Act, para 78 refers to the rules of the civil procedure that should be applied to the claims on damages caused by infringements of competition law.

6.1 Duration and cost of competition law cases

According to the 2013 EU Justice Scoreboard,⁶⁸⁴ the average duration of the administrative cases in Estonia was between 100 and 200 days while litigious civil and commercial cases that cover follow-on claims last on average 200 days.⁶⁸⁵ Without detailed review of the available judgments and interviews of the parties to the proceedings, it is not possible to establish the duration and cost of competition law cases. Attempts were made to find cases where the courts applied Articles 101 and/or 102 TFEU, but no precedents were found. Whilst there were several instances when the national courts referred to the EU competition rules or case-law, this was always in the context of the application of national competition rules. Another reason is that Estonia places an emphasis on the criminal enforcement of competition rules resulting in application of the Criminal Code provisions which do not mirror Articles 101 and 102 TFEU (see also Section 6.2 below).

The amount of state fees to be paid by the plaintiff upon the submission of claim in a follow-on proceeding will depend on the amount of damages claimed. For example, if the value of a civil matter exceeds 500,000 euros, a state fee shall be paid in the amount of 3,400 euros + 0.25% of the value of the civil matter but not more than 10,500 euros. If a petition in a civil matter with the aforementioned value is filed electronically through the website www.e-toimik.ee, a state fee shall be paid in the amount of 3,200 euros + 0.25 per cent of the value of the civil matter but not more than 10,000 euros.⁶⁸⁶ Legal costs are viewed as costs essential to proceedings and upon request of the winning party the court can order the losing party to compensate legal costs in the amount of up to 5% of the value of the satisfied or dismissed part of the action.⁶⁸⁷ The lawyers' fees can be agreed on an hourly basis (an average hourly rate in competition cases can vary between 100 and 150 euros),⁶⁸⁸ as a lump sum or contingency fee.

6.2 Influencing Factors

No court cases were found on the application of EU competition rules and specifically Articles 101 and 102 TFEU in Estonia. Among the specific factors which influence the application of EU competition law is the fact that national courts mainly apply national competition rules and because there is a clearly defined priority of the ECA to pursue primarily criminal enforcement of the competition rules, which could lead to the criminal prosecution of the offenders. As a result, significant resources of the ECA's Competition Division are directed towards investigation of cartels, i.e. collection of evidence that is then forwarded to the Prosecutor's Office for initiation of criminal proceedings against the suspects. A prosecutor brings the case to the court, which then applies the national criminal rules. As explained in Sections 2.1 and 6.1, the provisions of the Criminal Code, on the basis of which public prosecutors launch criminal proceedings, do not mirror Articles 101 and 102 TFEU; they refer only to horizontal cartels and repeated abuse of dominant position.

In Estonia the attention of the media is also focused on the high impact cases that would demonstrate the existence of anti-competitive agreements among the manufacturers or distributors of socially sensitive products such as food, household items, and utilities. These considerations might also divert the resources and public attention away from application of the EU competition rules.

⁶⁸⁴ The 2013 EU Justice Scoreboard, COM(2013)160 final, http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf.

⁶⁸⁵ The data are from 2010.

⁶⁸⁶ State Fees Act, passed 22.04.2010, RT I 2010, 21, 107, entry into force 01.01.2011, Annex 1.

⁶⁸⁷ Code of Civil Procedure, para 61.

⁶⁸⁸ See Sein, K., 'Private Enforcement of Competition Law – the Case of Estonia' (2013) 6(8) *Yearbook of Antitrust and Regulatory Studies*, p. 134.

6.3 Obstacles/Barriers

There are no significant barriers in relation to access of justice specific to competition law cases. As the judicial statistics demonstrates the average duration of the administrative cases in Estonia is far below the EU average. The E-File system used for filing the claims and monitoring the progress of the case also allows savings on time and resources.⁶⁸⁹

A recent study on comparative private enforcement and consumer redress identified the following obstacles in relation to private enforcement of competition law in Estonia: (1) prevalence of out-of-court settlements; (2) unfamiliarity with competition law for Estonian judges, attorneys, in-house counsel; (3) high burden of proof associated with demonstration and quantification of damages; (4) absence of collective redress mechanisms.⁶⁹⁰

⁶⁸⁹ <https://www.e-toimik.ee/>.

⁶⁹⁰ See Sein, K., 'Private Enforcement of Competition Law – the Case of Estonia' (2013) 6(8) *Yearbook of Antitrust and Regulatory Studies*, p. 139.

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COUNTRY FACTSHEET- GREECE

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Abbreviations used

CPC	Code of Civil Procedure
ECN	European Competition Network
EETT	National Telecommunications and Post Commission
EU	European Union
GDC	General Directorate of Competition
HCC	Hellenic Competition Commission
ICN	International Competition Network
NCA	National Competition Authority
RAE	Regulatory Authority for Energy
TEC	Treaty on the European Community
TFEU	Treaty on the Functioning of the European Union

1 Overview of the National Legal Framework

As with the other legal systems in continental Europe which are based on Roman law the sources of law that underpin the Greek legal order are very specific. Under Article 26 of the Constitution, legislative power is vested in Parliament and the President of the Republic. Only these two state bodies have the power to legislate or to assign part of this power to other state bodies.

The highest form of binding law in the Greek state is the Constitution⁶⁹¹. The present Constitution was adopted in 1975 and underwent minor amendments in 1986, 2001 and 2008. It is the apex of the pyramid of the Greek legal system. Immediately below the Constitution are the laws adopted by Parliament. The right of legislative initiative rests with Parliament and the Government. In accordance with Article 28 of the Constitution, generally acknowledged rules of international law and international conventions that have been ratified and entered into force, form an integral part of domestic Greek law. They take precedence over any provision of law that contradicts them.

Under Article 43 of the Constitution, the President of the Republic, acting on the proposal of the competent Minister, issues the decrees necessary to implement the laws and may not suspend the implementation of laws or exempt anyone from their application. For the regulation of more specific matters, matters of local interest and matters of a technical or detailed nature, regulatory decrees may be issued on the basis of special authorisation given by law, within the limits laid down in the authorisation; Regulatory acts may be issued by other administrative bodies. Under Article 1 of the Civil Code⁶⁹² (which is a legislative Act), “the rules of law are contained in legal acts and customs.” However, in the Greek legal system the role of custom as a source of law is negligible, if not non-existent. Unlike the Anglo-Saxon system, court rulings do not constitute a source of law. The courts interpreting existing laws and their rulings are nevertheless an important source of interpretation of the law.

Under Article 87 of the Constitution, justice is administered by courts composed of regular judges who enjoy functional and personal independence. In line with the principle of the separation of powers, justice is independent of the legislative and executive powers. The judicial powers are exercised by courts of law, the decisions of which shall be executed in the name of the Greek People. Further information on the court structure in Greece is provided in Section 4 below.

2 National Legislation establishing competition law rules

This section provides an overview of national legislation establishing competition law rules. Table 2.1 presents a list of relevant competition law instruments in Greece

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
Law 3959/2011 on the Protection of Free Competition (Νόμος 3959/2011 για τον Ελεύθερο Ανταγωνισμό) ⁶⁹³	15 April 2011, entry into force 20 April 2011 (upon its publication in the Official Government Gazette)
Law 703/1977 on the Control of Monopolies and Oligopolies, and on the Protection of Free Competition (Νόμος 703/1977 - Περί ελέγχου μονοπωλίων και ολιγοπωλίων και προστασίας του ελεύθερου ανταγωνισμού) ⁶⁹⁴	Entry into force 26 March 1978 Abolished and replaced by Law 3959/2011

⁶⁹¹ Available online at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggluko.pdf>

⁶⁹² Available online version of the Greek Civil Code (in Greek) at the following link:

<http://www.ministryofjustice.gr/site/kodikos/%CE%95%CF%85%CF%81%CE%B5%CF%84%CE%AE%CF%81%CE%B9%CE%BF%CE%91%CE%A3%CE%A4%CE%99%CE%9A%CE%9F%CE%A3%CE%9A%CE%A9%CE%94%CE%99%CE%9A%CE%91%CE%A3/tabid/225/language/el-GR/Default.aspx>

⁶⁹³ Available at <http://www.epant.gr/nsubcategory.php?Lang=gr&id=240>

2.1 General legislation

Free competition is currently regulated in Greece by Law 3959/2011 on the Protection of Free Competition (hereafter '2011 Law'), abolishing and replacing the previous Law 703/1977 on the Control of Monopolies and Oligopolies and on the Protection of Free Competition (hereafter '1977 Law'). Both laws are based upon European legislation on the matter. The new Competition Act preserved the structure of the former 1977 Law, keeping intact, with only minor grammatical and technical changes its core substantive law provisions, namely Article 1 on restrictive agreements and Article 2 on the abuse of a dominant position.⁶⁹⁵ Articles 1 and 2 of the 2011 Law are generally applicable provisions prohibiting anticompetitive behaviour and abuse of dominance, accordingly. Their wording is a literal translation of the equivalent Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereafter 'TFEU') which were originally introduced before Greece joined the EU and has remained unaltered until today.⁶⁹⁶

In more detail, Article 1(1) of the 2011 Law, echoing Article 101(1) TFEU, prohibits anti-competitive agreements and concerted practices that have as their object or effect the prevention, restriction or distortion of competition in the Greek territory. Undertakings⁶⁹⁷ caught within the scope of Article 1(1) may be exempted under Article 1(3) of the 2011 Law, as any prohibition may be declared inapplicable to agreements and concerted practices that contribute to improving the production or distribution of goods, or to promoting technical and economic progress, provided that they also allow consumers a fair share of the resulting benefit, only impose restrictions indispensable to achieving those objectives and do not permit the elimination of competition.

Likewise, Article 2 of the 2011 Law, echoing Article 102 TFEU, prohibits an undertaking holding a dominant position from abusing it through either exclusionary practices (predatory pricing, price discrimination, fidelity rebates, tying, bundling, refusal to supply, margin squeeze, etc) or exploitative practices (excessive pricing, unfair trading conditions, etc).

Principle of extraterritoriality

Under Article 46, the 2011 Law is applicable to all restrictions of competition that have or may have an effect in Greece, even if those restrictions result from agreements, decisions or concerted practices between undertakings or associations of undertakings concluded, taken or practised outside Greece or by undertakings or associations of undertakings that do not have an establishment in Greece.

2.2 Industry-specific legislation

It is worth noting that, under Article 3 of Law 3592/2007 on the licensing of media undertakings, which was published in July 2007⁶⁹⁸, special provisions are set in relation to the application of competition law on restrictive trade practices that take place between media undertakings, specifically prohibiting concerted practices in the sector whose object or effect is to restrict competition in any way through indirect advertising or the fixing of advertising rates.⁶⁹⁹ This industry-specific legislation contains provisions on the

⁶⁹⁴ ^ Ibid

⁶⁹⁵ OECD, Annual report on competition policy developments in Greece 2011 available at [http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR\(2012\)16&docLanguage=En](http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR(2012)16&docLanguage=En)

⁶⁹⁶ Yannikas C., *The European Antitrust Review 2014 - Greece Overview*, Global Competition Review 2013, available at <http://globalcompetitionreview.com/reviews/53/sections/179/chapters/2095/>

⁶⁹⁷ No definition of undertaking exists under the Greek legislation

⁶⁹⁸ Law 3592/2007 on the licensing of media undertakings, Official Journal A 161, 19 July 2007

⁶⁹⁹ Nissyrios A., *The application of competition regulation - Greece*, Global Competition 2013, available at http://www.martindale.com/members/Article_Atachment.aspx?od=994737&id=1777882&filename=asr-1777922.pdf

implementation of the Electronic Communications Directive 2002/77/EC on competition in the markets for electronic communication networks and services⁷⁰⁰.

3 The National Competition Authority

This Section describes the National Competition Authority (hereafter 'NCA') in Greece, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Hellenic Competition Commission

The responsibility for the enforcement of the 2011 Law lies with the Hellenic Competition Commission (HCC), which is also the NCA for the application of the equivalent EU provisions (Articles 101 and 102 TFEU). Law 2296/95 established the Competition Commission as an independent authority with administrative autonomy, and law 2837/2000 awarded it financial autonomy.⁷⁰¹ Under Law 3959/2011, as amended by Article 19(2) of Law 4013/2011⁷⁰², the HCC is recognised as having legal personality. Its members enjoy personal and operational autonomy in carrying out their duties, bound only by the law and their conscience. The HCC is supervised by the Minister of Development, Competitiveness, Infrastructure, Transport and Networks.

3.2 The reform of the Hellenic Competition Commission

The 2011 Law introduced significant amendments concerning, *inter alia*, the organisation and operation of the Hellenic Competition Commission, the prioritisation of cases, the administrative and criminal penalties for violations, as well as several procedural rules. The amendments served the following objectives⁷⁰³:

- the harmonisation of Greek legislation with European standards and the modernisation of the operations of HCC,
- the strengthening of the deterrent effect of sanctions,
- the empowerment of the authority to intervene in whole sectors of the economy,
- the institutional strengthening of HCC
- the enhancement of the effectiveness of its actions.

3.3 Composition and decision-making

The Hellenic Competition Commission consists of two bodies: the General Directorate for Competition (hereafter 'GDC') which is essentially conducting the investigations, and the HCC Board which is the decision-making arm of the Authority. Under Article 12(2) of the 2011 Law, HCC board consists of eight members, of whom six are full-time appointees (the chairman, the vice chairman and four commissioners).⁷⁰⁴ HCC Board members shall be individuals of recognised standing, as well as of scientific formation and professional ability in law and in economics, particularly as regards competition-related matters.

The four commissioners, who are members in the HCC board, also serve as Rapporteurs assigned to supervise the drafting of the Report – Proposal for each case that is introduced to the HCC for resolution. The report can take the form of a statement of objections, a rejection of a complaint or a recommendation that no further action is needed. In the context

⁷⁰⁰ Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communication networks and services [Official Journal L 249, 17.09.2002].

⁷⁰¹ Available at <http://www.epant.gr/content.php?Lang=en&id=85>

⁷⁰² This Law sets up the Uniform Independent Public Contracts' Authority but also amends certain provisions of the 2011 Law regarding the HCC status.

⁷⁰³ OECD, Annual report on competition policy developments in Greece 2011 available at [http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR\(2012\)16&docLanguage=En](http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR(2012)16&docLanguage=En)

⁷⁰⁴ The current composition is available at <http://www.epant.gr/content.php?Lang=en&id=86>

of drafting each Report – Proposal, the Commissioner-Rapporteur is assisted by members of the Directorate-General assigned to that specific case.⁷⁰⁵

3.4 Cooperation with other entities

3.4.1 Cooperation with other National Regulatory Authorities

The Competition Commission co-operates with the competent authorities that monitor special sectors of the economy, such as the National Telecommunications and Post-Services Commission (E.E.T.T.) and the Regulatory Authority for Energy (R.A.E.).

Collaboration at national level can take the form of coordinating work to deal with common issues, sharing of documents and exchanging practices and experiences between NCA and the other regulatory bodies.

3.4.2 Cooperation at European and International levels

The Hellenic Competition Commission co-operates closely with the Directorate General for Competition of the European Commission and with the National Competition Authorities of the other member states of the EU, mainly through the European Competition Network (ECN).

3.5 Investigations

HCC has the competence to begin an investigation either *ex officio* (on its own initiative in cases of public interest) or on the basis of a complaint lodged by a third party having a legitimate interest (usually competitor, supplier or customer).

On 12 January 2010, the HCC issued a Notice on Enforcement Priorities, with a view to improving the efficiency of its enforcement action while also increasing transparency and accountability of the public authorities. In accordance with the HCC's notice, the President introduces before the HCC Board the cases meeting those priority criteria, following a recommendation by the General Directorate.⁷⁰⁶

The 2011 Law outlines in detail the investigative powers of the General Directorate which are generally in line with those of the European Commission. The chairman of the HCC issues a written mandate which defines the scope and legal basis of the investigation, and also mentions the sanctions applicable in case the enterprise fails to cooperate. The investigations which are carried out by the General Directorate shall be in accordance with constitutional provisions safeguarding the rights of the involved parties. If an enterprise fails to comply with the investigation procedures, non compliance may result to severe administrative and criminal sanctions.⁷⁰⁷ HCC may impose a fine and the General Directorate may request the assistance of the Prosecuting Authorities. Individuals who obstruct an investigation are punished with imprisonment and a fine.

It is also possible that criminal courts impose criminal sanctions for anticompetitive behaviour in case there is a violation of 2011 Law or articles 101 and 102 TFEU. The range of pecuniary fines or imprisonment sentences depends on the type of violation. Under article 44 of the 2011 Law, participation in horizontal agreements is subject to imprisonment of at least 2 years and criminal fines from € 100,000 to € 1,000,000. A violation in vertical agreements could lead to a fine ranging from €15,000 to €150,000. The criminal fines in violations concerning abuse of dominance range from € 30,000 to € 300,000.

⁷⁰⁵ Loukas D, and Nteka L., *The Memorandum of Understanding on specific economic and competition policy conditionality for granting financial assistance : Greek point of view*, Bulletin e-Competitions May 2010, Art. N° 37517

⁷⁰⁶ *Ibid*

⁷⁰⁷ Yannikas C., *The European Antitrust Review 2014 - Greece Overview*, Global Competition Review 2013, available at <http://globalcompetitionreview.com/reviews/53/sections/179/chapters/2095/>

Pursuant to Article 14 (2) of the 2011 Law, a new internal management tool in the form of a "point-system" is established with a view to facilitate the prioritization of cases to be investigated by the General Directorate. In particular, the General Directorate shall investigate pending cases according to their ranking on the basis of a point system, which essentially exemplifies and quantifies the priority criteria set out in the Notice. Each case shall be awarded points based on that system. The ranking of individual cases may be revised, where deemed reasonable, by decision of the Director General, upon approval by the HCC Board.

3.6 Decision-making

Under 2011 Law, the deadlines for the issuance of decisions have been extended from 6 months to 12 months, with a possibility of an extension by 2 additional months in order to facilitate the smooth resolution of investigations within a reasonable and more flexible timeframe. The deadline starts from the introduction of each case to the HCC Board, following its prioritization if the relevant criteria of the Notice and the point system are satisfied. As soon as the investigation is concluded, the General Directorate of Competition assesses the findings of the investigation and proceeds, in cooperation with one of the commissioner-Rapporteurs, to draft a recommendation (similar to a statement of objections) to the HCC. Such recommendation is notified to the parties involved, in order to express their position both orally and in writing before the HCC with a view to respect the right of prior hearing.⁷⁰⁸

Following the submission of statements by the involved undertakings, the HCC issues its Decision, which may or may not accept the Statement of Objections by the GDC. The Rapporteur at the HCC to whom a case is assigned, has no longer a voting right on the final decision taken by the HCC. This new provision under 2011 Law ensures that none of the officials involved in the investigation of a case is among those issuing the decision, with a view to guarantee the right to a fair trial. At the date of the final decision the HCC publishes a press release with the main points of its Decision.⁷⁰⁹

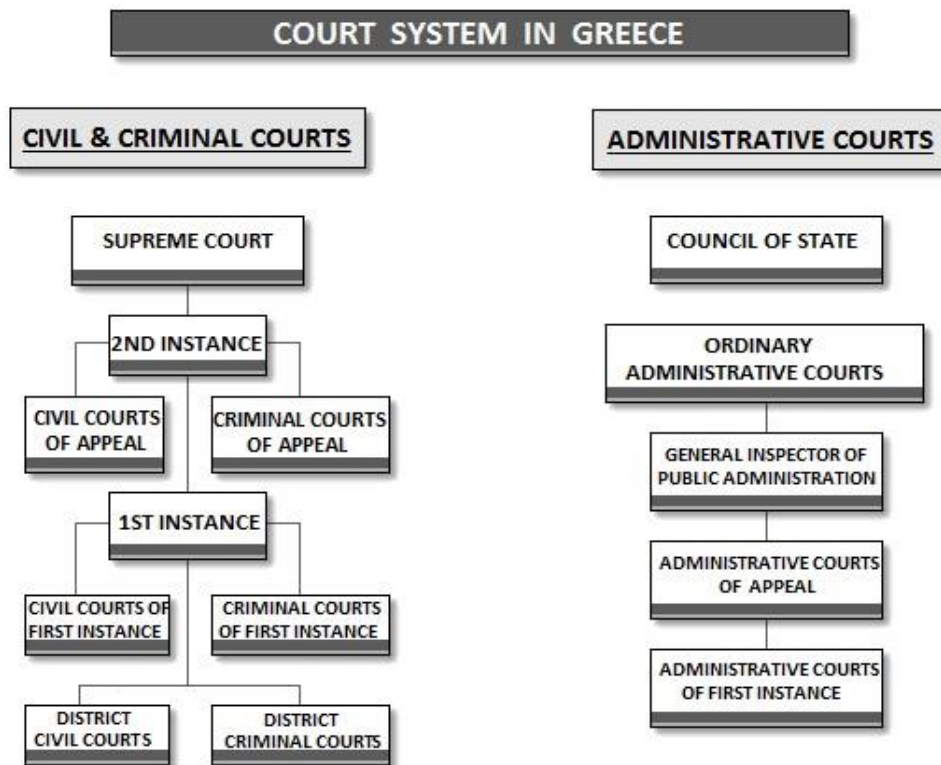
4 Competent courts

This Section provides an overview of the competent courts in Greece.
The Court system is presented in Figure 4.1 below.

⁷⁰⁸ Loukas D, and Nteka L., *The Memorandum of Understanding on specific economic and competition policy conditionality for granting financial assistance : Greek point of view*, Bulletin e-Competitions May 2010, Art. N° 37517

⁷⁰⁹ Fotis P., *Firm's damages from antitrust & abuse of dominant position investigations*, MPRA Paper No. 32788, 2011, available at http://mpra.ub.uni-muenchen.de/32788/1/MPRA_paper_32788.pdf

Figure 4.1 Court system in Greece



Source: Ministry of Justice website⁷¹⁰

The civil and administrative courts, relevant for competition law cases which are competent for Article 101 and Article 102 TFEU cases, are described in turn in the subsections below.

4.1 Civil courts

All private disputes are referred to civil courts,⁷¹¹ including cases of voluntary (non-contentious) jurisdiction⁷¹² assigned to these courts by law. Civil courts include:

1. The Supreme Court (Άρειος Πάγος);
2. Courts of Appeal (εφετεία);
3. Courts of First Instance with several judges (πολυμελή πρωτοδικεία);
4. One-member Courts of First Instance (μονομελή πρωτοδικεία) (as further explained in Section 5.3.2 below);
5. District Civil Courts (ειρηνοδικεία) which are competent in the First Instance if the amount claimed does not exceed the threshold of €20000.

For **private enforcement**, civil courts are competent for hearing actions including actions for damages resulting from the violation of competition law rules. The case begins either in the District Civil Courts or in the Courts of first instance depending on money thresholds. The judgment can then be appealed to the Courts of Appeal which tries cases both on legal and on factual issues and subsequently the Supreme Court which deals only with questions of law and not of fact (Court of Cassation).

⁷¹⁰ Available at http://www.ministryofjustice.gr/site/Portals/0/images/OrganogramaDikastirion_trans.gif. Translated by national expert.

⁷¹¹ Available at https://e-justice.europa.eu/content_ordinary_courts-18-el-maximizeMS-en.do?member=1

⁷¹² Non-contentious proceedings are listed in Articles 782-866 of the CPC

4.2 Administrative courts

Administrative Courts are responsible for resolving administrative disputes between government administration and citizens. Ordinary administrative courts include Administrative Courts of First Instance (διοικητικά πρωτοδικεία) and Administrative Courts of Appeal (διοικητικά εφετεία):

- **Administrative courts of first instance** sit as a one or three-member panel, depending on the monetary value of the dispute. They hear taxation cases, disputes between individuals and social security or social policy organisations and administrative disputes between citizens and national or local government. Three-member administrative courts of first instance also hear appeals against rulings by one-member administrative courts of first instance.
- **Administrative courts of appeal** hear appeals against rulings by three-member administrative courts of first instance. They also rule in the first instance on petitions for annulment of administrative acts relating to the employment of civil servants (dismissals, failure to appoint or promote, etc.).
- **The General Inspector of Public Administration** is an institution forming part of the ordinary administrative courts. The Inspector is responsible for inspecting the administration of administrative courts and lodging appeals against their rulings.
- **The Council of State** (Συμβούλιο της Επικρατείας) hears cases including: petitions for annulment of administrative acts for breach of law, abuse of power, lack of competence or formal omission; appeals by civilian, military, government and other personnel against rulings by staff councils (υπηρεσιακά συμβούλια) on promotion, dismissal, demotion, etc.; petitions for review of rulings by administrative courts.

For **public enforcement actions** (judicial review), HCC decisions can be appealed to the Athens Administrative Court of Appeal, which has exclusive jurisdiction to exercise a full review of their merits. A further appeal on points of law (cassation) can be filed with the Council of State.

The new Act provides that specialised competition chambers can be established at the Athens Administrative Court of Appeals, the aim being to further enhance the effectiveness of judicial review. These chambers have not yet been established.

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings related to breaches of competition law rules in Greece.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in Greece is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Any natural or legal person	Any natural or legal person
How can an action be filed?	A two-stage process applies. Undertakings may challenge the decisions of the HCC at first Instance at the Administrative Court of Appeal. They can then appeal the decision to the Council of State	An action can be filed to the civil courts which are generally competent to decide on private law disputes under Article 94(2) of the Constitution

With which authorities can the action be filed?	Athens Administrative Court of Appeal (First Instance); Council of State (Second Instance)	District Civil Courts if the amount claimed does not exceed €20000 or the Civil Courts of first instance if the amount claimed exceeds €20000.
Burden of proof	Each party bears the burden of proving its claims	The burden of the proof lies with the claimant, while the defendant has to prove the truth of the defences he presents.

5.2 Judicial Review Proceedings

This Section describes the judicial review proceedings for competition law cases in Greece.

5.2.1 Rules applicable to the judicial review of NCA decisions

Under Article 30 of the 2001 Law, decisions issued by the HCC are, at the first stage, subject to appeal (προσφυγή) before the Athens Administrative Court of Appeal. Subsequently, under Article 32, the decisions of this Administrative Court of Appeal may be challenged before the Council of State, the supreme administrative court of Greece, which is competent to review their legitimacy on points of law and, in particular, the procedure or jurisdiction.

5.2.2 Competent Court

The decision of the HCC may be challenged before the administrative judge in two instances. Therefore, respective competent Courts are the Athens Administrative Court of Appeal and the Council of State.

5.2.3 Timeframe

Article 30 of the 2011 Law specifies that the decisions of the HCC may be appealed before the Athens Administrative Court of Appeal within 60 days from their date of service. Similarly, the decisions of Athens Administrative Court of Appeal may be appealed before the Council of State within 60 days in the second instance. Both appeals lodged before the Athens Administrative Court of Appeal and the Council of State are to be heard as a matter of priority (Articles 30(4) and 32(3)). Adjournment is possible once only for sufficient reason to a hearing date which is nearest to the one initially scheduled (e.g. when an individual was not summoned to appear in court).

5.2.4 Admissibility of Evidence

Each party bears the burden of proving its claims. Available means of evidence are exhaustively listed by the Greek legislation: confession, documents, inspection, expert opinion, examination of litigants and witnesses, legal presumptions. Witnesses' cross examination is permissible. Expert evidence is also admissible in the hearing of the case.

5.2.5 Interim Measures

The filing of the appeal does not suspend the enforceability of the HCC decision; yet such enforcement may be suspended, in whole or in part, for serious reason, following application of the interested party, by the court, acting in council.

5.2.6 Rulings of the court

Pursuant to Article 93(2) of the Constitution, the sittings of all courts shall be public, except when the court decides that publicity would be detrimental to the good usages or that special reasons call for the protection of the private or family life of the litigants. Moreover, every court judgment must be specifically and thoroughly reasoned and must be pronounced in a public sitting. The Administrative Court of Appeal examines both the legality and the substance of the decision, which may be annulled in total or in part. This includes the reduction of the fine, something which is not unusual at all (e.g. in approximately 20 cases which fall under the scope of the study). Fines can only be suspended for up to 80% of the amount (unless the HCC decision is deemed manifestly unfounded, in which case the total

amount can be suspended). The annulment of an HCC decision, which is not as frequent, can be the result of non-compliance with administrative procedural rules. However, in second instance the Council of State may not deal with errors of fact or proceed to examine the case anew.⁷¹³

5.3 Follow-on Proceedings (private enforcement)

This Section describes the follow-on proceedings for competition law cases in Greece.

5.3.1 Rules applicable to follow-on procedures

In Greece, there are no specific provisions in place governing private antitrust litigation, i.e., legal actions brought by one private party against another party before a national court seeking damages for an injury suffered as a result of an antitrust violation.

Therefore, these actions are regulated by the general provisions of Greek law on the award of damages in civil proceedings, namely the Greek Civil Code.⁷¹⁴

5.3.2 Competent Court

Civil courts have competence to decide on private law disputes under Article 94(2) of the Constitution. The basic rule of territorial jurisdiction is that the court is determined by either the area (city, prefecture) where the defendant is domiciled/has its registered address (Article 22 CPC) or the area where the harmful event occurred or may occur (Article 35 CPC). Legal entities capable of being involved in legal proceedings are subject to the competence of the court in whose region their seat is located. A first instance ordinary court, which does not have territorial jurisdiction may, with the express or tacit consent of the parties, become competent except in the case of disputes which do not relate to assets. This agreement must be express in the case of disputes where exclusive competence rules apply. Tacit agreement is considered to exist if the defendant attends the first hearing in open court and does not raise a plea on lack of competence in due time. Agreement between the parties making an ordinary court competent for future disputes is valid only if drawn up in written format and reference is made to a specific legal relationship from which those disputes arise.

The jurisdiction of courts is determined by the value of the claim in the vast majority of cases. Where several claims are raised in the same action they are all taken into account. If the value of the claim is below the €20,000 threshold, the lawsuit must be filed at the District Civil Court (Article 14(1a) CPC); if the amount claimed is above that threshold but below that of €120,000, the lawsuit must be filed at the Civil Court of First Instance, with a single judge panel (Article 14(2) CPC); if it is above that sum, the lawsuit must be filed at the Civil Court of First Instance, with a three-judge panel.

5.3.3 Timeframe

As a general rule, the limitation period for bringing damages actions before the civil courts in Greece is five years from when the injured party became aware of the damage incurred by him/her and of the party liable for such damage (Article 937 of the Greek Civil Code). In any event, the claim is time-barred after 20 years have elapsed from the date that the unlawful act was committed.

⁷¹³ Nissyrios A., *The application of competition regulation - Greece*, Global Competition Review 2013 available at http://www.martindale.com/members/Article_Attachment.aspx?od=994737&id=1777882&filename=asr-1777922.pdf

⁷¹⁴ Economou A. and Bourtzalas E., *Study on the conditions of claims for damages in case of infringement of EC competition rules - Greece Report*, available at the following link: http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/greece_en.pdf

5.3.4 Admissibility of evidence

Each party has to prove the facts which, in case they have actually happened, are the conditions for the award of the remedy sought. So, essentially the burden of the proof lies with the claimant, while the defendant has to prove the truth of the defences he presents. Greek law recognizes only specific means of evidence: confession, documents, inspection, expert opinion, examination of litigants and witnesses, legal presumptions. Witnesses' cross examination is permissible and expert evidence is also admissible in the hearing of the case.

5.3.5 Interim Measures

According to Article 682 of the CPC, interim measures are ordered:

(i) in case of urgency or if the courts estimate that this is necessary for the prevention of imminent danger for the purpose of securing or preserving a right or the purpose of regulating a situation; and

(ii) if it is reasonably supposed that the measure will serve to temporarily protect a specific right in need of protection, given the existence of adequate preliminary evidence to substantiate the claim and justify the ordering of the measure.

Full proof of the facts surrounding the case is not required for a court to order interim measures.

The mere belief of the court in the possibility that the above conditions are met would suffice for the interim measures to be granted.

5.3.6 Rulings of the court

With a follow on action, the remedies provided by the court can take the following forms:

- 'Award of damages;
- Declaratory judgment concerning the void character of anticompetitive agreements.
- Order to cease and desist.⁷¹⁵

5.3.7 Rules applicable to the enforcement of court judgments

An enforceable title is a public document which certifies the claim and grants the claimant the right to demand compliance by the debtor with the content of the enforceable title. The necessary elements are the existence of the title and the validity of the claim.

Enforcement officers are divided into direct and indirect enforcement officers. Direct officers are appointed by the petitioning creditor. They are a) bailiffs, who are unsalaried public officers with the authority to take action to seize goods in the debtor's possession, seize property, ships or aircraft belonging to the debtor, effect direct enforcement, arrest debtors whose imprisonment has been ordered and prepare auctions, b) notaries, or justices of the peace substituting for them, who have the authority to conduct the voluntary or forced auction of the debtor's assets seized and to distribute the proceeds by drawing up a classification list. Indirect officers are the police, the armed forces and the bailiff's witnesses who collaborate when resistance to enforcement is offered or threatened. All these officers are responsible for any culpable breach of their obligations in the performance of their duties.

Substantive conditions for enforcement are the existence of a legitimate interest, i.e. the need for the act of enforcement and the legal protection it provides and the validity of the claim.⁷¹⁶

The purpose of the law of enforcement is to balance conflicting interests between creditors on the one hand and debtors or third parties on the other in the circumstances. The criteria which the courts apply in order to grant an enforcement measure are:

- swift satisfaction of creditors at little cost;

⁷¹⁵ Drakakakis S, *Competition Litigation 2014 - Greek Chapter*, ICLG 6th edition, available at <http://www.iclg.co.uk/practice-areas/Competition%20Litigation/competition-litigation-2014/greece>

⁷¹⁶ Available at http://ec.europa.eu/civiljustice/enforce_judgement/enforce_judgement_gre_en.htm

- protection of the debtor's rights of personality and legitimate interests in general;
- coincidence of the creditor's and the debtor's interests as regards the need to achieve the best possible price at auction;
- protection of third party interests.

5.4 Alternative dispute resolution mechanisms

Engaging in alternative dispute resolution prior to trial used to be mandatory and failure to attempt such resolution rendered the claim itself inadmissible under the Greek Code of Civil Procedure. However, this provision was recently amended by Law 3994/2011 'on the rationalisation and improvement of the award of civil justice and other provisions',⁷¹⁷ which abolished the mandatory nature of alternative dispute resolution. Under Article 214A of the Greek Code of Civil Procedure, as amended, the parties have the right, but not the obligation, to attempt to resolve the dispute extra-judicially prior to trial or at any stage of the proceedings before the issuance of a final court decision.⁷¹⁸

An ADR mechanism which has proven more operative in Greece is arbitration whose conditions are laid down in Chapter Seven of the CPC (Articles 867 to 903). All private law disputes, other than those relating to the provision of dependent labour, can be taken to arbitration, provided that the parties to the arbitration have the authority to dispose freely of the subject-matter of the dispute. The parties can make even future disputes subject to arbitration, but in that case the agreement must be in writing and refer to a specific legal relationship from which disputes may originate. An agreement to submit to arbitration may also be made before a court during the hearing of a case. One or several persons or even an entire court may be appointed as arbitrators.

On December 2010, the Law 3898/2010 on Mediation was voted by the Greek Parliament. This law adapts Greek legislation to EU Mediation Directive 52/2008/EC. It applies to any mediation regarding civil and commercial disputes which take place in Greece regardless to whether a claim is a cross-border one or not. According to the Greek Law, 'Mediation is a structured process, whereby two or more parties attempt to resolve a dispute on a voluntary basis, with a view to reaching an agreement on the settlement of with the assistance of a mediator.'

6 Contextual Information

This Section presents contextual information on the judicial system in Greece.

6.1 Duration and cost of competition law cases

6.1.1 Duration of cases

With regard to public enforcement cases (judicial review), under the 2011 Law, both appeals lodged before the Athens Administrative Court of Appeal and the Council of State are to be heard as a matter of priority (Articles 30(4) and 32(3)).⁷¹⁹ In the event of an adjournment for a serious reason which is permitted only once, the new hearing date must be the nearest possible to the initial one.

Private enforcement litigation proceedings before the courts can be considerably lengthy. 'Experience has shown that, except for injunctive measures, it may take from one to two

⁷¹⁷ Law 3994/2011 'on the rationalisation and improvement of the award of civil justice and other provisions' published in the Official Gazette on 25 July 2011

⁷¹⁸ Androulakakis M. and Chasioti M. , *Private Antitrust Litigation - Greek Chapter*, European Lawyer Reference Series 2013, available at http://www.bernitsaslaw.com/static/publication_files/19/private-antitrust-litigation-greek-chapter-2013.pdf?1369132890

⁷¹⁹ Nissyrios A., *The application of competition regulation - Greece*, Global Competition Review 2013, available at http://www.martindale.com/members/Article_Atachment.aspx?od=994737&id=1777882&filename=asr-1777922.pdf

years from filing a claim for an action to be scheduled for hearing by the court and, in case of adjournment (which is common in Greece), it could take another year for the case to be heard. The court would usually issue its judgment within six months from the hearing.⁷²⁰ However, courts may adjourn the hearing if the action is materially related to another lawsuit which is pending in relation to the same dispute which, in the court's discretion, should first be completed in order for the suspended case to be heard (Article 249 of the CPC).

6.1.2 Cost of cases

According to the provisions of Article 176 et seq. of the CPC, the most common practice is that the costs associated with bringing an action before the civil courts are borne by the defeated party. 'If the case is not fully won by either party, the Court may decide to split the judicial costs between both parties at its discretion. It is also possible, although not common in practice, that the Court may (in whole or in part) offset the costs (this would usually apply when the case involves a dispute between spouses or other relatives).'⁷²¹

It shall be noted that Law 3226/2004 on legal aid to low income citizens and other provisions' entitles low income individuals to legal aid in order to cover their legal costs. This is also envisaged in Articles 194 et seq. of the CPC.

Upon judicial review of NCA decisions imposing a fine to an undertaking, fines can only be suspended for up to 80% of the amount. The total amount can be suspended only if the HCC decision is deemed manifestly unfounded.

6.2 Influencing Factors

No specific factors which influence the application of (EU) competition law rules in Greece could be identified.

6.3 Obstacles/Barriers

Excessive length of proceedings in civil and administrative courts is considered a serious barrier existing in Greece in relation to access to justice. In private enforcement, the period from commencing an action to subsequent judgment is quite long and the delivery of a court judgment can be further delayed for the following reasons:⁷²²

- i. 'If the action is materially related to a private dispute which is the subject of another pending trial before a tribunal or other authority, the court may decide to adjourn the hearing until a final or irrevocable judgment has been issued in relation to the pending trial or the competent administrative authority (e.g. the HCC) has issued a decision that cannot be challenged (Article 249 of the CPC).
- ii. If the outcome of the case is materially affected by the outcome of parallel criminal proceedings,⁷²³ the court may adjourn the hearing of the civil action until the penal court has issued a final and unappealable decision (Article 250 of the CPC).
- iii. If the court requests the repetition of a hearing in order to clarify and fill-in missing points (Article 254 of the CPC).
- iv. If the hearing is adjourned following a party's request, a right which may be exercised only once per party (Article 241 of the CPC)
- v. If other unpredictable incidents take place, such as judges' strikes. Usually, when a hearing is adjourned, the new hearing date is scheduled to take place between six months to one year after depending on the court and the level of jurisdiction.'

⁷²⁰ Androulakis M. and Chasioti M. , *Private Antitrust Litigation - Greek Chapter*, European Lawyer Reference Series 2013, available at http://www.bermitsaslaw.com/static/publication_files/19/private-antitrust-litigation-greek-chapter-2013.pdf?1369132890

⁷²¹ ^ Ibid

⁷²² ^ Ibid

⁷²³ As explained above, criminal sanctions can also be imposed for anti-competitive behaviour in Greece

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COUNTRY FACTSHEET - FINLAND

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Abbreviations used

EA	Energy Authority
EU	European Union
FCA	Finnish Competition Authority
FCCA	Finnish Competition and Consumer Authority
FICORA	Finnish Communications Regulatory Authority
FSA	Finnish Financial Supervisory Authority

1 Overview of the National Legal Framework

The national legal system of Finland draws from the Civil Law system. Finland is part of the Nordic legal culture and its legal system has common features with other Nordic systems.

The legal system is based on the hierarchy of norms, which is as follows (in reverse hierarchical order):

1. the Constitution of Finland and the international treaties protecting human rights which are ratified by Finland
2. Acts (of Parliament) and international statutes that have been enacted at the same level as Acts of Parliament
3. Decrees issued by the President of the Republic, the Council of Ministers or Ministries
4. Legal rules and provisions issued by lower-ranking State authorities.

The Constitution of Finland (731/1999) includes 131 Sections which are divided into 13 chapters. It was recently amended and, in its new form, came into force on 1 March 2000. In the process of reforming the Constitution, four Acts that were hierarchically at the same level as the Constitution (i.e. highest source of law, constitutional acts) were compiled into one Act⁷²⁴.

Chapter 9, Sections 98–105, of the Constitution provides for the administration of justice. The Finnish Court system is divided into two parts: general courts and administrative courts. More information on the structure of the Finnish Court system is provided in Section 4.

The Åland Islands are autonomous. The Acts enacted by the Parliament of Finland are valid in the Åland Island with the exception of Åland's laws that are adopted by the Provincial Parliament under the Act of Autonomy of Åland. Hence, all laws enacted by the Parliament of Finland (including the legislation on competition law) are applicable also as such in Åland Islands.

2 National Legislation establishing competition law rules

This Section presents the national legislation in Finland establishing competition law rules.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
<i>Kilpailulaki 948/2011</i> Competition Act	12.8.2011, came into force 1.11.2011
<i>Laki kilpailunrajoituksista 480/1992</i> Act on Competition Restrictions	27.5.1992, came into force 1.9.1992, was repealed by the Competition Act.
<i>Laki kilpailunrajoituksista 709/1988</i> Act on Competition Restrictions	29.7.1988, came into force 1.10.1988; repealed by the Act on Competition Restrictions (480/1992)

2.1 General legislation

Already since the 1950s Finland adopted laws concerning restrictions on competition. However, the legislation concerning protection of competition in the free market economy is still quite new. Until the 1980s, competition rules were very closely linked to the economic

⁷²⁴ The Constitution repealed the following Constitutional Acts: the Constitution Act of Finland (17 July 1919), the Parliament Act (13 January 1928), the Act on the High Court of Impeachment (25 November 1922) and the Act on the Right of Parliament to Inspect the Lawfulness of the Official Acts of the Member of the Council of State, the Chancellor of Justice and the Parliamentary Ombudsman (25 November) 1922.

policy in Finland, with an emphasis on State control over prices⁷²⁵. The State-driven competition policy changed as the Act on Competition Restrictions (709/1988) was introduced. However, already in 1992 the Act was amended due to the rapid change of the market environment (e.g. the disintegration of the Soviet Union and the depression in Finland in the 1990s) with the adoption of the Act on Competition Restrictions (480/1992). In addition, EU competition law provisions had to be also taken into account.

The Finnish competition legislation has been significantly reformed in the past few years. This reform was implemented through the adoption of the Competition Act (948/2011), which came into force on 1 March 2011. The new Competition Act replaced the previous Act on Competition Restrictions (480/1992). The old Act on Competition Restrictions was substantially equivalent to the new Competition Act, but due to several amendments, the structure of the Act as well as some of its concepts were not comprehensive enough anymore. In addition, one of the objectives of the reform was to continue harmonising the national legislation with EU law. The main reforms of the new Competition Act concerned the procedures (Chapter 5), the system of sanctions and damages (Chapter 3) and merger control (Chapter 4).

The purpose of the Competition Act according to Section 1 is the protection of sound and effective economic competition from harmful practices. Section 2 of the Act provides limitations in its scope of application, according to which the Act will not apply to agreements or arrangements which concern the labour market. In addition, according to Section 2 of the Competition Act, Section 5 (prohibited agreements between undertakings⁷²⁶) shall not apply to certain arrangements by agricultural producers or associations, mirroring Article 42 TFEU.

Sections 5 and 7 of the Competition Act (948/2011) mirror Articles 101 and 102 TFEU. Section 5 prohibits restraints on competition between undertakings. According to Section 5 all agreements between undertakings, decisions by associations of undertakings and concerted practices by undertakings which have as their object the significant prevention, restriction or distortion of competition or which result in a significant prevention, restriction or distortion of competition shall be prohibited. Whereas Article 101 TFEU prohibits all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition, Section 5 of the Competition Act states that agreements which have as their object or effect the *significant* prevention of competition shall be prohibited. Thus, there is a slight difference between the wording of the provisions, but as the Court of Justice of the European Union has repeatedly ruled, for the restriction to fall under the scope of Article 101 TFEU, it must have an *appreciable effect* on competition⁷²⁷. The exemptions provided in Article 101(3) TFEU are mirrored as such in Section 6 of the Competition Act. Section 7 concerns abuse of dominant position, following the wording of Article 102 TFEU.

According to Section 3 of the Competition Act, when a restraint on competition *may* affect trade between the EU Member States, the provisions of Articles 101 and 102 TFEU shall also apply.

2.2 Industry-specific legislation

There is no industry-specific competition legislation in Finland, but the National Competition Authority, the Finnish Competition and Consumer Authority (FCCA), cooperates closely with the ministries responsible for certain sectors such as energy. More detailed information on the cooperation between different authorities is provided below in Section 3.4.1.

⁷²⁵ *Leivo et al.*: EU:n ja Suomen kilpailuoikeus (Helsinki 2012), p. 1312.

⁷²⁶ According to Section 4 of the Competition Act (948/2011), an undertaking is defined as a natural person, and one or more private or public legal persons, who engage in economic activities. When amending the Competition Act, the concept of 'undertaking' was revised to be equivalent to the concept used in EU competition law (*Leivo et al.*; EU: n ja Suomen kilpailuoikeus (Helsinki 2012), p. 1321.

⁷²⁷ *Leivo et al.*: EU:n ja Suomen kilpailuoikeus (Helsinki 2012), p. 1325.

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in Finland, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Finnish Competition Authority

The Finnish Competition Authority (FCA) was established in 1988 by the Act on Competition Restrictions (709/1988). The Act provided the Competition Authority with the competence to monitor compliance with its provisions.

3.2 The reform of the Finnish Competition and Consumer Authority

On 1.1.2013 the Finnish Competition and Consumer Authority (FCCA) began its operations. The authority was created by joining the Finnish Competition Authority (FCA) and the Finnish Consumer Agency. The objective was to increase the social significance of competition and consumer issues as well as improve the efficiency of the administration. The responsibilities of the joined authorities remained unchanged⁷²⁸.

According to Section 1 of *Laki kilpailu - ja kuluttajavirastosta (661/2012)* (Act on the Finnish Competition and Consumer Authority) the FCCA is legally mandated, amongst others, to implement both competition and consumer policy, ensure good market performance, implement competition legislation and EU competition rules and secure the financial and legal position of the consumer. In addition, the FCCA handles the supervision responsibilities of the Consumer Ombudsman.

3.3 Composition and decision-making

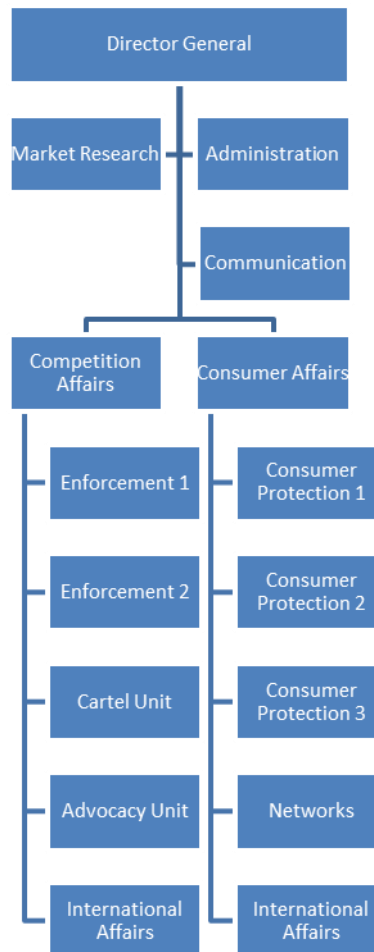
According to Section 3 of the Act on the Finnish Competition and Consumer Authority, the Authority is led by a Director General who is appointed by the Council of State. In addition, there are two Directors appointed by the Council of State: the Director of the Competition Division and the Director of the Consumer Division.

The following departments operate under the Competition Division: Enforcement 1, Enforcement 2, Cartel Unit, Advocacy Unit and International Affairs.

The organisation of the Finnish Competition and Consumer Authority is described in Figure 3.1 below.

⁷²⁸ For further information, please see the website of the Finnish Competition and Consumer Authority, available at <http://www.kkv.fi/Page/71661344-b9e9-49f2-bdc0-c533afea001a.aspx>.

Figure 3.1 Organisation of the Finnish Competition and Consumer Authority



The FCCA Director General is competent to issue a decision on the cases falling within the scope of the FCCA, unless another authority is competent according to the legislation and standing orders. In practice, decisions are prepared by the different FCCA units and the Director General issues his/her decision upon the proposal of the competent unit. The Director General can also decide on internal organisation issues (e.g. concerning allocation of work) and can substitute lower organs (e.g. the Director) in their decision-making powers⁷²⁹.

3.4 Cooperation with other entities

3.4.1 National cooperation

The Regional State Administrative Agencies act as competition authorities in their region. According to Section 41 of the Competition Act (948/2011), the Regional State Administrative Agencies shall investigate the conditions of competition and any restraints on competition, and by mandate of the FCCA, take other measures to promote competition within their region. It should be noted that the Regional State Administrative Agencies only have the power to *investigate* possible restrictions on competition; they do not have a right to decide whether the relevant competition law provisions have been infringed but rather inform the FCCA of the results of their investigation.

⁷²⁹ Section 3 of the Act on the Competition and Consumer Authority (661/2012).

The FCCA cooperates closely with the Finnish Communications Regulatory Authority (FICORA). On 14 March 2003 the FCCA and the FICORA signed a co-operation memorandum⁷³⁰, which clarified the division of labour between the agencies and encouraged consumers to turn directly to the authority that is best equipped to handle a potential competition concern. The cooperation was to benefit especially the users of telecom services. The FICORA is responsible for market definition and analyses related to cases involving entities of significant market power in accordance with the principles that are traditionally used in competition law reviews⁷³¹. The FICORA was considered to be better equipped to assess questions related to reasonable pricing and the FCCA competition restraints. The authorities have agreed to exchange information when needed; accordingly, the FCCA can submit to the FICORA a confidential document, obtained or drafted by the FCCA in the process of carrying out its duties, if it is necessary in order for the FICORA to attend to its duties⁷³².

The Energy Authority (EA) monitors the activities in the electricity and natural gas market and ensures the realisation of climate goals in Finland. The FCCA and the EA have also signed a joint memorandum on the practical forms of cooperation between the two authorities concerning the monitoring of the electricity and natural gas markets⁷³³. The FCCA and the EA regularly exchange information on open files and other investigations within the field of energy. Pursuant to Section 39 of the Competition Act, the FCCA has the right to submit to the EA a confidential document, obtained or drafted by it in the process of carrying out its duties, if it is necessary in order for the EA to attend to its duties.

Pursuant to Section 23(2) of the Competition Act, a concentration, to which the provisions of Chapters 3 to 10 of the Employee Pension Insurance Companies Act (354/1997); Chapter 11 of the Act on Pension Fund Act (1774/1995); Chapter 12 of the Insurance Fund Act (1250/1987); Chapter 11 of the Pension Foundation Act (1774/1995) or Chapter 12 of the Insurance Fund Act (1164/1992) apply, shall be notified to the FCCA after the parties to the concentration have been informed of the approval of the Finnish Financial Supervisory Authority (FSA), or if the FSA is not opposing the concentration. A notification is not necessary if the FSA in accordance with the acts cited, has requested a statement from the FCCA about the concentration and in its statement the FCCA has found that no impediment for the approval of the concentration exists. The FCCA has the right to submit a confidential document to the FSA if it is necessary in order for the FSA to perform its duties⁷³⁴.

3.4.2 International cooperation

The FCCA is part of the European Competition Network with the European Commission and the National Competition Authorities of the Member States. In addition, the FCCA and the competition authorities of Sweden, Norway, Denmark, Iceland, the Faroe Islands and Greenland participate in the Nordic cooperation. Finland is also represented by the FCCA in the OECD Competition Committee as well as in the International Competition Network (ICN)⁷³⁵.

Pursuant to Section 40 of the Competition Act, the procedure for submitting a confidential document that the FCCA possesses to a foreign competition authority is laid down in section 30 of the Act on the Openness of Government Activities.

⁷³⁰ Cooperation memorandum of FCA (now FCCA) and FICORA: <http://www.kilpailuvirasto.fi/cgi-bin/suomi.cgi?luku=tiedotteet&siivu=tied/t-2003-06> (available only in Finnish).

⁷³¹ Section 17 of the Communications Market Act (393/2003).

⁷³² Section 39 of the Competition Act (948/2011).

⁷³³ The joint memorandum of the FCCA and EA is available at <http://www.kilpailuvirasto.fi/cgi-bin/suomi.cgi?siivu=kivi-emv-muistio-2006> (available only in Finnish).

⁷³⁴ Section 39 of the Competition Act (948/2011).

⁷³⁵ 'The FCCA and international cooperation', available at <http://www.kilpailuvirasto.fi/cgi-bin/suomi.cgi?luku=kv-yhteisty&siivu=kv-yhteisty>.

3.5 Investigations

The FCCA is competent to investigate restraints on competition and the effects thereof⁷³⁶. It initiates the necessary proceedings if it finds that an undertaking or association of undertakings restraints competition in a manner referred to in Sections 5 or 7 of the Competition Act or Articles 101 or 102 TFEU and if the initiation of the proceedings is necessary to safeguard effective competition in the market.

The FCCA investigates competition restraints either on its own initiative or on the basis of complaints. The complaints can be made anonymously on the website of the FCCA⁷³⁷.

However, according to Section 32 of the Competition Act the FCCA shall prioritise its tasks and therefore restraints with only minor impact on competition might not be investigated or stated to meet the so-called *de minimis* criteria.

3.6 Decision-making

As mentioned above, the FCCA investigates restraints on competition and the effects thereof⁷³⁸. The FCCA can intervene in different ways if an undertaking's behaviour restricts competition. If a restraint on competition is prohibited under Sections 5 or 7 of the Competition Act or under Articles 101 or 102 TFEU the FCCA may:

- order that the undertaking or association of undertakings terminate the conduct prohibited under Sections 5 or 7 or Articles 101 or 102 TFEU; and
- oblige the undertaking to provide a product to another undertaking on similar conditions as offered by that undertaking to other undertakings in a similar position⁷³⁹.

Before 1 May 2004 these competences belonged to the Market Court instead of the FCCA.

If the restraint on competition must be stopped at once, the FCCA may issue an interlocutory injunction to that effect⁷⁴⁰. The FCCA shall make a decision on the principal issue⁷⁴¹ or submit a proposal for the imposition of a penalty payment for the restraint on competition to the Market Court within 60 days of issuing an interlocutory injunction⁷⁴². Prior to issuing an interlocutory injunction or an obligation, the FCCA must grant the undertaking or association of undertakings the opportunity to be heard, unless the urgency of the matter or some other reason demands otherwise. The FCCA may impose a periodic penalty payment to enforce the conditions it has set⁷⁴³. However, it is the Market Court that can order a periodic penalty payment to be paid. The FCCA may require that the commitments submitted by undertakings⁷⁴⁴ or associations of undertakings involved in a suspected infringement shall be binding on them, if the commitments are such that the restrictive nature of the conduct can be eliminated.

A penalty payment is imposed for a restraint on competition by the Market Court upon the proposal of the FCCA. The FCCA is also competent to decide about the reduction of penalty payments in cartel cases. The FCCA has the right to invite a representative of an undertaking or associations of undertakings who is suspected of having acted in a way that restricts competition, to appear before it⁷⁴⁵. The conditions concerning the invitation to

⁷³⁶ Section 31 of the Competition Act (948/2011).

⁷³⁷ Available at:

<http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=antitrust%2Fmakingacomplaint&sivu=makingacomplaint>

⁷³⁸ Section 31 of the Competition Act (948/2011).

⁷³⁹ Section 9 of the Competition Act (948/2011).

⁷⁴⁰ Section 45(1) of the Competition Act (948/2011).

⁷⁴¹ Section 45(2) of the Competition Act (948/2011).

⁷⁴² Section 12(3) of the Competition Act (948/2011).

⁷⁴³ Section 46 of the Competition Act (948/2011).

⁷⁴⁴ Section 10 of the Competition Act (948/2011).

⁷⁴⁵ Sections 34–36 of the Competition Act (948/2011).

appear are laid down in the Administrative Procedure Act (434/2003). In addition, the FCCA or an official of a Regional State Administrative Agency is empowered to conduct an inspection on the business premises or other premises of the undertaking. The FCCA must inform the undertaking under investigation of its position in the investigation and what it is suspected of⁷⁴⁶. In addition, the undertaking has the right to receive the information as soon as possible without jeopardising the investigation about the restraint on competition.

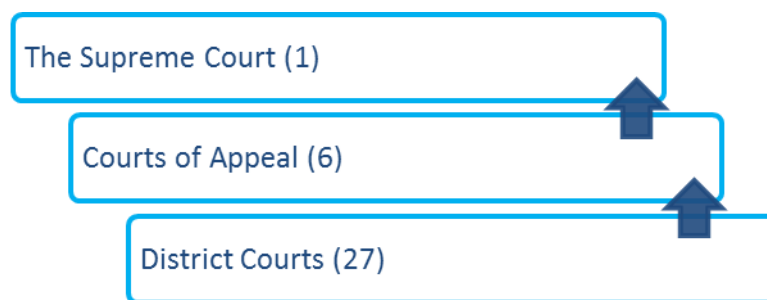
The decision of the FCCA is communicated to the parties of the decision but also published on the website of the FCCA⁷⁴⁷.

4 Competent courts

The judicial administration in Finland consists of the courts of law, the prosecution service, enforcement authorities, the Criminal Sanction Agency and Bar Association and the other venues of legal aid.

The Court system consists of a tripartite system of General Courts and Administrative Courts⁷⁴⁸. All courts (including the Supreme Court) can rule on matters of fact and of law.

Figure 4.1 Court system in Finland



General Courts deal with criminal and civil cases. The decisions made by District Courts can normally be appealed before a Court of Appeal. The Court of Appeal decisions can be appealed before the Supreme Court, provided that the Supreme Court grants a leave to appeal.

The ever increasing backlog of cases brought before the Supreme Court was addressed in 1980 by introducing the 'leave-to-appeal' system, which meant the Courts of Appeal became the last instance in many cases⁷⁴⁹. The Supreme Court may grant a leave to appeal: a) if it would be necessary to have a decision by the Supreme Court for the application of the law or to ensure consistency of the case-law; b) if there was a procedural error in the proceedings before the lower instance court which could lead to the reversal of the judgment; c) if there is another important reason to grant the leave to appeal. The application for a leave to appeal must be submitted within 60 days from the day the decision of the Court of Appeal is delivered. Within that period, a letter of appeal addressed to the Supreme Court, comprising the application for the leave and the appeal itself, must be delivered to the registry of the Court of Appeal. Any documents referred to in the letter of appeal must be attached to it. The application for the leave to appeal must indicate the grounds on which the leave is being sought, as well as the reasons which substantiate his/her request⁷⁵⁰.

⁷⁴⁶ Section 38 of the Competition Act (948/2011).

⁷⁴⁷ The website of the FCCA: <http://www.kkv.fi/fi-FI/>.

⁷⁴⁸ At the time, there is an ongoing major reform of the court system. Several Courts of Appeal and Administrative Courts will be merged in the beginning of year 2014.

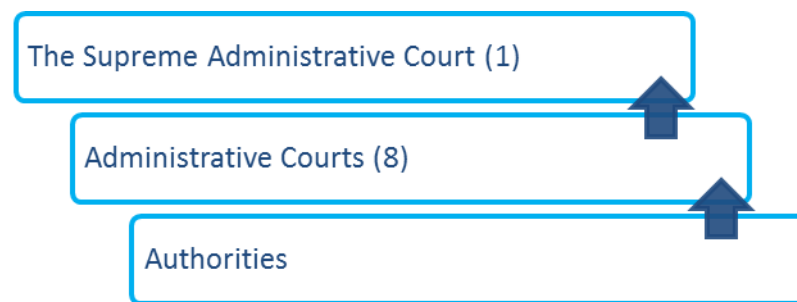
⁷⁴⁹ The Supreme Court's webpage: <http://www.korkeinoikeus.fi>.

⁷⁵⁰ Chapter 30, Section 3 of the Code of Judicial Procedure (4/1734).

A District Court is headed by the Chief Judge; the other judges have the title ‘District Judge’. In certain cases, the District court may also have Lay Judges. The cases are handled and resolved either in a session, where the parties are summoned to, or in chambers, where the decision is based solely on documents. In simple cases decisions can be made by the trainee district judge and by trained office staff. The District Courts are located in 27 towns throughout Finland.

Courts of Appeal are located in the provinces; there are 6 Courts of Appeal throughout Finland.

The Supreme Court is located in Helsinki. The President and other members (Justices) of the Supreme Court are appointed by the President of the Republic of Finland. The Supreme Court has a President and at least 15 members; at present the Supreme Court consists of 17 members⁷⁵¹.



Administrative courts review the decisions of State authorities. Administrative courts’ decisions can be appealed before the Supreme Administrative Court. Concerning some issues, such as taxes, the Supreme Administrative Court must first grant leave to appeal.

Administrative Courts are situated in the provinces. The Supreme Administrative Court is situated in Helsinki. The judges of the Supreme Administrative Court include the President and twenty Justices, as well as a few temporary Justices. The Supreme Administrative Court has about 40 *referendaires* (law clerks) and 40 other employees. They are headed by the Secretary General⁷⁵².

Appeals against the decisions of Administrative Courts can be lodged with the Supreme Administrative Court⁷⁵³. However, in certain instances such an appeal is not possible (‘appeal – ban’). Such a ban applies, e.g. to some traffic violation matters. For other matters, a leave-to-appeal system also exists with respect to the Supreme Administrative Court, i.e. the court hears and decides the case only if itself first grants a leave to appeal. A leave to appeal is required especially in taxation matters and in certain social welfare matters. However, the leave-to-appeal system does not concern competition law cases⁷⁵⁴. The time limit for an appeal to the Supreme Administrative Court and for requesting leave to appeal is 30 days from the date of the administrative court’s decision is served.

There are **three special courts** in Finland: the Market Court, the Labour Court and the Insurance Court. In addition, the High Court of Impeachment deals with charges brought against a member of the Council of Ministers.

⁷⁵¹ The webpage of the Supreme Court: <http://www.kko.fi/index.htm>.

⁷⁵² The Supreme Administrative Court’s webpage: <http://www.kho.fi/fi/index.html>.

⁷⁵³ Chapter 1, Section 9 of the Administrative Judicial Procedure Act (586/1996).

⁷⁵⁴ The webpage of the Supreme Administrative Court: <http://www.kho.fi/fi/index/asiointikhossa/muutoksenhaku.html>.



Generally, **decisions made by the FCCA are appealed before the Market Court**. In some cases, however, it is the Market Court that issues the first decision which can be challenged by the undertakings concerned. These cases include: 1) penalty payments that are imposed for a restraint on competition by the Market Court upon the proposal of the FCCA; 2) prohibition of a merger upon the proposal of the FCCA; 3) periodic penalty payments that the Market Court orders to be paid; and 4) the advance permission that the FCCA must seek from the Market Court to conduct an inspection.

As there is only one Market Court in Finland, its jurisdiction is nationwide. The Market Court's decisions can be appealed to the Supreme Administrative Court. The head of the Market Court is the Chief Justice who is accompanied by 20 Justices. In addition, there are also two Market Court Engineers and six *referendaires* (law clerks)⁷⁵⁵.

Private enforcement proceedings follow the General Courts' appeal system where the first instance is the District Court. Decisions made by the District Court can be appealed to the Court of Appeal. This decision can be appealed to the Supreme Court, given that the Supreme Court grants leave to appeal. At present, there have been no private enforcement cases which have reached the Supreme Court.

In private enforcement proceedings such as actions for damages resulting from the violation of competition law rules, competent is the District Court of the place where the legal entity is registered or where the administration of the legal entity is primarily conducted⁷⁵⁶. Claims against the State in private enforcement proceedings are considered by the District Court with jurisdiction for the place where the authority representing the State is located⁷⁵⁷.

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings related to breaches of competition law rules in Finland.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in Finland is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Any person to whom a decision is addressed or whose right,	Any natural or legal person who has suffered damages

⁷⁵⁵ The webpage of the Market Court: <http://www.markkinaoikeus.fi>.

⁷⁵⁶ Chapter 10, Section 2(1) of the Code of Judicial procedure (4/1794).

⁷⁵⁷ Chapter 10, Section 2(2) of the Code of Judicial procedure (4/1794).

	Judicial Review	Follow on
	obligation or interest is directly affected by the FCCA decision	
How can an action be filed?	First the decision may be challenged to the Market Court. The Market Court's decision can be appealed to the Supreme Administrative Court. However, since decisions imposing penalty payments are imposed by the Market Court instead of the FCCA, they are challenged for the first time to the Supreme Administrative Court.	An action may be filed with the District Court. The decision can be then appealed to the Court of Appeal and afterwards to the Supreme Court, provided that the Supreme Court grants a leave to appeal.
With which authorities can the action be filed?	The Market Court; the Supreme Administrative Court	The District Court, the Court of Appeal; the Supreme Court
Burden of proof	The burden of proof rests with the FCCA	The burden of proof rests with the applicant

5.2 Judicial Review Proceedings

This Section presents judicial review proceedings in Finland.

5.2.1 Rules applicable to the judicial review of NCA decisions

According to Section 44 of the Competition Act a decision adopted by the FCCA on the basis of the Act may be appealed to the Market Court, as prescribed by the Administrative Judicial Procedure Act. However, as decisions imposing penalty payments are adopted by the Market Court rather than the FCCA, they are challenged for the first time before the Supreme Administrative Court⁷⁵⁸. The Administrative Judicial Procedure Act (586/1996), which draws from and refers to the Code of Judicial Procedure (4/1734), regulates how the judicial proceedings are to be conducted.

5.2.2 Competent Court

The decision of the FCCA may be challenged before the Market Court and the Supreme Administrative Court.

5.2.3 Timeframe

Pursuant to Section 22 of the Administrative Judicial Procedure Act (586/1996) an appeal shall be lodged within 30 days of notice of the decision. When calculating this period, the day of notice shall not be included. The same applies to the appeals challenging the Market Court's decision.

5.2.4 Admissibility of Evidence

In Finland administrative courts of all instances evaluate freely the evidence presented before them, with a few exceptions provided mainly in the Code of Judicial Procedure (4/1734). After having carefully evaluated all the evidence presented, the court will decide what is to be regarded as the truth in the case⁷⁵⁹. When there is a special provision in law on the significance of a piece of evidence, this shall apply.

⁷⁵⁸ Section 44 of the Competition Act (948/2011).

⁷⁵⁹ Chapter 17, Section 2 of the Code of Judicial Procedure (4/1734).

In general, the appellant may not refer to circumstances and evidence other than the one presented to the lower courts, unless the appellant can establish that he/she could not have referred to the circumstances or evidence in a lower court or that he/she otherwise had justified cause not to do so. However, if the appellant wishes to present new evidence in support of the appeal, he/she shall indicate the evidence and what he/she intends to prove with it and for what reason the evidence in question has not been presented earlier⁷⁶⁰. This means that, if the aforementioned conditions are met, the appellant can submit before the Market Court / Supreme Administrative Court new evidence not considered during the proceedings before the FCCA or the Market Court respectively. In addition, where necessary, an oral hearing shall be conducted for the purpose of establishing the facts of the case where the parties, the appellate authority, witnesses and other experts may be heard⁷⁶¹.

5.2.5 Interim Measures

The FCCA may issue an interlocutory injunction if a restraint on competition must be prevented at once⁷⁶². The FCCA may also temporarily oblige an undertaking to provide products to another undertaking under similar conditions as offered by that undertaking to other undertakings. The FCCA must make a decision on the principal issue or a proposal for the imposition of a penalty payment on the restraint on competition under Section 12(3) of the Competition Act to the Market Court within 60 days of issuing an interlocutory injunction. Upon the FCCA application within that period the Market Court may extend the time limit.

The Market Court may issue interim measures but since the FCCA's competence has been widened in relation to the competition cases, the interim measures the Market Court issues are more related to cases concerning, e.g. industrial property rights.

5.2.6 Rulings of the court

The Market Court can either uphold or revoke the decision made by the FCCA and the Supreme Administrative Court can either uphold or revoke the decision made by the Market Court.

The Market Court proceedings are mainly written. Competition law cases can be brought before the Market Court: on the proposal of the FCCA (e.g. proposal to impose a fine on restraint on competition); an application by the FCCA (e.g. to conduct an inspection); or an appeal against a decision of the FCCA⁷⁶³. After the proposal or appeal has been filed with the Market Court, the Chief Judge or a Market Court Judge shall conduct a preliminary proceeding before the final proceedings, to enable a prompt decision to be made. Preliminary proceedings are not necessary if the matter is to be dismissed as inadmissible or is dismissed at once as unfounded⁷⁶⁴. The preliminary proceedings can be written or oral or in some cases even held via the phone.

The Market Court then holds a court session where the judge entrusted with preparing the case presents its finding to the other judges. However, a session is not necessary if the case will be dismissed without even considering its merits or if the case is settled. In addition, a court session is not necessary if the type of a matter does not require it.

The court may hold an oral hearing where necessary to establish the facts of the case or if a private party so requests. The parties, the authority, witnesses and experts may be heard in the oral hearing. The oral hearing may be limited to only a part of the matter or aim to clarify the parties' opinions or to receive oral evidence. However, the oral hearing requested by a party need not to be conducted if the claim is dismissed without considering its merits or immediately rejected or if an oral hearing is manifestly unnecessary in view of the nature of

⁷⁶⁰ Chapter 30, Section 7 of the Code of Judicial Procedure (4/1734).

⁷⁶¹ Chapter 7, Section 37 of the Administrative Judicial Procedure Act (586/1996).

⁷⁶² Section 45 of the Competition Act (948/2011).

⁷⁶³ Section 36 of the Competition Act (948/2011).

⁷⁶⁴ Section 42 of the Competition Act (948/2011).

the matter. The same applies to the proceedings before the Supreme Administrative Court. If the oral hearing concerns only a part of the matter, the proceeding will then continue afterwards in writing⁷⁶⁵.

If the whole matter is concluded in an oral session (even though this is very unusual) the court may issue its decision already after the oral session. However, normally the decision is delivered in a written form in the registry of the Market Court or the Supreme Administrative Court. The parties will receive copies of the decision by post.

5.3 Follow-on Proceedings (private enforcement)

This Section presents follow-on proceedings in Finland.

5.3.1 Rules applicable to follow-on procedures

Pursuant to Section 20 of the Competition Act, an undertaking or association of undertakings that, either intentionally or negligently, violates the prohibitions prescribed in Section 5 or 7 of the Competition Act, or Articles 101 and 102 TFEU, is obliged to compensate the damage caused by his acts. In addition to the provisions of the Competition Act, the general principles of contract law and the Tort Liability Act (412/1974) also stipulate rules that are applicable to follow-on procedures. However, it should be noted that when it comes to competition law-related cases, the provisions of the Competition Act are most commonly used, i.e. reference to the general principles of Contract law or the Tort Liability Act, which is a *lex generalis*, is less common⁷⁶⁶.

The main provisions concerning the way judicial proceedings on private enforcement actions are conducted are found in the Code of Judicial Procedure (4/1734).

5.3.2 Competent Court

Competent to adjudicate follow-on actions are: the District Courts (at first instance); the Courts of Appeal (at second instance); and the Supreme Court (at third and final instance) provided that the court grants a leave to appeal.

5.3.3 Timeframe

The right to compensation shall expire if the action for damages has not been instituted within 10 years from the date that the violation occurred or, in case of continuous infringements, within 10 years from the date on which the violation ended. If the claim for damages is based on a restraint on competition referred to in Section 20(1) of the Competition Act for which the FCCA has already ruled upon, or on a restraint on competition for which the FCCA proposed to the Market Court the imposition of a penalty payment, the right to damages shall not be prescribed until one year has passed from the date that the decision in the matter becomes valid (i.e. when the decision cannot be appealed).

5.3.4 Admissibility of evidence

Generally in Finland courts of all instances evaluate freely the evidence presented before them; only a few exemptions to this rule exist and are found mainly in the Code of Judicial Procedure (4/1734). According to the Code of Judicial Procedure (4/1734), Chapter 17, Section 2, after having carefully evaluated all the facts that have been presented, the court must decide what is to be regarded as the truth in the case. When there is a special provision in law on the significance of a piece of evidence, this shall apply.

In general, the appellant may not refer to circumstances and evidence other than the one presented to the lower instance courts unless the appellant can establish that he/she could not have referred to the circumstances or evidence in the previous instances or that he/she

⁷⁶⁵ Chapter 4, Section 11 and 14 of the Act on the Proceedings in the Market Court (100/2013), Chapter 5, Sections 10 and 14 of the Act on Proceedings in the Market Court (100/2013).

⁷⁶⁶ *Virtanen* (2001), p. 448

otherwise had justified cause not to do so. However, if the appellant wishes to present new evidence in support of the appeal, he/she shall indicate the evidence and what he/she intends to prove with and for what reason the evidence in question has not been presented earlier⁷⁶⁷.

In addition, experts can provide evidence at the hearing. If consideration of an issue requires special professional knowledge the court shall obtain a statement on this question from an agency, a public official or another person in the field or entrust the giving of such a statement to one or more experts in the field who are known to be honest and competent⁷⁶⁸.

5.3.5 Interim Measures

Pursuant to Chapter 7 of the Code of Judicial Procedure (4/1734) certain precautionary measures can be imposed by the courts. If the applicant can demonstrate that it is probable that he/she holds a debt that may be rendered enforceable by a decision of the court and that there is a danger that the opposing party may hide, destroy or convey his/her property or take another action that may endanger the payment of the debt, the court may order the attachment of the debtor's real or movable property to an amount securing the debt⁷⁶⁹.

The decision to impose precautionary measures is made, on application, by a general court of law. The issue of precautionary measures shall be heard by the court where the proceedings on the main claim or right of the applicant are pending. If the hearing of the main issue has been concluded and the time provided for appeal has not yet lapsed, the application for precautionary measures shall be heard by the court that last dealt with the main issue⁷⁷⁰. The application for precautionary measures shall be submitted in writing. If the precautionary measures relate to pending proceedings, the application may be submitted orally at the hearing where the main issue is dealt with. The application shall be considered urgently. In addition, the application shall not be granted without giving to the opposing party an opportunity to be heard. However, if the purpose of the precautionary measures can otherwise be compromised, the court may, on the request of the applicant, give an interim order on precautionary measures without giving to the opposing party the right to be heard. The order remains in force until further notice⁷⁷¹.

5.3.6 Rulings of the court

With a follow-on action, the court (District Court, Court of Appeal, Supreme Court) can either oblige the defendant to pay compensation for the damages caused or dismiss the plaintiff's claim. The proceedings before the District Court and the Court of Appeal include a preparatory session which takes place in writing or orally (i.e. include a hearing). The matter can also be admitted to a main hearing if the case has been prepared in writing, if an oral preparatory session is unnecessary.

After the preparatory session, the main hearing which follows is oral. The decision of the court may either be handed down after the court's deliberations after the main hearing or be made available to the parties in the registry of the court (which is a more common practice). A judgment and a final order shall be issued within 30 days from the conclusion of the main hearing. However, if for special reasons the decision cannot be issued within the said period, it shall be issued as soon as possible⁷⁷².

The Supreme Court's procedure is often written. Where necessary, the Supreme Court shall hold an oral hearing where the parties, witnesses and expert witnesses may be heard and other information examined. The oral hearing may be restricted to a part of the case on

⁷⁶⁷ Chapter 30, Section 7 of the Code of Judicial Procedure (4/1734).

⁷⁶⁸ Chapter 17, Section 44 of the Code of Judicial Procedure (4/1734).

⁷⁶⁹ Chapter 7, Section 1 of the Code of Judicial Procedure (4/1734).

⁷⁷⁰ Chapter 7, Section 4 of the Code of Judicial Procedure (4/1734).

⁷⁷¹ Chapter 7, Section 5 of the Code of Judicial Procedure (4/1734).

⁷⁷² Chapter 24, Sections 8 and 17 of the Code of Judicial Procedure (4/1734).

appeal⁷⁷³. The case is decided on the basis of the written trial documents, unless an oral hearing has been held⁷⁷⁴. The decision is normally issued in the registry of the court.

5.3.7 Rules applicable to the enforcement of court judgments

In case the defendant refuses to comply with the compensation order of the non-appealable judgment, the claimant can appeal for the enforcement of a judgment following the provisions provided in the Enforcement Code (705/2007).

The documents that serve as grounds for enforcement are, e.g. a court judgment in civil or criminal matter, a court order on precautionary measures or an order of an administrative court. Court decisions are normally enforceable at once. If a party has appealed the decision in the higher court, the court can order, either upon request or on its own motion, that the decision of the lower court is not to be enforced until further notice or order a stay of enforcement. District bailiffs and their deputies are responsible for enforcement⁷⁷⁵.

5.4 Alternative dispute resolution mechanisms

In cases amenable to settlement the court endeavours to persuade the parties to settle the case⁷⁷⁶. When the court deems it expedient in order to promote a settlement, considering the parties' wishes, the nature of the case and the other circumstances, it may also propose to the parties to amicably settle the case. The court may, especially during the preparation of the case, hold may propose to the parties to settle the case⁷⁷⁷.

There are competition law cases that have been first brought before the District Court which however were resolved through the settlement procedure. However, due to the 'closed doors' nature of the settlement procedures, detailed information is hard to provide⁷⁷⁸.

Parties to private enforcement proceedings can also settle their disputes by making recourse to general alternative dispute resolution mechanisms of arbitration (Arbitration Act 967/1992, *Laki välimiesmenettelystä 967/1992*) or mediation (Act 394/2011 on Court Mediation and Confirming Settlements in Courts, *Laki riita-asioiden sovittelusta ja sovinnon vahvistamisesta yleisissä tuomioistuimissa, 394/2011*).

6 Contextual Information

This Section presents contextual information relating to the judicial system in Finland.

6.1 Duration and cost of competition law cases

In 2012, the average time of hearing in the Market Court was 7.3 months. For public procurement the average duration of the hearing in the Market Court was 6.2 months and for cases concerning restraints on competition the average duration was 9.7 months⁷⁷⁹. It should be noted, however, that these statistics refer to all competition law cases dealt with by the Market Court, i.e. those applying both national and EU competition law rules, those dismissed on various grounds without discussing the merits of the case, etc.. Therefore, and

⁷⁷³ Chapter 30, Section 20 of the Code of Judicial Procedure (4/1734).

⁷⁷⁴ Chapter 30, Section 21a of the Code of Judicial Procedure (4/1734).

⁷⁷⁵ Chapter 2, Section 2 of the Enforcement Code (705/2007).

⁷⁷⁶ Chapter 5, Section 26 of the Code of Judicial Procedure (4/1734),

⁷⁷⁷ Chapter 5 Sections 26 and 27 of the Code of Judicial Procedure (4/1734).

⁷⁷⁸ *Aine*, Kilpailuoikeuden yksityisoikeudellisen soveltamisen kehityssuuntia, DL 4/2012, p. 441.

⁷⁷⁹ The Market Court's webpage: <http://www.markkinaoikeus.fi/fi/index/markkinaoikeus/tilastojajakasittelyajat.html>; the webpage of the Ministry of Justice: http://oikeusministerio.fi/fi/index/julkaisut/julkaisuarkisto/1366349071214/Files/OMTH_21_2013_Tyotilastot_2012.pdf.

in view of the fact that competition law cases applying Articles 101/102 TFEU are usually the most complex ones, the length of these proceedings is higher than the average one.

The court fees to bring a case before the Market Court amount to EUR 226⁷⁸⁰.

The court fees to bring a case before the District Courts are different depending on the nature of the case: for criminal cases and appeals under the Enforcement Act they are EUR 80; however no fees are collected in criminal cases that are prosecuted by the public prosecutor. The court fees for civil cases and land court cases are: EUR 80, when the case is concluded within the written preparatory stage; EUR 113, when the case is concluded within the oral preparatory stage; EUR 147 when the case is concluded in a main hearing with a single judge; EUR 182 when the case is concluded in a main hearing with the full court; EUR 60 when the case is concluded with a default judgment, the particulars of which have been entered directly in the data system⁷⁸¹.

The costs for bringing a case to the Supreme Court are: EUR 113 for criminal cases; however if the decision of a lower court is amended to the advantage of the appellant, no court fees are collected; EUR 226 for all other cases. When a petition for extraordinary appeal is turned down or leave to appeal is not granted, only 50% of the charge is collected.

The court fees to institute proceedings before the Supreme Administrative Court are EUR 226. When a petition for extraordinary appeal is turned down or a leave to appeal is not granted, only 50% of the charge is collected.

Legal proceedings in Courts of Appeal cost: EUR 80 in petitionary matters that pertain to the everyday life of people, such as divorce and inheritance; EUR 90 in criminal cases (however, if the decision of a lower court in a criminal case is amended to the advantage of the appellant, no processing charge is collected); EUR 182 in all other cases.

The fee to bring a case before Administrative Courts is EUR 90⁷⁸².

The average duration of cases brought before Court of Appeals was 6 months in 2012; before Administrative Courts, the average duration in 2012 was 7.7 months. In District Courts, the average duration for criminal cases was 3.6 months and for civil cases 8.8 months. In 2012, the average duration for cases heard by the Supreme Court was 17.5 months and by the Supreme Administrative Court 12.8 months⁷⁸³.

6.2 Influencing Factors

No specific factors influencing the application of competition law rules were identified in Finland.

6.3 Obstacles/Barriers

Generally the process is considered to be very long that there must be serious incentives to take legal action. In addition, even though the court fees are not that high, the overall costs are massive, considering how long it takes for a case to be resolved at final instance.

As the burden of proof rests with the applicant, the damages and causality are hard to prove.

⁷⁸⁰ The webpage of the Market Court: <http://www.markkinaoikeus.fi/fi/index/markkinaoikeus/oikeudenkayntimaksu.html>.

⁷⁸¹ The Ministry of Justice's webpage on the Finnish judicial system: <http://www.oikeus.fi/5835.htm>

⁷⁸² <http://www.oikeus.fi/12749.htm>.

⁷⁸³ The webpage of the Ministry of Justice: http://oikeusministerio.fi/fi/index/julkaisut/julkaisuarkisto/1366349071214/Files/OMTH_21_2013_Tyotilastot_2012.pdf.

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COUNTRY FACTSHEET - FRANCE

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Abbreviations used

ECN	European Competition Network
ECHR	European Convention on Human Rights
EU	European Union
TI	Tribunal of Instance
TGI	Tribunal of Great Instance

1 Overview of the National Legal Framework

The French judicial system is a Civil Law system stemming from Roman Canon law and the emergence of natural law. It is a written law system based on the hierarchical organisation of norms, which supreme norm is the Constitution.

The current Constitution is the Constitution of the Fifth Republic adopted on 4 October 1958⁷⁸⁴. It is composed of 89 articles organised in 16 titles. Since the question of human rights and fundamental liberties was not tackled in its original text, a “constitutionality block” was brought out by the Courts, including amongst other things the preamble of the 1946 Constitution⁷⁸⁵, the declaration of human and citizen rights of 1789⁷⁸⁶, the Charter on environment⁷⁸⁷, the fundamental principles recognised by the laws of the Republic, and of principles and goals of constitutional value, which all provide for the respect of fundamental rights.

The hierarchy of current norms is thus dominated by the constitutionality block, followed by organic laws (which regulate the organisation of powers in France), orders (adopted by the government on matters normally regulated by laws) and laws, and regulations.

Justice is only targeted by three articles of the Constitution (articles 64, 65 and 66) which affirm the independence of the judicial authority and its role as guardian of individual liberty.⁷⁸⁸ Article 65 also organises the Superior Judicial Council, which guarantees the constitutional independence of the judicial authority.⁷⁸⁹ Further information on the court structure in France is provided in Section 4 below.

⁷⁸⁴ Available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/la-constitution-du-4-octobre-1958.5071.html>

⁷⁸⁵ Available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/preambule-de-la-constitution-du-27-octobre-1946.5077.html>

⁷⁸⁶ Available at <http://www.assemblee-nationale.fr/histoire/dudh/1789.asp>

⁷⁸⁷ Available at <http://www.legifrance.gouv.fr/Droit-francais/Constitution/Charte-de-l-environnement-de-2004>

⁷⁸⁸ *Thierry S. RENOUX, La place de la justice dans la Constitution de 1958*, available at : <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-de-1958-en-20-questions/la-constitution-en-20-questions-question-n-13.17360.html>

⁷⁸⁹ *Ibid.*

2 National Legislation establishing competition law rules

This Section provides an overview of national legislation establishing competition law rules. Table 2.1 presents a list of relevant competition law instruments in France.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
Order n° 86-1243 relating to freedom of prices and of competition	01 December 1986
Order n° 2000-912 relating to the legislative part of the Code of Commerce	18 September 2000
Law n° 2001-420 relating to new economic regulations	15 May 2001
Order n° 2004-1173 adapting some provisions of the Code of Commerce to Community competition law	04 November 2004
Decree n° 2005-1765	30 December 2005
Law n° 2008-776 modernising the economy	04 August 2008

6.4 General legislation

In French law, the first provisions regarding competition law were included in modified Order No. 45-1483 of 30 June 1945 relating to prices. As a consequence, illicit cartels and abuses of a dominant position were prohibited under the control of the competition Committee.⁷⁹⁰

Order No. 86-1243 of 1 December 1986 relating to freedom of prices and of competition recast French competition law by creating the Competition Council.⁷⁹¹ This Order was modified several times, notably by Law No. 92-1282 of 11 December 1992 which, in its Article 11, habilitates the Competition Council to apply Articles 85 to 87 TEC.⁷⁹²

This Order and its application decrees were codified in the Fourth Book of the Code of Commerce, namely in Articles L410-1 and following, and R410-1 and following.⁷⁹³

Law No. 2001/420 of 15 May 2001 relating to new economic regulations brought several modifications to the existing legal arsenal against anti-competition practices. Its main provisions consisted in the introduction of leniency and transaction procedures as well as the raise of maximum sanctions.⁷⁹⁴

Following the adoption of Council Regulation (EC) No. 1/2003 of 16 December 2002, the provisions of the Code of Commerce were modified by Order No. 2004-1173 of 4 November 2004 adapting certain provisions of the Code of Commerce to Community competition law.⁷⁹⁵ Law No. 2008-776 of 4 August 2008 modernising the economy brought the last modifications to the organisation of French competition law⁷⁹⁶.

⁷⁹⁰ Available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000516237&categorieLien=cid> :

⁷⁹¹ Available at : <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000333548>

⁷⁹² Available on : <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000178817>

⁷⁹³ Order n° 2000-912 of 18 September 2000 relating to the legislative part of the Code of Commerce, available on : <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000219662&dateTexte=&categorieLien=id>

⁷⁹⁴ Available on : <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000223114>

⁷⁹⁵ Available on : <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000787131&dateTexte=&categorieLien=id>

⁷⁹⁶ Available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019283050>

These Laws and Orders were all accompanied with various application decrees, amongst which Decree No. 2005-1765 of 30 December 2005⁷⁹⁷, on which more information is provided under Section 4 below.

Article L410-1 of the Code of Commerce provides that the rules of the fourth Book apply to all production, distribution and services activities, including when conducted by legal persons.

Article L420-1 of the Code of Commerce prohibits cartels and Article L420-1 prohibits abuses of dominant position. The wording of these provisions is the same as in Articles 101 and 102 TFEU.

The following provisions deal with the organisation and the powers of the competition authority and the different procedures applicable to guarantee the respect of Articles L420-1 and L420-2 of the Code of Commerce.

Article L470-6 specifies that the same procedures and powers are recognised to the competition authorities and to the minister in charge of the economy as regards the application of Articles 101 and 102 TFEU.

When it comes to the application of Articles L410-1 and L410-2, it is enough that the practice affects the French market, even if the practice did not take place on the French territory. When the practice is prosecuted in application of Articles 101 and 102 TFEU, it is enough that the practice affects trade between Member States, even if it did not have effects on the French territory, is not committed on the French territory and is the doing of enterprises that are not located on the territory.⁷⁹⁸

There is no specific provision relating to the allocation of damages to victims of anti-competitive practices which should base their actions on Articles 1147 and 1382 of the Civil Code. However, Article L420-3 of the Code of Commerce provides that any engagement, convention or contractual clause relating to a prohibited practice by Articles L420-1 and L420-2 is null. This provision thus allows an action for the recovery of sums paid but not due.

⁷⁹⁷ Available at

http://legifrance.gouv.fr/affichTexte.do;jsessionid=B158C82F200C8841B509F84DDAD80BAA.tpdjo09v_3?cidTexte=JORFTEXT000000268755&dateTexte

⁷⁹⁸ : Cons. Conc., n° 00-MC-14 du 23 octobre 2000, BOCCRF, 30 décembre, p. 840, available on : http://www.economie.gouv.fr/files/files/directions_services/dgccrf/boccrf/00_14/a0140022.htm

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in France, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Competition Council

The Competition Council was created by Order of 1st December 1986⁷⁹⁹, in replacement of the Competition Committee which already had a consultative power against cartels and abuses of dominant position. The Competition Council kept this consultative power, but more importantly, mainly acquired a litigation power regarding anti-competitive practices.

In the framework of this litigation procedure, the Competition Council could, originally, adopt three types of measures: it could adopt conservation measures in the event of serious and immediate breaches of competition law rules. It could take a sanction decision (injunctions, financial sanctions, and publication of the decision in the press). Finally, it could decide to forward the case to the Republic prosecutor when the breach of competition law rules resulted from fraudulent shams that could be criminally sanctioned.

The Competition Council did not have investigation powers, which is why a reform was subsequently launched.

3.2 The reform of the Competition Council: the creation of the Competition Authority

The law modernising the economy of 4 August 2008 suppressed the Competition Council and created the Competition Authority, which is defined as an independent administrative authority.

This authority was granted new powers, amongst which specific investigation powers, the power to control the execution of its own decisions, and a decision power as regards the control of concentrations (for which the Competition Council only had a consultative role).

In parallel to the implementation of instruction services within the Competition Authority, new procedural guarantees were created in order to improve the respect of parties' rights, including those guaranteed by the provisions of Article 6 § 1 of the European Convention on Human Rights (ECHR).

3.3 Composition and decision-making

The Competition Authority comprises a college of seventeen members, including one president designated by decree for a period of five years, upon a report of the minister in charge of the economy⁸⁰⁰.

The Competition Authority can sit in plenary or in sections, or in permanent committee⁸⁰¹. The President of the Authority sets the number and composition of each section⁸⁰². There are six different sections. Although the plenary is intended to examine the most important cases, each section can decide to refer a case to the plenary at any moment⁸⁰³.

The Competition Authority is also composed of a general rapporteur, deputy general rapporteurs, rapporteurs, investigators, a hearing officer, a leniency officer (since 1 September 2011) and a public rapporteur.

⁷⁹⁹ Available at http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=92FAEFCFD75DEB9248AD4EF61E8601078.tpdjo05v_2?cidTexte=JORFTEXT000000333548&dateTexte

⁸⁰⁰ Article L461-1 of the Code of Commerce

⁸⁰¹ Article L461-3 of the Code of Commerce

⁸⁰² Article R461-1 of the Code of Commerce

⁸⁰³ Article R461-7 of the Code of Commerce

The general rapporteur plays an essential role in the instruction since he leads it, appoints its members, evaluates the degree of protection necessary for the confidentiality of cases, and decides of the assessment by way of simplified procedure⁸⁰⁴. More importantly, the general rapporteur is the only one who can suggest the Competition Authority to take up of its own motion a case on facts likely to constitute an anti-competitive practice⁸⁰⁵.

3.4 Cooperation with other entities

The Competition Authority cooperates with its European and third-country counterparts, as well as with the European Commission. Article L462-9 of the Code of Commerce provides that the Competition Authority can, on matters falling under the scope of its competence, and after informing of the minister in charge of the economy, provide them with the information or documents in its possession, subject to reciprocity, and under the condition that the competent foreign authority is subject to professional secrecy under the same guarantees as in France. It can also conduct or request the minister in charge of the economy to conduct investigations upon request of foreign authorities with similar competence⁸⁰⁶.

The Competition Authority is also part of the European Competition Network (ECN), where it cooperates with the European Commission as well as with authorities of other Member States.

Finally, when it acts on the grounds of Articles 101 and 102 TFEU, the Competition Authority has an obligation to inform the European Commission in written form before its action – or without delays after the action – after it initiates its first formal investigation measure.

3.5 Investigations

The Competition Authority can be seized by the minister in charge of the economy, enterprises, local authorities, professional organisations and chambers, trade unions, consumer organisations with legal standing and mayors in some cases⁸⁰⁷. It can also act of its own motion under the impulse of its general rapporteur.

Once seized, the Competition Authority must examine the admissibility of the seizure, including by verifying the legal standing, prescription delays, and its competence. It then rules on the competition conditions in the concerned markets, without being bound by the parties' requests, or by the facts stated in the referral letter.

In addition, it is seized *in rem*, which means that the request does not have to interest all the parties involved in the practice and that the Competition Authority can modify the interested parties during the investigation.

It can reject the seizure with a motivated decision when it deems that the facts are not backed up with enough conclusive elements⁸⁰⁸. This decision differs from the decision provided for in Article L464-6 of the Code of Commerce, according to which the Competition Authority adopts a non-suit decision. Indeed, while in the first hypothesis, new elements can lead to a new procedure, the decision taken in application of Article L464-6 is definitive (subject to the expiration of judicial remedies).⁸⁰⁹

On the contrary, the instruction can result in a notification of damage in application of Article L463-2 of the Code of Commerce. This notification of damage opens the adversarial stage of the procedure and therefore informs the parties of the reproached practices, their legal qualifications with regard to the applicable law, and the persons allegedly responsible for

⁸⁰⁴ Articles L463-3s and R463-13 of the Code of Commerce

⁸⁰⁵ Article L462-5 III of the Code of Commerce

⁸⁰⁶ Article L462-9 of the Code of Commerce

⁸⁰⁷ Article L462-5 of the Code of Commerce

⁸⁰⁸ Article L462-8 of the Code of Commerce

⁸⁰⁹ Competition Council, n° 94-D-62, 14 December 1994, BOCCRF 3 February 1995, p. 20

them. The parties can submit a written statement in response within a delay of two months. The rapporteur then addresses a report to which the parties can respond within two months.

3.6 Decision-making

The Competition Authority gives a ruling – either in section or in plenary – at the end of a hearing *in camera*, which can be attended by the parties and the Government Commissioner⁸¹⁰.

In case anti-competitive practices are identified, the Competition Authority can impose injunctions (including with a penalty payment), and an immediate financial sanction. It can also adopt a decision accepting the engagements proposed by the parties to restore competition⁸¹¹.

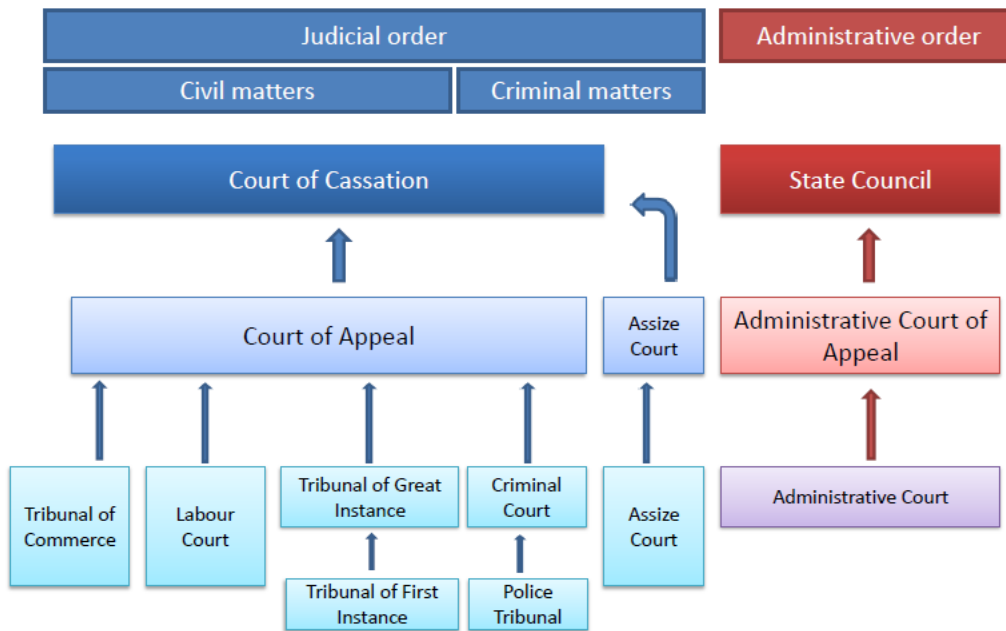
⁸¹⁰ Article L463-7 of the Code of Commerce

⁸¹¹ Article L464-2 of the Code of Commerce

4 Competent courts

This Section presents the competent courts in France. An overview of the national court system is firstly presented in Figure 4.1 below:

Figure 4.1 Court system in France



The French judicial system has a fundamental distinction between civil and administrative courts. Each judicial order has its own courts and its own hierarchy. In order to avoid competence problems, a specialised courts, the Tribunal of Conflicts, can be seized in order to determine which judicial order is applicable to a given case.

4.2 Civil courts

Civil courts are organised on three levels: first instance courts, appeal courts and the Cassation Court.

In first instance, there are so-called “common law courts” (*juridictions de droit commun*) and specialised courts. The latter are the Tribunal of Commerce, the *Prud’hommes* Council (specialised in labour law), the Tribunal of Social Security Affairs, and the Rural Lease Tribunal. If none of these courts are competent to rule on a matter, one of the three common law courts should be seized: the Tribunal of Great Instance (TGI), the Tribunal of Instance (TI) and the Judge of Proximity (local court). The sharing of competences between these three common law courts is done depending on the amount of the dispute’s interest.

Indeed, the Judge of Proximity is competent for all cases below € 4,000; the Tribunal of Instance is competent for cases between € 4,000 and € 10,000 and the Tribunal of Great Instance if competent for all cases above € 10,000. There are also rules about the exclusive competence of one or the other common law court in specific cases, no matter what the amount of the dispute is. This is the case, for instance, of disputes on lease agreements which fall under the exclusive competence of the Tribunal of Instance.

First instance decisions can be appealed before the territorially competent Court of Appeal as long as the amount of the dispute exceeds € 4,000.

Finally, the judgment ruled by the Court of Appeal can be appealed in cassation, but the Court of Cassation will only examine the respect of the relevant legal provisions by the Court of Appeal.

As regards actions in damages following an anti-competitive practice prohibited on the basis of Articles L420-1 or L420-2 of the Code of Commerce, or of Article 101 and 102 TFEU, only the Tribunals of Great Instance and the Tribunals of Commerce are competent⁸¹².

The sharing between the two types of courts depends on whether or not the parties to the dispute are local traders.

In addition, following Decree No. 2005-1756 of 30 December 2005, only some Tribunals of Great Instance and Tribunals of Commerce are competent to rule on such actions: the tribunals of Marseille, Bordeaux, Lille, Fort-de-France, Lyon, Nancy, Paris and Rennes⁸¹³.

Article R420-5 of the Code of Commerce specified that only the Court of Appeal of Paris is competent to rule on the appeals on these judgments.

This decree created a legal challenge with regards to its application by French courts, which was solved by the Court of Cassation on 21 February 2012.⁸¹⁴ In this ruling, the Court considered that an action before a court which is not concerned by Decree of 20 December 2005 is not admissible and constitutes a *fin de non recevoir* (which has to be raised, even automatically by the judge) and not as an exception of incompetence (which can only be raised at the initiative of the parties and before any defence on the substance of the case).

4.3 Administrative courts

Administrative courts are competent as soon as the dispute involves a public entity or a person in charge of a service public or granted with prerogatives of public authority.

First instance courts are the Administrative Tribunals. An appeal can be filed before Administrative Courts of Appeal. The rulings of the latter can be appealed before the State Council (*Conseil d'Etat*).

Administrative courts rule on the respect of competition law by public entities. Indeed, although according to Article L410-1 of the Code of Commerce (which forms part of the civil legal order), the Fourth Book applies to public entities, the Tribunal of Conflicts ruled that administrative courts are the sole competent when the practice cannot be separated from the exercise of a prerogative of public authority.

As a consequence, legal persons will only be sanctioned by the Competition Authority when they conduct economic activities, except when it comes to decisions or acts about the organisation of the public service or implementing prerogatives of public authority for which only the administrative courts are competent⁸¹⁵.

⁸¹² Article L420-7 of the Code of Commerce

⁸¹³ Articles R420-3 and R420-4 of the Code of Commerce

⁸¹⁴ : Cass. Com. 21 février 2012, n° 11-13276

⁸¹⁵ Court of Appeal of Paris, ch. 5-7, 9 June 2009, n° 2008/20337

5 Proceedings related to breaches of Competition Law rules

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in France is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Any person party to the procedure before the Competition Authority	Any natural or legal person with an interest to act
How can an action be filed?	Appeal within a month from the notification of the decision. Appeal before the Court of Cassation within one month	By assignment.
With which authorities can the action be filed?	Court of Appeal of Paris Court of Cassation	In first instance, before the TGI or the Tribunal of Commerce of Marseille, Bordeaux, Lille, Fort-de-France, Lyon, Nancy, Paris, Rennes. In appeal before the Court of Appeal of Paris In cassation before the Court of Cassation
Burden of proof	Defendant	Applicant

5.2 Judicial Review Proceedings

The following Section highlights the specific rules applicable to judicial review proceedings in France.

5.2.1 Rules applicable to the judicial review of NCA decisions

Following Article L464-8 of the Code of Commerce, the decisions of the Competition Authority are notified to the parties involved and the Minister in charge of the Economy, who can, within a month, file a judicial review action before the Paris Court of Appeal⁸¹⁶.

The appeal does not suspend the enforcement of the decision, unless it might have excessive consequences or new and serious facts occurred after the notification of the decision. Appeals in cassation can be filed within a month following the notification of the appeal judgment.

The President of the NCA can appeal a judgment in cassation if it quashed or reformed an NCA decision. The Minister in charge of the Economy can, in all cases, appeal the judgment in cassation.

5.2.2 Competent Court

Following Article L. 464-8 of the Code of Commerce, the competent court for appeals of NCA decisions is exclusively the Court of Appeal of Paris⁸¹⁷. Appeals in cassation are filed before the Court of Cassation, which rules exclusively on the Law.

⁸¹⁶ Available at:

http://www.legifrance.gouv.fr/affichCode.do;jsessionid=89EDC1D17357C91FAECA9A47CFBB2D16.tpdjo11v_2?iSectionTA=LEGISCTA000006146081&cidTexte=LEGITEXT000005634379&dateTexte=20140210

⁸¹⁷ *Ibid.*

5.2.3 Timeframe

Following Article L. 464-8 of the Code of Commerce, appeals before the Court of Appeal should be filed within a month from the notification of the decision of the Competition Authority. Appeals in Cassation should be filed within a month from the notification of the appeal judgment⁸¹⁸.

In average, it takes between one year and two years and a half for the Paris Court of Appeal to rule on a matter⁸¹⁹. This duration is not specific to competition law related cases. No information is available regarding the average length of an appeal in cassation.

5.2.4 Admissibility of Evidence

Article L. 463-4 of the Code of Commerce provides that the NCA rapporteur can refuse the communication or the access to evidence affecting other people's right to business confidentiality to a party. In such cases, a non-confidential version and a summary of the concerned elements will be communicated.

Articles R 463-13 to R 463-15-1 of the Code of Commerce specify the modalities of application of this provision. They set up a presumption that information or documents for which a protection request has not been submitted do not affect business confidentiality. In exceptional cases, the rapporteur general may issue a decision contradicting this for elements about sales, market shares, or similar data that are more than five years old⁸²⁰.

On two occasions, the Court of Cassation ruled on the loyalty of evidence obtained from wiretapping performed without the consent of the concerned undertakings. In a judgment ruled on 3 June 2008⁸²¹, the commercial chamber ruled that such wiretappings could not be used as evidence. The case was referred back to the Court of Appeal, which did not confirm the ruling. In a new ruling on 7 January 2011⁸²², the Plenary of the Court of Cassation confirmed its initial position and provided that such evidence could not be used.

5.2.5 Interim Measures

In application of Article L464-1 of the Code of Commerce, protective measures can be ordered if the practice concerned seriously and immediately affects the general economy, to the economy of the concerned sector, to consumers' interests or to the applicant enterprise⁸²³.

These measures can include the suspension of the practice concerned and the injunction to parties to restore the previous situation. In any case, they must be strictly limited to what is necessary to face the urgency.

5.2.6 Rulings of the court

The Competition Authority's decision can be either confirmed or quashed. If it is quashed, the devolving effect of the appeal gives competence to the Court of Appeal to rule on the entire dispute. The Court of Appeal then has similar powers to those of the Competition Authority when it took its decision.

⁸¹⁸ *Ibid.*

⁸¹⁹ <http://paris.cour-administrative-appel.fr/quelle-est-la-duree-de-la-procedure-devant-la/>

⁸²⁰

http://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2012_4571/livre_3_etude_4578/partie_4_administration_preuve_4589/principes_gouvernant_4591/admissibilite_modes_26241.html

⁸²¹ Appeal n° 07-17.147, *Bull.* 2008, IV, n° 112

⁸²² Appeal n° 09-14.667, *Bull.* 2011, Ass. plén., n° 1

⁸²³ Available at

http://www.legifrance.gouv.fr/affichCode.do?sessionId=89EDC1D17357C91FAECA9A47CFBB2D16.tpdjo11v_2?iSectionTA=LEGISCTA000006146081&cidTexte=LEGITEXT000005634379&dateTexte=20140210

When the judgment is submitted to the Court of Cassation, the latter can only reject it or quash and annul the judgment of the Court of Appeal. In the latter case, the case is sent back before the Court of Appeal of Paris (with another composition), which will rule on the matter again.

5.3 Follow-on Proceedings (private enforcement)

The following Section highlights the specific rules applicable to follow-on proceedings in France.

5.3.1 Rules applicable to follow-on procedures

General civil procedural rules apply to follow-on proceedings.

5.3.2 Competent Court

In application of Articles R.420-3 and R.420-4 of the Code of Commerce, only certain TGIs and Tribunals of Commerce are competent to rule on these actions: the tribunals of Marseille, Bordeaux, Lille, Fort-de-France, Lyon, Nancy, Paris and Rennes⁸²⁴.

Article R420-5 of the Code of Commerce specifies that only the Court of Appeal of Paris is competent to rule on appeals of these judgments⁸²⁵.

5.3.3 Timeframe

The applicable prescription delay for first instance actions to be filed is five years from the end of the practice.

Following Article L. 464-8 of the Code of Commerce, appeals before the Court of Appeal should be filed within a month from the notification of the decision of the Competition Authority. Appeals in Cassation should be filed within a month from the notification of the appeal judgment⁸²⁶.

5.3.4 Admissibility of evidence

Article L. 463-4 of the Code of Commerce provides that the NCA rapporteur can refuse the communication or the access to evidence affecting other people's right to business confidentiality to a party. In such cases, a non-confidential version and a summary of the concerned elements will be communicated.

For the modalities of application of this provision and the loyalty of evidence obtained from wiretapping performed without the consent of the concerned undertakings, please refer to section 5.2.4 above.

5.3.5 Interim Measures

Protective measures can be requested, before any trial, on the grounds of Articles 808 and 809 of the Code of Civil Procedure.

They can also be requested before the pre-trial judge once the procedure starts before the TGI.

5.3.6 Rulings of the court

The Court of Appeal can confirm the first instance decision or infirm it. In the latter case, because of the devolving effect of the appeal, it will rule on the entire dispute and will be able to rule on the substance of the case.

⁸²⁴

http://www.legifrance.gouv.fr/affichCode.do;jsessionid=89EDC1D17357C91FAECA9A47CFBB2D16.tpdjo11v_2?iSectionTA=LEGISCTA000006133184&cidTexte=LEGITEXT000005634379&dateTexte=20140210

⁸²⁵ *Ibid.*

⁸²⁶ *Ibid.*

When the judgment is referred to the Court of Cassation, the latter can only reject the appeal in cassation or quash and annul the judgment of the Court of Appeal. In the latter case, the case is sent back before the Court of Appeal of Paris (with another composition) which will rule on the matter again.

5.3.7 Rules applicable to the enforcement of court judgments

According to Article L. 111-3 of the Code on the enforcement of civil procedures⁸²⁷, all enforcement orders can be subject to an enforcement measure. Enforcement orders include decisions adopted by civil or administrative courts when they are enforceable as well as the agreements which were defined as enforceable and foreign judgments.

When the enforcement of a judicial decision is not subject to an appeal with suspensive effect, it is enforceable without any other decision needed. There is no intermediary procedure allowing their enforcement⁸²⁸.

The enforcement of enforcement orders is prescribed after ten years, in application of Article L. 111-4 of the Code on the enforcement of civil procedures⁸²⁹.

5.4 Alternative dispute resolution mechanisms

The provisions regulating the resort to alternative dispute mechanisms are defined in Article L. 464-9 of the Code of Commerce⁸³⁰.

The Minister in charge of the economy can enjoin the undertakings to put an end to their unlawful practice when it affects a local market, does not fall under the scope of Article 101 or 102 TFEU and if their turnover in France for the last fiscal year does not exceed 50 million euros, and their cumulated turnovers does not exceed 100 million euros.

The Minister in charge of the economy can also, under the same conditions, suggest a transaction. The amount of the transaction cannot exceed 75000 euro or 5% of the last turnover declared in France if the amount is inferior. The modalities of the transaction are set by way of decree in the State Council. The execution within the fixed deadlines of the obligations resulting from the injunction and the acceptance of the transaction puts an end to any action before the Competition Authority for the same facts. The Minister in charge of the economy informs the Competition Authority of all the transactions concluded.

A transaction cannot be proposed, nor can an injunction be imposed when the Competition Authority was previously seized for the same facts by an undertaking.

In the event the parties do not agree on a transaction, the Minister in charge of the economy seizes the Competition Authority. The Authority can also be seized in case the injunctions of the obligations resulting from the agreement to a transaction are not enforced.

The parties can also request a mediation measure. Although mediation is not very much in use, transactions are very common. If the parties reach an agreement, they can request the judge to homologate the agreement, which will acquire a binding force.

⁸²⁷

http://www.legifrance.gouv.fr/affichCode.do;jsessionid=54645F091867C46AC2E8613BDE3A9758.tpdjo09v_3?idSectionTA=LEGISCTA000025026751&cidTexte=LEGITEXT000025024948&dateTexte=20140203

⁸²⁸ https://e-justice.europa.eu/content_procedures_for_enforcing_a_judgment-52-fr-fr.do?member=1

⁸²⁹ *Op. cit.*

⁸³⁰ Available at

http://www.legifrance.gouv.fr/affichCode.do;jsessionid=54645F091867C46AC2E8613BDE3A9758.tpdjo09v_3?idSectionTA=LEGISCTA000006146081&cidTexte=LEGITEXT000005634379&dateTexte=20081217

6 Contextual Information

This Section provides a contextual overview of the judicial system in France.

6.1 Duration and cost of competition law cases

There is no public information on the subject.

6.2 Influencing Factors

The structure of French international economy is concentrated in Paris and justifies the exclusive competence granted to the Court of Appeal of Paris to rule on appeals.

6.3 Obstacles/Barriers

The main difficulty is the burden of proof in follow-on procedures. The courts are indeed strict with the applicant who has to define the fault, the causal link and the prejudice.

If a prior decision of the Competition Authority allows the applicant to demonstrate more easily the existence of a fault, the absence of precedent does not prevent that a practice qualified as anti-competitive by the Competition Authority might not be qualified as a fault in the sense of Article 1382 of the Civil Code.

In addition, the demonstration of the causal link is often rejected by the courts which consider that the anti-competitive character of the practice is not the only cause of the prejudice.

Finally, the prejudice is often reduced to a mere “loss of opportunity”.

It should also be underlined that French law does not always provide for class actions or punitive damages which would incite individuals to bring actions before the courts.

Annex 1 Bibliography

Legislation

- Order n° 86-1243 relating to freedom of prices and of competition
- Order n° 2000-912 relating to the legislative part of the Code of Commerce
- Law n° 2001-420 relating to new economic regulations
- Order n° 2004-1173 adapting some provisions of the Code of Commerce to Community competition law
- Decree n° 2005-1765
- Law n° 2008-776 modernising the economy
- Code of Commerce, available at http://www.legifrance.gouv.fr/affichCode.do;jsessionid=89EDC1D17357C91FAECA9A47CFBB2D16.tpdjo11v_2?cidTexte=LEGITEXT000005634379&dateTexte=20140210
- Books and Articles
- The International Comparative Legal Guide to Competition Litigation 2011, 2013 and 2014

Data sources

- Competition Authority annual reports, available at http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=15

COUNTRY FACTSHEET - HUNGARY

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Abbreviations used

European Union	EU
Hungarian Competition Authority	HCA
Treaty Establishing the European Community	TEC
Treaty on the Functioning of the European Union	TFEU

1 Overview of the National Legal Framework

Hungary has a Civil Law system. The Fundamental Law of Hungary⁸³¹ (Fundamental Law of Hungary promulgated on 25 April 2011, *Magyarország Alaptörvénye*) (hereinafter referred to as “Fundamental law”) sits at the apex of the legislative hierarchy in Hungary and every other law must be compatible with it.

According to the Fundamental Law, the rules for fundamental rights and obligations are determined by Acts. Acts are adopted by the National Assembly. The Fundamental Law recognises government decrees, Prime Ministerial decrees, Ministerial decrees, decrees by the Governor of the National Bank of Hungary, decrees by the Heads of autonomous regulatory bodies and local Government decrees.

The section of the Fundamental Law devoted to the organisation of the State contains the most fundamental rules applying to public dignitaries and the most important institutions of the country, setting out the legal status and tasks of the judiciary. The administration of justice is provided for in Articles 25-28 of the Fundamental Law, with provisions relating to the organisation of the courts and the nomination of judges (except for the Constitutional Court). Further information on the court structure in Hungary is provided in Section 4 below.

According to Article Q (3) of the Fundamental Law, Hungary accepts the generally recognised rules of international law. Customary international law and the general principles of international law become part of domestic law without the need for transposition.

Since Hungary is not a federal country, there is no federal law regulation.

⁸³¹ Available at:

<http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>

2 National Legislation establishing competition law rules

This section provides an overview of the national legislation establishing competition law rules. Table 2.1 presents a list of relevant competition law instruments in Hungary.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
Act LXXXVI of 1990 on the Prohibition of Unfair Market Practice, hereinafter referred to as 'Former Competition Act' (1990. évi LXXXVI. törvény a tisztességtelen piaci magatartás tilalmáról.)	1990; entry into force 1 January of 1991
Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition, hereinafter referred to as 'Competition Act' (1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról")	25 June 1995; entry into force 1 January 1997
Act CLXIV of 2005 on Trade (2005. évi CLXIV. törvény a kereskedelemről)	13 December 2005; entry into force: 1 June 2006

2.1 General legislation

The Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról, hereinafter 'Competition Act')⁸³² provides for the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter 'TFEU') and mirrors the provisions of EU Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty establishing the European Community (hereinafter "TEC") (now Articles 101 and 102 of the TFEU).

According to Article 1 (1), the Competition Act shall apply to the market conduct of natural and legal persons and unincorporated business associations, including the Hungarian branches of foreign-registered companies, displayed in the territory of Hungary.

The Competition Act has therefore an extraterritorial effect, due to the fact that any abroad market conduct by companies shall also fall under the scope of the Competition Act, if the effect of such conduct manifests itself within Hungary.

Agreements and concerted practices between companies, as well as the decisions of the social organisations of companies, public bodies, unions and other similar organisations of companies, which are aimed at the prevention, restriction or distortion of economic competition, or which may display or in fact displays such an effect, are prohibited by Article 11-20 of the Competition Act, enforcing the provisions of Article 101 TFEU. Articles 21-22 of the Competition Act prohibit the abuse of dominant position, as provided for in Article 102 TFEU.

Both horizontal agreements (between competitors) and vertical agreements (between undertakings operating on different levels of the production and distribution chain, e.g. between manufacturers and distributors) restricting competition are prohibited and void

⁸³² Available at: <http://www.HCA.hu/domain2/files/modules/module25/129678A2868BD0C90.pdf> (an official updated English translation is not available)

according to the Competition Act. The Act does not provide for a definition of undertaking, with an undertaking considered to be any kind of business association.

However, certain restrictive agreements are exempt from the prohibition. Agreements of minor importance (e.g. when the joint market share of the participating undertakings does not exceed ten percent) are not prohibited. Moreover, where the undertakings engaged are not independent of each other, their agreement does not qualify as restrictive under the Act. An agreement does not fall under Article 11 if:

- it has beneficial effects to the economy
- allows consumers a fair share of the resulting benefit,
- the restriction or exclusion of competition does not exceed the extent necessary to attain economically justified common goals,
- and it does not create the possibility of excluding competition in respect of a substantial part of the products concerned.

Block exemption regulations facilitate the application of exemption. Decisions made by associations of undertakings (social organisations of undertakings, public corporations or other similar organisations), which have as their object or effect the restriction of competition are also prohibited.⁸³³

The abuse principle applies to the dominant positions. To have a dominant position is not strictly prohibited; only abuse of the dominant position is prohibited. Under the Competition Act, dominant positions are deemed to be held on the relevant market by participants who are able to pursue their business activities to a large extent independently of other market participants substantially without the need to take into account the market reactions of their suppliers, competitors, customers and other trading parties when deciding their market conduct. An undertaking having a dominant position does not mean that there is no possibility to compete; it simply means that the undertaking concerned has a leading role on the market. Behind the most harmful practices of the abuses of dominant position there are strategies, the object of which is further to distort the weak competition by excluding competitors, hindering their expansion or deterring them from efficient competition.

2.2 Industry-specific legislation

Act CLXIV of 2005 on Trade⁸³⁴ (*2005. évi CLXIV. törvény a kereskedelemről*) (hereinafter '2005 Trade Act') shall apply to trading activities performed in the territory of Hungary - other than the healthcare services detailed in specific legislation and other than trading in metals subject to an authorisation requirement as determined by other legislation and tobacco retail licenced activity determined by other legislation⁸³⁵ - and to the control of these activities.

⁸³³ This provision of the Competition Act is explained by the aim of preventing such defences from the side of the undertakings, where they claim to be exempt from the prohibition on the basis that it was not them, but the association of undertakings (to which they were parties) which entered into the agreement. These associations are, in fact, capable of affecting the market behaviour of their member undertakings-, thus the association itself qualifies as a market player.

⁸³⁴ Available at: http://www.HCA.hu/domain2/files/modules/module25/jogi/Act_CLXIV_of_2005.pdf

⁸³⁵ The Acts listed hereby are implementation of EU legal instruments:

Act CLIV of 1997 on Healthcare in conformity with: 2005/36 directive Article 21-45 and 56 (2); 93/42 directive; 2007/47 directive; 90/385 directive; 98/8 directive; 2004/23 directive; 2010/53 directive; 2001/83 directive; 2010/84 directive; 96/29 directive; 2004/38 directive; 2011/24 directive

Act CXL of 2013 on Metal trade in conformity with 2006/123 directive

Government Regulation 443/2013 (XI.27) on Metal trading activity (in force from 1 January 2014) to be in conformity with 2006/123 directive

Act CXXXIV of 2012 on suppression of underage smoking and on tobacco retail in conformity with 2006/123 directive

According to Article 7(1) of the 2005 Trade Act, the abuse of significant market power against suppliers is forbidden. Meanwhile according to Article 7 (3) of this Act, companies exceeding net revenues of 100 billion Hungarian Forints⁸³⁶ consolidated in the previous year shall be deemed as having a significant market power. This Act does not take into account the strength of the companies.

⁸³⁶ Approximately 333 million EUR

3 The National Competition Authority

This Section describes the Hungarian Competition Authority, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Hungarian Competition Authority

The Hungarian Competition Authority (*Gazdasági Versenyhivatal, hereinafter: 'HCA'*)⁸³⁷) was established by Act LXXXVI of 1990 on the prohibition of unfair market practices, and started its operations on 1 January 1991. The enactment of the prohibition of anticompetitive behaviour and the setting up of the authority was motivated by the will to protect the freedom and fairness of competition.

The current Competition Act in force determines the legal status of the Authority and regulates its basic structure, operation and the procedures which it conducts. Following Hungary's accession to the EU, the HCA became a member of the European Competition Network..

The HCA is an administrative authority and has its seat in Budapest. The national Parliament is responsible for accepting the HCA's budget on an annual basis. The President of the HCA is required to submit an annual report on the activities of the HCA to the Parliament and upon request, the President presents the report to the competent Parliamentary Committee or gives expert advice in subjects related to competition. The HCA has no regional offices.

The task of the HCA in relation to the fairness and freedom of competition is to enforce the competition rules for the benefit of the public in a way which increases long-term consumer welfare and competitiveness at the same time. Furthermore, it promotes competition in general and, where no competition exists on the market, the HCA endeavors to create competition and promotes appropriate state regulation to be put in place.

3.2 Composition and decision-making

The HCA is headed by the President, whose work is assisted by two Vice Presidents. The President is nominated by the Prime Minister and appointed by the President of the Republic for a period of six years. The two Vice Presidents are nominated by the President of the Authority to the Prime Minister who, in agreement with the nomination, submits the nomination to the President of the Republic. One of the Vice Presidents is the head (Chair) of the Competition Council, while the other directs and supervises the investigative sections.

The investigative sections are supervised by a Vice-President and organised by case types. These sections commence investigations and collect information that is needed for the Competition Council to arrive at a decision. To this end, the sections

- closely follow the activities and the competition on the market;
- based upon the complaints and informal complaints or their own initiation, decide whether to start investigations;
- perform the investigative part of competition supervision proceedings;
- by way of post-investigation, check the fulfilment of the obligations provided for by decisions.

Beyond these, the investigative sections give their opinion concerning all measures drafted, and legislation in conception or drafted that have a bearing on the responsibilities of the HCA. Further, the sections take part in other competition related advocacy activities and in the enhancement and dissemination of competition culture.

Out of the investigative sections, the Consumer Protection Section deals with complaints, informal complaints and conducts proceedings concerning unfair manipulation of consumer

⁸³⁷ Its English name used in the early years of operation was Office of Economic Competition,

choice, while the secretly realized and most restrictive (e.g. price-fixing and market sharing) cartels are detected by the Cartel Section . The Antitrust Section and the Merger Section are responsible for cases of all other types, including the supervision, under the provisions of the Trade Act, of market players with significant market power.

The resolutions on the substance of the cases and on the enforcement of the resolutions of the HCA are issued and published by the Competition Council. Furthermore, it assesses the legal remedies submitted against the injunctions made by the investigator in the course of the proceedings. The Vice-President Chair of the Competition Council organises the activities of the Council, which makes the resolutions in a panel of three or five members. In the course of the competition supervision proceedings, the members of the Competition Council are subject only to the law

3.3 Cooperation with other entities

In applying Articles 101 and 102 TFEU, the HCA shall cooperate, in a manner specified by Regulation (EC) No 1/2003, with the European Commission and the competition authorities of the member states of the European Union. Furthermore the HCA cooperates with the OECD⁸³⁸.

The HCA also cooperates with state administration bodies related to competition policy, such as:

- National Media and Communications Authority
- Hungarian Energy & Utilities Control Authority
- National Transport Authority
- Hungarian Financial Supervisory Authority

3.4 Investigations

3.4.1 Sectorial inquiry

Where price movements or other market circumstances suggest that competition is being distorted or restricted in a market belonging to the sector in question, the President of the HCA starts, by an order of the President, an inquiry into the sector in order to understand and appraise the functioning of the market. The reasoning of such an order shall specify the market circumstances that necessitated the opening of the sectorial inquiry. The order opening the inquiry shall be published in an announcement on the Internet homepage of the HCA. The sectorial inquiry shall be conducted by civil servants appointed by the President of the HCA to proceed in such capacity.

3.4.2 Complaints & informal complaints

In connection with any conduct that contravenes the provisions of the Competition Act, or Articles 101 and 102 TFEU and which falls within the jurisdiction of the HCA, anyone may lodge a notification or complaint to the HCA. A notification shall be made by submitting a standard form. The standard form contains the essential data for the ensuing examination, such as data for the identification of the complainant and the notified person, a description of the alleged infringement, description of the actual conduct that is deemed illegal, basic information required for the definition of the market affected, the duration of the alleged infringement, and any facts and evidence that may be admitted to support the accusation of the alleged infringement. The complainant may request to remain anonymous, or that he/she shall not be identified as having made a notification to the HCA.

⁸³⁸ The OECD-Hungary Regional Centre for Competition in Budapest was established in 16 February of 2005 with the agreement between the OECD and the HCA.

3.5 Decision-making

The Competition Council shall make its decision in panels consisting of three or five members, depending on the internal ruling of the HCA.

The competition supervision proceeding consists of the following phases:

- the procedure of the investigator;
- the procedure of the Competition Council;
- post-investigation; and
- enforcement.

The Competition Council

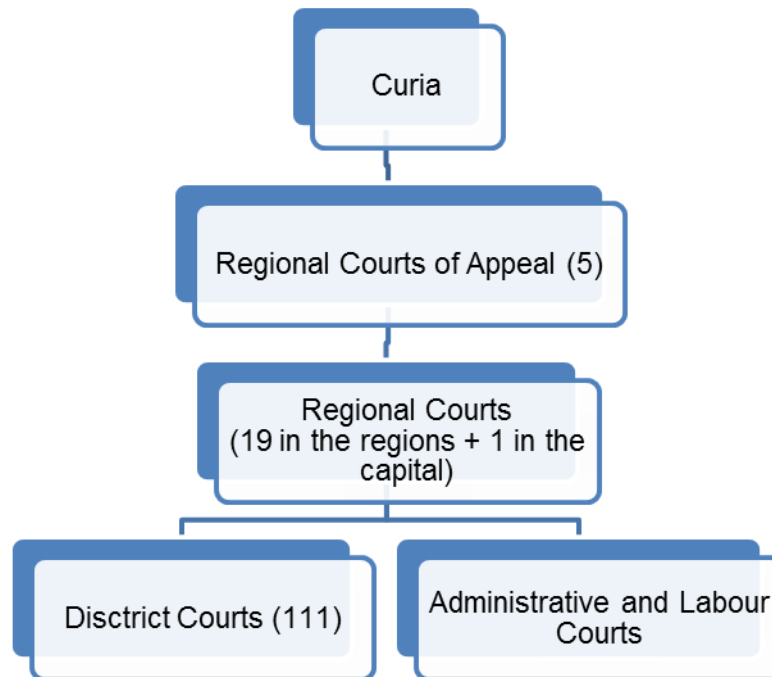
- may establish that the conduct is unlawful
- may order a situation violating the Competition Act to be eliminated
- may prohibit the continuation of the conduct which violates the provisions of the Competition Act
- where it finds that there is an infringement of the law, it may impose obligations including in particular the obligation of a contract to be concluded where an unjustified refusal to create or maintain business relations appropriate for the type of the transaction has been found
- may impose fines.

The decisions of the HCA are final, there is no administrative appeal against them. The decisions can only be challenged at the competent courts.

4 Competent courts

This section provides an overview of the competent courts in Hungary. Figure 4.1 firstly provides a graphic presentation of the court system.

Figure 4.1 Court system in Hungary⁸³⁹



In Hungary, justice is administered by the following courts: the **Curia (Kúria)**, the **Regional Courts of Appeal (ítélőtáblák)**, the Regional Courts (**törvényszékek**), the District Courts (**jársbíróságok**) and the Administrative and Labour Courts.⁸⁴⁰ All courts at First Instance are competent in both fact and law.

District courts

There are 111 District Courts in Hungary located in major cities. These courts rule only in first instance. District Courts have jurisdiction in first instance of all actions which are not delegated under the competence of regional courts by law. Specific departments (also known as ‘groups’) may be established at District Courts to handle certain types of cases, e.g. property issues, housing and residence issues. District courts are led by the President. Courts are not legal entities. Each Court is an independent part of the judicial organisation and each Court has a President.

Administrative and Labour Courts

The Administrative and Labour Courts are the competent courts in judicial review of HCA decisions in first instance.

There are 20 Administrative and Labour Courts located at the seat of Regional Courts. Administrative and Labour Courts shall proceed in the first instance in reviewing administrative decisions, and in cases regarding employment relationships and legal relationships of an employment nature. Administrative and labour courts are led by the President. Courts are not legal entities. Specific departments/groups may be established at administrative and labour courts to handle certain types of cases.

Regional courts

⁸³⁹ Source: <http://www.birosag.hu/birosagi-szervezetek>

⁸⁴⁰ We do not mention the Constitutional Court because of its special role

There are 20 regional courts in Hungary in the 19 regions of Hungary and in Budapest (Budapest-Capital Regional Court).

The Regional Court proceeds as the First Instance court – in cases defined by law (Code of civil procedure and Code of criminal procedure⁸⁴¹) – and review appeals lodged against the decisions of District Courts and Administrative and Labour Courts in the second instance.

Regional Courts are led by the President. Regional Courts are legal entities, serving as the responsible authority for District Courts and Administrative and Labour Courts. Chambers (i.e. groups of three or five judges), specific departments as well as criminal, civil, economic and administrative and labour judicial colleges operate at regional court. Colleges may operate jointly.

Regional courts of appeal

There are 5 regional courts of appeal in Hungary. The regional court of appeal shall review appeals - in second or third instance - submitted against the decisions of district courts or regional courts and shall proceed in other cases referred to its jurisdiction. Regional courts of appeal are led by the President. The regional court shall operate chambers as well as criminal and civil judicial colleges.

Curia of Hungary

The Curia is the highest judicial authority in Hungary. Under the authority of its President it has three departments: criminal, civil and administrative-labour law departments. Each department has various chambers: chambers hearing appellate cases, chambers passing uniformity decisions⁸⁴², chambers issuing decisions on principles⁸⁴³, as well as working groups examining judicial practice.

Within the framework of the departments, the judges administer justice in chambers consisting of three judges. A chamber adopting uniformity decisions consists of five judges chaired by the head of the section/department concerned, however, in cases requiring the collaboration of several sections/departments, the size of the chamber increases to seven members.

The Curia examines both fact and law, guaranteeing the uniform application of the law. The decisions of the Curia on uniform jurisdiction are binding for other courts.

The responsibilities of the Curia are the following:

- examination of appeals submitted against the decisions of the regional courts and the regional courts of appeal in cases defined by law,
- review final decisions if these are challenged through an extraordinary remedy,
- adopt uniformity decisions, which are binding for all other courts,
- analysis of final decisions to examine and explore judicial practice,
- publish decisions on principles,
- pass decisions in cases where local government decrees violate legal rules,
- pass decisions in cases where the local government fails to legislate as laid down in the act on local governments,
- other duties referred to its authority by law.

⁸⁴¹ For example: lawsuits with dispute value above 30M HUF (~100.000EUR); claims related to copyright issues, lawsuits related to international transport and freight forwarding

⁸⁴² The Curia renders uniformity decisions in cases of theoretical importance in order to ensure the uniform application of law within the Hungarian judiciary. Such decisions are binding on all Hungarian lower instance courts. The operative parts of uniformity decisions – as brief summaries – are accessible hereunder:

⁸⁴³ In case a chamber made a decision that has major importance for the public interest, the head of the chamber shall inform the chief of the competent department. The Chief of the Department shall propose the decision to the chamber issuing decision on principles. The chamber may decide about the disclosure of the decision as "principle of judicial decision".

5 Proceedings related to breaches of Competition Law rules

The court shall have the power to hear and decide on cases conducted against violations of:

- general prohibition of unfair competition;
- disparagement of competitors;
- business secrets;
- boycott appeals;
- imitation; and
- bidding

The HCA has the power to proceed in all competition supervision cases except for those in relation to which the courts have exclusive jurisdiction (e.g. access to or use of business secrets in an unfair manner, disclosing secrets to unauthorised parties).

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in Hungary is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow-on
Who can file an action?	Any natural or legal person concerned	Any natural or legal person
How can an action be filed?	A two-stage process applies. Persons concerned may challenge the decisions of the HCA at first Instance at the Administrative Court. They can then appeal the decision to the Budapest-Capital Regional Court.	At first Instance District courts (if claim is under 30M HUF ~ 100.000 EUR) ⁸⁴⁴ or at first instance Regional courts (if claim is over 30M HUF ~ 100.000 EUR) If the first instance was the District court, the second instance is the Regional court. If the first instance was the Regional Court, the second instance is the Regional Court of Appeal.
With which authorities can the action be filed?	At the HCA (it shall be transferred to the competent court)	At the competent civil court, according to the Civil Procedure Code
Burden of proof	The burden of proof always rests with the Competition Authority	The burden of proof rests with the applicant who invokes a legal or factual point to validate their claim.

In Hungary, any natural or legal person who can show a direct, certain and personal interest may sue for damages before the Hungarian courts for breach of competition law.

The HCA may file a civil action on behalf of consumers against a business entity engaged in any infringement of the provisions of this Act or the provisions of the UCPA, falling within the competence of the HCA, where such illegal action results in a grievance that affects a wide range of unknown consumers, whose identity however, can be established relying on the circumstances of the infringement.

⁸⁴⁴ 1 EUR is equal with 296 HUF (08.11.2013.) according to the Central Bank of Hungary. Current exchange rates are available at: <http://english.mnb.hu/>

Furthermore file against contracts with unfair terms and conditions or file cessation or prohibition of any infringement can be issued by:

- the prosecutor
- the minister
- notary
- chamber or representative organization (body)
- consumer association
- qualified entity for consumer interests (published in the Official Journal of the European Communities according to the Article4 (3) of 98/27 directive).

Upon the determination of the infringement the court shall declare the clause null and void to all other parties against whom the unfair clause is practiced.

5.2 Judicial Review Proceedings

This Section provides an overview of judicial review proceedings in competition law cases in Hungary.

5.2.1 Rules applicable to the judicial review of NCA decisions

There is no administrative appeal against the decision of the HCA. However the decisions can be reviewed by the competent courts. This is regulated in Articles 83 to 85 of the Act LVII of 1996.

Due to the geographical location of the HCA, the Administrative and Labour Court of Budapest (*Fővárosi Közigazgatási és Munkaügy Bíróság*) has competence for the judicial review at first instance.

5.2.2 Competent court

The judgment of the Administrative and Labour Court of Budapest can be also challenged on both fact and law, at second instance, at the Regional Court of Appeal of Budapest (*Fővárosi Ítéltábla*). New evidence cannot be represented at second instance unless it is exceptionally important or it was now known before.

Moreover the Curia (*Kúria*) has the power to review the final decision of the Regional Court of Appeal of Budapest on both fact and law.

5.2.3 Timeframe

The HCA's decision can only be challenged within 30 days from publication at first instance. At second instance, it must be challenged within 15 days from publication of the decision.

5.2.4 Admissibility of Evidence

The Hungarian system on evidences is a "free evidencing system", there are no limitations concerning the form evidence takes. Any evidence is allowed that can prove the opinion of the party concerned.

The Code of Civil Procedure lists witness statements, expert opinions, documents and other material evidence, but the list is not exhaustive. It is not possible to take an oath in a Hungarian court case.

5.2.5 Interim Measures

The courts – as an interim measure - have the right to suspend the execution of the decision of the HCA.

As a general rule: the decision of the HCA cannot be appealed according to the rules of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services and the Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.

Although there is no possibility to appeal, the judicial review provides a unique remedy for the party to challenge the decision. Upon challenge the decision of the HCA shall be suspended due to the lawsuit itself (without prove). With the final decision the court shall upheld or annul the decision of the HCA.

5.2.6 Rulings of the court

According to Article 83 (4) of the Competition Act the courts may overrule the decision of the HCA. The ruling of the court is done orally in public unless it is ordered to be closed in cases of highly important business secrets.

5.3 Follow-on Proceedings (private enforcement)

This Section provides an overview of follow-on proceedings of competition law cases in Hungary.

5.3.1 Rules applicable to follow-on procedures

The persons whose rights were infringed can file civil law claims and thus directly enforce the provisions laid down in the Competition Act. The court may grant damages or may even form contractual relationships (e. g. it may establish contracts between the parties, compel them to perform contracts or, after establishing that the contract is illegal for it restricts competition, may apply the consequences of invalidity).

In civil lawsuits, the HCA as *amicus curiae* may submit its (written or oral) observations on issues relating to the application of the unfair manipulation of consumer choice, restrictive agreements and abuse of dominance provisions of the Competition Act and of Articles 101 and 102 of the TFEU.

The legal basis for liability in damages in respect of damages caused outside contractual relations and of those caused in the context of contractual relations is identical, as provided by Article 318 (1) of the Act IV of 1959 on the Civil Code of the republic of Hungary "Civil Code" (1959. évi IV. törvény a Polgári Törvénykönyvről).⁸⁴⁵

Article 339 (1) of the Civil Code establishes the general rule of liability in damages caused outside contractual relations.⁸⁴⁶

For the procedure itself Act III of 1952 on the Code of Civil Procedure (1952 évi III. törvény a Polgári Perrendtartásról) shall be applicable.

5.3.2 Competent Court

The competent courts at first Instance are District Courts (if the claim is under 30 million HUF ~ 100.000 EUR) or Regional courts (if claim is over 30 million HUF ~ 100.000 HUF).

If the first instance was the District court, the court competent in second instance is the Regional court.

If the first instance was the Regional Court, the court competent in second instance is the Regional Court of Appeal.

The final judgment of the second instance court may be reviewed by the Curia.

All courts are competent to rule on both facts and law.

⁸⁴⁵ "In respect of the liability for breach of contract and of the level of the compensation for damages, the rules on the liability for damages caused outside contractual relations shall be applied, with the difference that the compensation for damages shall not be lowered, except otherwise provided by law."

⁸⁴⁶ Those who cause damages to another person by infringement of law shall compensate therefor. He/she is exempted from liability if he/she proves that he/she behaved as it is generally expected in the given situation.

5.3.3 Timeframe

For the procedure itself Act III of 1952, on the Code of Civil Procedure (*1952 évi III. törvény a Polgári Perrendtartásról*) shall be applicable. According to the general rules of Civil Code about the prescription there is a 5 year limit to start the follow on procedure. The procedure starts with the claim. There is a 15-days limit for challenging the decision of the court from the publishing.

5.3.4 Admissibility of evidence

The Hungarian system on evidence is a “free evidencing system”, there are no limitations concerning the form evidence takes.

The Code of Civil Procedure lists witness statements, expert opinions, perambulation, documents and other material evidence, but the list is not exhaustive. It is not possible to take an oath in a Hungarian court case.

5.3.5 Interim Measures

According to the Article 156 of Civil Procedures the court may order an interim measure if it's necessary to:

- avert imminent harm;
- keep the condition that give rise to the dispute unchanged;
- merit particular legal protection for the applicant.

5.3.6 Rulings of the court

With a follow-on action, the court can declare a clause of a contract or a practice void, due to the breach of competition law. Hearings are in public orally.

Damages can also be granted to the claimant, though fines cannot be imposed. It is considered that the fines that are imposed by the Competition Council, in its initial decision, can have an indirect effect on the determination of the damages to be awarded by the courts in the case of follow on actions between the parties.

With regard to the recovery of costs, the legal costs are borne by the party which has lost the case unless the court holds that both parties should bear the legal costs. These costs do not include the lawyers' fees which are principally borne by each client.

5.3.7 Rules applicable to the enforcement of court judgments

The court's judgment shall be executed by the general rules and principles of the Act LIII of 1994 on Judicial Execution.⁸⁴⁷ All courts have the right to decide about enforcement.

The general procedure shall be done as follows:

The final decision shall be issued for execution at the competent court with the form regulated in the Judicial Execution Act. The court assigns the execution to the competent bailiff.

5.4 Alternative dispute resolution mechanisms

In case of private enforcement, the parties concerned can use other ordinary alternative mechanisms, like mediation or arbitration, however the use of these procedures is not mandatory. These solutions are rarely used.

The mediation procedure is regulated generally in Act LV of 2002 on Mediation (*2002. évi LV. törvény a közvetítői tevékenységről*).

The arbitration procedure is regulated generally in Act LXXI of 1994 on Arbitration (*1994. évi LXXI. törvény a választottbíráskodásról*).

⁸⁴⁷ 1994. évi LIII. törvény a bírósági végrehajtásról).

6 Contextual Information

This Section provides an overview of contextual information on the judicial system in Hungary.

6.1 Duration and cost of competition law cases

The length of the competition law cases can be difficult to determine, due to the fact that the applicable general court procedures do not lay down strict deadlines. However according to our estimation they may last 1-3 years, including appeal mechanisms.

The costs of the cases can be separated into multiple components. First of all is the cost of the procedure. The costs of duties are regulated in the Act XCIII of 1990 on Duties (*1990. évi XCIII törvény az illetékről*). The general rule for duty in lawsuit is 6% of the value of the claim with a minimum of 15.000 HUF (~50EUR) and a maximum of 1.500.000 HUF (~5000 EUR).

6.2 Influencing Factors

No specific factors influencing the application of competition law rules in Hungary could be identified. .

6.3 Obstacles and barriers to access to justice

There are no significant barriers to the access to justice in competition law cases. However the length of the procedures may undermine the efficiency of the system.

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⁸⁴⁸ The articles/books have been published in Hungarian. Please consider their English title as a non-official translation.

COUNTRY FACTSHEET - IRELAND

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Abbreviations used

EU	European Union
TFEU	Treaty on the Functioning of the European Union
ComReg	Commission for Communications Regulation
DPP	Director of Public Prosecutions

1 Overview of the National Legal Framework

The national legal system of the Republic of Ireland (hereinafter “Ireland”) is based on the common law, thereby recognising the system of precedent or *stare decisis*.

The legal system is hierarchical, with the Constitution as the highest source of law in the country, from which all law derives its authority. The Constitution (*Bunreacht na hÉireann*) came into operation on the 29 December 1937 and establishes the institutions and apparatus of the State and provides for the separation of powers into Executive, Legislative and Judicial. It also guarantees fundamental rights, subject to their interpretation by the courts.

Primary legislation consists of Acts adopted by the *Oireachtas* (Parliament), consisting of the President of Ireland, *Seanad Éireann* (Upper House) and *Dáil Éireann* (Lower House).

Secondary legislation is a mechanism by which the *Oireachtas* may delegate legislative powers to a Minister of Government or a particular authority. Statutory Instruments are the most common form of secondary legislation but they can also take the form of Regulations, Orders, Rules, Schemes or Bye-laws.

The administration of justice is dealt with in Articles 34-37 of the Constitution, with these articles regulating the structure of the courts and the nomination of judges.

2 National Legislation establishing competition law rules

This section provides an overview of national legislation establishing competition law rules. Table 2.1 presents a list of relevant competition law instruments in Ireland.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
The Competition Act 2002	10 April 2002, entry into force 1 July 2002
The Competition (Amendment) Act 2006	11 March 2006, entry into force 20 March 2006
The Competition (Amendment) Act 2012	20 June 2012, entry into force 3 July 2012

2.1 General legislation

The Competition Act 2002 (hereinafter “the 2002 Act”)⁸⁴⁹ replaced previous competition legislation enacted in Ireland. The majority of changes introduced by the 2002 legislation dealt with the control of mergers and procedural aspects of competition enforcement in Ireland, in anticipation of the adoption of Regulation 1/2003. The 2002 Act contains two main prohibitions, which, to a large extent, mirror the rules on competition as set out in Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter “TFEU”). The principle of extraterritoriality applies to the 2002 Act insofar as behaviour prohibited under Sections 4 and 5 extends to conduct which has an effect on trade in Ireland or any part of the State.

Section 4 (1) imposes a general prohibition on agreements between undertakings⁸⁵⁰, decisions by associations of undertakings and concerted practices whose object or effect is the prevention, restriction or distortion of competition. Section 4(2) provides that any agreement, decision or concerted practice shall not be prohibited under Section 4(1) if it complies with the conditions contained in Section 4(5) or else falls within a category of agreements, decisions or concerted practices the subject of a declaration under Section 4(3). Section 4(3) relates to the ability of the Competition Authority to declare, in the form of an opinion, that a specified category of agreements, decisions or concerted practices complies with the conditions set out in Section 4(5).⁸⁵¹

Section 4(5), requires the fulfilment of certain pro-competitive conditions, which reflect the conditions of Article 101(3) TFEU. Section 4(5) essentially provides an efficiency defence, permitting those agreements which, having regard to all relevant market conditions, contribute to improving the production or distribution of goods or provision of services or to promoting technical and economic progress, while allowing consumers a fair share of the resulting benefits. In addition, the agreement, decision or concerted practice must not impose on the undertakings concerned terms which are not indispensable to the attainment of its objectives and must not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Section 5 prohibits the abuse of a dominant position, and the wording of this provision reflects that found in Article 102 TFEU.

The penalties for breaching Section 4 or 5 are set out in Section 8. The Act, for the purpose of criminal sanctions, draws a distinction between hard-core breaches of competition law, such as price fixing and less serious breaches. Section 7 of the 2002 Act renders it a

⁸⁴⁹ The Competition Act 2002, available at: <http://www.irishstatutebook.ie/pdf/2002/en.act.2002.0014.pdf>

⁸⁵⁰ “Undertaking” is defined in Section 3(1) of the 2002 Act as “a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service”.

⁸⁵¹ See, for example, “Notice in Respect of Vertical Agreements and Concerted Practices,” providing guidance on Decision N/10/01 (which largely reflects the European Commission’s Block Exemption Regulation No. 330 of 2010), available at: <http://www.tca.ie/images/uploaded/documents/Guidance%20Notice%202010.pdf>
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criminal offence to breach Section 5 or Article 82 of EC Treaty (now Article 102 TFEU). Section 8 sets out the penalties and proceedings for offences under Section 6 and Section 7.

The Competition Law (Amendment) Act 2006⁸⁵² (hereinafter “the 2006 Act”) inserted a new Part 2A into the 2002 Act, and was enacted with the specific aim of preventing certain unfair trading practices in the grocery trade. Its provisions prohibit specific anticompetitive practices in the grocery trade such as attempts to impose resale price maintenance; compelling or coercing payment or allowances for advertising or display of goods and “hello money”⁸⁵³ in relation to new or extended retail outlets or outlets under new ownership. The 2006 Act specifies that this conduct is only prohibited where its object or effect is the prevention, restriction or distortion of competition.

The Competition (Amendment) Act 2012⁸⁵⁴ (hereinafter “the 2012 Act”) entered into force in July 2012. Intended to strengthen the enforcement of competition law, the Act’s main provisions include an increase from 5 to 10 years of the maximum prison sentence for conviction of an offence relating to anti-competitive agreements, decisions and concerted practices and an increase in the maximum fine that may be imposed. The Act also provides for director disqualification as a sanction for anticompetitive behaviour. The 2012 Act also extends the procedural powers of the Competition Authority.

2.2 Industry-specific legislation

In addition to the generally applicable legislation cited in Section 2.1, including the specific grocery sector targeted in the 2006 Act,⁸⁵⁵ Ireland has provided for a certain number of specific provisions targeting anticompetitive behaviour in defined sectors. The Credit Institutions (Financial Support) Act 2008⁸⁵⁶ provides for specific requirements for certain mergers and acquisitions in the financial sector, in addition to those set out in Section 3 of the 2002 Act.

The Communications Regulation (Amendment) Act 2007⁸⁵⁷ amends the 2002 Act to extend its provisions to confer a limited power to enforce sections 4 and 5 of the Competition Act to the Commission for Communications Regulation (“ComReg”).

As Ireland is a common law country, some of the basic legal principles governing unfair competition are covered by tort doctrines of misrepresentation and deceit. Some issues involving trademark may be covered by the Trade Marks Acts. In general, competition law is not applied to most traditional types of unfair competition — false advertising, deception, unfair practices, trademark abuse and passing off, sales below cost, and abuse of economic dependence.⁸⁵⁸

⁸⁵²The Competition Law (Amendment) Act 2006, available at: <http://www.irishstatutebook.ie/pdf/2006/en.act.2006.0004.pdf>

⁸⁵³ The practice among large retailers of charging producers to stock their products in-store.

⁸⁵⁴The Competition Law (Amendment) Act 2012, available at: <http://www.irishstatutebook.ie/pdf/2012/en.act.2012.0018.pdf>

⁸⁵⁵ This Act was enacted to amend the 2002 Act by providing for the prohibition of activities which prevent, restrict or distort competition in the trade of grocery goods in Ireland, thereby revoking the Restrictive Practices (Groceries) Order 1987 and the Restrictive Practices (Confirmation of Order) Act 1987 and related acts.

⁸⁵⁶ The relevant provisions are to be found in Section 7 of the Credit Institutions (Financial Support) Act 2008, available at <http://www.irishstatutebook.ie/pdf/2008/en.act.2008.0018.pdf>

⁸⁵⁷ The relevant provisions are to be found in Part 4 of the Communications Regulation (Amendment) Act 2007, available at: <http://www.irishstatutebook.ie/pdf/2007/en.act.2007.0022.pdf>

⁸⁵⁸ One example of which is the Consumer Protection Act, which protects consumers against unfair commercial practices, including misleading advertising. Available at <http://www.irishstatutebook.ie/pdf/2007/en.act.2007.0019.pdf>

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in Ireland, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Competition Authority

The Irish Competition Authority (hereinafter “the Competition Authority”) was established pursuant to the Competition Act 1991.⁸⁵⁹ The Competition Authority was set up to replace the Fair Trade Commission previously in place. Initially, the role of the Authority was limited to that of an advisor, with only the Minister for Industry and Commerce competent to file suit in court seeking an order to stop prohibited behaviour.

The Competition Authority’s fields of competence have been expanded since its establishment, notably in the 2002 Act.

Unlike most European Member States, where national competition authorities may adopt decisions regarding breaches of the law and impose penalties such as fines, in Ireland, owing to constitutional constraints, that responsibility lies with the Courts.

The Competition Authority may investigate suspected breaches of competition law and either take legal proceedings in court, or, for serious criminal breaches, send a file to the Director of Public Prosecutions, who decides whether to take a criminal prosecution on indictment.

3.2 The reform of the Competition Authority

The Competition (Amendment) Act of 1996⁸⁶⁰ provided the Competition Authority with independent enforcement power and a Director of Competition Enforcement. At the same time that enforcement powers were dramatically expanded, an external advisory panel, the Competition and Mergers Review Group (“CMRG”), was appointed to examine competition policy and enforcement processes.

The Competition Act 2002 provided the most comprehensive reform of both the administrative and enforcement powers of the Competition Authority, aligning the Irish system with Regulation 1/2003. The Competition Act 2002 therefore had to increase the enforcement powers of the Competition Authority. Part 4 of the 2002 Act deals with these provisions in detail, specifying that the Competition Authority is an independent body, conferred with investigative and advisory powers. Cross-border co-operation with foreign competition bodies is also allowed under the Competition Act 2002. Section 34 of the 2002 Act provides for cooperation agreements between the Competition Authority and statutory bodies for the purpose of facilitating cooperation in the performance of their state duties insofar as they relate to issues of competition between undertakings.

The Communications Regulation (Amendment) Act 2007⁸⁶¹ amends the 2002 Act to extend its provisions to the Commission for Communications Regulation (“ComReg”) in the enforcement of competition law in the electronic communications sector. ComReg has the power to enforce competition law jointly with the Competition Authority in relation to electronic communications services, networks or associated facilities.

The Competition Authority has co-operation agreements with a number of authorities:

- the Commission for Taxi Regulation
- the Broadcasting Authority of Ireland
- the Commission for Energy Regulation

⁸⁵⁹ The Competition Act, 1991, available at: <http://www.irishstatutebook.ie/1991/en/act/pub/0024/print.html>

⁸⁶⁰ The Competition (Amendment) Act 1996, available at: <http://www.irishstatutebook.ie/1996/en/act/pub/0019/print.html>

⁸⁶¹ The relevant provisions are to be found in Part 4 of the Communications Regulation (Amendment) Act 2007, available at: <http://www.irishstatutebook.ie/pdf/2007/en.act.2007.0022.pdf>

- the Commission for Aviation Regulation
- the Health Insurance Authority
- the National Consumer Agency
- the National Transport Authority

The Competition Authority also cooperates with a number of other law enforcement agencies in the State to enforce competition law, including the Director of Public Prosecutions and An Garda Síochána (the Irish police service).

The functions of the Authority are:

- (i) to study and analyse any practice or method of competition;
- (ii) to carry out investigations into any breach of the Competition Act;
- (iii) to advise the government, ministers of the Government and ministers of State concerning the implications for competition of proposals for legislation;
- (iv) to publish notices containing practical guidelines as to how the compliance with provisions of the Competition Act may be assured;
- (v) to advise public authorities on issues concerning competition which may arise in the performance of their functions;
- (vi) to identify and comment on constraints imposed by any enactment or administrative practice on the operation of competition in the economy; and
- (vii) To inform the public about issues concerning competition.⁸⁶²

In addition, the Authority may bring civil proceedings and summary criminal prosecutions⁸⁶³ in respect of breaches of competition law.

The Competition Authority is soon to be merged with the National Consumer Agency.⁸⁶⁴

3.3 Composition and decision-making

The Executive Board of the Competition Authority is composed of a Chairperson and three members.⁸⁶⁵ The Competition Authority's work is divided into six separate divisions, each one headed by a Member of the Authority. The sections are: cartels, monopolies, mergers, advocacy, corporate services and strategy.

In addition to the Executive Board, the Competition Authority is assisted by a team of legal advisors and case handlers whose role it is to investigate possible breaches of competition law.

The Irish courts have sole competence to take decisions, make orders, grant remedies (behavioural or structural), including interim relief, and impose penalties in respect of breaches of domestic and EU competition laws.

3.4 Cooperation with other entities

Domestically, Section 34 of the 2002 Act provides for cooperation agreements between the Competition Authority and statutory bodies, including national regulators, for the purpose of

⁸⁶² Section 30 of the 2002 Act.

⁸⁶³ A summary offence is a crime that can be proceeded against summarily, i.e. without the right to a jury, trial and/or indictment.

⁸⁶⁴ The Government has given indications that the proposed Bill, the Consumer and Competition Bill would be published by spring 2013, but it has not yet been made available. The Bill purports to amalgamate the National Consumer Agency and the Competition Authority and to give effect to other changes to competition and consumer law including making provision for a statutory code of conduct for the grocery goods sector and giving effect to the recommendations of the Advisory Group on Media Mergers.

⁸⁶⁵ Section 35 of the 2002 Act provides that the Minister may appoint between two and four full-time members.

facilitating cooperation in the performance of their state duties insofar as they relate to issues of competition between undertakings.

On an international level, the Competition Authority may cooperate with competition authorities in other jurisdictions as well as the European Commission.⁸⁶⁶ Cross-border cooperation with foreign competition bodies is allowed under the Competition Act 2002. The Competition Authority may therefore provide information and other assistance to foreign competition bodies to facilitate their investigations. There are conditions in place for the disclosure of information, particularly confidential information, which must be complied with at all times. The Competition Authority is part of the European Competition Network (ECN), the European Competition Authorities (ECA) and the International Competition Network (ICN) and represents Ireland at the Organisation for Economic Cooperation and Development (OECD) Competition Committee.

3.5 Investigations

The Competition Authority is competent to initiate an investigation into a breach of competition law, *ex officio* or on the basis of a complaint.⁸⁶⁷

The Competition Authority will firstly determine whether the matter falls within the scope of the Competition Act. All complaints are through a screening process to make sure they are properly assessed.

The Competition Authority has a Complaint Handling Process in place in order to ensure a sufficient and thorough screening of the complaint, which consists of three steps:

- (i) **Screening:** does the complaint involve an alleged breach of competition law?
- (ii) **Assessment:** the complaint will then be communicated to the relevant division for further assessment.
- (iii) **Investigation:** The Competition Authority selects cases for full investigation on the basis of clearly defined prioritisation criteria. These criteria include issues such as:
 - the significance of the alleged infringement (and, in particular, its likely effect on consumers);
 - the economic significance and strategic importance of the market involved;
 - the likely impact of enforcement action by the Authority; and
 - The risk, resources and cost implications for the Authority of taking enforcement action.

Should the complaint proceed to an investigation, there may be a number of possible outcomes. It must be recalled that the Competition Authority does not have the competence to make a finding of an infringement of competition law.⁸⁶⁸ However, the Competition Authority's possible actions include:

- sending a file to the DPP recommending that criminal charges be brought;
- taking legal proceedings in the High Court in order to stop the anti-competitive behaviour concerned;
- negotiating a settlement with the company which may be made an order of court; or
- making recommendations to Government concerning changes in anti-competitive regulations.

⁸⁶⁶ Section 46 of the 2002 Act.

⁸⁶⁷ Section 30 (1) b of the 2002 Act.

⁸⁶⁸ This is as a direct result of Article 34.1 of the Irish Constitution, which provides that "*Justice shall be administered in Courts established by law*", thereby precluding the Competition Authority from making such a finding.

The Competition Authority has extensive procedural competences, such as the power to conduct investigations and to carry out searches. These competences include, specifically, the power to enter and search premises and homes with a search warrant issued by the District Court, the power to seize documents and records, the power to summon witnesses and to require information from third parties.⁸⁶⁹

3.6 Decision-making

Following an investigation, should the Competition Authority conclude that there has been an infringement of competition law, it can initiate summary proceedings in the District Court. In the case of serious (indictable) offences, the Competition Authority's file is referred to the Director of Public Prosecution (hereinafter "DPP") who may bring proceedings in the Central Criminal Court. Alternatively, the Competition Authority can bring civil court proceedings before the Circuit Court or High Court for an injunction or declaratory order.

Typically, in civil cases, the accused party is given an opportunity to comment on the Competition Authority's findings or to remedy the infringement before court proceedings are initiated. These options are unavailable in the case of criminal prosecution for cartel involvement.

In civil cases, the Competition Authority will have to prove that "on the balance of probabilities", the defendant engaged in the alleged anti-competitive conduct. In a criminal prosecution, however, the DPP will have to prove that an infringement has been committed "beyond a reasonable doubt". The defendant will benefit from the usual legal protections of Irish law (procedural and rights of due process) before the court.

⁸⁶⁹ Section 45 of the 2002 Act. The abovementioned activities may only be conducted only upon the presentation of a warrant, which may be obtained for such purposes from the District Court.

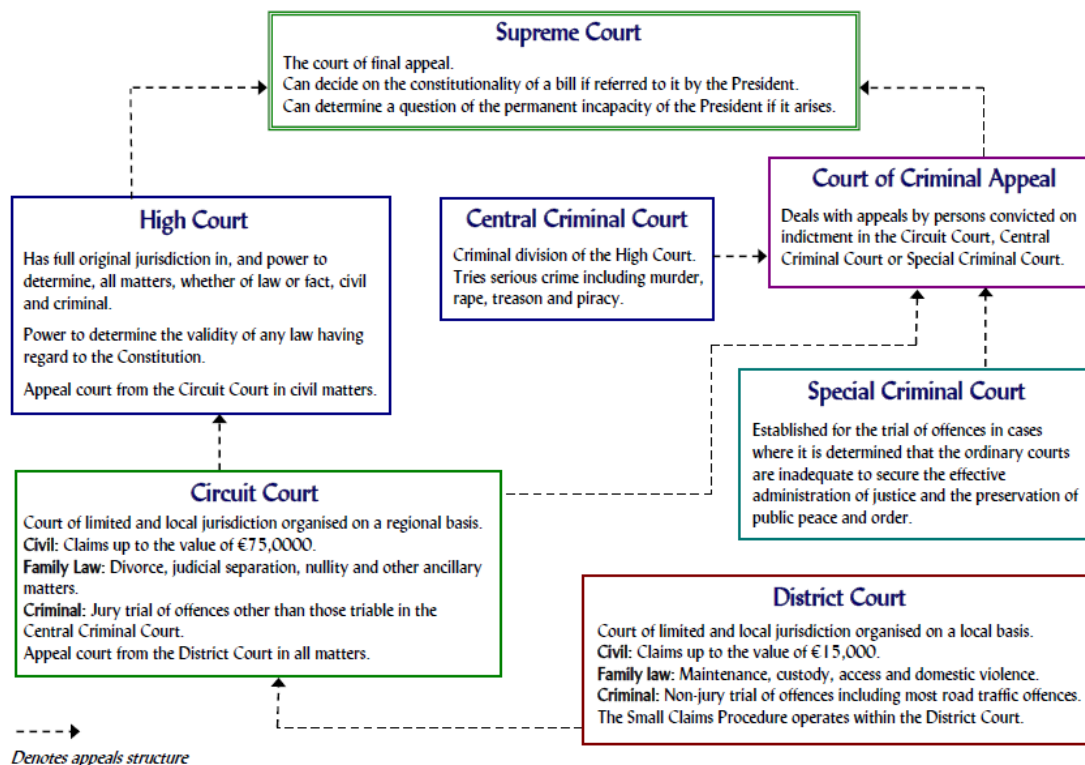
4 Competent courts

This Section provides an overview of the competent courts in Ireland.

In Ireland, the legal process is adversarial,⁸⁷⁰ and as a common law system, does not have specific administrative courts. There is no dedicated court for competition law cases. As the sanctions for breaches of competition law in Ireland are criminal, there may be proceedings before both a civil and a criminal court.

Figure 4.1 provides an overview of the court system in Ireland.

Figure 4.1. Court system in Ireland



Source: www.courts.ie

4.1 Overview of the court system

Articles 34 to 37 of the Constitution deal with the administration of justice in general. Article 34.1 states that 'Justice shall be administered in Courts established by law'. The Constitution outlines the structure of the court system as comprising a court of final appeal, the Supreme Court, and courts of first instance which include a High Court with full jurisdiction in all criminal and civil matters and courts of limited jurisdiction, the Circuit Court and the District Court organised on a regional basis.

The **Supreme Court** is composed of the president of the Court (the Chief Justice) and seven ordinary judges. The composition of the Court will change according to the nature of the case at issue.

⁸⁷⁰ Any action, hearing, investigation, inquest, or inquiry brought by one party against another in which the party seeking relief has given legal notice to and provided the other party with an opportunity to contest the claims that have been made against him or her. A court trial is a typical example of an adversary proceeding, whereby parties have the responsibility of finding and presenting evidence. This is contrasted with the "inquisitorial" system, whereby the judge will play an active role in the proceedings.

The main jurisdiction of the Court is to hear appeals from decisions of the High Court. The Court also deals with matters referred to it by way of Case Stated from a Judge of the Circuit Court or of the High Court. An appeal can also be brought to the Supreme Court from a decision of the Court of Criminal Appeal.

The **High Court** has full jurisdiction in, and power to determine, all matters and questions whether of law or fact, civil or criminal. Its jurisdiction also extends to the question of the validity of any law having regard to the Constitution. The High Court acts as an appeal court from the Circuit Court in civil matters. The High Court exercising its criminal jurisdiction is known as the **Central Criminal Court**. The High Court consists of the President and thirty six ordinary judges. The President of the Circuit Court and the Chief Justice are, by virtue of their office, additional judges of the High Court.

The High Court sits in Dublin to hear original actions, but also hears other cases in several provincial locations (Cork, Galway, Limerick, Waterford, Sligo, Dundalk, Kilkenny and Ennis). Matters coming before the High Court are normally heard and determined by one judge but the President of the High Court.

The **Circuit Court** has jurisdiction mainly for actions where the claim does not exceed €38,092.14. In criminal matters the Circuit Court has the same jurisdiction as the Central Criminal Court in all indictable offences except for some serious offences. Criminal cases dealt with by the Circuit Criminal Court begin in the District Court and are sent forward to the Circuit Court for trial or sentencing.

The Circuit Court consists of the President and thirty seven ordinary judges. The country is divided into eight circuits with one judge assigned to each circuit except in Dublin where ten judges may be assigned, and Cork, where there is provision for three judges. There are twenty-six Circuit Court offices throughout Ireland with a County Registrar in charge of the work of each office. The Circuit Court is a court of limited and local jurisdiction. The work can be divided into four main areas: civil, criminal, family law and jury service. The Circuit Court sits in venues in each circuit.

The **District Court** consists of a President and sixty three ordinary judges. The country is divided into twenty four districts with one or more judges permanently assigned to each district and the Dublin Metropolitan District. The District Court is a court of local and summary jurisdiction. The business of the District Court can be divided into four categories: - criminal, civil, family law and licensing. The civil jurisdiction of the District Court in contract and most other matters is where the claim or award does not exceed €6,348.69. The District Court exercising its criminal jurisdiction deals with four particular types of offences:

- (i) Summary offences are those for which there is no right of trial by judge and jury. This makes up the bulk of the criminal work of the District Court, these offences are exclusively statutory in origin.
- (ii) Indictable offences tried summarily - with the consent of the accused and the DPP and the judge being of the opinion that the facts constitute a minor offence.
- (iii) Indictable offences - other than certain offences including rape, aggravated sexual assault, murder, treason and piracy where the accused pleads guilty and the DPP consents, and the judge accepts the guilty plea. Otherwise, the accused is sent forward to the Circuit Court on his signed plea of guilty for sentencing.
- (iv) Indictable offences not tried summarily.

In November 2013, the Thirty-third Amendment of the Constitution⁸⁷¹ was signed into law, establishing a **Court of Appeal** which will sit between the High and Supreme Courts and will

⁸⁷¹ Thirty-third Amendment of the Constitution (Court of Appeal) Act 2013, available at: <http://www.irishstatutebook.ie/pdf/2013/en.ca.2013.0033.pdf> . The Court has not yet been established, but for the purposes of this report, references have been made to the Court of Appeal as the court of final appeals, with limited recourse to the Supreme Court. Until that Court is established, the Supreme Court remains as the highest court in Ireland.

assume the function of the appellate jurisdiction of the Supreme Court. Appeals from the Court of Appeal to the Supreme Court will be subject to obtaining the leave of the Supreme Court which would only be available in cases of general public importance or in the interests of justice. This is intended to reduce the work load of the Supreme Court and allow it to concentrate on a smaller number of more important cases. Currently, civil cases decided by the High Court are directly appealable to the Supreme Court which has no choice over which appeals it hears.

4.2 The role of the courts in competition proceedings

The Competition Authority is empowered to initiate civil proceedings in respect of breaches of Sections 4 and 5, but owing to constitutional considerations, does not have the power to determine whether a breach of the Competition Act has occurred, nor may it impose penalties thereof. Proceedings in civil and criminal matters must instead be brought before either the Circuit or High Court, with possibilities to appeal either before the High Court or the Court of Appeal, with possible recourse to the Supreme Court. Section 14(3) of the Competition Act provides that an action- either by private parties or the Competition Authority- in respect of a breach of Sections 4 or 5 may be brought in the Circuit Court or in the High Court.

If, having completed an investigation, the Competition Authority concludes that there has been an infringement of competition law, it can initiate summary proceedings in the District Court. In the case of serious (indictable) offences, the Competition Authority's file is then referred to the DPP, who may bring proceedings before the Central Criminal Court. Alternatively, the Competition Authority can bring civil court proceedings before the Circuit Court or High Court for an injunction or declaratory order. Circuit Court decisions may be appealed to the High Court or, on a point of law, to the Court of Appeal. High Court decisions may be appealed on a point of law to the Court of Appeal.

Apart from the statutory restriction provided by Section 14(3) of the Competition Act referred to above, there are no official restrictions on which courts may hear competition claims. The rules on competence with respect to competition law actions do not differ in any way from the normal rules applicable to damages actions.

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings related to breaches of competition law rules in Ireland.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in Ireland is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Natural and legal persons. They must demonstrate a "sufficient interest".	Actions under Section 14(1) of the Competition Act may be brought by "any person who is aggrieved" (i.e. an individual or an undertaking). Section 14A (1) of the 2002 Act also provides for a statutory right of action for a competent authority (the Competition Authority).
How can an action be filed?	The decision of a finding of an infringement of the Competition Acts by the relevant court may be appealed before a superior court.	Section 14(3) states that the action shall be brought either before the Circuit or High Court.
With which authorities can the action be filed?	Circuit Court decisions may be appealed to the High Court or, on a point of law, to the Court of Appeal. High Court decisions may be appealed on a point of law to the Court of Appeal. Recourse will be possible to the Supreme Court if the case raises sufficient public importance or interests of justice.	The Circuit or High Court.
Burden of proof	The party seeking to reverse the decision bears the burden of proof. Further, in Ireland, unlike most EU countries, hardcore cartel offences are criminally prosecuted and the burden of proof in court is to a criminal standard. That means the offence must be proved to a judge or jury beyond a reasonable doubt. In civil cases (i.e. those other than hardcore cartels), the Competition Authority will have to prove its case "on the balance of probabilities".	The burden of proof lies on the party attempting to assert that there has been a breach of competition rules.

5.2 Judicial Review Proceedings

This section presents proceedings relating to judicial review of competition law cases in Ireland.

5.2.1 Rules applicable to the judicial review of NCA decisions

In Ireland, only the courts have the power to make enforcement decisions in respect of breaches of competition law. Decisions may be appealed to a higher court in the same manner as in other cases.

5.2.2 Competent Court

Final decisions in competition cases may be appealed in the same way as any other civil or criminal cases may be appealed. Circuit Court decisions may be appealed to the High Court or to the Court of Appeal. High Court decisions may be appealed to the Court of Appeal. Appeals to the Supreme Court will be possible if the considerations of general public importance or the interests of justice are met. There is no constitutional or common law right of appeal from the District Court to the Circuit Court, but a person convicted in the District Court has a statutory right of appeal to the Circuit Court against his or her conviction or sentence, or both. Notice of appeal must be served on every party directly affected by the appeal within 14 days of the date of the decision being appealed.

Appeals from the Circuit Court or the Central Criminal Court are to the Court of Criminal Appeal. There is no absolute right of appeal to the Court of Criminal Appeal and a party must apply to the trial judge for leave to appeal, which involves satisfying the court that one of the following grounds of appeal exist: that the case raises a question of law, that the trial appears to have been unsatisfactory, or the court considers that there are any other sufficient grounds of appeal. This application must be made at close of trial or within three days thereafter. Notice of appeal must be served within 14 days of the date on which the certificate was granted.

5.2.3 Timeframe

Criminal cases must be appealed within 14 days of the granting of the leave to appeal. Notice of appeal to the Supreme Court must be served within 21 days of the judgment or the order appealed against.

5.2.4 Admissibility of Evidence

Section 12 of the Competition Act provides for a number of presumptions in relation to evidence that apply in both criminal and civil proceedings under the Competition Act.

Section 13 of the Competition Act provides for the admissibility in proceedings under the Competition Act of statements contained in documents. The Section provides that, if a document contains a statement by a person asserting that an act has been done, or is or was proposed to be done, by another person relating to an anti-competitive arrangement or an abuse of a dominant position, then that statement shall be admissible as evidence that the act was done or was proposed to be done by that other person. The statement must be made by a person who has done an act relating to an anti-competitive arrangement or an abuse of a dominant position. The document must have come into existence before the commencement of the proceedings and must have been prepared otherwise than in response to an enquiry made or questions put by a member or officer of the Authority, An Garda Síochána (the Irish police service), the Commission or an authorised officer otherwise connected to the proceedings.

In addition to these specific provisions of the Competition Act, the general principles and law of evidence apply to judicial review. According to general principles, hearsay evidence is not admissible, subject to certain exceptions. Witnesses can refuse to answer questions on the basis of legal professional privilege. In addition, in civil proceedings, there is a privilege against self-incrimination.

The rules on admissibility of evidence vary depending on the court before which the appeal is brought, and its acceptance is generally at the discretion of that court. For example, where any party desires to submit fresh evidence upon the hearing of an appeal in any action or matter at the hearing or for the determination of which no oral evidence was given, he/she shall serve and lodge an affidavit setting out the nature of the evidence and the reasons why it was not submitted to the Circuit Court.⁸⁷²

In general, new evidence is not permitted at appeal stage before the Supreme Court, however, new evidence is permitted where suppression of the evidence would be an injustice.

The admissibility of new evidence at the appeal stage is based on the application of three criteria: the evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial. It must be credible evidence which might have a material and important influence on the result of the case. The assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation.⁸⁷³

5.2.5 Interim Measures

Since the Competition Authority does not itself have powers in relation to interim measures, it will have to apply to the Circuit Court or the High Court, under Section 14(5) of the Competition Act, for injunctive relief, which may be granted on an interim basis.

The 2012 Act specified the three forms of injunction available:

- (i) an interim injunction
- (ii) an interlocutory injunction, or
- (iii) An injunction of definite or indefinite duration.

Injunctions are an equitable remedy and the Competition Authority would have to establish, to the satisfaction of the court that:

- there is a serious question to be tried;
- damages are not an adequate remedy; and
- the balance of convenience lies in favour of granting the relief sought.

5.2.6 Rulings of the court

Hearings are held in public, based on the constitutional principle provided in Article 34(1) that “justice shall be administered in public”. Legal submissions are made to the court before the hearing and the hearing itself generally consists of oral submissions by counsel on both sides before opening all of the papers filed in the proceedings.

Section 14(7) of the Competition Act provides that where, in an action under Section 14(1), a court decides that an undertaking has, contrary to Section 5, abused a dominant position, the court may, either at its own instance or on the application of the Authority, by order either:

- require the dominant position to be discontinued unless conditions specified in the order are complied with, or
- require the adjustment of the dominant position, in a manner and within a period specified in the order by a sale of assets or otherwise as the court may specify.

In cases of appeal, the decision of the lower court will either be upheld or revoked.

⁸⁷² Order 61 of the Rules of the Superior Courts.

⁸⁷³ As set out in *Lynagh v Mackin* [1970] I.R. 180.

5.3 Follow-on Proceedings (private enforcement)

This section presents the follow-on proceedings in Ireland.

5.3.1 Rules applicable to follow-on procedures

Civil claims may be brought under Section 14(1) of the Competition Act by any person (including a legal person) who is aggrieved in consequence of a practice which is prohibited by the Competition Act. In respect of EU competition law, civil claims by third parties may be brought on the basis of the direct effect of Articles 101 and 102 TFEU.

There is also a statutory right of action for a competent authority. The right is contained in Section 14A of the 2002 Act, inserted by Section 4 of the 2012 Act.

Section 14A(1) of the 2002 Act provides that the competent authority shall, in respect of any agreement, decision, concerted practice or abuse that is prohibited under Section 4 or 5 of the 2002 Act, or by Articles 101 or 102 of the TFEU, have a right of action under Section 14A(1).

Section 8 of the 2012 Act introduced the principle of *res judicata*, which will facilitate follow-on actions. According to this provision, where a court has found that an undertaking has engaged in prohibited conduct or practices, this finding will have the status of *res judicata*. Consequently, plaintiffs in follow-on actions will no longer have to prove the competition law breach but will only have to prove loss, causation, and quantification of damages. The Act is silent on the issue of whether plaintiffs may file an action while such a judgment, benefitting from the *res judicata* is under appeal.

5.3.2 Competent Court

Section 14(3) specifies that such an action would be brought before the Circuit or High Court. However, Section 14(4) continues to provide that where an action under Section 14(1) is brought in the Circuit Court any relief by way of damages, including exemplary damages, shall not, except by consent of the necessary parties in such form as may be provided for by rules of court, be in excess of the limit of the jurisdiction of the Circuit Court in an action founded on tort. The Circuit Court's maximum jurisdiction in terms of damages is €38,092.14. Accordingly, claims are likely to be in the High Court.

5.3.3 Timeframe

As a breach of Sections 4 or 5 of the 2002 Act constitutes a civil wrong, the period of limitation is six years from the date on which the cause of action accrued, as is the case with all such actions⁸⁷⁴

The appeal of a Circuit Court decision must be lodged within ten days of that judgment to the High Court.⁸⁷⁵ The notice of appeal of a High Court decision to the Supreme Court shall be a ten-day notice and served not later than twenty-one days from the passing and perfecting of the judgment or order appealed against.⁸⁷⁶

5.3.4 Admissibility of evidence

See section 5.2.4.

⁸⁷⁴ Section 11(2)(a) of the Statute of Limitations Act 1957, available at: <http://www.irishstatutebook.ie/1957/en/act/pub/0006/sec0011.html>

⁸⁷⁵ Order 61, Rules of the Superior Courts.

⁸⁷⁶ Order 58, Rules of the Superior Courts.

5.3.5 Interim Measures

Section 14(5) of the 2002 Act (as amended by Section 3 of the 2012 Act) provides that the following relief may be granted to the plaintiff in an action under Section 14(1):

- (a) relief by way of injunction or declaration (including a declaration in respect of a contravention of Section 4 or 5 or Art.101 or 102 TFEU that has ceased);
- (b) Damages, including exemplary damages.

5.3.6 Rulings of the court

In addition to monetary compensation, a plaintiff may seek an injunction and/or a declaration for infringement of Sections 4 and 5 and, therefore, Articles 101 and 102 TFEU. Section 14(5) of the Competition Act provides that damages, including exemplary damages, are available as reliefs to a plaintiff in an action taken under Section 14(1).

Hearings are held in public, based on the constitutional principle provided in Article 34(1) that "justice shall be administered in public", although parties may seek to have proceedings held in camera, generally where a public hearing would involve the disclosure of information which, if made public, could be highly prejudicial to the undertaking. Legal submissions are made to the court before the hearing and the hearing itself generally consists of oral submissions by counsel on both sides before opening all of the papers filed in the proceedings.

In calculating damages in a civil action in respect of a breach of the competition rules, Irish courts do not take account of the motives or the intention of the party in default unless the question of exemplary damages arises. The Courts award damages on the same basis as they would award them in the case of any tort or civil wrong.

5.3.7 Rules applicable to the enforcement of court judgments

There are a number of different ways of enforcing monetary awards by courts.

One manner in which a judgement for the recovery by or payment to any person of money may be enforced is by execution order.

Where a judgment or order is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court which handed down the decision for leave to issue execution against such party. The Court may then order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried.

Creditors have 12 years from the date of the judgment to look for enforcement orders. However, if the judgment order was issued six or more years earlier, the creditor may have to apply to court for 'leave to issue execution'.⁸⁷⁷ Once issued, enforcement orders are generally valid for a year and may then be renewed.

The courts can also grant a stay of execution. This means that the enforcement of the debt is halted for a period.

The following are the main ways of enforcing judgments:

- Registration of the judgment
- Execution against goods
- Judgment mortgage
- Instalment orders, followed if necessary, by committal orders
- Attachment of earnings
- Attachment of debts
- The appointment of a receiver

⁸⁷⁷ Order 42, Rules of the Superior Courts.

- Bankruptcy proceedings

5.4 Alternative dispute resolution mechanisms

Aggrieved parties may, in addition to bringing an action in court in respect of breaches of the competition rules, seek redress by agreement through the generally available mechanisms of alternative dispute resolution in the form of arbitration or mediation⁸⁷⁸. There is no publicly available information on the use of these methods in competition law proceedings. An arbitration agreement may be entered into either before a dispute arises or after the dispute has arisen.⁸⁷⁹

In addition, a settlement between the parties before the court reaches final judgment is available as an alternative means of dispute resolution.

⁸⁷⁸ European Communities (Mediation) Regulations 2011 S.I. No. 209/2011 - <http://www.irishstatutebook.ie/2011/en/si/0209.html>

⁸⁷⁹ See The Arbitration Act 2010 for further information, available at: <http://www.irishstatutebook.ie/pdf/2010/en.act.2010.0001.pdf>

6 Contextual Information

This Section provides a contextual overview of the judicial system in Ireland.

6.1 Duration and cost of competition law cases

There is no information available on the duration of competition law cases. No official statistics exist regarding the cost or duration of litigation in Ireland, although it is unlikely that any case would take longer than six years.⁸⁸⁰

The cost of litigation will depend on the complexity and duration of the case in question. Legal fees payable to solicitors and/or barristers are set privately by counsel. Other costs incurred by parties include those fees payable to the Court, including, for example, filing costs and the stamping of relevant documents.⁸⁸¹

The Competition (Amendment) Act 2012 increased the maximum fines for an infringement of competition law. The fine of €3,000 has been raised to €5,000 where there is a summary conviction involving a Section 4 or Section 5 infringement. The maximum fine for convictions on indictment relating to a breach of Section 4 of the 2002 Act is set at 10 per cent of the undertaking's turnover but the alternative fine (effectively for undertakings with turnovers of less than €50 million or individuals) has been raised from €4,000,000 to €5,000,000 by Section 2 of the 2012 Act. In the case of a conviction on indictment of an offence involving a non-hardcore breach of Sections 4 or 5 fine was increased by the 2012 Act from €4,000,000 to €5,000,000.

Section 8(11B) of the 2002 Act (as inserted by Section 2 of the 2012 Act) contains a new provision whereby a person convicted of certain offences may be liable for payment of some of the costs involved in the case.

By way of illustration, the highest fine imposed for breach of Irish competition law in recent years was to the amount of €30,000 on an individual convicted of a breach of Section 4 of the 2002 Act.⁸⁸²

6.2 Influencing Factors

In Ireland, unlike most EU countries, hardcore cartel offences are criminally prosecuted and the burden of proof in court is to a criminal standard. That means the offence must be proved to a judge or jury beyond a reasonable doubt, a standard which has been criticised as being too deterrent for the purposes of prosecuting cartels.

As part of the funding that Ireland secured from the European Central Bank, the European Commission and the International Monetary Fund, a range of measures were proposed, one of which was the introduction of civil penalties for competition infringements.⁸⁸³ However, considering the constitutional impediments, this was not possible, and instead, the 2012 Act was adopted, to strengthen the enforcement of competition law.

The strengthening of the criminal sanctions in the 2012 Competition (Amendment) Act was motivated by the aim of increasing deterrence, since it was not possible to introduce civil sanctions. This was to directly address the concern that Irish judges were unwilling to commit individuals to prison, despite the Competition Authority having secured multiple

⁸⁸⁰ National Report on Ireland, Actions for Damages, European Commission. Available at: http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/ireland_en.pdf

⁸⁸¹ For a listing of fees payable to the Supreme Court and the High Court, please see S.I. 24/2014 Supreme Court and High Court (Fees) Order 2014, available at: <http://www.irishstatutebook.ie/pdf/2014/en.si.2014.0024.pdf>. For a listing of Circuit Court fees, see S.I. 23/2014 Circuit Court (Fees) Order 2014, available at: <http://www.irishstatutebook.ie/pdf/2014/en.si.2014.0023.pdf>

⁸⁸² For further information on fines imposed, see the website of the Competition Authority, available at: <http://www.tca.ie/EN/Enforcing-Competition-Law/Criminal-Court-Cases/Home-Heating-Oil.aspx>

⁸⁸³ EU/IMF Programme of Financial Support for Ireland, 16 December 2010, available at: <http://www.finance.gov.ie/sites/default/files/euimfrevised.pdf>

convictions. This increased deterrence was reinforced by the insertion of Section 8(11B) to the 2002 Act, which contains a new provision whereby a person who is convicted of certain offences may be made liable for payment of some of the costs incurred in the case.

6.3 Obstacles/Barriers

It is not possible to bring class actions in Ireland. However, it is possible for plaintiffs to bring joint actions. A representative body may take a civil action on behalf of its members seeking declaratory or injunctive relief but it may not sue for damages on behalf of its members. Where members of a representative body have suffered injury each member may sue for damages on an individual basis. A representative body may sue for damages in its own right where it has suffered injury.

The cost and duration of litigation in Ireland may also be dissuasive to aggrieved parties. The Legal Services Regulation Bill 2011⁸⁸⁴ seeks to address some of the fees that are charged to litigants.

The provision on *res judicata* was introduced by the 2012 Act to facilitate private actions to recover damages from breaches of competition law. However, concerns have been raised that only a decision “of a court” would benefit from this status of *res judicata*. The implication of this could mean that an infringement decision of the European Commission would therefore not benefit from *res judicata*, unless challenged and confirmed by the Court of Justice of the European Union.

⁸⁸⁴ The Bill, not yet adopted, has proposed many reforms of legal services, notably with regard to fees, available at: <http://www.oireachtas.ie/documents/bills28/bills/2011/5811/document2.pdf>

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COUNTRY FACTSHEET - ITALY

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Abbreviations used

NCA	Autorità Garante della Concorrenza e del Mercato
EU	European Union
SO	Statement of Objection
TAR	Regional Administrative Tribunal

1 Overview of the National Legal Framework

The national legal system in Italy belongs to the Civil Law tradition. The legal system is a hierarchical one. The Constitution is the highest source of law followed by laws, regulations, custom or usage.⁸⁸⁵

The Italian legal system is governed by the Constitution of the Italian Republic, promulgated in 1948 and composed of 139 articles.⁸⁸⁶ The Constitution contains the general principles which are considered to be essential values of the life of the State; dictates the principles which must be abided by in the legislation produced by the Parliament, the regions and any other public institution with the power to issue decrees and regulations of general or specific validity; and sets out the basis of foreign policy and relations with the legal system of the European Union (hereafter “EU”). It also organizes the separation of powers between the executive and the parliament, with the judiciary responsible for supervising the execution of laws.

The judicial function is subject only to the law. Therefore, judges are autonomous and independent from the political and executive powers.⁸⁸⁷ The administration of justice is regulated by articles 101 to 113 of the Constitution and can be broken down into the following areas: (i) civil and criminal; (ii) administrative; (iii) accounting; (iv) military and (v) taxation.

Further information on the Court structure in Italy is provided in Section 4 below. With regards to territorial organization, the courts of first instance (both civil and administrative) have a seat in the main town of each province; but several separate sections have been established in other communes within a province, with territorial jurisdiction coinciding with the divisions of these sections made by the Ministry of Justice. Judgments may be appealed before the Court of Appeal, in whose district the court of first instance is located

Further information on the Court structure in Italy is provided in Section 4 below.

⁸⁸⁵ See articles 1-8 of the preliminary provisions to the Italian Civil Code available at http://www.jus.unitn.it/cardoza/obiter_dictum/codciv/codciv.htm

⁸⁸⁶ Available at <http://www.governo.it/Governo/Costituzione/principi.html>

⁸⁸⁷ See article 101(2) of the Constitution of the Italian Republic.

2 National Legislation establishing competition law rules

This section provides an overview of national legislation establishing competition law rules. Table 2.1 presents a list of relevant competition law instruments in Italy.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
Law on Competition no. 287/1990 of October 10, 1990 (<i>Legge 10 ottobre 1990, n. 287 - Norme per la tutela della concorrenza e del mercato</i>)	October 10, 1990, entry into force October 14, 1990

2.1 General legislation

Law on Competition no. 287/1990 of October 10, 1990 (hereinafter the “Law 287/90”)⁸⁸⁸ introduced the first competition rules in Italy. Before 1990, the protection of competition was guaranteed through the application of European Community (EC) competition law and the Civil Code provisions on unfair competition. The Law 287/90 established the National Competition Authority (*Autorità Garante della Concorrenza e del Mercato - AGCM*)⁸⁸⁹ (hereinafter the “NCA”) as the National Authority entrusted with its enforcement. It does not provide for either criminal sanctions or treble damage awards.

Law 287/90 mirrors EU competition law. In particular, the structure and the scope of Sections 2 and 3 (prohibiting, respectively, agreements and practices in restraint of competition, and abuses of market power) are strictly modelled on Articles 101(1) and 102 of the Treaty on the Functioning of the European Union (including the relevant exemptions regime) (hereafter “TFEU”). Moreover, pursuant to Section 1(4), its provisions must be interpreted in accordance with the principles of EU competition law.

There is no specific provision under Law 287/90 that provides rules relating to material scope. However, it can be inferred from the entire body of law that it applies not only to private undertakings,⁸⁹⁰ but also to public and state-owned undertakings.

The principle of extraterritoriality applies to Law 287/90. To the extent that the anticompetitive conduct taking place outside Italy has effects⁸⁹¹ within the Italian territory or a substantial part of it, such conduct falls within the scope of the Law 287/90.

In addition to the provisions of Law 287/90, damages in tort for breach of Italian (or EU) competition law provisions may be claimed by victims of anticompetitive conduct pursuant to Article 2043 of the Italian Civil Code.

2.2 Industry-specific legislation

In addition to the generally applicable legislation mentioned above, Italy has introduced specific competition law rules which allow for a sectorial approach or relate to specific sectors.

The Bank of Italy is vested with the power to enforce Italian competition rules in cases affecting core banking activities.⁸⁹² However, the Bank of Italy retains jurisdiction over the assessment of whether mergers in the banking sector comply with national prudential rules.

⁸⁸⁸ Available at <http://www.agcm.it/en/comp/1727-law-no-287-of-october-10th-1990.html>

⁸⁸⁹ See www.agcm.it

⁸⁹⁰ In the Italian system there is no statutory definition of “undertaking”. The notion coincides with the one set out by EU case-law: “any entity carrying out activities of a commercial or economic nature”.

⁸⁹¹ In order to establish where an anticompetitive conduct has affected a specific a specific territory reference is made to the sales affected by such conduct.

⁸⁹² Law No. 262 of December 28, 2005 repealed Section 20(2), (3), and (6) of the Law 287/90.

According to Section 20(4) of Law 287/90, the NCA is responsible for the enforcement of the Law 287/90 with respect to insurance companies. However, it must request the non-binding opinion of the Institute for the Surveillance of Private Insurance Companies (*Istituto per la Vigilanza sulle Assicurazioni Private e d'Interesse Collettivo (ISVAP)*). Specific cooperation protocols regulate the relationships between such institution and the NCA.

The NCA is again responsible for the enforcement of the Law 287/90 within the media and communications sector, though it must request the non-binding opinion of the Communications Authority (*Autorità per le Garanzie nelle Comunicazioni - AgCom*). Pursuant to Article 1(6)(c)(11) of Law No. 249/1997, this non-binding opinion must be issued by the Communications Authority within 30 days of receiving the documentation on which the proposed decision is based. The NCA, however, may still adopt its decision even if the opinion is not issued within this time limit. Law No. 249/1997 also provides specific rules preventing the creation of a “dominant position” in the media and telecommunications sector. Article 2(3) of Law No. 249/1997 provides for a broad notification obligation. Pursuant to this provision, undertakings active in the telecommunications and media sectors must notify the Competition and the Communications Authority about all agreements and concentrations to which they are party so that the agencies may engage in the “exercise of their respective functions.”

3 The Italian Competition Authority

This Section describes the National Competition Authority (NCA) in Italy, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Italian Competition Authority

The enforcement of Italian competition law is entrusted to the NCA, established in 1990 by Law 287/90. The NCA is an independent agency which acts as both an investigative and a decision-making body.

The NCA enforces rules which prohibit anticompetitive agreements among undertakings, abuse of dominant position as well as any possible mergers which may create or strengthen dominant positions detrimental to competition. As of 2007, the NCA has been in charge of protecting consumers from any unfair commercial practices among undertakings, as well as from all misleading advertising.⁸⁹³ In order to guarantee fair market competition, it also intervenes against all comparative advertising which may bring discredit on competitors' products or cause confusion among consumers. As of 2004,⁸⁹⁴ the NCA has also been in charge of enforcing laws against conflicts of interest for Holders of Public Office. As of 2012⁸⁹⁵ the NCA has been in charge of (i) declaring "unfair" (*vessatoria*) a commercial clause inserted by an undertaking in a contract addressed to consumers where such contract is concluded through the acceptance by the consumer of general terms and conditions or the signing of a pre-formulated standard contract; (ii) developing a legality rating for the undertakings operating in Italian territory. Such a rating will be relevant in the context of granting public financing and for the access to banking credit; (iii) challenging vis à vis the Regional Administrative Courts (*Tribunali Amministrativi Regionali – TAR*) any administrative act which violates competition rules.⁸⁹⁶

3.2 The reform of the Italian Competition Authority

A part from the recent expansion of its competences started in 2007 and already mentioned in paragraph 31 above, the NCA has not been substantially reformed since its establishment in 1990. With regards to its structure, an internal reorganization of its offices has been implemented in 2000. The relevant details are provided in paragraph 3.2 below.

3.3 Composition and decision-making

The NCA is composed of five members who make decisions by majority vote. It is comprised of a chairman and four members who are appointed jointly by the Speakers of the Senate and the Chamber of Deputies from a group of candidates who are "clearly recognised as independent."⁸⁹⁷

To be considered for the position of chairman, a candidate must also have held an institutional position of high prominence. Each member serves a non-renewable seven-year term. The Minister of Production Activities appoints a secretary general (*Segretario Generale*) upon the recommendation of the chairman of the NCA. The secretary general supervises the operation and organisation of the NCA.

The members of the NCA are assisted by a staff of approximately 230 officials and a director general, who coordinates investigations. The NCA's staff is composed of civil servants transferred from other public entities, recruited as permanent employees on the basis of performance in *ad hoc* competitive examinations, or hired under temporary employment

⁸⁹³ Legislative Decree no. 145 of August 2, 2007 – Unfair advertising.

⁸⁹⁴ Law no. 215; July 20 2004, Norms in the ambit of conflict of interest

⁸⁹⁵ Law Decree no. 1/2012 converted into Law no. 27 of March 24, 2012 – Urgent provisions in the ambit of competition, infrastructures and competitiveness

⁸⁹⁶ See Article 21-bis of the Law 287/90.

⁸⁹⁷ See Article 10(2) of Law 287/90.

contracts. The officials cannot carry out any other professional activity which may undermine their independence and must comply with the NCA's ethical code. Article 14(4) of Law 287/90 provides that, in exercising their duties, NCA officials are considered public officials and are sworn to secrecy.

Following an internal reorganisation set forth in March 2000, the NCA's investigative activities are carried out by a General Investigation Directorate (*Direzione Generale Istruttoria*) that coordinates the activities of several units (*Direzioni settoriali*). These investigative units have a horizontal competence. That is, they are responsible for overseeing the enforcement of all substantive provisions set forth in the Law 287/90 (e.g., investigating cartel and abuse cases and reviewing merger filings) in a specific economic sector.

3.4 Cooperation with other entities

In the course of performing its duties, the NCA may correspond with any governmental department and any other statutory body or agency, and may request information from them as well as their cooperation.⁸⁹⁸ For example, on June 14, 2013, the NCA, the Bank of Italy (*Banca d'Italia*), the Italian Authority on Financial Markets (*Commissione Nazionale per le Società e la Borsa – CONSOB*) and the Institute for the Surveillance of Private Insurance Companies (*Istituto per la Vigilanza sulle Assicurazioni Private e d'Interesse Collettivo (ISVAP)*) executed a cooperation protocol in order to coordinate their actions in the ambit of interlocking directorates' in the financial sector.

Moreover, the NCA can cooperate with antitrust authorities of other Member States of the European Union within the framework of the European Competition Network (ECN).

3.5 Investigations

The NCA has competence to begin an investigation either on its own initiative or on the basis of a complaint lodged by an individual having a legitimate interest.⁸⁹⁹ Decree No. 217/1998⁹⁰⁰ lays down the relevant procedural rules for the enforcement of Law 287/90. The list of investigative powers provided for in Section 14 of the Law and the Decree is exhaustive and does not include the exercise of any type of general surveillance powers such as bugging, telephone tapping, or trailing individuals allegedly involved in cartel conduct.

Pursuant to Section 8 of Decree No. 217/1998, the NCA may exercise its investigative powers only after it serves the companies involved with the decision to open proceedings typically at the outset of an on-site surprise inspection. This decision must clearly indicate the presumed facts that it intends to investigate.

For companies established outside of Italy, the serving of a decision to open proceedings is accomplished through the diplomatic channel, which takes considerably longer than notification by the NCA's officials before the commencement of a dawn raid. Accordingly, where a dawn raid is staged to take place simultaneously at the premises of several companies, companies established outside of Italy and in a country other than a Member State of the EU are not raided simultaneously with the companies in Italy, even with the assistance of the local antitrust authority's staff.

The NCA's key investigatory powers are the following:

- to order the production of specific documents or information;
- to carry out compulsory interviews with individuals, only with regard to a company's legal representatives and in the course of an unannounced search of business premises or a hearing;

⁸⁹⁸ See Article 10 of Law 287/90.

⁸⁹⁹ There are no public guidelines or templates available to file a complaint.

⁹⁰⁰ Decree of the President of the Republic of Italy no. 217, April 30, 1998 – Regulation regarding the investigations pursued by the NCA.

- to carry out an unannounced search of business premises (as opposed to residential premises);
- to image computer hard drives using forensic IT tools;
- to require an explanation of any documents or information supplied by the company being investigated; and
- to secure premises overnight by seal.⁹⁰¹

The NCA may also request in writing information and documents from any individual, undertaking, or entity in possession of such information and documents. All activities carried out by the NCA are recorded in the minutes of the inspection, which must be signed by the NCA's officials and the parties' representatives.

Pursuant to Article 8(2) of Decree No. 217/1998, the NCA can hear third parties to gather their position as to the agreement or practice being investigated and evidence that may be useful for its proof and assessment. Also the parties can request to be heard. Hearings are usually organised also with the parties in order to discuss the NCA's concerns as formulated in the decision to open proceedings, as well as possible commitments.

3.6 Decision-making

Where it deems to have acquired sufficient evidence of the collusive practice in question, the NCA issues the statement of objections (hereafter "SO") (*Comunicazione delle risultanze istruttorie*), by which it notifies the companies involved and any complainant of its objections against the cartel members. The issuance of the SO is authorised by the NCA's College, provided that the latter considers the staff's conclusions not to be manifestly devoid of grounds.

Together with the SO, the NCA notifies all interested parties (i.e., the companies being investigated, the complainants, if any, and any other third parties admitted to the proceedings) of the date of closure of the investigation, which must be at least 30 days later than the date of notification of the SO. The parties to the alleged cartel, the complainants, if any, and any other third parties admitted to the proceedings may file written submissions in response to the SO as well as other documents up to five days before the date of closure of the investigation.

If the companies being investigated request to be heard by the NCA's College, a final hearing takes place, typically on the date of closure of the investigation. Any complainants or third parties admitted to the proceedings under Article 7(1)(b) of Decree No. 217/1998 are allowed to participate in the final hearing.

After the final hearing, the NCA issues a decision. If the NCA decides that there was an infringement of Law 287/90, it orders the infringement to end within a time limit set out in the decision.⁹⁰² If the infringement is serious the NCA can impose a fine. Such decision: (i) identifies the undertakings concerned; (ii) provides a description of the main stages and results of the investigation and a definition of the relevant market; (iii) sets forth a legal assessment, including a reply to the parties' main arguments; and (iv) states the corrective measures that will be taken, including the issuance of cease and desist orders and the imposition of fines.

Decisions are administrative acts. The NCA must set out the principles of law and facts upon which its decision is based in a concise, clear, and relevant manner. Under the principles of Italian administrative law, the NCA does not need to address all arguments raised by the parties or considered during the administrative proceedings that in its opinion do not affect the outcome. The statement supporting the decision must be sufficient to allow a court to exercise its powers of review and to provide the undertaking concerned with the information

⁹⁰¹ See Articles 8 – 16 of the Decree of the President of the Republic of Italy no. 217, April 30, 1998 – Regulation regarding the investigations pursued by the NCA.

⁹⁰² See Article 15 of Law 287/90.

necessary to enable it to determine whether or not the decision is well-founded. Decisions are served on the parties and published in the Bulletin of the NCA. They are also available on the NCA's official website.⁹⁰³

⁹⁰³ The NCA's website is available at <http://www.agcm.it>.

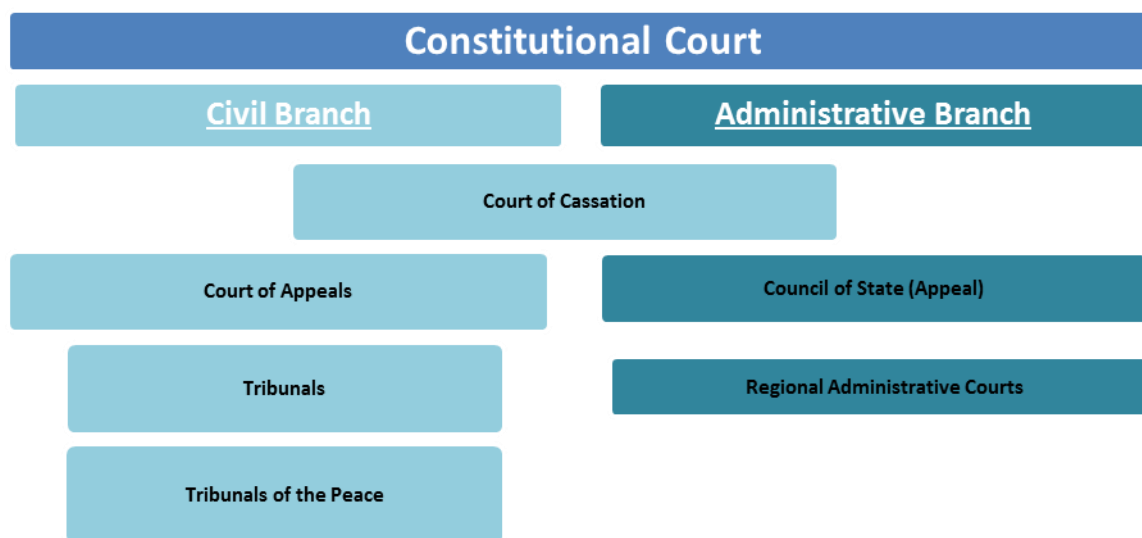
4 Competent courts

This section provides an overview of the competent courts in Italy.

Within the Italian judicial system, the courts which are competent to apply Articles 101 and 102 TFEU are those belonging to the administrative branch, for judicial review actions, and to the civil branch, for follow-on actions.

Figure 4.1 below provides an overview of the civil and administrative branch's court system in Italy

Figure 4.1 civil and administrative court system in Italy



	Civil branch	Administrative branch
Infringement of Law	<p>Court of Cassation (<i>Corte di Cassazione</i>): the highest court in Italy, located in Rome. It is divided into three sections, for criminal, civil and labour law disputes. For particularly important matters it may judge in plenary (“<i>a sezioni unite</i>”). Competence over:</p> <ul style="list-style-type: none"> - appeals on issues of law only of second-instance court judgments; - contests raised in any procedure of the jurisdiction of the Italian judges. 	<p>Court of Cassation (<i>Corte di Cassazione</i>): the highest court in Italy, located in Rome. It is divided into three sections, for criminal, civil and labour law disputes. For particularly important matters it may judge in plenary (“<i>a sezioni unite</i>”). Competence over:</p> <ul style="list-style-type: none"> - appeals on issues of law only of second-instance court judgments; - contests raised in any procedure of the jurisdiction of the Italian judges.
Second Instance	<p>Court of Appeals (<i>Corte d’Appello</i>): Jurisdiction (on both issues of law and merits) over appeals from the Courts of First Instance; jurisdiction over enforcement proceedings in Italy of decisions rendered by foreign courts and arbitrators; jurisdiction proceedings for nullity or damages in competition matters. It is comprised of a panel of 3 judges.</p>	<p>Council of State (<i>Consiglio di Stato</i>): Italy’s highest ranking court for administrative litigation. The Council of State has its central head-office, subdivided into three litigation sections, having the power to appeal the decisions reached by Regional Administrative Tribunals.</p>

First instance

Tribunal (*Tribunale*): Default court of general jurisdiction for all civil disputes as well as disputes that do not have a determinable value. It may act as an appellate court for the decisions rendered by the Tribunal of the Peace (*Giudice di Pace*).

Tribunal of the Peace (*Giudice di Pace*): Honorary judge with jurisdiction over minor civil claims; motor vehicle accidents; real estate boundaries; minor rental and co-habitation disputes; minor criminal matters. Its decisions may be appealed before the Tribunal.

Regional Administrative Courts (*Tribunali Amministrativi Regionali – TAR*): there are 21 Regional Administrative Courts, operating in the regional capitals, and eight special assignment sections (such as section 3 of the Regional Administrative Court of Lazio to which are exclusively assigned the judicial review of NCA decisions).

The civil and administrative branches, relevant for competition law cases, are described in turn in the subsequent subsections below, as well as an overview of the courts competent for Article 101 and 102 TFEU cases.

4.1 Civil courts – Follow-on proceedings

Article 2 of Law Decree No. 1 of 2012, as incorporated in Law No. 27 of 2012, amended the rules on civil courts' jurisdiction over competition law disputes. As of 22 September 2012, the newly established Companies Courts (*Tribunali delle Imprese*)⁹⁰⁴ will have jurisdiction over, *inter alia*, private actions based on Articles 101 and/or 102 TFEU and/ or Law 287/90.

The Companies Courts' rulings may be appealed both on the facts and on the law to the Courts of Appeals (*Corte d'Appello*). The judgments of the Courts of Appeals may be appealed to the Court of Cassation on questions of law only.

4.2 Administrative courts – Judicial Review

NCA's decisions, as any other administrative decision, are subject to judicial review by the Regional Administrative Court of Latium (*Tribunale Amministrativo Regionale Lazio – TAR Lazio*). Judgments rendered by the Regional Administrative Court of Latium may be appealed to the Council of State.⁹⁰⁵ Judgments by the Council of State are subject only to: (i) appeals to the Italian Supreme Court (*Corte di Cassazione*) on questions of law only; and (ii) appeals for revocation of decisions of the Council of State, in the cases and under the circumstances set forth in Article 396 of the Italian Civil Code of Procedure. If the appeal is successful, the decision is annulled. If the appeal is denied, the party may appeal to the Council of State on points of law only (*Consiglio di Stato*). Decisions by this court are final and cannot be appealed.

⁹⁰⁴ Specialised sections of Tribunals and Courts of Appeals sitting in the capitals of the Italian regions, the only exceptions being Lombardy and Sicily, each of which has two company courts in its territory, and Valle d'Aosta, which does not have any

⁹⁰⁵ See Article 33(1) of the Law 287/90.

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings related to breaches of Competition Law rules in Italy for both judicial review and follow-on cases.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in Italy is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	(i) Addressees of the NCA's decisions; and (ii) persons who are directly and individually prejudiced by it (e.g. competitors).	Any victims (natural or legal person) of anticompetitive conduct
How can an action be filed?	Filing a complaint to the <i>TAR Lazio</i>	Filing a complaint to a Company court
With which authorities can the action be filed?	Regional administrative court of first instance of Latium (<i>Tribunale Amministrativo Regionale Lazio – TAR Lazio</i>).	Companies Courts (specialised sections of Tribunals)
Burden of proof	The burden of proof lies with the plaintiff, who must prove the facts on which his claims are founded.	The burden of proof lies with the plaintiff, who must prove the facts on which his claims are founded.

5.2 Judicial Review Proceedings

This Section presents the judicial review proceedings for competition law cases in Italy.

5.2.1 Rules applicable to the judicial review of NCA's decisions

Pursuant to Article 33(1) of the Law 287/90, the NCA's decisions are subject to judicial review by the Regional Administrative Court of Latium (*Tribunale Amministrativo Regionale Lazio – TAR Lazio*). Law No. 241 of August 7, 1990 (Law No. 241/1990) provides a general framework for administrative procedures and sets forth a general right of access to documents retained by administrative bodies.⁹⁰⁶

5.2.2 Competent Court

NCA's decisions are subject to judicial review by the Regional Administrative Court of Latium (*Tribunale Amministrativo Regionale Lazio – TAR Lazio*). Judgments rendered by the Regional Administrative Court of Latium may be appealed to the Council of State.

5.2.3 Timeframe

The addressees of the NCA's decisions may file an appeal to the Regional Administrative Court of Latium (*Tribunale Amministrativo Regionale Lazio – TAR Lazio*) within 60 days from receipt of the notifications of the decision of the NCA for both issues of law and merits. Any other persons directly and individually prejudiced by the NCA's decision may file an appeal within the term set out by Law No. 241/1990 to challenge any ordinary administrative decision. Then, the losing party before the Regional Administrative Court of Latium may lodge an appeal to the Council of State within 60 days of service or notification of judgment (made by the winning party).

⁹⁰⁶ See Articles 22 – 28 of Law No. 241 of August 7, 1990 on the Administrative Procedure.

Generally, appeals before the administrative courts now have a total duration not exceeding two years, and the procedure before the *TAR* usually lasts for only a few months.⁹⁰⁷

5.2.4 Admissibility of Evidence

All evidence normally admitted in administrative proceedings is admissible (not only those produced by the parties and the NCA in the course of the proceeding). In any event, the Court can autonomously gather evidences on its own initiative.

5.2.5 Interim Measures

The parties can ask the *TAR* for a stay of execution of the NCA's decision. Hearings for interim measures (not public) are usually granted within a short time of the filing of a notice of appeal. Fundamental conditions for the grant of a stay of execution of the NCA's decision are: (i) likelihood of success in the action undertaken (*fumus boni juris*) and (ii) urgency (*periculum in mora*).

5.2.6 Rulings of the court

With regard to the scope of the judicial review of NCA's decisions, the Council of State (*Consiglio di Stato*) stated that the scope of the *TAR*'s review of substantive findings is limited to an assessment of whether the NCA based its conclusions on accurately-stated facts and supported its decision on adequate and coherent grounds.⁹⁰⁸ However, the *TAR* has power of full judicial review with respect to the imposition of fines and cease and desist orders.⁹⁰⁹

In case of judicial review, NCA's decisions can be upheld or revoked by the *TAR*. If upheld, the party may appeal to the Council of State (*Consiglio di Stato*).

The hearings of both *TAR* and Council of State are normally public.

5.3 Follow-on Proceedings (private enforcement)

This Section presents the follow-on proceedings for competition law cases in Italy.

5.3.1 Rules applicable to follow-on procedures

Damages in tort for breach of Italian (or EU) antitrust provisions may be claimed by victims of anticompetitive conduct pursuant to Article 2043 of the Italian Civil Code, according to which "any act committed with either intent or fault causing an unjustified injury to another person obliges the person who has committed the act to compensate the damages."

Depending on the underlying facts, antitrust infringements may also give rise to damages actions based on contract liability (e.g. being a party to a cartel may induce a company to act in bad faith towards its customers or distributors).

5.3.2 Competent Court

The Companies Courts – which are specialised sections of Tribunals and Courts of Appeals sitting in the capitals of the Italian regions, the only exceptions being Lombardy and Sicily, each of which has two Company Courts in its territory, and Valle d'Aosta, which does not have any.

The Companies Courts' rulings may be appealed both on the facts and on the law to the Courts of Appeals (*Corte d'Appello*). The judgments of the Courts of Appeals may be appealed to the Court of Cassation on questions of law only.

⁹⁰⁷ Please note that as a result of the reform of the administrative procedure held in 2000, all annulment proceedings concerning the NCA's decisions are now automatically and effectively conducted under a "fast-track" procedure.

⁹⁰⁸ See, *inter alia*, *Autorità Garante della Concorrenza e del Mercato v. Enel*, 1 Oct. 2002, n. 5156 (concerning a merger case).

⁹⁰⁹ *Coca-Cola v. Autorità Garante della Concorrenza e del Mercato*, 19 July 2002, n. 4001 (Cons. di Stato).

5.3.3 Timeframe

A damage action may be launched within 5 years from occurrence of fact causing damage. Then, the losing party before the Tribunal/Tribunal of the Peace (depending on the value of the damage) may lodge an appeal to the Court of Appeals within 60 days of service or notification of judgment (made by the winning party). Then, a party may lodge proceedings before the Court of Cassation within two months of the service or notification of the judgment.

The average duration of ordinary actions before the Tribunals and Courts of Appeals is two to three years at each level of jurisdiction. Such a time frame may be lengthened considerably in the event of an appeal to the Court of Cassation.

5.3.4 Admissibility of evidence

All evidence normally admitted in civil liability proceedings, including witness testimonies, documents, and expert opinions, is admissible. Courts may also order one of the parties or a third party to submit relevant documents, which must be reasonably identified by the party applying for the disclosure order or request documents from the NCA's file.⁹¹⁰

Any finding made by the NCA in the context of an administrative procedure pursuant to the Law 287/90, or by the administrative courts reviewing the case, is not binding on the civil court having jurisdiction over a follow-on damage action. However, according to the Court of Cassation,⁹¹¹ the NCA's and the administrative courts' findings have value as a preferred means of proof of the infringing conduct (*i.e.*, they create a rebuttable presumption with respect to the existence of the infringement). As a result, in order to refute such a presumption, the defendant must provide evidence that has not already been unfavourably assessed by the NCA.⁹¹²

5.3.5 Interim Measures

Interim measures may be granted according to Article 700 *et seq* of the Italian Civil Procedure Code. An interim measure may be requested if the plaintiff reasonably fears that its rights are likely to be irreparably damaged during the course of the ordinary civil proceedings.

5.3.6 Rulings of the court

Depending on the type of action filed, the court can (i) award damages or injunctive relief or (ii) declare the nullity of an agreement or a single clause violating competition rules.

The hearings of both Tribunals/Tribunals of Peace and Court of Appelas are normally public.

5.3.7 Rules applicable to the enforcement of court judgments

Enforcement of court judgments is granted according to the ordinary provisions of the Italian Civil Procedure Code by ordinary civil Tribunals.

Italian judgments are ordinarily enforceable only if issued on appeal or if no longer subject to appeal. According to Article 282 of the Italian Code of Civil Procedure even a decision rendered at the end of a first degree proceeding has executory effect, save that the defendant has attacked it and the second instance court has suspended the executory effect of the first instance decision during the appeal proceeding.

There are three types of enforcement proceedings:

1. Enforcement of an obligation to pay a sum of money;
2. Specific enforcement of an obligation to deliver a movable or immovable property;

⁹¹⁰ Please note that pre-trial discovery is not available in Italian civil litigation, including for private antitrust actions.

⁹¹¹ Italian Court of Cassation No. 3640/2009.

⁹¹² Italian Court of Cassation No. 10211/2011.

3. Enforcement of an obligation to perform (or not to perform) a specific act.

The most relevant of the three ordinary types of enforcement is surely the Enforcement of an obligation to pay a sum of money, which is carried out through the distraint and forced liquidation of assets belonging to the debtor.

5.4 Alternative dispute resolution mechanisms

Italian legislation provides for various types of alternative dispute resolution (hereafter 'ADR') mechanisms (none of them specifically dedicated to competition cases). Broadly speaking they can be described as follows:

- Amicable settlements, as provided for in Article 1965 of the Civil Code;
- Mediation: the parties turn to an independent third party to settle their dispute and reach an agreement;
- Judicial or extrajudicial conciliation (as provided for by sections 183, 320 and 322 of the Code of Civil Procedure);
- Arbitration as an alternative means of dispute resolution to a court decision, as provided for by section 806 of the Code of Civil Procedure.

No specific ADR mechanism exists for competition cases.

6 Contextual Information

This Section provides contextual information on the judicial system in Italy.

6.1 Duration and cost of competition law cases

No information is available on the costs of both judicial review and follow-on cases.

6.2 Influencing Factors

The NCA may, in certain cases, have a strong incentive to apply Articles 101(1) and 102 TFEU as opposed to the equivalent national substantive rules. This is mainly true in cases in which the power to apply EU competition rules directly represents, in the NCA's view, an effective weapon against anticompetitive market conduct that, according to the undertakings involved, complies with state legislative or administrative measures.

In light of the principles of direct effect and supremacy of EU law over national law, as well as Member States' obligations to "abstain from any measure which could jeopardise the attainment of the objectives of" the EU Treaty, any state measure undermining the effectiveness of EU competition rules may be unenforceable in the national courts. Similarly, any anticompetitive conduct that is required of undertakings by national legislation, and which would otherwise be shielded from the NCA's scrutiny, is subject to direct enforcement under the EU provisions.

6.3 Obstacles/Barriers

The development of follow-on damage litigation is expected to be negatively affected by the fact that the commitment procedure introduced in 2006, - where the parties to an investigation offer suitable commitments to meet the concerns expressed by the NCA in its preliminary assessment, the procedure may be closed, without a finding of infringement, by a final decision making those commitments binding on the companies concerned – has become a frequently used enforcement tool, especially with reference to abuse of dominance cases (in 10 out of 11 cases in 2010; in three out of seven cases in 2011), thus freeing the NCA from the need to conduct a fully-fledged investigation.⁹¹³

⁹¹³ Global Competition Review, Private Antitrust Litigation 2013, Mario Siragusa, Marco D'Ostuni and Cesare Rizza.

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COUNTRY FACTSHEET - LITHUANIA

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Abbreviations used

EU	European Union
ECA	European Competition Authorities
ECN	European Competition Network
ICN	International Competition Network
NCA	National Competition Authority
OECD	Organization for Economic Co-operation and Development
TFEU	Treaty on the Functioning of the European Union

1 Overview of the National Legal Framework

Following the restoration of independence in 1990, the national legal system in the Republic of Lithuania (*Lietuvos Respublika*) moved to a Civil Law system.

The legal system follows a hierarchical arrangement. The Constitution of the Republic of Lithuania adopted by citizens of the Republic of Lithuania in the Referendum of 25 October 1992⁹¹⁴ is the highest source of law. It establishes the rights, freedoms, and duties of citizens. The Constitution provides that sovereign state power is vested in the people of Lithuania⁹¹⁵ and is executed by the *Seimas* (Parliament), the President of the Republic, the Government, and the Judiciary.⁹¹⁶

Other sources of law, such as constitutional laws (*konstitucinis istatymas*), codes and laws (*istatymas*), resolutions (*nutarimas*) of the *Seimas* (the Parliament) and Government (*Vyriausybė*), decrees (*dekretas*) of the President, and implementing acts of other governmental institutions and local municipal authorities must comply with the Constitution.

International treaties and conventions which are ratified by the *Seimas* become a constituent part of the Lithuanian legal system.⁹¹⁷ The administration of the judiciary is set out in Chapter IX of the Constitution, with provisions relating to the organisation of the courts and the nomination of judges. Chapter VIII is devoted to the Constitutional court which ensures that laws or acts are not in conflict with the Constitution. Similar to other Civil law legal systems, Lithuanian law does not recognise the rule of precedent applicable in Common Law systems, with judges not generally bound by judicial decisions given in other cases.

There are two main branches of the courts in Lithuania: i) courts of general jurisdiction, and ii) courts of special jurisdiction (administrative jurisdiction).⁹¹⁸ With regard to courts of general jurisdiction, there are five regional courts in Lithuania in Vilnius, Kaunas, Klaipėda, Šiauliai, and Panevėžys. However, only the Vilnius Regional Court is a first instance court for civil disputes concerning a breach of national competition rules or Articles 101 and 102 TFEU. An appeal against a decision of the Vilnius Regional Court can be lodged with the Court of Appeal. A further appeal (i.e. cassation), *albeit* on points of law only, can be submitted to the Supreme Court - the highest court in Lithuania, whose rulings are final with respect to private enforcement cases. As far as the administrative branch is concerned, resolutions of the Competition Council can be appealed to Vilnius Regional Administrative Court. The Supreme Administrative Court is the final court of appeal with respect to judicial review cases relating to competition law.⁹¹⁹ Both the Supreme Court and the Supreme Administrative Court develop uniform court practices in the interpretation and application of laws and other legal acts.⁹²⁰

⁹¹⁴ Available at: <http://www3.lrs.lt/home/Konstitucija/Constitution.htm>

⁹¹⁵ Article 2 of the Constitution, 25 October 1992

⁹¹⁶ Article 5 of the Constitution, 25 October 1992

⁹¹⁷ Article 138 of the Constitution, 25 October 1992

⁹¹⁸ Article 12 of the Law on Courts, No I-480, 31 May 1994, as amended No [IX-732](#), 2002-01-24

⁹¹⁹ Further discussion is provided in Section 4

⁹²⁰ Articles 23 and 31 of the Law on Courts

2 National Legislation establishing competition law rules

This Section presents the national legislation in Lithuania establishing competition law rules.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
Law on Competition	15 September 1992
Law on Competition	23 March 1999, as amended by No. XI-1937, 22 March 2012

2.1 General legislation

The first Law on Competition ("*Konkurencijos įstatymas*") adopted on 15 September 1992⁹²¹ was rather brief encompassing only 15 articles. Although it prohibited abuse of a dominant position and restricted anti-competitive agreements, the wording did not entirely reflect Articles 101 and 102 TFEU.

The signing of the Association Agreements⁹²² (Europe Agreements) initiated the new Law on Competition⁹²³ in 1999 (hereinafter referred to as the "1999 Law on Competition"). Further amendments to the Law on Competition were designed to facilitate the enforcement of EU competition rules under the new regime provided in EU Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 TEC (now Articles 101 and 102 of the TFEU).

Overall, since 1992 the Lithuanian Law on Competition has been amended 10 times with the latest changes (*albeit* minor changes) being made in 2012.⁹²⁴ However, no changes were made to the provisions of the prohibition of restrictive agreements and of abuse of a dominant position as set out in the 1999 Law on Competition and which are based on Articles 101 and 102 TFEU. One of most recent developments is a launch of Notice on Agency's Enforcement Priorities ("Enforcement Priorities Notice"). The ever-increasing number of investigations meant that important investigations were not carried out or were not allocated enough resources. The Notice accentuates a single priority of the Competition Council, which is to ensure highest consumer benefit, allowing rational allocation of the Council's resources, and making it possible to prioritise between investigations more efficiently.⁹²⁵

Article 1 provides that the Law on Competition regulates the activities of entities of public administration and economic entities⁹²⁶ which restrict or may restrict competition and acts of unfair competition, and shall establish the rights, duties and liabilities of the said entities and the legal basis for the restriction of competition and control of unfair competition in the Republic of Lithuania. Economic entity means an enterprise, a combination of enterprises (associations, amalgamations, consortiums, etc.), an institution or an organisation, or other legal or natural persons which perform or may perform economic activities in Lithuania or whose actions affect or whose intentions, if realised, could affect economic activity in

⁹²¹ No I-2878, 15 September 1992.

⁹²² Free Trade agreement was incorporated into the European Agreement, which was signed on 12 June 1995.

⁹²³ No. VIII-1099, 23 March 1999.

⁹²⁴ No. VIII-1099 23 March 1999; No. [VIII-1933](#), 19 September 2000; No. [IX-1715](#), 4 July 2003; No. [IX-2126](#), 15 April 2004; No. [X-1311](#), 25 October 2007; No. [XI-216](#), 9 April 2009; No. [XI-434](#), 24 September 2009; No. [XI-1347](#), 21 April 2011; No. [XI-1607](#), 29 September 2011; No. [XI-1937](#), 22 March 2012 came into force 1 May 2012.

⁹²⁵ Lithuania: The Competition Council adopts Enforcement Priorities Notice, Press Release 03/07/2012, available at: http://kt.gov.lt/en/index.php?show=news_view&pr_id=1067.

⁹²⁶ Article 1 of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

Lithuania. Entities of public administration of Lithuania are considered to be economic entities if they engage in economic activities.⁹²⁷

As far as extraterritoriality is concerned, the law also applies to activities of economic entities registered outside the territory of the Republic of Lithuania if the said activities restrict competition on the domestic market of Lithuania.⁹²⁸ However, the law does not apply to activities of economic entities which restrict competition on foreign markets, unless international agreements to which the Republic of Lithuania is a party provide otherwise.⁹²⁹

With regard to the substantive provisions, Article 5 of the Law on Competition (equivalent to Article 101 TFEU) provides that all agreements which have the purpose of restricting competition or which restrict or may restrict competition shall be prohibited and shall be void from the moment of their conclusion. However, Article 5 does not apply where: 1) the agreement promotes technical or economic progress or improves the production or distribution of goods, and thereby creates conditions for consumers to receive additional benefit; 2) the agreement does not result in restrictions on the activities of the parties; 3) the agreement does not afford the contracting parties the possibility to restrict competition in a large share of the relevant market.⁹³⁰ In addition, Article 5 does not apply to agreements between undertakings, which, due to their non-appreciable influence, cannot substantially restrict competition.⁹³¹ Article 7 of the Law on Competition (equivalent to Article 102 TFEU) spells out that abuse of a dominant position within a relevant market by performing any acts which restrict or may restrict competition, limit, without due cause, the possibilities of other economic entities to act in the market or violate the interests of consumers shall be prohibited.

Damages for breach of competition law are governed by the Law on Competition,⁹³² the Code on Civil Procedure,⁹³³ and the Civil Code.⁹³⁴ Specifically, Article 43(1) of the Law on Competition establishes an obligation for undertakings that are in breach of the Law to indemnify damage caused to other undertakings or natural and legal persons.

2.2 Industry-specific legislation

There is specific legislation in various sectors, such as the telecommunications sector,⁹³⁵ postal services,⁹³⁶ energy⁹³⁷ and gas⁹³⁸ and special institutions to ensure that the industry-related rules are followed. However, the Competition Council has jurisdiction to intervene in relation to anti-competitive practices in the public sector based on the 1999 Law on Competition. The Competition Council preserves its right and obligation to ensure that those sectors function on a competitive basis.⁹³⁹ For instance, the Competition Council provides consultation and cooperates with the Communications Regulatory Authority when supervising competition in the field of electronic communications. It also exchanges with the

⁹²⁷ Article 3(17) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹²⁸ Article 2(2) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹²⁹ Article 2(3) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹³⁰ Article 6 of the Law on Competition No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹³¹ The Resolution of the Competition Council No. 1S-172 of 9 December 2004 "On requirements and conditions in respect of agreements of minor importance that are not considered infringing article 5(1) and (2) of the Law on Competition".

⁹³² No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹³³ No IX-743, 28 February 2002.

⁹³⁴ No VIII-1864, 18 July 2000.

⁹³⁵ IX-2135 15 April 2004 Official Gazette No 69-2382, 2004.

⁹³⁶ XI-2379 8 December 2012 Official Gazette No 135-6867, 2012.

⁹³⁷ 16 May 2002 No. IX-884 as amended by 24 June 2003 No IX – 1644.

⁹³⁸ 20 March 2007 No X-1054.

⁹³⁹ J.Gumbis et al, *Competition Law in Lithuania*, Kluwer, 2011, p.33.

Communications Regulatory Authority any information related to electronic communications activities required for the performance of functions of the Competition Council and the Communications Regulatory Authority.⁹⁴⁰

⁹⁴⁰ Article 12 of the Law on Electronic Communications, IX-2135 15 April 2004 Official Gazette No 69-2382, 2004.

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in Lithuania, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Competition Council

The first Competition Council was set up in 1992 then reorganised in 1995 and subsequently it became independent from any particular governmental institution under the 1999 Law on Competition.

The Competition Council of Lithuania is the country's only competition enforcement authority. It is an independent body responsible for safeguarding effective competition in Lithuania. The Competition Council takes measures against the anti-competitive conduct of private undertakings as well as public administrative bodies in accordance with the provisions of the Law on Competition. It is also designated as the competition authority responsible for the application of Articles 101 and 102 TFEU as required by Article 35(1) of the Council (EC) Regulation 1/2003. The Competition Council investigates competition restrictions both on its own initiative and on the basis of complaints.

3.2 The reform of the Competition Council

There have not been any major reforms of the Competition Council since the 1999 Law on Competition as discussed in the previous section. The most prominent development were amendments to the Law on Competition in March 2012, which aimed at increasing the effectiveness of the Competition Council through prioritisation of cases, improving the enforcement process and stepping up advocacy and preventive efforts.⁹⁴¹ As its enforcement priority, the Competition Council identifies those market interventions that significantly contribute to the protection of effective competition with the purpose of maximising consumer welfare. In order to identify whether a matter falls within the enforcement priority, the Competition Council assesses: the potential impact of an investigation on effective competition and consumer welfare; the strategic importance of such an investigation; and the rational use of resources.⁹⁴²

3.3 Composition

The Competition Council of the Republic of Lithuania is composed of the chairman of the Competition Council and four members. Lithuanian citizens of irreproachable reputation and holding a university degree in the fields of either economics or law are eligible to be appointed by the President of the Republic of Lithuania upon the proposal of the Prime Minister to the positions of Chairperson and Members of the Competition Council⁹⁴³.

The chairperson and members of the Competition Council are appointed for a term of six years. The same person may be appointed a chair or a member of the Competition Council for not more than two consecutive terms of office. The chair of the Competition Council appoints two vice-chairs of the Competition Council from the appointed members of the Competition Council. In performing its functions the Competition Council is assisted by the Competition Council administration.⁹⁴⁴ The administration of the Council includes the Head of the Council and eight structural divisions.⁹⁴⁵

⁹⁴¹ S. Keserauskas, Lithuania: Competition Council, The European Antitrust Review, 2014, GCR.

⁹⁴² Lithuania: The Competition Council adopts Enforcement Priorities Notice, Press Release **03/07/2012**, available at: http://kt.gov.lt/en/index.php?show=news_view&pr_id=1067.

⁹⁴³ Under Article 19 of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁴⁴ Article 19(9) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁴⁵ *Konkurencijos Tarybos naujoji administracijos struktūra ir funkcijos*, Resolution No. 1S-158 21 July 2011, available at: <http://kt.gov.lt/index.php?show=struktura>.

3.4 Cooperation with other entities

The Competition Council cooperates with the European Commission and national competition authorities within the European Competition Network (the ECN) and the European Competition Authorities. The Council cooperates with other national authorities within the Network when deciding cases for which Articles 101 and 102 TFEU are applicable, as well as when participating in working groups set up by the European Commission.

The Competition Council actively participates in developing competition policy in international forums, such as **ECA** (European Competition Authorities), **OECD** (Organization for Economic Co-operation and Development) and **ICN** (International Competition Network).

The Competition Council also collaborates with competition authorities in neighbouring and other countries. For instance, bilateral agreements are signed with the Competition Authority of Kazakhstan and Ukraine.⁹⁴⁶

3.5 Investigations

The investigatory powers of the Competition Council are defined in Chapter V of the Law on Competition. The Council has the right to initiate an investigation on its own initiative or on the basis of notifications and complaints.

Following a preliminary investigation and within 30 days of the submission of the application and the documents, it makes a decision to launch or refuse to launch an investigation.⁹⁴⁷ Refusal may be based on 8 grounds relating to: immaterial facts or no grounds for suspicion, lack of jurisdiction or the matter is not a Council priority, the matters has already been decided upon, time periods have not been complied with, and the legal act of an entity or public administration have been annulled, changed or expired before the Competition Council examines the matter.⁹⁴⁸

The Council has extensive investigatory powers (sometimes subject to judicial oversight⁹⁴⁹), such as the power to request information from undertakings under investigation; search any premises with or without notice; inspect and copy documents; seize evidence; seal the premises used by undertakings; obtain oral and written explanations; and require individuals to appear at the offices of the Council.⁹⁵⁰ In addition, the Competition Council is entitled to obtain information and documents from other bodies not subject to investigation. Investigating officials of the Council may enlist police assistance.⁹⁵¹ Upon the completion of the investigation, the investigation file materials are available to the participants in the procedure, with the exception of confidential documents.⁹⁵²

The participants in the procedure and other interested parties have procedural rights including proper notification of the time and place of the Competition Council's meeting (prior to its decision), the opportunity to provide clarifications, access to the investigation material and familiarisation with the findings of the investigation.⁹⁵³

⁹⁴⁶ International Activities, available at: <http://kt.gov.lt/en/index.php?show=international>.

⁹⁴⁷ Article 24(3) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁴⁸ Article 24(4) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁴⁹ Article 25 of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁵⁰ Article 25 of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁵¹ Article 24(3) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁵² Article 29(2) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁵³ Article 29 (2) and (3) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

3.6 Decision-making

The resolutions of the Competition Council are adopted by majority vote, with participation of at least three members of the Competition Council, including the chair.⁹⁵⁴ The participants in the procedure and other interested parties have procedural rights including proper notification of the time and place of the Competition Council's meeting, the opportunity to provide clarifications, access to the investigation material and familiarisation with the findings of the investigation.⁹⁵⁵ Generally Competition Council meetings are public though it may, on its own initiative or on request, announce a closed hearing to protect state or service secrets, or commercial secrets of economy entities.⁹⁵⁶

The Competition Council may impose or refuse to impose sanctions (based on breach/no breach), to terminate the procedure where there is no violation, or to conduct a supplementary investigation.⁹⁵⁷ The resolutions of the Competition Council can only be repealed or amended by the courts.⁹⁵⁸

⁹⁵⁴ Article 19 of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁵⁵ Article 29(5) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁵⁶ Article 29(4) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

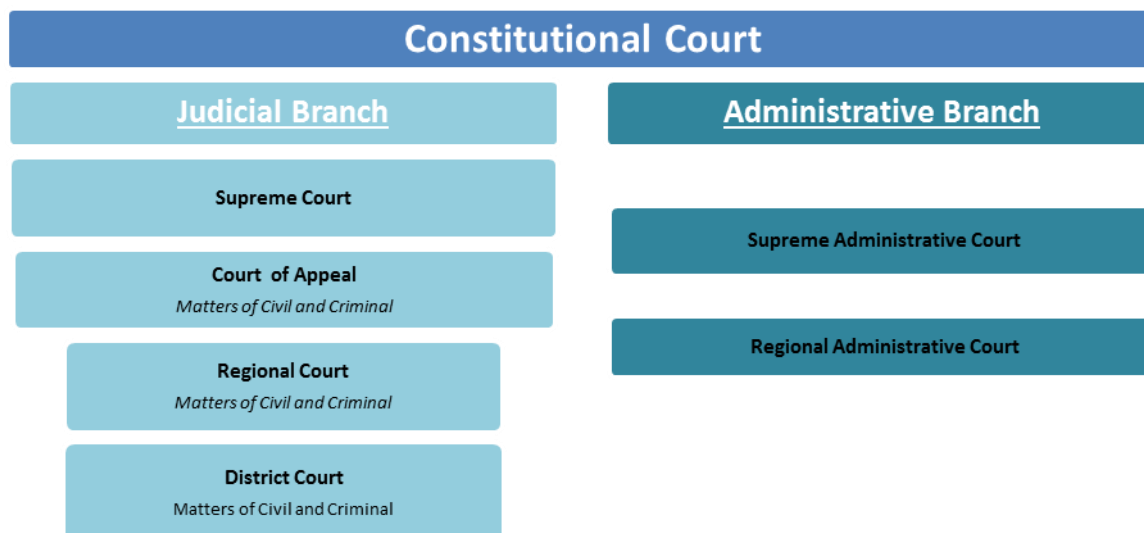
⁹⁵⁷ Article 30(1) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁵⁸ Article 30(4) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

4 Competent courts

This Section presents the competent courts in Lithuania. The court system is firstly presented in Figure 4.1.

Figure 4.1 Court system in Lithuania



The court system of the Republic of Lithuania consists of two main branches: i) courts of general jurisdiction, and ii) courts of special jurisdiction (administrative jurisdiction).⁹⁵⁹

All matters relating to the organisation and administration of the court system are regulated by the Constitution, the Law on Courts and other legal acts. Court decisions may be reviewed only by higher instance courts in accordance with the relevant legal procedure.⁹⁶⁰

The judicial process is adversarial. There is no specialised competition court in Lithuania. However, Article 111(2) of the Constitution states that specialised courts may be established for the consideration of administrative, labour, family and cases of other categories.

4.1 Judicial branch

There are 54 district courts, which are the lowest courts in Lithuania handling, inter alia, criminal and civil cases and administrative offences at 1st instance as well as cases relating to the enforcement of decisions and sentences.⁹⁶¹

There are also five regional courts – regional courts of Vilnius, Kaunas, Klaipėda, Šiauliai, and Panevėžys. The Vilnius Regional Court has an exclusive jurisdiction to hear civil disputes concerning a breach of national competition rules or Articles 101 and 102 TFEU.

An appeal against a decision of the Vilnius Regional Court can be lodged with the appellate court (the Court of Appeal). There is one Court of Appeal in Lithuania with a Civil and Criminal Division. The Court of Appeal is composed of the Chairman, Chairmen of the divisions and other judges.

A further appeal (otherwise cassation), *albeit* on points of law only, can be submitted to the Supreme Court. It is the highest court in Lithuania and its rulings are final and subject to no further appeal. It is comprised of two divisions: Civil and Criminal. Cases before the Supreme Court are normally heard by a panel of three judges. Where a cassation case involves a complicated issue of interpretation or application of laws, the President of the Supreme

⁹⁵⁹ Article 12 of the Law on Courts, No I-480, 31 May 1994, as amended No IX-732, 24 January 2002.

⁹⁶⁰ <http://www.teismai.lt/en/courts/judicial-system/>.

⁹⁶¹ Article 15 of the Law on Courts, No I-480, 31 May 1994, as amended No IX-732, 24 January 2002.

Court, the Chairman of the relevant Division, or a panel of judges may forward the case an extended panel of seven judges or to a plenary session of the relevant Division.⁹⁶²

4.2 Administrative branch

Courts of special jurisdiction hear disputes arising from administrative legal relations.⁹⁶³ They are the Supreme Administrative Court of Lithuania and five regional administrative courts: Vilnius Regional Administrative Court, Kaunas Regional Administrative Court, Klaipėda Regional Administrative Court, Šiauliai Regional Administrative Court, and Panevėžys Regional Administrative Court. Administrative courts consider disputes when at least one of the parties is a state, municipality or institution of the state or municipality, agency, office, officer and when a dispute arises against these institutions when implementing their functions as an executive authority.

As far as competition issues are concerned, the resolutions of the Competition Council can be appealed to Vilnius Regional Administrative Court. It may examine administrative acts and acts of commission or omission (failure to perform duties) by entities of public and internal administration.

Decisions of the Vilnius Regional Administrative Court may be appealed to the Supreme Administrative Court. The Supreme Administrative Court of Lithuania is first and final instance for administrative cases assigned to its jurisdiction by the law. The Supreme Administrative Court is composed of the President, the Vice-president and other judges. Cases at the Supreme Administrative Court are heard by a chamber of three judges, an extended chamber of five judges or a plenary session of the Supreme Administrative Court.⁹⁶⁴

⁹⁶² Article 23 of the Law on Courts, No I-480, 31 May 1994, as amended No IX-732, 24 January 2002.

⁹⁶³ Article 12(4) of the Law on Courts, No I-480, 31 May 1994, as amended No IX-732, 24 January 2002.

⁹⁶⁴ Available at: <http://www.lvat.lt/en/the-court.html>.

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings related to breaches of competition law rules in Lithuania.

5.1 Legal standing in judicial review and follow-on proceedings

Any natural or legal person can initiate two types of actions:

1. a person may lodge a complaint with Vilnius Regional Court and prove an infringement of the competition rules without the benefit of a prior decision to that effect by the Competition Council of Lithuania (or other Competition Authorities, including the European Commission);
2. a person can complain to the Competition Council of Lithuania.

The legal standing in cases of judicial review and follow-on cases in Lithuania is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Any natural or legal person	Any natural or legal person
How can an action be filed?	A two-stage process applies. First, economic entities and other persons may challenge the resolutions of the Competition Council at Vilnius Regional Administrative Court. ⁹⁶⁵ Second, the final review (cassation) is made by the Supreme Administrative Court.	There are three stages of litigation: A claim can be first filed with Vilnius Regional Court. An appeal can be then lodged with the Court of Appeal. Final ruling is decided by the Supreme Court
With which authorities can the action be filed?	Vilnius Regional Court Supreme Administrative Court	Vilnius Regional Court Court of Appeal Supreme Court
Burden of proof	The burden of proof rests with the Competition Council.	The burden of proof rests with the person who invokes a claim

5.2 Judicial Review Proceedings

This Section presents judicial review proceedings in Lithuania.

5.2.1 Rules applicable to the judicial review of NCA decisions

Any economic entities and other persons who believe that their rights protected by the Law on Competition were violated have the right to appeal to Vilnius Regional Administrative Court against the Competition Council's resolutions⁹⁶⁶.

⁹⁶⁵ Article 33 of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁶⁶ Article 33 of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937. Further regulation is provided by the Law on Proceedings of Administrative Cases of the Republic of Lithuania - *Lietuvos Respublikos administracinių bylų teisenos įstatymas*, No. VIII-1029 14 January 1999, as amended by No. VIII-1927, 19 September 2000 and the Administrative Code of the Republic of Lithuania - *Administracinių teisės pažeidimų kodeksas* as amended No. XII-316, 16 May 2013.

5.2.2 Competent Court

As outlined in Section 4.2, the resolutions of the Competition Council can be appealed to Vilnius Regional Administrative Court and the final review (cassation) is performed by the Supreme Administrative Court.

5.2.3 Timeframe

An appeal to Vilnius Regional Administrative Court must be filed in writing no later than 20 days after the receipt of the resolution of the Competition Council or, if the resolution is to be published on the website of the Competition Council, after the date of publication.⁹⁶⁷

The judgement of Vilnius Regional Administrative Court can be further appealed within 14 days of its adoption to the Supreme Administrative Court.⁹⁶⁸ The Supreme Administrative Court may accept late submission only if there are very important reasons of such delay.⁹⁶⁹

5.2.4 Admissibility of Evidence

Any testimonial (including explanation made by the parties and third parties, or experts, witness testimonies, etc.), documentary evidence, or tangible evidence are admissible if they help to prove the factual circumstances of the case⁹⁷⁰. Courts assess the evidence before them based on the principles of justice and rationality.

5.2.5 Interim Measures

In urgent cases, where there is sufficient evidence of breach of the Law on Competition, the Competition Council, seeking to prevent a substantial or irreparable damage to the interests of economic entities or the public, has the right to apply interim measures necessary for the implementation of the final decision of the Competition Council.⁹⁷¹ The interim measures cease to be applied upon the implementation of sanctions imposed by the resolution of the Competition Council after the investigation of the case.

Before adopting a resolution to apply interim measures, the Competition Council must give the economic entity suspected of violation of this Law an opportunity to provide explanations within the set time limit.⁹⁷²

The decision of the Competition Council on the application of interim measures may be appealed to Vilnius Regional Administrative Court within one month from the date of adoption of the decision. However, the filing of an appeal does not suspend the application of interim measures.⁹⁷³

5.2.6 Rulings of the court

Upon hearing the appeal against the resolution of the Competition Council, Courts can adopt one of the following decisions: i) uphold the resolution and reject the appeal; ii) revoke the resolution or its individual sections and refer the case back to the Competition Council for a

⁹⁶⁷ Article 33(2) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁶⁸ Article 127(1) of the Law of Proceedings of Administrative Cases of the Republic of Lithuania, *Lietuvos Respublikos administracinių bylų teisenos įstatymas*, No. VIII-1029 14 January 1999, as amended by No. VIII-1927, 19 September 2000.

⁹⁶⁹ Article 127(2) of the Law of Proceedings of Administrative Cases of the Republic of Lithuania, *Lietuvos Respublikos administracinių bylų teisenos įstatymas*, No. VIII-1029 14 January 1999, as amended by No. VIII-1927, 19 September 2000.

⁹⁷⁰ Article 57 of the Law on Proceedings of Administrative Cases of the Republic of Lithuania.

⁹⁷¹ Article 26(1) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁷² Article 26(3) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁷³ Article 26(4) of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

supplementary investigation; iii) revoke the resolution or its individual sections; or iv) amend the resolution on concentration i.e. a decision on a merger transaction), application of sanctions or interim measures.⁹⁷⁴

5.3 Follow-on Proceedings (private enforcement)

This Section presents follow-on proceedings in Lithuania.

5.3.1 Rules applicable to follow-on procedures

The issues related to the private enforcement of competition law in Lithuania are governed by the 1999 Law on Competition,⁹⁷⁵ the Code on Civil Procedure,⁹⁷⁶ and the Civil Code.⁹⁷⁷

5.3.2 Competent Court

As indicated in Section 4.1, Vilnius Regional Court hears civil disputes concerning a breach of national competition rules or Articles 101 and 102 TFEU. An appeal can be lodged with the appellate court (the Court of Appeal) and a further appeal (otherwise cassation), *albeit* on points of law only, can be submitted to the Supreme Court, whose rulings are final and subject to no further appeal.

5.3.3 Timeframe

The general time limit for bringing an action before a court is 10 years.⁹⁷⁸ However, under Article 1.125(8) of the Civil Code, actions for compensation of damage are subject to a three-year limitation period from the moment the damaged is suffered and/or illegal acts are committed.

An appeal must be lodged in writing within 30 days from the decision of the first instance court.⁹⁷⁹ The cassation appeal must be brought before the Supreme Court within the three months after the adoption of the decision of the appellate instance court.⁹⁸⁰

5.3.4 Admissibility of evidence

Any testimonial evidence (including explanation made by the parties and third parties, or experts, witness testimonies, etc.), documentary evidence (i.e. minutes of inspections), or tangible evidence, may be submitted if they help to prove the factual circumstances of the case.⁹⁸¹ In addition, evidence may be provided in the form of audio and visual records as well as photographs.

5.3.5 Interim Measures

Interim measures are defined in Articles 144-152 of the Code on Civil Procedure. Interim measures can be imposed, if there is sufficient evidence that without these measures the implementation of the decision would be difficult or almost impossible to achieve. The Court can ex officio apply interim measures only to prevent a substantial or irreparable damage to the public interest.⁹⁸² As a general rule, interim measures are valid until the execution of final

⁹⁷⁴ Article 34 of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁷⁵ 23 March 1999, No VIII-1099 with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁷⁶ 28 February 2002, No IX-743.

⁹⁷⁷ 18 July 2000, No VIII-1864.

⁹⁷⁸ Article 1.125(1) of the Civil Code, 18 July 2000, No VIII-1864.

⁹⁷⁹ Article 307 of the Code on Civil Procedure, 28 February 2002, No IX-743.

⁹⁸⁰ Article 345 of the Code on Civil Procedure, 28 February 2002, No IX-743.

⁹⁸¹ Article 177 of the Code on Civil Procedure, 28 February 2002, No IX-743.

⁹⁸² Article 144 of the Code on Civil Procedure, 28 February 2002, No IX-743.

decision of the court.⁹⁸³ The court's decision on interim measures can be appealed to a higher instance court.⁹⁸⁴

5.3.6 Rulings of the court

With a follow on action, the court can uphold a claim and award damages; uphold a claim without rewarding damages, or reduce the amount of damages claimed; or dismiss a claim. Upon receipt of the claim related to the application of Articles 101 or 102 TFEU the court must notify the European Commission and the Competition Council. A copy of the decision (ruling) adopted in the case in which Articles 101 or 102 TFEU were applied must be forwarded to the European Commission and the Competition Council. The proceedings may be reopened when it transpires that the European Commission's decision on the application of the said Articles to the same agreements, decisions or practices, and the effects of the application differ substantially.⁹⁸⁵

The appellate court has the power to adopt one of the following decisions: i) to uphold the decision of the first instance court and reject the appeal; ii) to revoke the decision of the first instance court or its individual sections and render a new decision; iii) to amend the decision of the first instance court; iv) to revoke the decision of the first instance court or its individual sections and refer the case back to the court of first instance for a new investigation; or v) to revoke the decision of the first instance court or its individual sections and dismiss the case.⁹⁸⁶

The Supreme Court of Lithuania can only decide on questions of law, and does not establish facts of the case or challenge the facts of the case. The facts of the case are regarded to be finally established by the appellate instance court. The objective of the Supreme Court, as a court of cassation, is to ensure uniform court practice of courts of general jurisdiction by means of precedents formulated in the cassation rulings. A ruling passed by the court of cassation is final, cannot be appealed against and is effective from the day of its adoption.⁹⁸⁷ The Supreme Court can adopt one of the following decisions: i) to uphold the decision; ii) to amend the decision; iii) to revoke the decision and uphold the decision of the lower instance court; iv) to revoke the decision or its individual sections and render a new decision; v) to revoke the decision or its individual sections and refer the case back to the appellant court for a new investigation; vi)) to revoke the decision or its individual sections and dismiss the case.⁹⁸⁸

5.3.7 Rules applicable to the enforcement of court judgments

Part 6 of the Code on Civil Procedure (Enforcement proceedings) defines the rules applicable to the enforcement of civil court judgments in Lithuania. Specific rules regulating the enforcement of decisions may be defined by other legal acts. If the addressee of a judicial decision does not implement the decision voluntarily, the creditor in question is entitled to apply to the court for the issue of an enforcement order. The enforcement order is then submitted to a bailiff, who acts at a creditor's request to ensure that a judicial decision which is not implemented voluntarily is implemented by means of coercive enforcement measures.

There are different measures available, such as recovery from the debtor's funds and rights to assets or property, recovery from the debtor's assets and monies held by other persons, recovery from the debtor's wages and salaries, pensions, grants or other income, confiscation from the debtor of certain items referred to in the judicial decision and their transfer to the claimant, administration of the debtor's assets and use of income to reimburse

⁹⁸³ Article 150 of the Code on Civil Procedure, 28 February 2002, No IX-743.

⁹⁸⁴ Article 151 of the Code on Civil Procedure, 28 February 2002, No IX-743.

⁹⁸⁵ Article 47 of the Law on Competition, No VIII-1099, 23 March 1999, with the latest amendments in 2012, 22 March 2012, No XI-1937.

⁹⁸⁶ Article 326 of the Code on Civil Procedure, 28 February 2002, No IX-743.

⁹⁸⁷ Available at: <http://www.lat.lt/en/common-information/competence-and-functions-pdcx.html>.

⁹⁸⁸ Article 359 of the Code on Civil Procedure, 28 February 2002, No IX-743.

the claimant, obligation on the debtor to perform or refrain from certain actions, and other measures defined by the law.⁹⁸⁹

5.4 Alternative dispute resolution mechanisms

Alternative methods of dispute resolution are rare in Lithuania. Article 11(1) of the former Law on Commercial Arbitration⁹⁹⁰ provided that competition-related disputes could not be submitted to arbitration. This prohibition is now abolished with the new Law on Commercial Arbitration, which widely liberalises restrictions on the 'arbitrability' of disputes⁹⁹¹. This new Law is based on the UNCITRAL Model Law on International Arbitration of 2006 and it will, most likely, encourage competition disputes to be solved in arbitration proceedings.

Another form of alternative dispute resolution available in Lithuania is mediation. Theoretically, private antitrust claims concerning infringements of competition rules can be solved by court mediation, since there is only one broad limitation where mediation is not possible. This is in cases where the settlement agreement would contravene imperative norms. It is not clear to what extent bilateral negotiations are used in place of formal proceedings or arbitration

⁹⁸⁹ http://ec.europa.eu/civiljustice/enforce_judgement/enforce_judgement_lit_en.htm.

⁹⁹⁰ No. I-1274, 2 April 1996.

⁹⁹¹ Article 12, the Law of Commercial Arbitration, 21 June 2012, No XI-2089.

6 Contextual Information

This Section provides a contextual overview of the judicial system in Lithuania.

6.1 Duration and cost of competition law cases

Given that competition disputes are regarded as complex by courts, potentially a six-month period could be regarded as a more realistic time-frame for the proceedings in the court of first instance. Proceedings in the court of appeal and in the Supreme Court of Lithuania, which is the court of last resort, might take approximately 5-8 months. Therefore, in general the proceedings for recovery of damage in civil courts might take from 11 to 14 months or up to 22 months if it reaches the Supreme Court. However, the litigation in the case *LUAB "Klevo lapas"/ AB "ORLEN Lietuva"*⁹⁹² lasted 10 years. The judicial review proceedings in the court of first instance might take approximately 3-7 months and 3-12 months in the Supreme Administrative Court.

In Lithuania there are two types of litigation costs, which are applicable for judicial review proceedings and private enforcement: a stamp duty (i.e. the court fee which depends on the value of the case)⁹⁹³ and other legal costs encountered in supporting or contesting a lawsuit.⁹⁹⁴ Other legal costs include fees for witnesses, court appointed experts, institutions providing services of forensic experts and interpreters, attorney fees, service fees, expenses related to the execution of a court's decision as well as other reasonable expenses which are necessary to ensure the conduct of the hearing.⁹⁹⁵

In the course of the proceedings each party must bear its own legal costs. However, if one party is successful in the proceedings, then it shall be awarded the legal costs which are covered by the unsuccessful party. Although the recommended maximum possible litigation costs are established by supplementary acts of the Government, the courts usually award litigation expenses at their own discretion. Attorney fees are generally granted only to a limited extent. This is because the attorney fees in Lithuania can be recovered only to the extent authorised by law.⁹⁹⁶ Generally, one hour of attorney service in commercial cases varies from 150 Lt (€44) to 800 Lt (€232) depending on the lawyer's experience and expertise, and complexity of the case. However, some Lithuanian lawyers may agree a 'per case' fee. Also, Article 50(2) of the Law on Advocacy⁹⁹⁷ allows an attorney to enter into an arrangement with a client, where the attorney's fee is dependent on the outcome of the case.

6.2 Influencing Factors

There are no specific factors that would influence the application of competition law in Lithuania.

⁹⁹² Case No. 3K-3-207/2010.

⁹⁹³ Article 80 of the Code on Civil Procedure (28 February 2002, No IX-743) provides that 'the stamp duty of 3% is charged, if the value of the claim does not exceed 100,000 Lt (approx. €28,992); claims in the range of amount from 100,000 Lt to 300,000 Lt (approx. €86,976) shall be subject to the stamp duty of 3,000 Lt (approx. €870) plus 2% from the amount which is above 100,000 Lt; claims exceeding 300,000 Lt shall be subject to stamp duty of 7,000 Lt (approx. €2,029) plus 1% from the amount which is above 300,000 Lt.' However, the amount of the stamp duty may not exceed 30,000 Lt (approx. €8,698) article 80(1) of the Code on Civil Procedure.

⁹⁹⁴ Article 79 of the Code on Civil Procedure, 28 February 2002, No IX-743.

⁹⁹⁵ Article 88 of the Code on Civil Procedure, 28 February 2002, No IX-743.

⁹⁹⁶ The 2 April 2004 Order No. 1R-85 of the Minister of Justice approved the Recommendations on the Maximum Amounts of Attorney Fees that can be Recovered in Civil Proceedings. The Recommendations provide a general procedure for calculation of remuneration for separate actions, such as representation in the court, drafting the claim etc. The actual amount of attorney fee which may be recovered from a losing party is determined on individual basis.

⁹⁹⁷ Law on Advocacy, No. IX-2066, 18 March 2004.

6.3 Obstacles/Barriers

The lack of private enforcement in competition law in Lithuania can be attributed to a number of factors. Firstly some argue that Lithuanian society is by its nature non-litigious⁹⁹⁸. As such modern private enforcement in Lithuania is relatively new and therefore lacks a litigation tradition. Competition law cases are of the immense complexity. As such, litigation is likely to be very expensive and practically inaccessible to the great majority of persons.⁹⁹⁹ Arguably the fact that there are barely any successful damage cases in competition law is both a deterrent to future claims as well as an indication that the Lithuanian judiciary has not yet built enough confidence to take more courageous steps in private legal proceedings.¹⁰⁰⁰

Additional problems include the difficulty in calculating and proving damages, and lack of experts to calculate damages (i.e. there are only two experts in the **Forensic Science Centre of Lithuania**¹⁰⁰¹). **The amounts awarded by the courts are also very low** (approx. €87 359 in the UAB “Šiaulių tara”/SPAB “Stumbras” case¹⁰⁰², only 11% of the claimed amount). It is also challenging for the claimant to prove causation and attribute loss specifically to the defendant’s behaviour rather than the claimant’s poor business strategy or other factors, such as a general economic slowdown in Lithuania.

An obvious obstacle to private enforcement in Lithuania is the current unavailability of procedural mechanisms for bringing class action lawsuits. Without this mechanism there are currently no practical possibilities of aggregating damages of a large group of consumers. This especially limits consumers’ opportunities to obtain redress, as it is impractical for individual consumers to initiate private enforcement actions against cartels or monopolists.

The relationship between public and private enforcement is also rather weak in Lithuania which can mean that deterrent effect of private litigation are not experienced. A stronger relationship could be achieved for example through the Competition Council being involved in private litigation or by it providing some indication of possible damages. Some commentators therefore argue that it is necessary to align the public and private interest in private enforcement of competition law.¹⁰⁰³

⁹⁹⁸ See e.g. Paper presented by Dr Norkus, Partner of the Raidla Lejins & Norcous, presented during the conference on private enforcement in Lithuania, 14 December 2011 (in Lithuanian).

⁹⁹⁹ J.Gumbis, M.Juonys and S.Keserauskas, The Lithuanian report submitted to the European Commission on Actions for Damages.

¹⁰⁰⁰ J. Malinauskaite, ‘Private Enforcement of Competition Law in Lithuania: a Story of Underdevelopment’, GCLR, 2013, Issue 3, at 133.

¹⁰⁰¹ <http://www.ltec.lt/>.

¹⁰⁰² Case No 2A-41/2006.

¹⁰⁰³ R. Audzevičius, T. Samulevičius and B.Kozubovska, ‘Lithuania’, Chapter 18 In I.K.Gotts (ed.) *The Private Competition Enforcement Review*, 5th ed., Law Business Research Ltd, 2012.

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COUNTRY FACTSHEET- LUXEMBOURG

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Abbreviations used

EU	European Union
NCA	National Competition Authority
Law on Competition of 23 October 2011	2011 Law
Law on Competition of 17 May 2004	2004 Law

1 Overview of the National Legal Framework

The national legal system in the Grand Duchy of Luxembourg (hereafter ‘Luxembourg’) is derived from the Civil Law system, with many laws based on French or Belgian legislation. The legal system is made up of a hierarchical system. The Constitution is the highest source of law followed by Statutes and Regulations.

The current Constitution of Luxembourg was adopted on 17 October 1868.¹⁰⁰⁴ It is a written Constitution, composed of 121 articles. The constitutional foundations of the State are set out in the text as well as the guarantees for the rights and freedoms of citizens and the organisation of public power. The Constitution organises the separation of powers between the executive and the parliament, with the judiciary responsible for supervising the execution of laws.

The administration of justice is governed by Chapter VI of the Constitution, with provisions relating to the organisation of the courts and the nomination of judges. Luxembourg law does not recognise the rule of precedent applicable in Common Law systems, with judges not generally bound by judicial decisions given in other cases. The general rule is that judgments in civil and commercial cases are binding only in the case concerned.

Luxembourg is divided into two judicial districts (Luxembourg and Diekirch). Further information on the court structure in Luxembourg is provided in Section 4 below.

¹⁰⁰⁴ Available at <http://mjp.univ-perp.fr/constit/lu1868.htm>

2 National Legislation establishing competition law rules

This Section provides an overview of national legislation establishing competition law rules. Table 2.1 presents a list of relevant competition law instruments in Luxembourg.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
<i>Loi du 23 octobre 2011 relative à la concurrence</i> (Law on Competition of 23 October 2011)	23 October 2011, entry into force 1 February 2012
<i>Loi du 17 mai 2004 relative à la concurrence</i> (Law on Competition of 17 May 2004)	17 May 2004

2.1 General legislation

The Law on Competition of 23rd October 2011 (*Loi du 23 octobre 2011 relative a la concurrence*) (hereafter the '2011 Law'),¹⁰⁰⁵ provides for the enforcement of Articles 101 and 102 TFEU and mirrors the provisions of EU Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 TEC (Article 101 and 102 of the TFEU).¹⁰⁰⁶

This law partially abrogated the Law on Competition of 17 May 2004 (*Loi du 17 mai 2004 relative a la concurrence*) and entered into force on 1 February 2012, with changes made to the institutional structure. The 2011 Law has not amended the provisions relating to the prohibition of cartels, which were set out in the 2004 Law.

According to Article 1, this law applies, to all activities of production and distribution of goods and services including those committed by persons governed by public law. The law is applicable to undertakings, individuals and corporations. It also applies to entities other than corporations such as de facto associations, trade unions and professional organisations.

Article 3 of the 2011 Law prohibits cartels, enforcing the provisions of Article 101 TFEU, with Article 5 prohibiting the abuse of the dominant position, as provided for in Article 102 TFEU.

More specifically, Article 3 prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition within a market, in accordance with the provisions of Article 101 TFEU.¹⁰⁰⁷

Article 5 prohibits abuse of dominant position. The wording of this provision mirrors that of Article 102 TFEU.

The 2011 Law significantly modified the institutional framework on competition law in Luxembourg. The 2004 Law established two separate institutions for the application of competition law rules: the *Competition Council* and the *Competition Inspectorate*. However, the 2011 Law abolished the Competition Inspectorate and merged its functions into the Competition Council. Further information on the institutional framework is provided in Section 3 below. In addition to this restructuring, the 2011 Law strengthened the powers of the Council endowing it with advisory powers; such that it must be consulted on any bill or draft regulation which may affect competition.

¹⁰⁰⁵ Available at <http://eli.legilux.public.lu/eli/etat/leg/l/2011/10/23/n1?>

¹⁰⁰⁶ Available at <http://webcache.googleusercontent.com/search?q=cache:WxpNoUkpDPAJ:eur-lex.europa.eu/LexUriServ/LexUriServ.do%3Furi%3DOJ:l:2003:001:0001:0025:en:PDF+%&cd=1&hl=en&ct=clnk&gl=be>

¹⁰⁰⁷ Article 4 of the 2011 Law provides exceptions to Article 3. The provisions of Article 3 are inapplicable to: (i) agreements or categories of agreements between undertakings; (ii) decisions or categories of decisions by associations of undertakings; and (iii) (categories of) concerted practices

The principle of extraterritoriality applies to the 2011 Law. As such, the Council may take into account relevant behaviour or actions that occurred outside Luxembourg provided they have an effect on the Luxembourgish territory.

Damages for breach of competition law may be granted under the 'ordinary' legal basis for contractual liability (Article 1134 of the Civil Code) or liability in tort (Article 1382 of the Civil Code).

2.2 Industry-specific legislation

In addition to the generally applicable legislation mentioned above, Luxembourg has introduced specific competition law rules which allow for a sectoral approach or relates to specific sectors.

Article 2 of the 2011 Law authorises the government to proceed to price-fixing in sectors when competition is too weak or where there is market failure in one or more sectors.¹⁰⁰⁸

Legislative instruments exist in Luxembourg which regulate specific sectors only.

The Law of 30 July 2002 regulating certain commercial practices and prohibiting unfair competition prohibits anti-competitive practices in relation to advertising.¹⁰⁰⁹ An anti-competitive practice can be considered as an abuse of dominant position if the practice is exercised by one or several undertakings in a dominant position in the relevant market.

The Law of 30 May 2005 on the telecommunications sectors¹⁰¹⁰ also contains provisions on competition such as the prohibition of squeeze out practices or of entry barriers to the access of essential facilities.

The Luxembourg Regulatory Authority (ILR) is the regulatory body for specific sectors¹⁰¹¹.

¹⁰⁰⁸ Article 2(3) of the 2011 Law does not specify the sectors where this provisions can apply.

¹⁰⁰⁹ Available at <http://www.legilux.public.lu/leg/a/archives/2002/0090/2002A18301.html>

¹⁰¹⁰ Available at <http://www.legilux.public.lu/leg/a/archives/2005/0073/a073.pdf>

¹⁰¹¹ The postal sector (Law of 15 December 2000 on postal services and financial postal services); the electronic communications sector (Law of 25 February 2001 on networks and services of electronic communications); the electricity sector (Law of 1 August 2007 on the organisation of the electricity market); and the gas sector (Law of 1 August 2007 on the organisation of natural gas).

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in Luxembourg, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Competition Council and Competition Inspectorate

The 2004 Law established the Competition Council and the Competition Inspectorate, providing the Council with the responsibility for enforcing competition law. The Competition Inspectorate, a service of the Ministry of Economics and Foreign Trade, was made responsible for the registration of the complaints concerning infringements of competition law, the investigation and the submission of reports to the Council. The 2011 Law modified the previous structure by merging the Investigation Division with the Council. The Division has the competence to require undertakings to provide all necessary information by request as well as the competence to interview natural or legal persons and conduct the necessary inspections. Its powers are similar to those assigned to the European Commission and were subject to the same conditions as provided in Regulation (EC) No. 1/2003.

3.2 The reform of the Competition Council

The Competition Council is an independent administrative authority whose role is to guarantee free competition and to ensure the proper functioning of markets. Chapter II of the 2011 Law outlines its competences, powers and composition. The Competition Council is responsible for the implementation of Articles 3 to 5 of the 2011 Law relating to cartels and the abuse of dominant position. The investigation and adjudication on cartels are made in the public interest, on the basis of administrative law procedures.

The Competition Council aims to protect the interests of consumers as well as companies against anti-competitive practices. It is required to sanction anti-competitive practices by fines and / or penalties. It must also take all necessary measures to stop the offenses. The Council also plays an important role in the prevention of infringements. Finally, it is expected to educate businesses about their responsibilities relating to competition law in order to encourage them not to engage in prohibited behaviour such as cartels and abuse their dominant position.

3.3 Composition and decision-making

As provided in Article 7 of the 2011 Law, the Council's Board consists of four members – a Chairman and three members (counselors).¹⁰¹² The Board sits either in a formation of four or in a formation of three.

The Board, sitting in a formation of four, is competent for publishing opinions, modifying the internal regulation, drafting the annual report, deciding on conducting sectorial inquiries and rejecting complaints. Sitting in a formation of three, the Board is competent to find and stop a breach of Articles 3 to 5 of the 2011 Law. Further information on the decision-making functions is provided in Section 3.6 below.

The Competition Council also comprises a clerk who is responsible for internal organisation and administrative tasks. The clerk is responsible for forwarding decisions, opinions, notices and other communications of the Board and is responsible for maintaining the records and documents of the Council.

In the exercise of their duties, the members of the Competition Council are assisted by agents who form the administrative framework of the Council. Their mission is to help counselors in identifying competition infringements and exercising their investigative powers.

¹⁰¹² The Law provides that the Board also comprises of five substitute counselors. No further information on these individuals is available, however, on the NCA Website.

3.4 Cooperation with other entities

The Council can cooperate with antitrust authorities in other jurisdictions as well as the European Commission. A mechanism for cooperation is provided in Article 31 of the 2011 Law between the Council and the European Commission or the competition authorities of other EU Member States. Article 19 of the 2011 Law also enables the Council to request information, including confidential information, from other regulatory bodies of various sectors as well as all public institutions or administrative bodies.

Pursuant to Regulation No. 1/2003, the Council is relieved of its competence to apply Article 101 or 102 TFEU if the European Commission has initiated proceedings for the adoption of a decision. If the Council had already been acting on a case, however, the European Commission shall only initiate proceedings after consultation with the Council.

3.5 Investigations

The Council has the competence to begin an investigation either on its own initiative or on the basis of a complaint lodged by an individual having a legitimate interest, by the Minister of Economy or the European Commission. Guidelines and a template for complaints are available on the website of the NCA.¹⁰¹³

Following a preliminary investigation into the issue, the Council may decide to close the file or to continue its investigation. If it continues its investigation, the Council may ask for information from the relevant undertakings or their employees, as provided for in Article 14 of the 2011 Law. The Council can also carry out searches, proceed to the seizure of documents and ask for expert opinion.

If the officer responsible for the investigation finds that there are sufficient grounds for anti-competitive practice, the concerned undertakings will be notified of this claim. Following the undertakings' notification, they have a right of access to the file. The undertakings are given a deadline of a minimum of one month for providing a response to the communication of the claim, as provided for in Article 25 of the 2011 Law.

Judicial review is available, with the decision of the Council challengeable before the administrative courts. The burden of proof rests with the competition authorities in this regard. Further information is provided in Section 5 below.

3.6 Decision-making

The Board, in its formation of three, is competent to find and stop a breach of Articles 3 to 5 of the 2011 Law. It is also responsible for deciding on obligations imposed on companies and for imposing fines and penalties. The remaining fourth member of the Board in this case is in charge of the investigation and does participate in deciding on whether a breach has occurred.

Following the continuation of an investigation, as outlined in Section 3.5 above, the Council, in its formation of three, will hear the undertakings, the complainant, the Minister of Economy (or a representative) and the Council's officer responsible for the investigation. The hearing will take place not later than two months after the notification of the communication of the claim. Any other person, natural or legal, may also be heard by the Council if deemed to be necessary. The hearing is not public.

With regard to evidence, this can take the form of written documents, whether official or private, affidavits or testimonies. Expert evidence is also accepted by the court though it is not binding on the judge. Concerning witnesses, the judge conducts the hearing of the witness and parties are not allowed to address queries directly to the witness.

Following the hearing, the Council will either decide to close the file in the absence of proof of anti-competitive practice or take action, by levying a fine against all or some of the

¹⁰¹³ Available at <http://www.guichet.public.lu/entreprises/fr/index.html>

undertakings or by requesting the undertakings to terminate the practice, with or without a financial penalty. The decision of the Council is communicated to the parties and published on the website.¹⁰¹⁴

¹⁰¹⁴ www.concurrence.public.lu

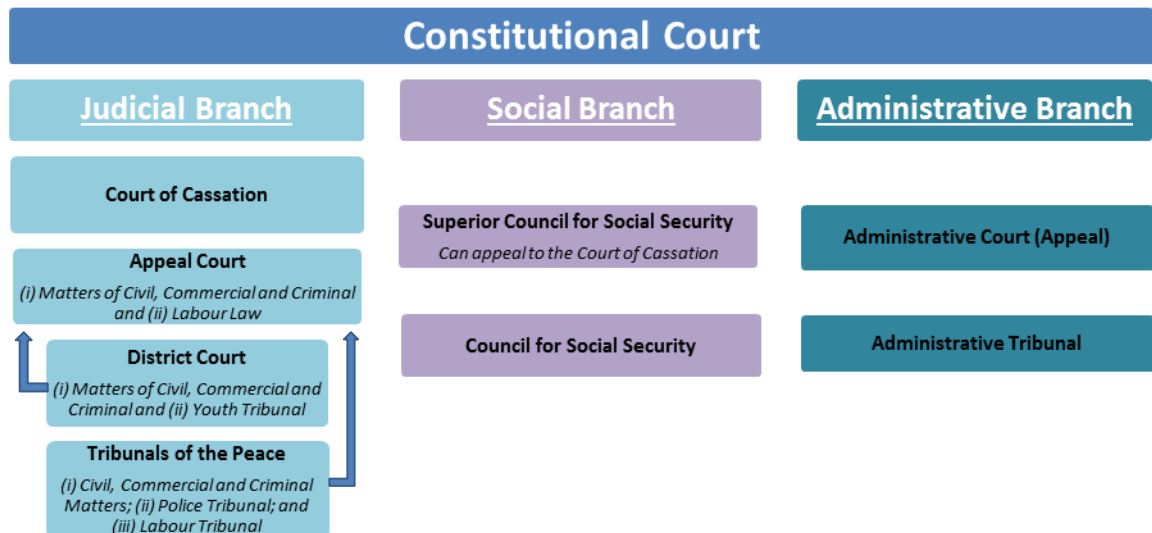
4 Competent courts

The judicial process is adversarial (where two advocates represent the positions of their parties before a judge or jury), with the system divided into two main branches: judicial and administrative. The Social branch of the judicial system is linked to the judicial branch.

No specialised courts exist in Luxembourg to which competition law cases are assigned.

Figure 4.1 provides an overview of the court system in Luxembourg.¹⁰¹⁵

Figure 4.1 Court system in Luxembourg



The judicial and administrative branches, relevant for competition law cases, are described in turn in the subsections below, as well as an overview of the courts competent for Article 101 and Article 102 TFEU cases.

4.1 Judicial branch

The lower courts of the Grand Duchy of Luxembourg are the **Tribunals of the Peace** (*Tribunaux de Justice de Paix*). There are three Tribunals in Luxembourg City, Diekirch and Esch-sur-Alzette (judicial district of Luxembourg).

In civil and commercial cases, under which competition law matters fall, the Tribunals of the Peace hear all cases over which they have been provided with jurisdiction by the Code of Civil Procedure up to a value of €10 000.

In addition to the Tribunals of the Peace, the **District Courts** make up the lower courts. Luxembourg is divided into two judicial districts (Luxembourg and Diekirch), each with a District Court.

The District Courts are divided into sections that comprise three judges. In civil and commercial cases, these courts hand down decisions in ordinary law and try all cases apart from those falling expressly within another jurisdiction. The District Courts deal with cases in excess of €10 000.

At the top of the judicial branch stands the **Supreme Court of Justice**. The Supreme Court comprises the **Court of Cassation** and the **Court of Appeal**. A department of Public Prosecution is also included within the Supreme Court.

The **Court of Appeal** is responsible for hearing civil, commercial and criminal cases and cases decided by the industrial tribunals. The **Court of Cassation** is responsible primarily

¹⁰¹⁵ Further information available from <http://www.justice.public.lu/fr/organisation-justice/index.html>

for hearing cases which seek to overturn or set aside decisions given by the various benches of the Court of Appeal.

The Court of Appeal can rule on matters of fact and of law while the Court of Cassation can only rule on matters of law.

For **private enforcement**, civil commercial courts are competent for hearing actions including actions for damages resulting from the violation of competition law rules when the breach took place or produced effects in Luxembourg. The case begins either in the District Court of the Tribunal of Peace. The judgment can then be appealed to the Appeal Court and subsequently the Court of Cassation.

4.2 Administrative branch

The administrative branch is comprised of the **Administrative Court** and the **Administrative Tribunal**, both of which sit in Luxembourg City.

The Administrative Tribunal is competent for deciding on appeals in cases of incompetence, acting in excess of authority, breaches of the law or of the procedures designed to protect private interests, appeals against administrative measures having a regulatory nature and appeals against administrative decisions in respect of which no other remedy is available. The decisions of the Administrative Tribunal can be appealed at the Administrative Court.

The Administrative Court therefore acts as a Court of Appeal for the Administrative Tribunal. It decides on decisions given by the Administrative Tribunal exercising its authority to set aside decisions delivered relating to administrative measures of a regulatory nature. The Administrative Court can also act as a trial and appeal court relating to proceedings against decisions of other administrative courts that have heard applications to reopen proceedings where special laws grant jurisdiction to these courts.

For **public enforcement actions** (judicial review), decisions of the Competition Council may be appealed to the Administrative Tribunal and subsequently the Administrative Court.

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings related to breaches of competition law rules for both judicial review and follow-on cases.

5.1 Legal standing in judicial review and follow-on proceedings

An individual faced with a breach of competition law has two options available:

1. The lodgement of a claim with the competition authority;
2. The lodgement of a claim with a court, having ordinary jurisdiction in civil or commercial matters.

The legal standing in cases of judicial review and follow-on cases is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Any natural or legal person	Any natural or legal person
How can an action be filed?	A two stage process applies. Undertakings may challenge the decisions of the Competition Council at first Instance at the Administrative Court. They can then appeal the decision to the Administrative Court of Appeal. ¹⁰¹⁶	A complaint can be filed to the judicial courts which are fully competent to judge on the existence of a violation of competition rules.
With which authorities can the action be filed?	Administrative Court of First Instance; Administrative Court of Appeal.	Lower Courts: Tribunals of Peace (if the amount claimed does not exceed €10 000 or the District Court if the amount claimed exceeds €10 000).
Burden of proof	The burden of proof rests with the Competition Authorities.	The burden of proof rests with the applicant who invokes a legal or factual point to validate their claim.

In Luxembourg, any natural or legal person who can show a direct, certain and personal interest may sue for damages before the Luxembourg courts for breach of competition law. Article 23 of the 2002 Law provides that any representative association or professional grouping may introduce an ‘action en cessation’ of an antitrust practice even if it has not suffered any damage. Joint actions are also permitted under procedural rules in Luxembourg. Class actions are not, however, possible under national law.

5.2 Judicial Review Proceedings

This Section presents the judicial review proceedings in Luxembourg.

5.2.1 Rules applicable to the judicial review of NCA decisions

Article 28 of the 2011 Law provides for judicial review of decisions of the Competition Council to the Administrative Tribunal. The Law of 7 November 1996 relating to the organisation of jurisdiction for administrative order¹⁰¹⁷ and the Law of 21 June 1999

¹⁰¹⁶ Article 28 of 2011 Law

¹⁰¹⁷ Available at <http://www.justice.public.lu/fr/organisation-justice/juridictions-administratives/index.html>

regulating the administrative judicial procedure¹⁰¹⁸ sets out the procedural rules applicable for these courts in the instance of judicial review.

5.2.2 Competent Court

As outlined in Section 4 above, the Competition Council can publish a decision on the violation of competition law rules. The decision of the Competition Council may be challenged before the administrative judge in two instances.

5.2.3 Timeframe

The decision of the Competition Council must be challenged before the Administrative Tribunal within three months of the decision being published.¹⁰¹⁹

Following the decision of the Administrative Tribunal, an appeal may be lodged against the judgment at the Administrative Court (of Appeal) within 40 days of notification of the judgment of first instance.

It has been estimated that an appeal process takes, on average, 19 months (one year for the first instance before the Tribunal administrative and seven months for the appeal before the Administrative Court).¹⁰²⁰

5.2.4 Admissibility of Evidence

Evidence submitted to the court in Luxembourg must be approved by the court. It can take the form of affidavits, testimonies and written documents, both official and private. An expert opinion can be requested by a judge, with each party also able to appoint its own expert. In accordance with national case law, court may only rely on a unilateral report provided that this report has been duly communicated to the other party and that the other party was able to comment on it.¹⁰²¹

5.2.5 Interim Measures

For public enforcement procedures, in the case of a suspected competition law infringement, the president of the Competition Council may order interim measures. These measures can only be ordered if the anti-competitive practice causes serious, imminent and irreparable harm to the public and the economic order or to the complainant. The interim measure must be proportional to the anti-competitive practice.

5.2.6 Rulings of the court

In cases of judicial review, the decision of the Competition Council will either be upheld or revoked.

Since the Administrative Court will not itself decide on sanctions or penalties in a case of judicial review, it is important to outline the fines that can be imposed by the Competition Council. If the Administrative Court upholds a decision of the Competition Council, these fines would continue to be imposed. No criminal sanctions are provided by the 2011 Law. Article 20 provides that the Council can impose fines against undertakings where there has been a breach of Article 3 (Article 101 TFEU) or Article 5 (Article 102 TFEU). Article 20(2) provides that the maximum fine should not exceed 10 % of the maximum worldwide turnover that was realised during the last full financial year preceding the year in which the anti-competitive practices were committed.

¹⁰¹⁸ Available at <http://www.justice.public.lu/fr/organisation-justice/juridictions-administratives/index.html>

¹⁰¹⁹ Information available at <http://www.justice.public.lu/fr/organisation-justice/juridictions-administratives/procedure-recours/index.html>

¹⁰²⁰ Legal Guide to Competition Litigation 2011 – Luxembourg, Santer, P., and Gloden, L., available at <http://www.ehp.lu/legal-topics/legal-topics-by-areas-of-expertise/competition/competition-detail/article/legal-guide-to-competition-litigation-2011-luxembourg/>

¹⁰²¹ Information available at <http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/luxembourg>

5.3 Follow-on Proceedings (private enforcement)

This Section presents follow-on proceedings in Luxembourg.

5.3.1 Rules applicable to follow-on procedures

The Competition Act does not provide an explicit statutory basis for damages actions. Article 1134 of the Civil Code is the legal basis for introducing claims for damages. A third party wishing to bring a court action against an infringement by a company of Articles 101 or 102 TFEU and/or Articles 3 to 5 of the Competition Act need to bring a court action on the basis of Articles 1382 and 1383 of the Civil Code relating to liability in tort.

5.3.2 Competent Court

For private enforcement procedures, three instances (Tribunals of the Peace/District Court, Court of Appeal and Court of Cassation) exist in the judicial branch. However, decisions of the Tribunals of the Peace cannot be appealed where the amount of the claim is less than €2 000. The procedure is undertaken orally with the court issuing a written decision.

5.3.3 Timeframe

The time limit for bringing an action before a court for commercial matters including competition law issues is 10 years (Article 189 Code of Commerce).

With regard to appeal of a judicial decision relating to a follow-on procedure, the appeal must be lodged within 40 days of the service of the decision before the District Court or before the Court of Appeal (more than €10 000). A party may lodge proceedings before the Court of Cassation within two months of the service of the decision.¹⁰²²

5.3.4 Admissibility of evidence

As for judicial review cases.

5.3.5 Interim Measures

For private enforcement procedures, an interim injunction can be awarded by the responsible judge in order to put an end to a *prima facie* unlawful situation if (i) the claim is urgent; (ii) the order is sought to avert a situation which would cause irreparable harm to the plaintiff; or (iii) the order is sought to remedy an unlawful situation which has already occurred. This order is immediately enforceable and may be revoked or amended if new evidence arises.

The interim injunction is immediately enforceable notwithstanding any appeal lodged against it. The interim order does not have any influence on the substance of the case.

No compensation for the harm caused can be awarded by the summary judge.

The request for an interim measure is to be produced in writing to the clerk of the administrative court.

5.3.6 Rulings of the court

With a follow on action, the court can declare a clause of a contract or a practice void, due to the breach of competition law. The court may also order the publication of the court decision in the press.

Damages can also be granted to the claimant, though fines cannot be imposed.¹⁰²³ It is considered that the fines that are imposed by the Competition Council, in its initial decision,

¹⁰²² Legal Guide to Competition Litigation 2011 – Luxembourg, Santer, P., and Gloden, L., available at <http://www.ehp.lu/legal-topics/legal-topics-by-areas-of-expertise/competition/competition-detail/article/legal-guide-to-competition-litigation-2011-luxembourg/>

¹⁰²³ With regard to damages, these are assessed on the basis of the injury suffered by the plaintiff due to the anti-competitive practice. The amount of the damages is equivalent to the amount necessary to put the claimant in the

can have an indirect effect on the determination of the damages to be awarded by the courts in the case of follow on actions between the parties.

With regard to the recovery of costs, the legal costs are borne by the party which has lost the case unless the court holds that both parties should bear the legal costs. These costs do not include the lawyers' fees which are principally borne by the clients.

5.4 Alternative dispute resolution mechanisms

In Luxembourg, parties have the option to conclude a settlement agreement without the permission of the court, even during the course of the trial.

Alternative dispute resolution by means of arbitration (Articles 1224-1251 Code of Civil Procedure) and/or mediation is available in Luxembourg.

There is no central body responsible for the regulation of mediators. However, a Mediation Centre exists in Luxembourg as well as a centre in cooperation with the Luxembourg Bar Association. Mediation is mainly admissible in criminal cases, family cases and business cases. Though these centres do not deal with competition law matters, they are not precluded from doing so.

Lawyers have considered arbitration as a more effective manner of resolving disputes relating to competition as it is considered to be a faster procedure, with arbitrators specialised in competition law.¹⁰²⁴

position he would have been in without the breach of competition law. The national law in Luxembourg only recognises the reparatory character of allocating damages and does not allow damages to be exemplary in nature.

¹⁰²⁴ Luxembourg report on Antitrust, available at http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/luxembourg_en.pdf

6 Contextual Information

This Section provides a contextual overview of the judicial system in Luxembourg.

6.1 Duration and cost of competition law cases

No information is currently available on the duration of competition law cases. However, in Luxembourg, *any* case before a Court of First Instance will last, on average 18 months though this can be shorter (10 months) when the case is before the Tribunals of Peace. Proceedings before the Court of Appeals also last, on average, 18 months.¹⁰²⁵

6.2 Influencing Factors

No specific factors influencing the application of competition law rules were identified in Luxembourg.

6.3 Obstacles/Barriers

No obstacles were identified.

¹⁰²⁵ Legal Guide to Competition Litigation 2011 – Luxembourg, Santer, P., and Gloden, L., available at <http://www.ehp.lu/legal-topics/legal-topics-by-areas-of-expertise/competition/competition-detail/article/legal-guide-to-competition-litigation-2011-luxembourg/>

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- Law of 30 May 2005 on the telecommunications sectors;
- Law of 15 December 2000 on postal services and financial postal services;
- Law of 25 February 2001 on networks and services of electronic communications;
- Law of 1 August 2007 on the organisation of the electricity market; and
- Law of 1 August 2007 on the organisation of natural gas.

Books and Articles

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COUNTRY FACTSHEET - LATVIA

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Abbreviations used

CL	Competition Law of the Republic of Latvia
EU	European Union
NCA	National Competition Authority
PUC	Public Utilities Commission
SO	Statement of Objections
TFEU	Treaty on the Functioning of the European Union

1 Overview of the National Legal Framework

Latvia is a unitary State and its national legal order is based on the Civil Law system. Latvian Civil Law and Administrative Law are based on principles of German law. However, other continental systems have had an influence on Latvian law as well. For instance, Latvian Criminal Law initially was inherited from the Soviet Union when Latvia regained its independence in 1991.

The doctrine of judicial precedent is not recognised in Latvia. Laws are the main legal source for courts. Except for interpretations of law approved by decisions of the General Meeting of the Senate of the Supreme Court, judges are not bound to follow decisions adopted in other cases. However, judges tend to follow precedents voluntarily.

The Constitution of Latvia (*Satversme*)¹⁰²⁶ occupies the highest place in the Latvian national legal hierarchy. The Constitutional Court has the right to declare unlawful laws and other regulations contradicting the Constitution. The Constitution is followed by laws which are adopted by the Parliament (*Saeima*). On the basis of laws, the Government (*Ministru kabinets*) adopts regulations. If provided by laws and Government regulations, local municipalities (*pašvaldības*) may also adopt regulations. These mainly relate to the provision of public services.

The main principles for the administration of justice in Latvia are set out in the Law on Judicial Power (*likums "Par tiesu varu"*)¹⁰²⁷. The respective procedures of judicial review in criminal, administrative or civil cases are governed by the Criminal Procedure Law (*Kriminālprocesa likums*)¹⁰²⁸, the Administrative Procedure Law (*Administratīvā procesa likums*)¹⁰²⁹ and the Civil Procedure Law (*Civilprocesa likums*)¹⁰³⁰ respectively.

¹⁰²⁶ Constitution of Latvia, 1922, available online at: <http://likumi.lv/doc.php?id=57980>.

¹⁰²⁷ Law on Judicial Power, 1992, available online at: <http://likumi.lv/doc.php?id=62847>.

¹⁰²⁸ Criminal Procedure Law, 2005, available online at: <http://likumi.lv/doc.php?id=107820>.

¹⁰²⁹ Administrative Procedure Law, 2001, available online at: <http://likumi.lv/doc.php?id=55567>.

¹⁰³⁰ Civil Procedure Law, 1998, available online at: <http://likumi.lv/doc.php?id=50500>.

2 National Legislation establishing competition law rules

This Section presents the national legislation in Latvia establishing competition law rules.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
The Competition Law (<i>Konkurences likums</i>)	4 October 2001

2.1 General legislation

In Latvia, competition policy is determined and regulated by the Competition Law (*Konkurences likums*)¹⁰³¹.

Competition legislation in Latvia has developed gradually since 1991, the year in which Latvia regained its independence. The first Competition Law (CL) in Latvia was adopted in 1998. That law, however, had its shortcomings and did not meet the requirements of modern Europe. A new CL was adopted on 4 October 2001, which entered into force on 1 January 2002. This CL, as amended to date, embodies the main principles of EU competition law. In general, legislators in Latvia have tried to develop competition law and its application in Latvia in a way that follows the principles and experience of the EU, i.e. guidelines and decisions adopted by the European Commission and EU case law.

The CL applies to all market participants in Latvia and to all types of registered and unregistered associations of market participants operating in Latvia. The meaning of 'market participant' is the same as the meaning of the term 'undertaking' under EU competition rules. That is, a market participant is any person, who performs or intend to perform an economic activity in the territory of Latvia or whose activity may influence competition in the territory of Latvia irrespective of its legal status or way it is financed¹⁰³². The CL also applies to bodies of State administration and local governments but only when they act as market participants, i.e. involved in commercial activities¹⁰³³.

The definition of market participants covers foreign undertakings which perform or intend to perform business activity in the territory of Latvia or which have or may have an impact on competition in the territory of Latvia¹⁰³⁴. In determining the potential or actual impact on competition, one must consider whether the foreign undertaking has sufficient assets to enter the relevant market in the territory of Latvia and offer goods for sale or render services to customers within a short time period, without making significant investments¹⁰³⁵.

The CL has been amended six times¹⁰³⁶. The latest amendments have, among other things, adjusted the merger notification thresholds and amended notification procedures, clarified the rights of the NCA to carry out investigations, aligned the definition of a dominant position with the definition under EU competition rules, and have introduced and later revised the novel concept of a dominant position in the retail sector.

The CL contains the main legislation on competition law regulation and enforcement. The Latvian antitrust rules enforcing the provisions of Articles 101 and 102 of the TFEU are:

- Article 11 of the CL that regulates restricted agreements and practices;
- Article 13 of the CL prohibiting abuse of dominance; and

¹⁰³¹ Competition Law, 2001, available online at: <http://likumi.lv/doc.php?id=54890>.

¹⁰³² Article 1(9) of the Competition Law.

¹⁰³³ Article 1(9) of the Competition Law.

¹⁰³⁴ Article 1(9) of the Competition Law.

¹⁰³⁵ Article 1(9) of the Competition Law.

¹⁰³⁶ On 22 April 2004 in close correlation with Latvia's accession to the European Union on 1 May 2004, and, more recently on 13 March 2008, 14 November, 2008, 18 June 2009, 1 December 2009 and 12 September 2013.

- Article 18 of the CL prohibiting unfair competition.

The CL only establishes the general rules regarding agreements and practices that might restrict competition. More detailed procedures for the application of various provisions of the CL are left to be provided by supplementing regulations issued by the Government.

Regarding judicial review and follow on actions, the CL establishes general principles¹⁰³⁷. The main procedural rules for judicial review and follow up procedures are established by the Administrative Procedure Law and the Civil Procedure Law respectively.

There are no laws in Latvia establishing exemptions from the general regulation of the CL.

2.2 Industry-specific legislation

In Latvia, several industry specific regulations exist in the field of public services (e.g. energy, financial services, postal and railway services, electronic communications). These regulations govern different competition matters such as access to the network, interconnection fees and tariffs for services. Most of the sector specific regulations in Latvia are also the implementing measures of the EU sector specific regulations in the field of competition.

The responsibility for regulating public services is split between the State and local municipalities. Sectors of regulated services, e.g. energy, electronic communications, postal and railway services, are subject to regulation by the State, whilst local municipalities regulate public utilities, e.g. waste management, water and heat supply.

As a consequence, different decentralised sector regulators are currently exercising control over the regulated services. It is stated by the Law on Regulators of Public Utilities (*likums "Par sabiedrisko pakalpojumu regulatoriem"*)¹⁰³⁸ that the Public Utilities Commission (PUC) exercises supervision over the sectors regulated by the State. However, the issue of control over regulated services at the municipal level is of a more complex nature.

According to the Energy Law (*Enerģētikas likums*)¹⁰³⁹, the energy supplies include electricity, thermal energy, and gas. The sectors of electricity and gas are regulated by the PUC.

The Law on Local Municipalities (*Likums par "Pašvaldībām"*)¹⁰⁴⁰ states that municipalities should ensure thermal energy for the end-users residing within their administrative territories. Therefore, the sector of thermal energy is regulated at the municipal level.

The sector of financial services is regulated by the Financial and Capital Market Commission. The supervisory functions of this Commission are prescribed by the Law on Financial Instrument Market (*Finanšu instrumentu tirgus likums*)¹⁰⁴¹ and Law on Financial and Capital Market Commission (*Finanšu un kapitāla tirgus komisijas likums*)¹⁰⁴².

Following the regulation of the Law on Post Services (*Pasta likums*)¹⁰⁴³ and Law on Regulators of Public Utilities, the postal services are regulated by the PUC. Regulators at municipal level are not involved in this matter.

The Law on Railway Services (*Dzelsceļa likums*)¹⁰⁴⁴ and the Law on Regulators of Public Utilities state that the railway transport, including carriage of passengers, is administered by the PUC. Regulators at municipal level are not engaged in the regulation of railway transport.

¹⁰³⁷ Articles 8, 20 and 21 of the Competition Law.

¹⁰³⁸ Law on Regulators of Public Utilities, 2000, available online at: <http://likumi.lv/doc.php?id=12483>.

¹⁰³⁹ Energy Law, 1998, available online at: <http://likumi.lv/doc.php?id=49833>.

¹⁰⁴⁰ Law on Local Municipalities, 1998, available online at: <http://likumi.lv/doc.php?id=49833>.

¹⁰⁴¹ Law on Financial Instrument Market, 2003, available online at: <http://likumi.lv/doc.php?id=81995>.

¹⁰⁴² Law on Financial and Capital Market Commission, 2000, available online at: <http://likumi.lv/doc.php?id=8172>.

¹⁰⁴³ Law on Post Services, 2009, available online at: <http://likumi.lv/doc.php?id=193574>.

¹⁰⁴⁴ Law on Railway Services, 1998, available online at: <http://likumi.lv/doc.php?id=47774>.

The exclusive competence of the PUC in regulation of telecommunications sector is prescribed by the Law on Electronic Communications (*Elektronisko sakaru likums*)¹⁰⁴⁵ and the Law on Regulators of Public Utilities. The regulators at the municipal level have no competence in this sector.

The PUC and local municipalities cooperate with the NCA (e.g. in sharing information) on a case by case basis, however no formal cooperation mechanism is established by the law.

¹⁰⁴⁵ Law on Electronic Communications, 2004, available online at: <http://likumi.lv/doc.php?id=96611>.

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in Latvia, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Competition Council

The Competition Council (*Konkurences padome*) was established in 1998, replacing the former State antitrust authority. The Competition Council is a State institution which is financed from the State budget. The Competition Council acts under the supervision of the Ministry of Economics.

The legal basis for the NCA competencies is the CL. In accordance with the CL, the NCA adopts administrative decisions in competition cases. The primary duties of the NCA, according to the CL, include the following:

- monitoring that prohibitions stipulated in the CL and other laws and international treaties against the abuse of dominant position and use of prohibited agreements are observed by market participants;
- supervising compliance with the Advertising Law (*Reklāmas likums*)¹⁰⁴⁶ within the limits of its competence;
- examining notifications regarding agreements by market participants and adopting decisions with respect thereto;
- examining notified mergers; and
- cooperating, within the scope of its competence, with relevant foreign institutions¹⁰⁴⁷.

3.2 The reform of the Competition Council

The NCA has been reformed several times during last ten years. These reforms mainly have been related to and changes of responsibilities of the NCA and increase or decrease of personnel employed by the NCA. For instance, when Latvia joined the EU in 2004, the NCA started monitoring EU internal market rules and integrated in the cooperation and information networks of the European competition authorities¹⁰⁴⁸. When the crisis hit Latvia in 2008, many employees of the NCA were laid off. Now, the most discussed issue is the independence of the NCA. The NCA together with its supervising authority, i.e. the Ministry of Economics, is currently discussing the proposal for legislative amendments to ensure full independence for the NCA¹⁰⁴⁹.

3.3 Composition and decision-making

The NCA consists of two bodies: the governing body, which consists of three members, and the executive body, which is the Executive Directorate. The chairperson and two members of the governing body are appointed by the Government upon the nomination of the Minister of Economics for a five-year period¹⁰⁵⁰.

The Executive Directorate is entrusted with the preparation of draft documents and decisions for further review and approval by the NCA, as well as with the enforcement of the decisions passed by the NCA. Furthermore, the Executive Directorate analyses the received complaints and prepares case materials for the review and the approval at the meetings of the governing body. Investigations of alleged violations of the CL are carried out by the

¹⁰⁴⁶ Advertising Law, 1999, available online at: <http://likumi.lv/doc.php?id=163>.

¹⁰⁴⁷ Article 6(1) of the Competition Law.

¹⁰⁴⁸ Information available online at: <http://www.kp.gov.lv/en/about-competition-council/history>.

¹⁰⁴⁹ Information available online at: <http://www.kp.gov.lv/lv/aktualitates/214-eiropas-savienibas-konkurences-iestazu-vaditaji-brisele-spriez-par-konkurences-uzraudzibas-efektiviz>.

¹⁰⁵⁰ Article 5(3) of the Competition Law.

Executive Directorate. It also functions as the Secretariat of the NCA and is entrusted with the preparation and filing of claims with the courts on behalf of the NCA. Independent consultants may be engaged by the Executive Directorate to perform assignments given by the governing body¹⁰⁵¹.

3.4 Cooperation with other entities

The NCA cooperates with other entities both on the national as well as international level.

On the national level, the NCA cooperates with other State institutions and in particular the PUC and the Bureau for Prevention and Combating of Corruption (*Korupcijas novēršanas un apkarošanas birojs*). This cooperation mainly involves sharing of information, knowledge and views. Apart from the Administrative Procedure Law, which establishes basic principles on how the State authorities share information, there is no formal regulation in place governing cooperation in the competition field.

On the international level, the NCA is a member of the European Competition Network (ECN) and the International Competition Network (ICN). Moreover, the NCA has also concluded several bilateral agreements with the authorities from other States outside the EU (for example, Russia and Ukraine).

The NCA complies with Regulation (EC) No 1/2003¹⁰⁵². According to this Regulation, information (including confidential information) received from another authority within the EU can be used as evidence in the case of the NCA which requested such information. This could be done provided that laws of the country where the receiving authority is located:

- do not provide for stricter fines regarding the same infringements; and
- do not grant less rights of defence than laws of the country, where the authority providing the information is located¹⁰⁵³.

The NCA in its practice has used information provided by the authority of another EU Member State for investigation purposes¹⁰⁵⁴.

3.5 Investigations

Generally, investigations are initiated by the NCA upon:

- an application of a person who has a legitimate interest in preventing a violation of the CL (a person whose rights and legal interests have been or might be violated, as well as a person involved in the violation of competition rules);
- the initiative of the NCA; and
- a report from other institutions¹⁰⁵⁵.

Thus, the NCA must initiate an investigation on the basis of every reasoned and sufficiently grounded application submitted by a third party except where the potential infringement would have a minor effect on the competition. Regarding the cases initiated on the basis of its own initiative, the NCA makes its own judgment as to which business sectors the NCA should pay particular attention. These particular sectors can vary from one year to another.

There are no guidelines or templates for submitting complaints to the NCA. The content of a complaint is briefly described in the CL¹⁰⁵⁶. A submission must indicate documentarily

¹⁰⁵¹ Article 7(1)(7) of the Competition Law.

¹⁰⁵² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 of 4.1.2003.

¹⁰⁵³ Article 3 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 of 4.1.2003.

¹⁰⁵⁴ Please see, for example, the decision of the NCA in the No P/04/07/3, the decision available online at: <http://www.kp.gov.lv/files/pdf/z6VAMMXj7W.pdf>.

¹⁰⁵⁵ Article 22 of the Competition Law.

justified information regarding the persons involved in the possible violation; relevant evidence; the rules of the CL which may have been violated; the facts that testify the interest of the person and the measures which have been performed to terminate the violation prior to the receipt of the submission by the NCA. The NCA has the right to refuse any submission which does not cover the basic requirements if the person has not submitted additional information on the request of the NCA¹⁰⁵⁷.

When a case is initiated, the NCA gathers all the necessary information to make a decision. In the course of investigation, the NCA has the right to request any legal or natural person to provide any information it would need to perform the tasks specified in the CL, including accessing restricted information or information classified as business secret. The NCA also has the right to receive written or oral explanations from any person¹⁰⁵⁸. Nevertheless, legally privileged documents, i.e. written communications between the relevant person or market participant on the one hand and sworn advocates on the other, may not be requested¹⁰⁵⁹.

According to the law, the NCA must adopt its decision within six months' time from the opening of the investigation. If due to objective reasons meeting this deadline is not possible, the deadline may be extended up to one year. If establishing the facts of the case is exceptionally time consuming, the deadline may further be extended up to two years¹⁰⁶⁰.

3.6 Decision-making

When the NCA during its investigation has gathered all the necessary information and evidence, it sends a Statement of Objections (SO) to the party that has allegedly committed the violation. The SO consists of information on the basis of which the NCA makes its opinion stipulating whether or not at the time of the SO the NCA considers that actions performed by the relevant market participant have infringed the CL. The suspected party has the right to comment on the SO and submit additional evidence within a period of ten days after receiving the SO. In addition, the suspected party has the right to access the case file (except for confidential information) during the entire period of the investigation, unless the NCA decides that reviewing the file may adversely affect the achievement of goals set by the law¹⁰⁶¹.

After the suspected party submits to the NCA its opinion on the SO, the NCA adopts the final decision in the case. In the decision the NCA must address only those arguments raised by the party which are important to the case. Thus, if the NCA considers that the argument expressed by the party in response to the SO is important, it will address it in the final decision.

The governing body is the decision making body of the NCA. After the governing body adopts the decision, it sends it to all parties of the case. Besides, not later than ten days after the adoption of the decision, the NCA publishes on its website and in the official gazette (*Latvijas Vēstnesis*) a non-confidential version of the decision stating that an infringement is established or that the case is dismissed¹⁰⁶².

¹⁰⁵⁶ Article 23 of the Competition Law.

¹⁰⁵⁷ Article 23(4) of the Competition Law.

¹⁰⁵⁸ Article 9(5)(2) of the Competition Law.

¹⁰⁵⁹ Article 8 of the Advocacy Law, 1993, available online at: <http://likumi.lv/doc.php?id=59283>.

¹⁰⁶⁰ Article 27 of the Competition Law.

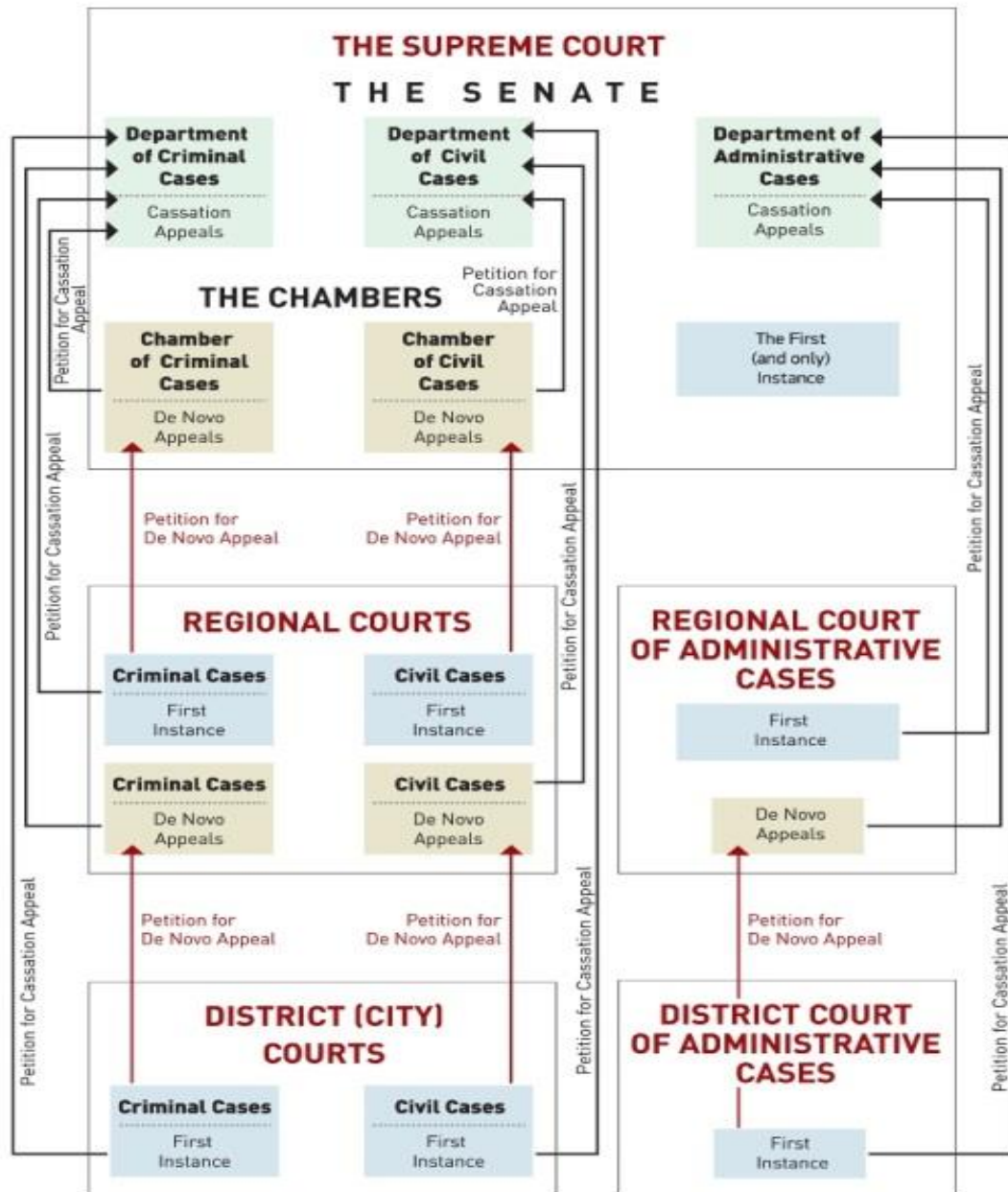
¹⁰⁶¹ Article 26(6) of the Competition Law.

¹⁰⁶² Article 6(2) of the Competition Law.

4 Competent courts

This Section presents the competent courts in Latvia. Figure 4.1 firstly provides an overview of the court system at national level.

Figure 4.1 Court system in Latvia



According to the Law on Judicial Power (*Likums "Par tiesu varu"*)¹⁰⁶³, Latvia has a three-tier court system:

- district (city) courts;
- regional courts; and
- the Supreme Court.

¹⁰⁶³ Information available online at: <http://likumi.lv/doc.php?id=62847>.

The current three-tier judicial system secures the option to appeal court decisions adopted by the court of first instance and review of the case in appeal and cassation instances.

District (city) courts are usually the courts in which civil, criminal and administrative cases are heard in the first instance. Regional courts are the courts of second instance in cases which have been heard by district (city) courts. Exceptionally, however, regional courts may adjudicate cases as the courts of first instance if specified so by law. This is also the case in competition matters, where the Administrative Regional Court is the first instance court to hear appeals of the NCA decisions.

The Supreme Court is composed of two separate instances – the Senate and two court chambers: the Chamber of Civil Cases and the Chamber of Criminal Cases hearing appeals in cases that have been tried by regional courts as the courts of first instance. Conversely, the Senate is the cassation instance for all other cases. The Senate is the final instance of the judicial system.

Besides the general courts in Latvia, the Constitutional Court as an independent judicial body hears cases regarding the conformity of laws and other regulations with the Constitution, falling under its jurisdiction, in accordance with the Constitution and the Constitutional Court Law (*Satversmes tiesas likums*)¹⁰⁶⁴.

Competition matters are dealt with by administrative courts and specifically by the Administrative Regional Court as the first instance for competition cases. This court is responsible for administrative matters, including judicial reviews of decisions adopted by public authorities, thus also the NCA. An appeal of the court's decision may be brought before the Supreme Court, which would be the final instance in competition cases. Follow-on cases, however, are civil matters and as such are dealt with by civil courts in three instances. While courts in general are competent to rule both on facts and law, the Supreme Court rules only on matters of law.

According to the Law on Judicial Power, the courts are organised centrally in Latvia. Furthermore, normally courts have a national competence but with respect to competition matters, they also have the right to review enforcement of Articles 101 and 102 of the TFEU¹⁰⁶⁵.

Administrative courts dealing with competition matters are situated in Riga (capital of Latvia) whereas the courts of general jurisdiction are seated in all major cities of Latvia¹⁰⁶⁶.

The case in administrative court is reviewed by three judges in each instance (in the Supreme Court in exceptional, difficult cases the case might be reviewed by seven judges)¹⁰⁶⁷.

In the court of general jurisdiction cases are reviewed by a single judge in first instance, and three judges in second and third instance. If the case is exceptionally difficult, in the Supreme Court it might be reviewed by seven judges¹⁰⁶⁸.

Each party of the case might choose how many representatives to involve. Usually, there is one representative for each party. There is no limitation as to who can represent the party.

¹⁰⁶⁴ Constitutional Court Law, 1996, available online at: <http://likumi.lv/doc.php?id=63354>.

¹⁰⁶⁵ Article 7(1)(6) of the Competition Law.

¹⁰⁶⁶ Article 29 of the Law on Judicial Power, 1992, available online at: <http://likumi.lv/doc.php?id=62847>.

¹⁰⁶⁷ Articles 304 and 339 of the Administrative Procedure Law, 2001, available online at: <http://likumi.lv/doc.php?id=55567>.

¹⁰⁶⁸ Articles 12 and 465 of the Civil Procedure Law, 1998, available online at: <http://likumi.lv/doc.php?id=50500>.

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings related to breaches of competition law rules in Latvia.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in Latvia is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Party having an interest in the outcome of the case (that is, the addressee of the NCA's decision, party which submitted a complaint to the NCA or competitor which is directly influenced by the decision of the NCA).	Any natural or legal person.
How can an action be filed?	The claim must be submitted in writing with the Administrative Regional Court. The decision of the court can be further appealed to the Supreme Court. Decision of this court is final.	The claim must be filed in writing with the competent court.
With which authorities can the action be filed?	Administrative Regional Court. Supreme Court.	The competent district court.
Burden of proof	With the plaintiff.	With the plaintiff.

5.2 Judicial Review Proceedings

This Section presents the judicial review proceedings in Latvia.

5.2.1 Rules applicable to the judicial review of NCA decisions

The decision of the NCA can be appealed before the Administrative Regional Court within one month from the moment when the addressee of the decision has received it¹⁰⁶⁹. The procedural rules for litigation in competition matters are established by the Administrative Procedure Law. According to the general administrative litigation procedure, this is the court of second instance. However, in competition matters it adjudicates as the court of first instance.

The Administrative Regional Court may render one of the following judgments – (1) leave the decision of the NCA unchanged and dismiss the complaint; (2) annul the decision of the NCA in full or in part¹⁰⁷⁰.

The judgment of the court can further be appealed by submitting a cassation claim to the Administrative Department of the Supreme Court, the judgment of which is final. The Supreme Court has competence to review the court judgement only for breach substantive or procedural law¹⁰⁷¹.

¹⁰⁶⁹ Article 8 of the Competition Law.

¹⁰⁷⁰ Article 323 of the Administrative Procedure Law.

¹⁰⁷¹ Article 325 of the Administrative Procedure Law.

The Supreme Court may render one of the following judgments – (1) leave the judgment of the Administrative Regional Court unchanged and dismiss the complaint, in which case the judgment is final; (2) set aside the judgment of the Administrative Regional Court in full or in part and return the case back to the Administrative Regional Court for retrial; or (3) set aside the judgment of the Administrative Regional Court in full or in part and terminate the judicial proceedings¹⁰⁷².

The appeal of the NCA decision suspends the obligation of the party to pay the fine imposed by the NCA; however, it does not release the party from the obligation to fulfil other obligations imposed by the decision (for example, to grant access to network, unbundle services)¹⁰⁷³. The decision can be appealed on its merits and also on the grounds of procedural errors made by the NCA during the investigation. Please note that also the decision of the NCA not to initiate or terminate investigation may be appealed before courts.

The essence of the administrative court proceedings is the court's control over the legality or efficiency of the administrative decision issued by the NCA or the actual activity of the NCA. In administrative proceedings the court operates on the principle of objective investigation, i.e. it is the court's duty to *ex officio* determine the circumstances of the case. With respect to the timeframe, Latvian legislation does not set any specific deadlines for handling court cases. However, Latvian courts are bound by the principle of procedural economy which requires that any dispute is settled as fast as possible¹⁰⁷⁴.

5.2.2 Competent Court

The Administrative Regional Court is the competent court where decisions of the NCA can be appealed. In general, this court is the second instance court but in competition matters it reviews cases in the first instance. Following this, the judgment of the court can be further appealed by submitting a cassation complaint to the Administrative Department of the Supreme Court.

5.2.3 Timeframe

The NCA's decision can be appealed within one month from the moment when the addressee of the decision has received it. This is the standard appeal-filing period for administrative decisions in Latvia¹⁰⁷⁵. The first instance court usually adopts its decision within one year time.

The decision of the first instance court may also be appealed within a period of one month¹⁰⁷⁶. The Supreme Court usually adopts its decision within 8-12 month time. This time might differ subject to complexity of the case or if the Supreme Court decides to dismiss the judgment of the court of first instance and send it back for a retrial.

5.2.4 Admissibility of Evidence

The court accepts evidence which concerns the subject of the case. It is possible to hear experts at the court or submit their opinions to the courts. Besides, it is also possible to hear witnesses. The parties of the case have full access to materials of the case file (except for confidential information of other parties).

5.2.5 Interim Measures

At the moment, legislation in Latvia does not allow the courts to adopt any interim measures in infringement cases of competition rules. However, the NCA, if it has any evidence of a potential breach of EU competition rules and if failure to remedy the breach may result in material and irrevocable damages to competition, can adopt a decision on imposition of

¹⁰⁷² Article 348 of the Administrative Procedure Law.

¹⁰⁷³ Article 27.¹ of the Competition Law.

¹⁰⁷⁴ Article 28⁴ of the Law on Judicial Power.

¹⁰⁷⁵ Article 8(2) of the Competition Law.

¹⁰⁷⁶ Article 329 of the Administrative Procedure Law.

interim measures, or impose an obligation on the market participant to perform a certain activity within a certain period of time, or, alternatively, prohibit a specific activity. The decision on interim relief is in force until the moment when the final decision of the NCA in the relevant case is no longer subject to dispute. The decision of the NCA on interim measures can be appealed at the administrative court; however, while pending this appeal does not suspend the validity and enforceability of the decision¹⁰⁷⁷.

5.2.6 Rulings of the court

The court can uphold or dismiss the decision of the NCA. The court itself does not (re)calculate the fines or impose commitments on the parties of the case. The first instance court holds an oral hearing when examining the case. The Supreme Court, however, most of the time adopts the judgment in a written procedure¹⁰⁷⁸. The judgment of the court is usually sent to the parties of the case in a period of one month but in some cases it might take substantially longer. Non-confidential versions of the judgment are made public.

5.3 Follow-on Proceedings (private enforcement)

This Section presents follow-on proceedings in Latvia.

5.3.1 Rules applicable to follow-on procedures

In accordance with the CL, any violations of this law can also be assessed by a civil court¹⁰⁷⁹. Follow on cases may only be heard before the civil courts. Therefore, the person who has suffered damages must claim such damages in the competent court according to the registered address of the defendant¹⁰⁸⁰. Procedure before civil courts is governed by the Civil Procedure Law.

It is up to the person whether to submit a claim with the court of general jurisdiction or submit a complaint to the NCA. If the person decides to submit a claim directly before the court, the court may establish the infringement of the CL and then award damages. Alternatively, the person can wait for the decision of the NCA, which would potentially identify a breach of competition rules, and subsequently use it as a basis for his/her damage claim. In such cases, the court would only adjudicate with respect to the amount of damages and would not have to identify the infringement as such.

A court which reviews civil claims in relation to violations of the CL has a duty to inform the NCA about the case¹⁰⁸¹.

5.3.2 Competent Court

The competent court in follow on cases is the court having a jurisdiction over the defendant. The court's jurisdiction is based on the registered address of the entity or address where the natural person has declared its residence¹⁰⁸². Thus, such claim can be submitted to any court in Latvia depending on the registered address of the natural or legal person.

5.3.3 Timeframe

The CL does not set out a limitation period that would apply to the claim of damages. However, the general limitation period, which is ten years after the infringement is identified, could also apply to infringements of the CL¹⁰⁸³.

¹⁰⁷⁷ Articles 30 and 31 of the Competition Law.

¹⁰⁷⁸ Articles 112.¹, 304 and 339 of the Administrative Procedure Law.

¹⁰⁷⁹ Article 20 of the Competition Law.

¹⁰⁸⁰ Section 3 of the Civil Procedure Law.

¹⁰⁸¹ Article 20 of the Competition Law.

¹⁰⁸² Article 26 of the Civil Procedure Law.

¹⁰⁸³ Article 1895 of the Civil Law, 1937, available online at: <http://likumi.lv/doc.php?id=90220>.

Courts usually review cases on average within one year per instance. Therefore, to adjudicate a follow on case in all three instances it would take approximately three years. The period may be shorter in courts having to deal with fewer cases and thus longer in courts with more cases, e.g. in the courts of Riga – the capital of Latvia.

5.3.4 Admissibility of evidence

Standard rules of the Civil Procedure Law apply. Evidence from the NCA decision, opinions of experts and all other non-confidential information of the case file of the NCA can be used as evidence in such cases.

5.3.5 Interim Measures

Only the person submitting the claim regarding damages have the right to ask the court to take interim measures and secure the claim (arrest the bank account, vehicles or the property)¹⁰⁸⁴. Legislation in Latvia does not allow the courts to adopt interim measures *ex officio*.

5.3.6 Rulings of the court

The court might adopt the judgment requesting the infringer of the CL to pay damages to the party who has suffered damages. Oral hearings are the usual form in which the courts review cases in civil matters. However, the Supreme Court may use only the written procedure. Judgments of the court are made public.

5.3.7 Rules applicable to the enforcement of court judgments

If the judgment of the court is not complied with voluntarily, the judgment can be enforced by the bailiff according to the rules established by the Civil Procedure Law. The same court which adopts the decision on merits issues a document regarding the enforcement of the decision. The person, who has the right to have the decision enforced, has the right also to choose his/her bailiff¹⁰⁸⁵.

5.4 Alternative dispute resolution mechanisms

Theoretically, it is possible to resolve the CL related disputes between private parties through a general mediation or arbitration procedures. However, such cases in Latvia are very rare.

If the party has appealed the decision of the NCA to the court, the NCA might settle the case by signing of the administrative agreement with the party accused of violating the CL. Any party of the proceedings has the right to initiate signing of the agreement. If such agreement is signed, the judicial proceedings are terminated. The court does not need to approve such agreements but it must be informed about it in order to terminate the case. Besides, the NCA may adopt a decision to close the case without imposing a fine subject to commitments undertaken by the parties of the case¹⁰⁸⁶.

¹⁰⁸⁴ Articles 137 and 138 of the Civil Procedure Law.

¹⁰⁸⁵ Article 549 of the Civil Procedure Law.

¹⁰⁸⁶ Article 27.² of the Competition Law.

6 Contextual Information

This Section provides contextual information on the judicial system in Latvia.

6.1 Duration and cost of competition law cases

The average duration of competition cases in Latvia is one to two years (i.e. the time period when the NCA adopts the final decision in a case). Further, if the decision of the NCA is appealed to the court it could take additional two years until the final decision of the court is adopted. This duration can differ subject to the complexity of the case.

The submission of the complaint to the NCA and subsequently the initiation of the case before it are free of charge. Furthermore, the court fees to appeal the decision of the NCA are rather low. The fees are approximately EUR 30 and EUR 70 for submitting the appeal with the court of first instance and the Supreme Court respectively¹⁰⁸⁷.

The average duration of follow on cases are approximately three years. The fee for the review of the case is approximately one percent from the amount of the claim¹⁰⁸⁸. In addition, parties of the case must cover the legal fees (costs of lawyers). The State fee and legal fees can be reclaimed from the losing party.

6.2 Influencing Factors

In Latvia, a high number of international businesses operate. These large international companies usually are very well aware of the substance of the EU competition rules. Nevertheless, small and middle size companies usually are less aware of the principles of EU competition law. Therefore, these companies very seldom use the opportunity to complain regarding or claim damages resulted from infringements of EU competition law.

6.3 Obstacles/Barriers

Whilst judges of the administrative courts are well informed of the EU competition rules, other judges, e.g. from civil courts and thus dealing with follow on cases, have very little knowledge of competition law. Therefore, they are very reluctant to implement the CL in private action cases.

Besides, general awareness of the society regarding possibility to claim damages based on the infringement of the CL is very low. There is no public information available about successful cases which could encourage persons to take legal action against the parties that infringed the CL. This is because of the lack of well-organised public data base of civil law cases and thus absence of such cases as such.

¹⁰⁸⁷ Article 124 of the Administrative Procedure Law.

¹⁰⁸⁸ Article 34 of the Civil Procedure Law.

Annex 1 Bibliography

Legislation

- The Competition Law
- The Civil Law
- The Law of Administrative Procedure
- The Law on Regulators of Public Utilities
- The Energy Law
- The Law on Local Municipalities
- The Law on Financial Instrument Market
- The Law on Financial and Capital Market Commission
- The Law on Post Services
- The Law on Railway Services
- The Law on Electronic Communications
- The State Control Law
- The Constitution of the Republic of Latvia
- The Constitutional Court Law
- The Civil Procedure Law
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COUNTRY FACTSHEET – MALTA

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Abbreviations used

Appeals Tribunal	Competition and Consumer Appeals Tribunal
COCP	Code of Organisation and Civil Procedure
EU	European Union
MCCAA Act	Malta Competition and Consumer Affairs Authority Act
MCCAA	Malta Competition and Consumer Affairs Authority
TFEU	Treaty on the Functioning of the European Union

1 Overview of the National Legal Framework

Malta is a unitary State with no federal structure. Malta's legal system is a synthesis of the various legal cultures which exerted influence on it during long years of colonial rule, and as such is a mix of both Civil and Common Law systems¹⁰⁸⁹. Private law is traditionally based on the French civil code, whilst public law (notably, constitutional and administrative law as well as procedural law) is based on the English common law. The current Maltese Constitution, enacted in 1964 and subsequently amended, is based on the Westminster model and features a Bill of Rights. The most noteworthy amendments were made in 1974 when Malta gained independence and became a republic¹⁰⁹⁰. The European Convention on Human Rights was subsequently incorporated in Malta's legislation in 1987¹⁰⁹¹.

The Constitution is the supreme law of the country and most of its provisions can only be amended by the Parliament if passed by a two-thirds majority. The primary sources of law are the acts of Parliament followed by subsidiary legislation. Subsidiary legislation includes by-laws and legal notices which are enacted by ministries and other authorities. Since Malta's accession to the EU in 2004, the EU *acquis communautaire* and future regulations prevail over domestic legislation and directives have to be incorporated in domestic legislation¹⁰⁹².

The Maltese judicial system is a two-tier system comprising a court of first instance presided over by a judge or magistrate, and a court of appeal. There are also various tribunals which deal with specific areas of law and have varying degrees of competence among which is the Competition and Consumer Appeals Tribunal. The majority of appeals from decisions awarded by any of these tribunals are heard by the Court of Appeal (civil jurisdiction)¹⁰⁹³. This is governed by the Code of Organisation and Civil Procedure (COCP), which is Chapter 12 of the Laws of Malta¹⁰⁹⁴.

2 National Legislation establishing competition law rules

This Section describes the national legislation in Malta establishing competition law rules.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
Cap. 379 Competition Act	1 January 1995
Cap. 510 Malta Competition and Consumer Affairs Authority (MCCAA) Act	23 May 2011

2.1 General legislation

Maltese competition rules are contained in the Competition Act (adopted on 1 January 1995 and subsequently amended). The rules contained in the Competition Act are to a large extent based on the EU competition rules, namely Articles 101 and 102 of the TFEU. Article 14 of the Schedule to the Competition Act, which is a part of the Competition Act, states that in the interpretation of the Act, the Commission for Fair Trading (now – the Office of Competition)¹⁰⁹⁵ must have recourse to its previous decisions and to the interpretation given by the EU institutions on the provisions of the relevant EU treaties, regulations, directives and decisions.

¹⁰⁸⁹ See JJ. Cremona, *Maltese Constitution and Constitutional History since 1813*, 2nd Edition, PEG, 1997

¹⁰⁹⁰ See JJ. Cremona, *Maltese Constitution and Constitutional History since 1813*, 2nd Edition, PEG, 1997.

¹⁰⁹¹ Malta's eServices website, available at: <http://www.justiceservices.gov.mt/>.

¹⁰⁹² Information available at: <http://www.gov.mt/en/Services-And-Information/>.

¹⁰⁹³ Information available at: <http://vassallohistory.wordpress.com/the-legal-system/>.

¹⁰⁹⁴ Malta's eServices website, available at: <http://www.justiceservices.gov.mt/>.

¹⁰⁹⁵ Article 13, Chapter 510 of the Laws of Malta.

The national equivalents to Articles 101 and 102 of the TFEU are Articles 5 and 9 of the Competition Act.

- Article 5 of the Competition Act contains a general prohibition against restrictive agreements entered into between undertakings carrying out a commercial or economic activity, decisions by associations of undertakings and concerted practices among undertakings having the object or effect of restricting, distorting or preventing competition in Malta or which may affect trade between Malta and any one or more EU Member States. Whilst national law does not provide for a definition of the term ‘undertaking’, it has the same meaning as under EU competition law and thus relates to both natural and legal persons undertaking an economic activity. The Second Schedule of the Malta Competition and Consumer Affairs Authority (MCCAA) Act provides that the Competition and Consumer Appeals Tribunal must take into account the relevant judgments of the EU courts as well as the relevant EU legal instruments in case there are flaws or gaps in the domestic legislation¹⁰⁹⁶.
- Article 9 of the Competition Act prohibits the abusive conduct by a dominant undertaking, such as charging discriminatory or predatory prices and limiting production in Malta and in other Member States. An undertaking is dominant when it has the ability to act independently of its customers, competitors and consumers.

Both Articles 5 and 9 of the Competition Act provide that Articles 101 and 102 of the TFEU apply where a collusive practice between undertakings or an abuse of a dominant position by an undertaking may affect trade between Malta and any one or more Member States.

2.2 Industry-specific legislation

The Competition Act is a framework law and applies also to specific industries. Furthermore, a special NCA directorate – the Communications, Energy, Transport and Financial Services Markets Directorate, deals with industry-specific competition issues.

As examples of general legislation that regulates individual sectors, one can mention the Enemalta Act¹⁰⁹⁷, which relates to the production and distribution of energy, and the Electronic Communication (Regulations) Act¹⁰⁹⁸, covering the topic of electronic communications. Whilst these laws do not contain competition rules as such, they do relate to competition, for example, the granting of a monopoly to Enemalta Corporation¹⁰⁹⁹ for the distribution of energy in line with the EU energy rules¹¹⁰⁰.

There is no information about formal cooperation between the NCA and other authorities responsible for the regulation of specific sectors. However, the MCCAA Act provides that the Office of Competition is the only contact point on competition law issues in the country.

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in Malta, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Malta Competition and Consumer Affairs Authority (MCCAA)

The Malta Competition and Consumer Affairs Authority (MCCAA) was established on 23 May 2011 with the coming into force of Chapter 510 of the Laws of Malta. The functions of the Authority are:

- promoting and enhancing competition;

¹⁰⁹⁶ See paragraph 9 of the Second Schedule annexed to the MCCAA Act, Chapter 510 of the Laws of Malta.

¹⁰⁹⁷ Chapter 272 of the Laws of Malta.

¹⁰⁹⁸ Chapter 399 of the Laws of Malta.

¹⁰⁹⁹ Enemalta Corporation is a public corporation responsible for the production and distribution of electricity.

¹¹⁰⁰ Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, 14.8.2009, p. 55–93.

- safeguarding consumers' interests and enhancing their welfare;
- promoting voluntary standards and providing standardisation related services;
- promoting the national metrology strategy;
- promoting the smooth transposition and adoption of technical regulations; and
- performing such other functions that may be assigned to it under the MCCA Act or any other law or regulations.

These functions are vested in the respective entities of the MCCA which are:

- The Office of Competition;
- The Office for Consumer Affairs;
- The Technical Regulations Division;
- The Standards and Metrology Institute.

The Office of Competition is responsible for ensuring effective competition in all sectors of the economy. It is entrusted to investigate, determine and suppress:

- agreements between undertakings, decisions of associations and concerted practices which restrict competition, the most harmful being cartels involving price-fixing, market-sharing and the allocation of production and sales quotas; and
- abusive conduct by dominant undertakings.

The Office of Competition may undertake market sector inquiries where it results that competition on a particular market may be restricted.

In addition, the Office fosters competition by providing advice to public authorities on the competition constraints imposed by legislation, policy and administrative practices and by encouraging undertakings and associations of undertakings to comply with competition law¹¹⁰¹.

3.2 The reform of the Office for Fair Competition

The original Competition Act of 1995 established the Office of Fair Competition. In 2011, a new law was enacted, the MCCA Act. This law integrated the former Office of Fair Competition into a larger authority with a much wider scope than just competition. The Office of Fair Competition subsequently was renamed to the Office of Competition which is now part of the MCCA. In fact, the new authority deals with other non-competition law issues such as consumer law. The Office and the personnel effectively remained the same but instead of being independent they are now an autonomous section of a wider authority.

The MCCA Act also increased the investigative powers of the NCA by widening the decision-making powers of the Director-General responsible for competition matters which are now backed by administrative fines. The amendments also provide for damages actions resulting from an infringement of the competition rules that can be filed before the NCA, i.e. in administrative proceedings¹¹⁰².

In addition to the above, the MCCA Act also established a new Competition and Consumer Appeals Tribunal, which deals with both appeals from the NCA decisions and consumer issues.

3.3 Composition and decision-making

The MCCA Act provides in a general manner for the responsibilities of the Office of Competition. The Office includes the following three Directorates:

- Inspectorate and Cartel Investigations Directorate with the responsibility to detect and curtail cartels and to carry out inspections according to the Competition Act.

¹¹⁰¹ Chapter 510 of the Laws of Malta, available at: <http://www.justiceservices.gov.mt/>.

¹¹⁰² See the ECN brief, available at: http://ec.europa.eu/competition/ecn/brief/03_2011/mt_act.pdf.

- Communications, Energy, Transport and Financial Services Markets Directorate focusing on competition concerns, infringements and concentrations in regulated markets.
- Primary, Manufacturing and Retail Markets Directorate focusing on restrictive practices and concentrations in other sectors of the economy¹¹⁰³.

The Director-General, who is a legal professional, is assisted by a team of three lawyers and other technical experts, including economists, and have access to a pool of other specialists if they are needed according to the subject matter.

The Director-General takes all the decisions in consultation with colleagues who have supported him/her in investigations. From the legal point of view, all decisions are taken by the Director-General.

3.4 Cooperation with other entities

The Office of Competition is the only body in Malta responsible for the enforcement of competition law. Hence, any matter dealing with competition law is dealt with by the Office. Whilst there is no statutory provision on the cooperation of the NCA with other entities, national or international, in practice this office serves as the contact point for all competition law matters in the country.

3.5 Investigations

The Director-General of the Office of Competition has the power to start investigation based on Articles 5 and 9 of the Competition Act and Articles 101 and 102 of the TFEU *ex officio* or investigate a reasonable allegation received in writing¹¹⁰⁴. There is neither a mandatory form to be submitted nor any prescriptive period within which a complaint must be made. Usually, the complaint needs to be in the form of a letter. The law does not indicate any requirements for the letter but normally it should include the facts of the complaint and on what grounds it is being made. Investigations are carried out by the Office of Competition, which has the right to:

- request information from any interested legal and natural person;
- carry out dawn raids, which can include entering and searching business or domestic premises, copying hard copy and electronic documents, sealing premises and questioning employees¹¹⁰⁵.

3.6 Decision-making

Where the Director-General considers that an infringement of Articles 5 and 9 of the Competition Act or Articles 101 and 102 of the TFEU may have occurred, he/she notifies each of the parties concerned in writing of the objections raised against them¹¹⁰⁶. In a time-limit set by the Director-General, the parties concerned may in their written submissions set out all facts known to them which are relevant to their defence against the objections raised by the Director-General and should attach any relevant documents as evidence thereof¹¹⁰⁷.

The Competition Act provides that in the course of any investigation the Director-General has the right to receive written or verbal statements from any person, as well as to make copies of any document produced to him/her. The record of such statements and such copies duly attested by the Director-General must be used as evidence before the Competition and Consumer Appeals Tribunal and before any other court of law. Furthermore, the Director-General or any officer deputed by him/her may be a witness should his/her evidence be required as part of the case for the prosecution. In such a case,

¹¹⁰³ Chapter 510 of the Laws of Malta, available at: <http://www.justiceservices.gov.mt/>.

¹¹⁰⁴ Article 14, Chapter 510 of the Laws of Malta.

¹¹⁰⁵ Articles 14 and 26 to 30, Chapter 510 of the Laws of Malta, and Article 12 of the Competition Act, which is Chapter 379 of the Laws of Malta.

¹¹⁰⁶ In accordance with Article 64 of the MCCA Act.

¹¹⁰⁷ Articles 14, Chapter 510 of the Laws of Malta.

his/her evidence should be heard before that of any other witness for the prosecution unless the necessity of his evidence arises subsequently¹¹⁰⁸.

In cases of urgency due to the risk of serious and irreparable damage to competition, the Director-General, acting on the basis of a *prima facie* finding of an infringement of Articles 5 or 9 of the Competition Act or Article 101 or 102 of the TFEU, order interim measures. The respective undertakings, who are notified of these measures, may appeal this decision before the Competition and Consumer Appeals Tribunal within 20 days from the date upon which the decision was notified. Such appeal does not have the effect of suspending the interim measure unless the Appeals Tribunal, after hearing the submissions of the undertaking or association of undertakings concerned and the Director-General, directs otherwise. Any decision of the Appeals Tribunal is final concerning the facts of the case¹¹⁰⁹. It can be further appealed only on points of law before the Court of Appeal (civil jurisdiction).

The Competition Act also authorises the Director-General to initiate settlement discussions in the course of investigating a breach of Article 5 and Article 101 of the TFEU. The Director-General may, prior to issuing a statement of objections, invite all or some of the undertakings concerned to indicate in writing, within the time-limit set by him/her, whether they are prepared to engage in settlement discussions with a view to possibly introducing settlement submissions¹¹¹⁰. Should settlement discussions progress, the Director-General may set a time-limit within which the parties may commit to follow the settlement procedure acknowledging their participation in the infringement. Interested third parties may submit their observations within the time-limit fixed by the Director-General in the publication which must not be less than a month¹¹¹¹.

The final decisions on violations of competition rules are taken by the Director-General in consultation with the team that conducted the investigation. After the investigation and the submissions by the parties, the expert staff assisted by a lawyer will decide on the content of the decision. These decisions, which in Malta are not made public, can be challenged by the parties before the Competition and Consumers Appeals Tribunal¹¹¹².

4 Competent courts

The courts in Malta are divided into Superior and Inferior courts. The Superior Courts are the Constitutional Court, Court of Appeal, Court of Criminal Appeal, Civil Court and Criminal Court. Judges sit in the Superior Courts. There are two Inferior Courts: the Court of Magistrates (Malta) and the Court of Magistrates (Gozo).

The Constitutional Court as an appellate court hears appeals from other courts on interpretation of the Constitution, validity of laws, as well as appeals from decisions on alleged breaches of fundamental human rights. As a court of original jurisdiction, the Constitutional Court decides on validity of general elections and election of members of the House of Representatives¹¹¹³.

The Court of Appeal is the final appellate court in civil matters. The Court of Criminal Appeal is the final court of appeal in criminal matters¹¹¹⁴.

The Civil Court is divided into three sections: the General Jurisdiction Section (also called the First Hall of the Civil Court), the Family Section and the Voluntary Jurisdiction Section¹¹¹⁵. The First Hall of the Civil Court, *inter alia*, hears cases on damages from

¹¹⁰⁸ Articles 14, Chapter 510 of the Laws of Malta.

¹¹⁰⁹ Article 15 of the Competition Act, Chapter 379 of the Laws of Malta.

¹¹¹⁰ Article 12B of the Competition Act, Chapter 379 of the Laws of Malta.

¹¹¹¹ Article 12B of the Competition Act, Chapter 379 of the Laws of Malta.

¹¹¹² Article 12A of the Competition Act, Chapter 379 of the Laws of Malta.

¹¹¹³ Constitutional Court, available at: <http://www.judiciarymalta.gov.mt/constitutional-court>.

¹¹¹⁴ Criminal Court, available at: <http://www.judiciarymalta.gov.mt/court-of-appeal>.

¹¹¹⁵ Civil Court, available at: <http://www.judiciarymalta.gov.mt/civil-court>.

violation of competition rules. The Criminal Court usually deals with cases where the punishment exceeds six months imprisonment¹¹¹⁶.

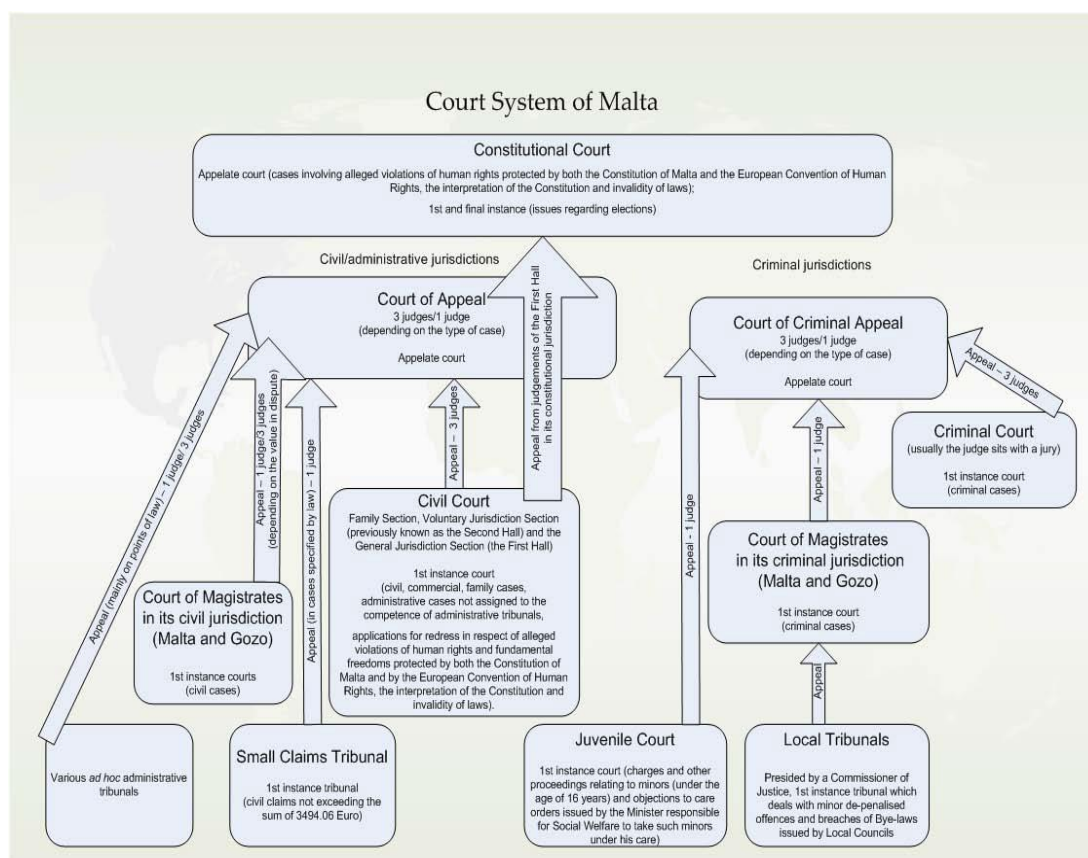
The Court of Magistrates has both a civil and a criminal jurisdiction. It hears civil cases which do not fall within the competence of the First Hall of the Civil Court. In its criminal jurisdiction, it generally deals with cases where the punishment does not exceed six months imprisonment¹¹¹⁷.

Chapter 510 of the Laws of Malta provides for the establishment of the Competition and Consumer Appeals Tribunal (hereafter – ‘Appeals Tribunal’). As of 2011, it replaces the Commission for Fair Trading and the Consumer Affairs Appeals Board. The Appeals Tribunal is presided by a judge and each case must be heard by two members selected from a panel of six.

The Appeals Tribunal hears appeals from the decisions of the Director-General responsible for competition matters. The Appeals Tribunal is the only court which has jurisdiction to deal with cases involving Articles 101 and 102 of the TFEU. It sits in the Law Courts in Valletta which is the only location of courts in Malta. Any decision of the Appeals Tribunal is final concerning the facts of the case¹¹¹⁸. It can be further appealed only on points of law before the Court of Appeal.

The party who has suffered damages from a violation of competition rules can opt to seek compensation under tort law in the ordinary civil courts. The decision of the court of first instance can be appealed to the Court of Appeal. The courts are competent to rule on both law and facts.

Figure 3.1 Court system in Malta¹¹¹⁹



¹¹¹⁶ Criminal Court, available at: <http://www.judiciarymalta.gov.mt/criminal-court>.

¹¹¹⁷ Court of Magistrates, available at: <http://www.judiciarymalta.gov.mt/court-of-magistrates>.

¹¹¹⁸ Article 15 of the Competition Act, Chapter 379 of the Laws of Malta.

¹¹¹⁹ Maltese judicial system, available at: <http://www.judiciarymalta.gov.mt/court-structure>.

5 Proceedings related to breaches of Competition Law rules

This Section describes the proceedings related to breaches of competition law rules in Malta.

5.1 Legal standing in judicial review and follow-on proceedings

Any natural or legal person can file a complaint with the NCA about a possible breach of competition rules. The NCA investigates the complaint and adopts a decision. The party, against whom the NCA has adopted its decision, can appeal it to the Competition and Consumer Appeals Tribunal. Any decision of the Appeals Tribunal is final concerning the facts of the case¹¹²⁰. It can be further appealed only on points of law before the Court of Appeal (civil jurisdiction).

Private parties can always seek compensation for damages caused by infringement of competition rules in civil courts on the basis of civil law. In these cases, any natural or legal person can file a claim before the First Hall of the Civil Court. Any party can then file an appeal to the Court of Appeal (civil jurisdiction)¹¹²¹.

The legal standing in cases of judicial review and follow-on cases in Malta is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Persons appealing the decision of the NCA.	Any natural or legal person.
How can an action be filed?	By a written application to the Registry of the Competition and Consumer Appeals Tribunal. By a written application to the Court of Appeal.	A written complaint filed with the First Hall of the Civil Court. By a written application to the Court of Appeal.
With which authorities can the action be filed?	Competition and Consumer Appeals Tribunal. Court of Appeal (only on points of law).	The First Hall of the Civil Court. Court of Appeal.
Burden of proof	With the Director-General of the Office of Fair Competition.	With the plaintiff.

5.2 Judicial Review Proceedings

This Section presents judicial review proceedings for competition law cases in Malta.

5.2.1 Rules applicable to the judicial review of NCA decisions

The NCA decisions are subject to the general administrative review according to the Code of Organisation and Civil Procedure (COCP). Parties have a right to appeal the NCA decision to the Competition and Consumer Appeals Tribunal¹¹²². Any decision of the Appeals Tribunal is final concerning the facts of the case¹¹²³. It can be further appealed before the Court of Appeal (civil jurisdiction) only on points of law.

5.2.2 Competent Court

The Appeals Tribunal, which is composed of a judge and two other panel members, hears appeals brought before it on matters of the Competition Act. According to this Act, any

¹¹²⁰ Article 15 of the Competition Act, Chapter 379 of the Laws of Malta.

¹¹²¹ Chapter 12 of the Laws of Malta, the Code of Organisation and Civil Procedure (COCP).

¹¹²² Article 13A of the Competition Act, Chapter 379 of the Laws of Malta.

¹¹²³ Article 15 of the Competition Act, Chapter 379 of the Laws of Malta.

undertaking or association of undertakings concerned may appeal before the Appeals Tribunal from any infringement decision, cease and desist or compliance order, administrative fine or daily penalty payment adopted or imposed by the Director-General responsible for competition matters¹¹²⁴.

The Director-General and any party to an appeal before the Appeals Tribunal, who feels aggrieved by the decision of the Appeals Tribunal, may appeal it to the Court of Appeal on questions of law.

5.2.3 Timeframe

Any decision taken by the Office of Competition may be appealed before the Competition and Consumer Appeals Tribunal within 20 days of notification thereof¹¹²⁵. The appeal must be notified to the Director-General and the Director-General must file his/her reply thereto within 20 days from the date of notification of the appeal. Usually, it takes around three to six months for an appeal to be heard and decided.

Decisions of the Appeals Tribunal may be appealed on questions of law before the Court of Appeal within 20 days from the date of the decision of the Appeals Tribunal.

5.2.4 Admissibility of Evidence

Admissibility of evidence is regulated by the general rules. As this is an appeal stage, evidence usually consists of the same evidence that was used by the NCA to take its decision. Nevertheless, the parties are free to produce new evidence. Evidence normally consists of documents and information provided by witnesses. Expert witnesses are also accepted. This matter is governed by the COCP.

5.2.5 Interim Measures

As the Appeals Tribunal hears appeals from the decisions of the NCA, the Tribunal's role in relation to interim measures is restricted to the upholding or rejecting the NCA's interim decisions¹¹²⁶. The Appeals Tribunal *ex officio* is not authorised to adopt interim measures.

5.2.6 Rulings of the court

The Appeals Tribunal may either confirm in whole or in part the NCA's decision or quash the decision or any order of the Director-General and may confirm, revoke or vary the administrative fine or daily penalty payment imposed by the Director-General, taking into account the gravity and duration of the infringement as well as any aggravating or attenuating circumstances¹¹²⁷.

Proceedings are initiated in writing but continue mainly through oral hearings. The judgment is pronounced in writing though the operative part is read in a public hearing.

5.3 Follow-on Proceedings (private enforcement)

Apart from submitting a complaint to the Office of Competition, any legal or natural person who has suffered damages as a result of a competition law infringement can always sue the offender in a civil court for compensation.

In 2012, the Collective Proceedings Act also came into force¹¹²⁸. This Act introduces class actions in respect of infringements competition rules. Since this law is relatively recent, so far there are no cases to report. It is likely that in future due to this Act there will be more private enforcement actions brought before courts.

¹¹²⁴ Article 26 of the MCCA Act, Chapter 510 of the Laws on Malta.

¹¹²⁵ Article 19(1) of the Competition Act, Chapter 379 of the Laws of Malta.

¹¹²⁶ Article 19 of the Competition Act, Chapter 379 of the Laws of Malta.

¹¹²⁷ Ibid.

¹¹²⁸ Chapter 520 of the Laws of Malta.

5.3.1 Rules applicable to follow-on procedures

An aggrieved party can opt to seek redress under civil law. In this case the party has to file a written writ of summons in the First Hall of the Civil Court which is then served to the defendant. The defendant can then reply in writing and the case is heard by the court. Both parties can appeal the final judgement to the Court of Appeal. The proceedings are governed by the COCP¹¹²⁹.

5.3.2 Competent Court

The competent court of first instance is the First Hall of the Civil Court and the Court of Appeal (civil jurisdiction) hears appeals.

5.3.3 Timeframe

A party can bring an action before the court from the moment he/she has become aware of the potential claim. The limitation period that applies to claims governed by competition law is two years after the injured party became aware or should have reasonably become aware of the damage, the infringement and the identity of the undertaking or association of undertakings responsible for the infringement¹¹³⁰.

If the party is not satisfied with the decision of the court of first instance, an appeal can be lodged within eight working days before the Court of Appeal (civil jurisdiction).

5.3.4 Admissibility of evidence

The court may accept documented evidence such as contracts or evidence provided by witnesses under the oath during proceedings. Evidence provided by experts is also allowed. In general, it is the responsibility of the parties to gather and present before the court any relevant evidence. The court may also ask for clarifications if necessary¹¹³¹.

5.3.5 Interim Measures

The parties have the right to ask, by means of a written application, the court to issue an injunction to prohibit a particular activity that allegedly is causing damage. It is up to the court to decide if such a request is well-founded¹¹³².

5.3.6 Rulings of the court

The court may grant damages or dismiss the action. The judgment is delivered in writing but the operative part is read in a public hearing. The same procedure is followed in the appeal stage¹¹³³.

Although the court proceedings start by a written application, the process continues mainly through oral hearings.

5.3.7 Rules applicable to the enforcement of court judgments

If the defendant does not comply voluntarily with the final judgment, the plaintiff can file an application to the same court, which dealt with the case, to enforce the judgment according to the COCP. Based on the court's decision, a bailiff will be appointed to enforce the judgment¹¹³⁴.

¹¹²⁹ Chapter 12 of the Laws of Malta.

¹¹³⁰ Article 27A (9)(a) of the Competition Act, Chapter 379 of the Laws of Malta.

¹¹³¹ Articles 558-727 of the COCP, Chapter 12 of the Laws of Malta.

¹¹³² Articles 252-281 of the COCP, Chapter 12 of the Laws of Malta.

¹¹³³ This is regulated by the COCP, Chapter 12 of the Laws of Malta.

¹¹³⁴ Articles 281-388 of the COCP, Chapter 12 of the Laws of Malta.

5.4 Alternative dispute resolution mechanisms

Arbitration and mediation mechanisms are not usually used to solve competition cases. Nevertheless, parties can always resort alternative methods of dispute resolution if they opt for ordinary civil proceedings. Bilateral negotiations are only used on a voluntary basis¹¹³⁵.

6 Contextual Information

This Section presents contextual information on the judicial system in Malta.

6.1 Duration and cost of competition law cases

The duration of a case often depends on how much of evidence needs to be gathered and presented before a court to prove a breach of competition rules. On average, an ordinary civil case, which would include follow on cases, can take from a little over a year to around five years. The average duration of a competition case would be around two years plus approximately another year for an appeal.

The costs involved in a case depend on the monetary value of the claim. Court fees for cases with no monetary value are between EUR 500 to 1000. Lawyers have specific fees but for advice and other professional work they are free to charge as much as they like. The losing party usually must bear the costs in accordance with the court's decision.

6.2 Influencing Factors

Some factors which influence the application of (EU) competition law rules in Malta may be linked with international business activity. However, local particularities, e.g. the size of local market, may have even a greater influence on the application of competition rules in Malta.

6.3 Obstacles/Barriers

There are three obstacles or barriers in relation to access to justice concerning the application of competition law rules that can be outlined in relation to Malta:

- High legal costs to bring and pursue an action before the courts;
- Long duration of judicial proceedings; and
- The lack of public information on completed competition cases before the NCA and the courts.

¹¹³⁵ Chapter 387 of the Laws of Malta.

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Legislation¹¹³⁶

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¹¹³⁶ Information available at: <http://www.justiceservices.gov.mt/>.

COUNTRY FACTSHEET - THE NETHERLANDS

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Abbreviations used

1998 Act	Dutch Competition Act
ACM	New Dutch Competition Authority (<i>Autoriteit Consument en Markt</i>)
DCCP	Dutch Code of Civil Procedure
ECA	European Competition Authorities Association
ECN	European Competition Network
EEA	European Economic Area
EFTA	European Fair Trade Area
EU	European Union
GALA	General Administrative Law Act
ICN	International Competition Network
NCA	Old Dutch Competition Authority (<i>Nederlandse Mededingingsautoriteit</i>)
NZa	Authority for market regulation for the health sector (<i>Nederlandse Zorgautoriteit</i>)
OECD	Organisation for Economic Co-operation and Development
OPTA	Netherlands Independent Post and Telecommunications Authority (<i>Onafhankelijke Post en Telecommunicatie Autoriteit</i>)
TFEU	Treaty on the Functioning of the EU
WCAM	Act on Collective Settlements of Mass Claims (<i>Wet Collectieve afwikkeling massaschade</i>)

1 Overview of the National Legal Framework

The national system in the Netherlands is derived from the Civil Law system, with many laws based on French legislation and with influences from Roman law and traditional Dutch customary law.

The Constitution of the Kingdom of the Netherlands (*Grondwet van het Koninkrijk der Nederlanden*) was adopted on 24 August 1815.¹¹³⁷ The written Constitution forms the foundation for the organisation of the Dutch State and the basis for its legislation. The Constitution determines how the powers are divided between the Government, the Parliament and the legislature. The Kingdom of the Netherlands also includes Aruba, Curacao and Sint-Maarten. There is an overarching Constitution for the entire Kingdom: the Statute or Charter of the Kingdom of the Netherlands (*Statuut voor het Koninkrijk der Nederlanden*).¹¹³⁸ The Statute describes the political relationship between the four different countries which form the Kingdom of the Netherlands.

The acts and statutes of the various public authorities form the majority of Dutch law. Case law is also an important source of law. Although lower courts are not bound by judgments of higher courts, they will usually follow their decisions. Dutch law does not recognise the rule of precedent applicable in Common Law systems. When two valid laws are in conflict with each other, then their mutual hierarchy decides which of both is effective and which is not.

Chapter 6 of the Constitution regulates the Dutch judicial system with provisions relating to the organisation of the courts, the guarantee of independence and the safeguards of a fair trial. Article 120 of the Constitution prohibits the judiciary to test Acts of Parliament and treaties against the Constitution, as this is considered a prerogative of the legislature. The courts are thus not competent to answer a question on the compatibility of a law with the Constitution. The Dutch Courts can only assess whether Acts of Parliament and treaties are conform with directly effective rights under EU law. Thus there is no Constitutional Court in the Netherlands. The judicial system consists of the District Courts, Courts of Appeal, Special Tribunals and Supreme Courts.

2 National Legislation establishing competition law rules

This Section provides an overview of national legislation establishing competition law rules. Table 2.1 presents a list of relevant competition law instruments in the Netherlands.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
Dutch Competition Act of 22 May 1997 (<i>Wet van 22 mei 1997, houdende nieuwe regels omtrent de economische mededinging (Mededingingswet)</i>) ¹¹³⁹	22 May 1997, entry into force 1 January 1998

2.1 General legislation

The Netherlands enacted its first competition legislation in 1956, the Act on Economic Competition (*Wet Economische Mededinging*)¹¹⁴⁰. This act allowed cartels or dominant positions, but it forbade abuse deriving from cartels or the attainment of a dominant position. Under the Act, cartels had to be registered in a secret cartel register. The Minister of Economic Affairs could only take action if it could be proved that the behaviour was detrimental to Dutch public interest. This relaxed approach towards cartels made the

¹¹³⁷ <http://legislationline.org/documents/section/constitutions>

¹¹³⁸ http://wetten.overheid.nl/BWBR0002154/geldigheidsdatum_23-01-2014

¹¹³⁹ http://wetten.overheid.nl/BWBR0008691/geldigheidsdatum_23-01-2014

¹¹⁴⁰ <http://retro.nrc.nl/W2/Evj/Begrip/W/weteconomischemededinging.html>

Netherlands a cartel paradise.¹¹⁴¹ On 1 January 1998 the Dutch Competition Act (*Nederlandse Mededingingswet*) (hereafter the '1998 Act') entered into force and amended the 1956 law. The 1998 Act is an administrative act. This Act introduced a system prohibiting restrictive cartel agreements (Article 6 of the 1998 Act) and abuses of a dominant position (Article 24 of the 1998 Act) as well as an *ex ante* merger control regime. On the same day in January 1998, the Netherlands Competition Authority¹¹⁴² (*Nederlandse Mededingingsautoriteit, hereafter NCA*), started its operations. The *NCA* joined forces with other government agencies, creating a new regulator, the Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*), on April, 1, 2013. Further information is provided in Section 3 below.

The 1998 Act has been amended to bring it in line with the European Regulation 1/2003. As of August 2004, the individual exemption system was abolished. Also a fine imposed for non-cooperation with the *ACM* was increased from € 4,500 to € 450,000. And on July 1, 2012, four rules to prevent unfair competition came into effect for situations where the government competes with undertakings. These rules have been laid down in the new Dutch Act on Government and Free Markets (*Wet overheid en markt*), which is an amendment to the 1998 Act.¹¹⁴³

The 1998 Act is applicable to all sectors of the economy. Sectors in which undertakings are entrusted with tasks of general economic interest, have a special character but do not fall outside the scope of the 1998 Act (Article 11 and 25 of the 1998 Act). As in European Competition law, (Article 106(2) TFEU) the 1998 Act stipulates that an exception must be provided from the rules contained in the Act insofar as the application of the competition rules would obstruct, in law or in fact, the performance of the tasks assigned. The 1998 Act is applicable to undertakings and adopts the broad concept of an undertaking used in Article 101 TFEU.

Article 6 of the 1998 Act mirrors article 101 TFEU, except the effect on interstate trade criterion and the specific examples of restrictive clauses. Article 6 (3) of the 1998 Act is similar to article 101 (3) TFEU. Article 7 of the 1998 Act provides for an exemption for restrictive agreements, including hard-core cartels, where no more than eight participants with an aggregate turnover of less than € 5,5 million (for companies involved in the supply of goods) or € 1,1 million (for other companies) are involved. As per 3 December 2011, an additional exemption is available for any restrictive agreement between undertakings whose combined market share on any relevant market does not exceed 10 per cent and which agreement does not appreciably affect interstate trade.¹¹⁴⁴ Article 24 of the 1998 Act also is in material aspects identical to Article 102 TFEU but it does not provide specific examples of abuses or the effect on interstate trade criterion.

The 1998 Act applies the principle of extraterritoriality. As such the *ACM* may take into account a conduct that affects competition on part or the whole of the Dutch market, whereby the place of establishment of the undertakings is not relevant. Dutch firms engaged in restrictive practices outside the Netherlands that do not affect a market in the Netherlands cannot be subject to sanction under the 1998 Act. With respect to restrictive practices, the decisive factor is the place where the agreement, decision or concerted practice is implemented, not where or by whom it is agreed.

¹¹⁴¹ Competition regimes in the world – A Civil Society Report – the Netherlands , Ralf van Debeek, 87, September 2005 & April 2006, pages 457-450, available at: <http://competitionregimes.com/pdf/Book/Europe/87-Netherlands.pdf>

¹¹⁴² www.acm.nl

¹¹⁴³ These new rules do not apply to elementary and higher education, public TV and radio, nor to activities of general interest that the government performs or in case of state aid. News *NMa* begins enforcement of Dutch Act on Government and Free Markets 07/02/2012, available at: <https://www.acm.nl/en/publications/publication/10811/NMa-begins-enforcement-of-Dutch-Act-on-Government-and-Free-Markets/>

¹¹⁴⁴ One of the main problems of the bill was whether this would constitute an infringement of European law, since it would mean that certain hard-core cartels caught by article 101 TFEU, due to an appreciable effect on interstate trade, would be exempted under national law. DG Competition indicated that the revised *de minimis* clause would lead to the exemption of hard-core restrictions, which could affect interstate trade and could thus be prohibited under EU law. The bill was subsequently amended to introduce an additional condition reading that the restrictive agreement at hand may not have an appreciable effect on interstate trade.

2.2 Industry-specific legislation

The competition rules also apply across regulated sectors. However, there are specific competition rules and exemptions which allow for a sectoral approach or relate to specific sectors. On the basis of Article 15 of the 1998 Act national block exemptions have been issued. This article says that by order in Council, subject to conditions and restrictions if necessary, Article 6(1) of the 1998 Act may be declared inoperative in respect of such categories of agreements, decisions or practices, as referred to in the said Article, as defined in the said order, which contribute to the improvement of production or distribution of goods or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not:

- a. impose any restrictions on the undertakings concerned, ones that are not indispensable to the attainment of these objectives, or
- b. Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products and services in question.

There are two national block exemptions laid down in a Decree which provides for an exemption from Article 6 of the 1998 Act for

- Agreements offering temporary protection from competition to undertakings in new shopping centres (*besluit vrijstelling branchebeschermingsovereenkomsten in nieuwe winkelcentra*);¹¹⁴⁵ and
- Certain cooperation in the retail sector (*besluit samenwerkingsovereenkomsten detailhandel*).¹¹⁴⁶

Moreover, under the Act on fixed book prices (*Wet op de vaste boekenprijs*)¹¹⁴⁷, publishers must fix the resale prices of Dutch language books and music publications sold for the first time in the Netherlands. Resellers of books are under a legal obligation to apply these prices vis-à-vis end-users. And article 16 of the 1998 Act provides for non-application of the cartel prohibition to collective labour agreements, sector agreements on pensions between employers' organisations and employees' organisations and agreements or decisions on occupational pension schemes by an association of practitioners of a liberal profession.

There are also legislative instruments which regulate specific sectors only in accordance with EU legislation. The Dutch Postal Act 2009 (*Postwet*) which is based on the EU-postal directives and the secondary legislation based on that Act provide for sector specific rules in the postal sector. The Dutch Telecommunication Act (*Telecommunicatiewet*), which is based on the EU-telecommunications Directives, provides for sector-specific rules for the telecommunications sector. The Netherlands Independent Post and Telecommunications Authority (*Onafhankelijke Post en Telecommunicatie Autoriteit*) (hereafter 'OPTA') supervises the application of both laws and was established in August 2007. The OPTA joined forces with other government agencies, establishing the ACM. Further information is provided in section 3 below.

The Dutch Gas Act (*Gaswet*), and the Dutch Electricity Act 19985 (*Elektriciteitswet*), provide *inter alia* for regulated network access and for purchasing obligations for the manager of the national gas network with respect to gas extracted from Dutch gas fields. The government agency that supervises the energy sector was the Office of Energy Regulation (*Energiekamer*), which was a separate department of the NCA. However, the NCA and other government agencies joined forces establishing, the *Autoriteit Consument en Markt*. Therefore, the ACM is now responsible to regulate the energy sector. The Office of Transport Regulation (*Vervoerkamer*) was also a separate department of the NCA and supervised the Dutch Railway Act (*Spoorwegwet*), the Dutch Shipping Traffic Act (*Wet Luchtvaart*) and the Dutch Passenger Transport Act 2000 (*Wet personenvervoer*).

Other separate authorities responsible for market regulation are the Dutch Media Authority (*Commissariaat voor de Media*) for the media sector and the NZa (*NederlandseZorgautoriteit*) for the health sector. The Dutch Media Authority supervises the

¹¹⁴⁵ http://wetten.overheid.nl/BWBR0009039/geldigheidsdatum_05-11-2013

¹¹⁴⁶ http://wetten.overheid.nl/BWBR0009141/geldigheidsdatum_01-11-2013

¹¹⁴⁷ http://wetten.overheid.nl/BWBR0017452/geldigheidsdatum_01-11-2013

application of the Media Act (*Mediawet*), which implements Directive No 89/552 of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services. The *NZa* supervises the health markets in the Netherlands on the basis of the Act for the Regulation of the Health Sector (*zorgverzekeringswet*), which is linked to the first Council Directive of 24 July 1973 on the coordination of laws, Regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life insurance.

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in the Netherlands, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the NCA

As previously mentioned, the 1998 Act established the *NCA*. The *NCA* was, until recently, headed by a Director General and operated under the direction of the Minister of Economic Affairs. Due to an amendment of the 1998 Act, as of July 1, 2005, the Director General of the *NCA* has been replaced by a Management Board, which has the status of an independent administrative authority.¹¹⁴⁸

3.2 The reform of the NCA

The Netherlands Consumer Authority (*Consumentenautoriteit*), the *NCA* and the *OPTA* joined forces on April 1, 2013, creating a new regulator: the *ACM*. The need to reduce government spending constituted the trigger for the merger.¹¹⁴⁹ The *ACM* is an independent regulatory body without legal personality. Enforcement of the 1998 Act is now entrusted to the *ACM*. The *ACM* has now approximately 400 employees, up from the 70 employees it had in 1998. The *ACM* consists of seven directorates, including (i) the Competition Directorate (*Directie Mededinging*), (ii) the Energy Directorate (*Directie Energie*), (iii) the Telecommunications, Transport and Postal Services Directorate (*Directie Telekom, Vervoer en Post*), (iv) the Consumer Directorate (*Directie Consumenten*), (v) the Sanctions and Legal Affairs Directorate (*Directie Sancties en Juridische zaken*), (vi) the Policy and Communications Directorate (*Directie Bestuur, Beleid en Communicatie*) and the (vii) Corporate Services Directorate (*Directie Bedrijfsvoering*) and there also is the Office of the Chief Economist (*Chief Economist van het Economisch Bureau*). The Sanctions and Legal Affairs Directorate will be entrusted with the imposition of all sanction decisions. The legal service has a separate position because of the internal division of responsibilities between the department that carries out the investigation on the one hand, and the department that is responsible for sanction decisions on the other. The Competition Directorate will take over the portfolio of the *NCA* with an exception in the fields of energy and transport, in which the Energy Directorate and the Directorate for Transport may apply competition rules themselves.

The consolidation of these three authorities will be realised through two separate bills. On the 1st of January 2013 the 'Act establishing the *ACM*' (*Instellingswet Autoriteit Consument en Markt*) entered into force.¹¹⁵⁰ Changes in the harmonisation of the procedure and powers of the different divisions of the *ACM* will be brought about by another substantive bill, which will enter into force at the earliest at the beginning of 2014. The substantive bill was submitted to the Dutch Parliament and the Second Chamber has accepted it by 17 December 2013. The First Chamber will make a decision by 4 March 2014. The formal establishment of the *ACM* does not yet entail any changes to the application of the 1998 Act.

¹¹⁴⁸ http://wetten.overheid.nl/BWBR0017654/geldigheidsdatum_05-11-2013 and Competition regimes in the world – A Civil Society Report – the Netherlands, Ralf van Debeek, 87, September 2005 & April 2006, pages 457-450, available at: <http://competitionregimes.com/pdf/Book/Europe/87-Netherlands.pdf>

¹¹⁴⁹ Explanatory memorandum to the draft bill of May 31, 2012. This document can be found at: <http://www.internetconsultatie.nl/materielewetACM/document/549>.

¹¹⁵⁰ Act establishing the *ACM*, available at: http://wetten.overheid.nl/BWBR0033043/geldigheidsdatum_31-10-2013.

3.3 Composition and decision-making

The staff of the *ACM* is officially employed by the Dutch Ministry of Economic Affairs. The new authority will be run by a collegial board, currently consisting of three members. The Board is an autonomous administrative authority under Dutch law and has a final say over all decisions issued by the *ACM*. The Board *can* consist of a minimum three and maximum five members – a chairman and two or four other board members, as provided by article 3 of the Act establishing the *ACM*. The *ACM* also employs eight directors who are each responsible for a different Directorate.

All decision-making powers have been conferred to the Management Board. Since the Management Board is an independent administrative authority, the Minister of Economic affairs can no longer issue directives in individual competition cases. However, the Minister remains responsible for competition policy and the laws the *ACM* enforces, and may issue general directives in the form of policy rules on the way in which the Management Board should exercise its powers (Articles 5d and 5l of the 1998 Act). These directives have to be published in the Official Gazette.¹¹⁵¹

3.4 Cooperation with other entities

The *ACM* is an active member of various fora for international cooperation. The *ACM* is part of the:

- European Competition Network (ECN), which provides for formal cooperation between the Commission and EU Member State competition authorities;
- European Competition Authorities Association (ECA), which facilitates cooperation between the European Economic Area (EEA) national competition authorities, the Commission and the European Fair Trade Area (EFTA) Surveillance Authority; and
- International Competition Network (ICN)

The *ACM* is also involved in competition work undertaken by the Organisation for Economic Co-operation and Development (OECD).¹¹⁵²

The *ACM* can supply information obtained in the course of the application of the 1998 Act to foreign competition authorities (Article 13 of Regulation 1/2003). This is an exception to the general rule that information collected about companies under the 1998 Act should remain confidential and should be used only for the purposes of the 1998 Act. However, such information may only be transferred by the *ACM* if the confidentiality of the information is sufficiently protected, adequate assurances are given that the information will not be used for purposes other than the enforcement of competition law and the provision of such data is in the interests of the Dutch economy (see also article 7 of the Act establishing the *ACM*). In addition, any information collected in relation to the *ACM*'s own initiative enforcement of EU Regulation 1/2003 can also only be exchanged with foreign competition authorities on the basis of the above guarantees. An exception is made for information collected in relation to EU Regulation 1/2003 that is covered by professional secrecy rules (as set out in article 28(1)).

The following provisions allow the exchange of knowledge and information collected under the 1998 Act with national administrative agencies¹¹⁵³:

- A cooperation protocol between the *ACM* and the *Nza* which provides for information exchange between these authorities and for coordination of enforcement action.¹¹⁵⁴

¹¹⁵¹ Competition regimes in the world – A Civil Society Report – the Netherlands , Ralf van Debeek, 87, September 2005 & April 2006, pages 457-450, available at: <http://competitionregimes.com/pdf/Book/Europe/87-Netherlands.pdf>.

¹¹⁵² See for more information: <https://www.acm.nl/en/about-acm/collaboration/international-cooperation---competition/> and <http://www.mondaq.com/x/213408/Cartels+Monopolies/Cartel+Regulation+The+Application+Of+Competition+Regulation+In+48+Jurisdictions+Worldwide+2013>

¹¹⁵³ See for further details <https://www.acm.nl/en/about-acm/collaboration/national-cooperation/> .

¹¹⁵⁴ Available at: http://www.nza.nl/96810/20527/Samenwerkingsprotocol_NMa_NZa_-_december_2010.pdf

- A less structured form of interagency cooperation is currently in place between the *ACM* and the public prosecutor (*Openbaar Ministerie*). In 2003, a covenant was concluded for the exchange of information and coordination of investigative measures concerning alleged infringements of competition and criminal law in the construction sector.¹¹⁵⁵
- Another form of interagency cooperation is currently in place between the *ACM* and the Dutch tax administration (*Belastingdienst*). In 2004, a covenant was concluded for the exchange of information and coordination of investigative measures concerning alleged infringements of competition and tax law.¹¹⁵⁶

3.5 Investigations

There are limits to the *ACM*'s powers, in particular, the limits placed on administrative authorities by the General Administrative Law Act (hereafter *GALA*) (*Algemene wet bestuursrecht*)¹¹⁵⁷, which was enacted in 1994. The *ACM* is also bound in general to certain general principles of sound administration (*algemene beginselen van behoorlijk bestuur*), such as the requirements of due care, proper preparation and the obligation to provide proper and consistent grounds for a decision.

Investigations are initiated on the basis of third-party complaints, requests for leniency by a party to an agreement or concerted practice, or *ex officio* on the initiative of the *ACM*. On the basis of Article 83 of the 1998 Act, the *ACM* may impose a provisional order subject to periodic penalty payments if, in its provisional opinion, it is probable that Article 6(1), Article 24(1) or Article 41(1) of the 1998 Act have been violated and immediate action is required, in view of the interests of the undertakings affected by the violation or in the interest of preserving effective competition.

A template for complaints is available on the website of the *ACM*.¹¹⁵⁸ The *ACM* is not obliged to investigate every suspected complaint. The *ACM* establishes specific priorities each year. In its annual agenda the *ACM* identifies the sectors and themes to which it will give special attention in the coming year.

Investigations on the *ACM*'s own initiative start with fact finding, by making requests for information to parties possibly involved in a suspected infringement or carrying out dawn raids or company visits. The *ACM* has the following powers when dawn raiding:

- The *ACM* can gain access to premises. Prior authorization from the Rotterdam District Court is required in order to gain access to and search private residences (article 55 and 55a of the 1998 Act).
- The *ACM* has the power to demand information (article 5:16 *GALA*). The *ACM* may present questions to anyone who has been involved in the suspected violation of the 1998 Act (article 5:20 *GALA*). In addition to a company's directors and legal representatives, individual employees may also be interviewed and are therefore also required to cooperate. Employees are not required to answer questions if they would thereby incriminate themselves or the company (article 53 of the 1998 Act). The *ACM* can ask for the inspection of business data and documents and seal company premises and objects (article 54 of the Act). The *officers* may ask, read and copy all official and unofficial documents and business data related to the company, except for privileged correspondence (article 5:17 (1) *GALA*).¹¹⁵⁹ The term data also includes electronically recorded data.¹¹⁶⁰

¹¹⁵⁵ Available at: <https://zoek.officielebekendmakingen.nl/stcrt-2003-73-p8-SC39499.html>

¹¹⁵⁶ Available at:

http://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/themaoverstijgend/brochures_en_publicaties/convenant_belastingdienst_nederlandse_mededingingsautoriteit_nma

¹¹⁵⁷ http://wetten.overheid.nl/BWBR0005537/geldigheidsdatum_23-01-2014

¹¹⁵⁸ <https://www.acm.nl/nl/contact/tips-en-meldingen/tip-ons/>.

¹¹⁵⁹ As opposed to recent EU case law – in *ACM* dawn raids based only on Dutch competition law, attorney-client privilege also exists in relation to in-house lawyers who are admitted to the bar.

¹¹⁶⁰ News *ACM* Werkwijze onderzoek digitale gegevens 06/06/2003, available at: <https://www.acm.nl/nl/publicaties/publicatie/4747/NMa-publiceert-werkwijze-analoog-en-digitaal-rechercheren/>.

3.6 Decision-making

If the *ACM* has a reasonable suspicion that an infringement has occurred on the basis of the information gathered it will normally pursue a case. It will then send a report to the undertakings concerned (Article 59 of the 1998 Act). The addressees of the report have access to the documents contained in the *ACM*'s files and may submit a written reply concerning the contents of the report to the *ACM*. In practice, addressees of the report are also invited to present their views in an oral hearing before the *ACM* (article 60 of the 1998 Act and article 4:8 *GALA*). The legal service of the *ACM* subsequently reassesses the case and the *ACM* issues a decision.

The *ACM* may in addition to the imposition of administrative fines, impose an order subject to periodic penalty payments (*dwangsom*) and impose a binding instruction to comply with the 1998 Act (*bindende aanwijzing*) in the event of a violation of Article 6 (1) or 24 (1) of the 1998 Act (article 56 (1) of the 1998 Act).

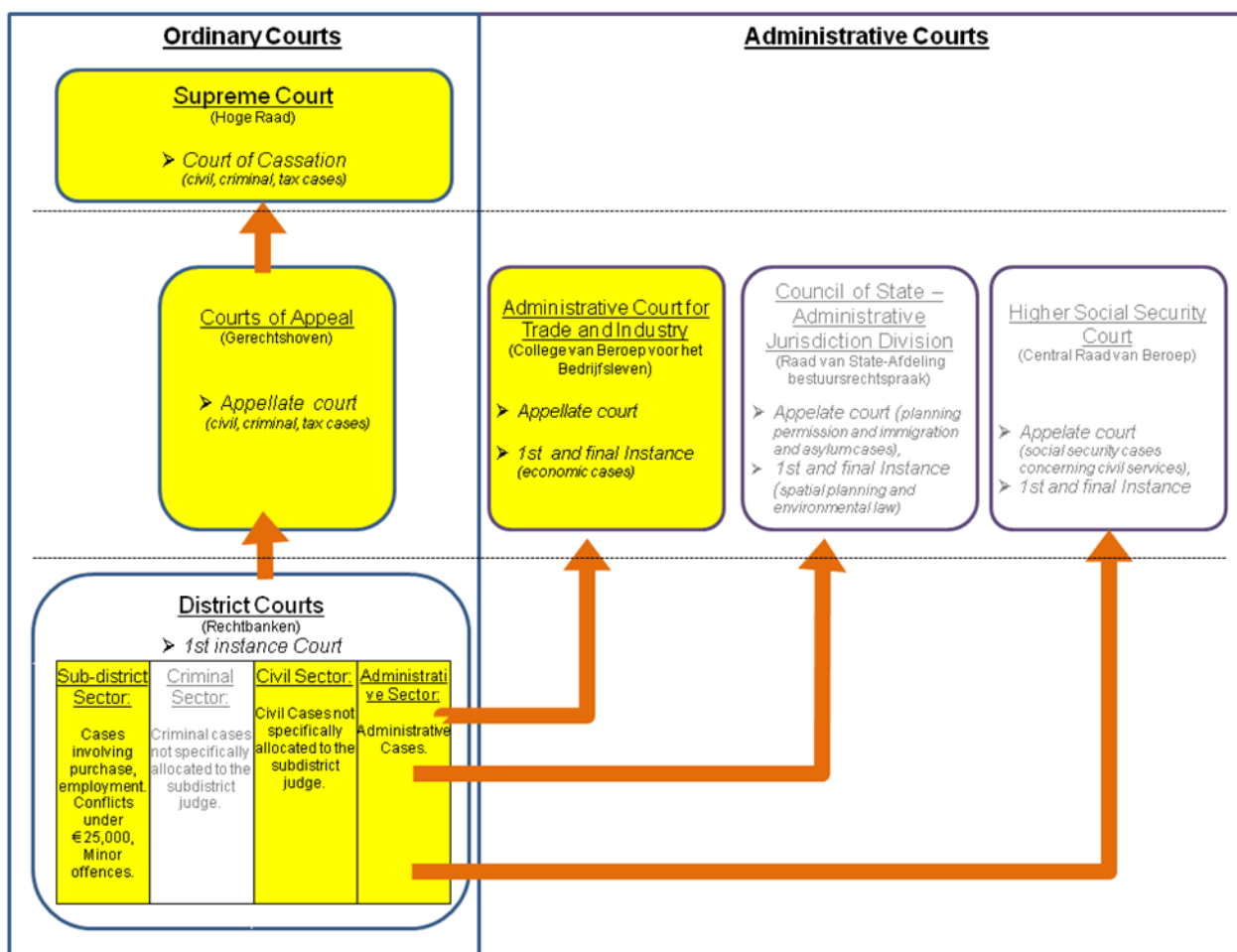
According to Article 65 of the 1998 Act, a decision imposing an administrative fine or an order subject to periodic penalty payments, as referred to in Article 56 of the 1998 Act, shall be available for inspection at the *ACM* after it has been announced. The decision shall not be made available for inspection before five days have passed since the decision was announced. The decision shall be published in the Official Gazette. Information which does not qualify for publication, pursuant to Article 10 of the Dutch Act on Public Access to Government Information (*Wet openbaarheid van bestuur*), shall not be available for inspection.¹¹⁶¹

¹¹⁶¹ Such as business secrets, see: http://wetten.overheid.nl/BWBR0005252/geldigheidsdatum_06-11-2013

4 Competent courts

This Section provides an overview of the competent courts in the Netherlands. Figure 4.1 outlines the court system in the Netherlands

Figure 4.1 Court system in the Netherlands¹¹⁶²



Judicial Review

Administrative actions brought against the ACM are exclusively assigned to a specialised court for administrative enforcement of competition rules, the administrative section of the District Court (*rechtbank*) in Rotterdam. Appeals are lodged on questions of facts and law. The judgment of the District Court in Rotterdam can be appealed to the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*) in The Hague. Appeals are lodged on questions of facts and law. According to article 8:10 of the GALA, cases which are brought before the court shall be heard by a single-judge section. If a single-judge section considers that a case is unsuitable to be heard by a single judge it shall refer it to a collegiate section. A single-judge section will consider that a case is unsuitable to be heard by a single judge in case of complex legal issues.¹¹⁶³

Follow on actions

There are no specialised competition law courts in the Netherlands for civil matters. Civil claims for breach of competition law must be brought before one of the 11 District Courts that are located in Amsterdam, Den Haag, Gelderland, Limburg, Midden-Nederland, Noord-Holland, Noord-Nederland, Oost-Brabant, Overijssel, Rotterdam and Zeeland-West-Brabant.

¹¹⁶² The boxes shaded in yellow show those courts competent for competition law cases, see http://www.juradmin.eu/en/eurtour/eurtour_en.lasso?page=detail&countryid=19

¹¹⁶³ There are no official rules on when this would be the case.

Each District Court is made up of a maximum of five sectors, which include the administrative law, civil law, criminal law and sub-district law sector. Damage claims up to € 25,000 must be brought before the sub-district court (*kantonrechter*), in all other cases the civil sector of the District Court is competent. The normal number of judges in a civil section of the court is one, unless the section, in its own discretion, decides that the case is unsuited to be handled by a single judge, in which case three judges are appointed to the section (article 15 (1) and (2) *Dutch Code of Civil Procedure*, hereafter *DCCP*). The sub-district court always works on a single judge basis.

Cases initially brought before the sub-district court may be appealed to the District Court. Cases initially brought before the District Court may be appealed to the Courts of Appeal (*Gerechtshof*), for a full review of questions of fact and question of law. There are five Courts of Appeal: Amsterdam, Arnhem, Leeuwarden, Den Haag and 's-Hertogenbosch. The five Courts of Appeal have jurisdiction to hear appeals against the judgments of the District Courts within its district. In appeal, the Court of Appeal normally sits with a chamber composed of three judges, but it may decide to refer the case to a single judge chamber (article 16 (1) and (2) *DCCP*).

A second appeal may be brought before the Supreme Court. Appeals in cassation in civil cases are lodged at the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*) in the Hague, on question of law only. There are 37 judges involved at the Supreme Court of the Netherlands. The Supreme Court in cassation normally sits with a chamber composed of five judges, but it may decide to refer the case to a chamber with three judges (article 17 (1) and (2) *DCCP*).

In cases with an international dimension, the rules laid down in the Regulation 44/2001 (Brussels I) apply if the defendant has its seat or domicile in the EU.¹¹⁶⁴ If the defendant is not established within the EU, the jurisdiction rules laid down in the Dutch Code of Civil Procedure (hereafter *DCCP*) are applicable. In general, a Dutch court has jurisdiction when one of the defendants has its seat or is domiciled in the Netherlands or if the harmful effects of the unlawful act have occurred or may occur in the Netherlands.

5 Proceedings related to breaches of Competition Law rules

This Section outlines the court proceedings in place in the Netherlands from the commencement of an investigation to the time a decision is reached for judicial review and follow-on cases.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in the Netherlands is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Any natural or legal person.	Any person, legal or natural, including indirect purchasers.
How can an action be filed?	A two-stage judicial appeal process: the first and second stages are before the administrative section of the District Court in Rotterdam and the Trade and Industry Appeals Tribunal. ¹¹⁶⁵	A claimant can initiate legal proceedings at the district courts which are competent to judge on private damages actions for competition law infringements.

¹¹⁶⁴ Council Regulation 44/2001 of December 22, 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial Matters, [2001] O.J. L12/1.

¹¹⁶⁵ However, in principle, an administrative appeal is necessary before the judicial appeal stages can be carried out. The administrative appeal must be lodged with the ACM, with advice from an independent committee.

	Judicial Review	Follow on
With which authorities can the action be filed?	Administrative section of the District Court in Rotterdam and the Trade and Industry Appeals Tribunal.	Damage claims up to €25,000 must be brought before the sub-district court, in all other cases one of the 10 civil courts is competent.
Burden of proof	ACM has to prove the infringement. The company claiming the benefit of article 6(3) of the 1998 Act ¹¹⁶⁶ shall bear the burden of proving that the conditions of that paragraph are fulfilled.	The plaintiff has to prove its case.

There are no class actions in the Netherlands. However, representative bodies (associations or foundations representing the interest of injured parties) can bring claims in their own names to seek declaratory judgments on the basis of Article 3:305a *DCC*. It is, however, not possible for representative bodies to claim damages, unless individual claims have been assigned to them. Monetary compensation is explicitly excluded in the final sentence of Article 3:305a section 3 *DCC*.

5.2 Judicial Review Proceedings

This Section provides an overview of the judicial review proceedings existing for competition law cases in the Netherlands.

5.2.1 Rules applicable to the judicial review of NCA decisions

Chapter 8 of the *GALA* contains special procedural rules applicable for appeals to an administrative Court, thus for the administrative sector of the District Court in Rotterdam and the Trade and Industry Appeals Tribunal.

5.2.2 Competent Court

Decisions of the *ACM* in cartel cases are subject to a two-stage judicial appeal process. However, an interested party can only contest an administrative decision before a court if he has lodged an administrative appeal with the *ACM* that took the decision in the first place.

This first administrative review stage, the so-called objection (*bezwaar*), is carried out by the *ACM*, with advice from an independent committee. The Committee consists of minimum two members – a chairman and two members, as provided by article 7:13 of the *GALA*. These members shall not be employees of the Dutch Ministry of Economic Affairs, nor can a member of the *ACM* be part of such an independent committee (article 92 (2) of the 1998 Act). Since 1 September 2004, it is possible to dispense with the administrative review stage. When filing an administrative review application with the *ACM*, an applicant can request that the *ACM* allows a direct judicial appeal to the District Court in Rotterdam. It is for the *ACM* to decide, depending on whether the case is suitable for direct appeal and subject to certain other rules, whether to grant the request.¹¹⁶⁷

The first and second judicial appeal stages are before specialist administrative law courts. The administrative appeal allows the parties to request the *ACM* to review its decision in the light of advice received from an independent Advisory Committee. Administrative actions brought against the *ACM* are exclusively assigned to a specialised court for administrative enforcement of competition rules, the administrative section of the District Court in

¹¹⁶⁶ According to this article, agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings, which have the intention to or will result in hindrance, impediment or distortion of competition on the Dutch market or on a part thereof, are prohibited.

¹¹⁶⁷ <http://www.mondaq.com/x/213408/Cartels+Monopolies/Cartel+Regulation+The+Application+Of+Competition+Regulation+In+48+Jurisdictions+Worldwide+2013>

Rotterdam. The judgment of the District Court in Rotterdam can be appealed to the Trade and Industry Appeals Tribunal in The Hague.

5.2.3 Timeframe

Appellants may, within six weeks, appeal the administrative decision of the *ACM* to the administrative law section of the District Court (article 8:1 *GALA*). An objection or appeal shall not stay the operation of the decision of the *ACM* (article 6:16 *GALA*). The court shall give judgment within six weeks after the closing of the examination in court (article 8:66 *GALA*). Within six weeks after the judgment of the District Court, the company can lodge a higher appeal against the judgment of the Court with the Trade and Industry Appeals Tribunal. The same timeframe applies to the judgment of the Trade and Industry Appeals Tribunal.

5.2.4 Admissibility of Evidence

Regarding the administrative stage of the appeal before the *ACM*, according to Article 6:7 of the *GALA* an appeal is required to be filed within six weeks of the publication of the decision of the *ACM*. The *ACM* assesses cases on appeal on the basis of the evidence and rules in effect of that time, *ex nunc*. This means that the parties can submit new evidence and new arguments. Before giving a decision on an objection, the *ACM* shall again give interested parties the opportunity to be heard during an oral hearing (article 7:2 *GALA*). At the request of an interested party witnesses and experts may be heard according to article 7:8 *GALA*. The *ACM* shall give a ruling within ten weeks of receipt of the notice of objection (article 7:10 *GALA*). This deadline can be prolonged with four weeks or in an agreement with all parties involved.

The District Court and the Trade and Industry Appeals Tribunal can undertake their own investigations (articles 8:56 until 8:65 *GALA*). The Courts may summon parties to appear in person or represented by an agent either to provide information or otherwise; may summon witnesses and appoint experts and interpreters; may request the parties and other persons to provide written information and lodge documents in their possession within a period to be specified by it and the courts may also appoint an expert to carry out an examination.

The District Court Rotterdam and the Trade and Industry Appeals Tribunal will always examine *ex tunc* the regularity of the disputed decision. This means that the Courts assess cases on appeal on the basis of the rules in effect of that time. According to article 8:58 *GALA* parties can submit additional documents containing new evidence and facts ten days before the hearing, except in case the interested party can reasonably be held responsible for not having made an objection against the original order.

The burden of proof for showing that cartel rules have been infringed lies with the *ACM*. According to Article 6 (4) of the 1998 Act, the company claiming the benefit of Article 6(3) of the 1998 Act shall bear the burden of proving that the conditions of that paragraph are fulfilled. There are no further specific rules for the allocating of the burden of proof in Dutch administrative procedural law.

5.2.5 Interim Measures

According to article 8:81 *GALA*, the court which has or may acquire jurisdiction in the proceedings on the merits may, if an appeal against an order has been lodged with the court or prior to a possible appeal to the court, on request, grant a provisional remedy where because of the interests involved, speed is of the essence (*voorlopige voorziening*). When an objection has been made against the decision of the *ACM*, this shall not stay the execution of the decision. That is the reason why the legislator made this provisional remedy available to avoid the actual effects of a decision taking place. The remedy can consist of the following: the execution of the disputed order can be stayed pending the procedure on the merits or the requested provisional remedies will be granted, the president of the court shall give judgment orally or in writing as quickly as possible.

5.2.6 Rulings of the court

The hearing of both District court and the Trade and Industry Appeals Tribunal shall be held in public (Articles 8:62 and 8:108 *GALA*). However, the courts may determine that the

hearing in court will be conducted wholly or partly with closed doors. The judgment can be given orally or in writing (Articles 8:66 ,8:67 and 8:108 *GALA*).

In cases of judicial review, the decision of the *ACM* will either be (partially) upheld or revoked. The quashing of an order or part of an order entails the nullification of the legal consequences of that order or the quashed part thereof. If the court holds that the appeal is well-founded, it may instruct the *ACM* to make a new order or to perform another act in accordance with its judgment (article 8:72 para 4 *GALA*).. It may also request that its judgment takes the place of the quashed order or the quashed part thereof (article 8:72 para 3 *GALA*).

According to Article 8:113 *GALA* the Trade and Industry Appeals Tribunal can confirm a decision of the District Court either without changes or with improvements regarding the grounds of the decision. This article also determines that the Trade and Industry Affairs Tribunal can annul partially or wholly the decision of the District Court and do what the court should have done in the first place. The Trade and Industry Affairs Tribunal may thus (partially) annul the District court's judgment and replace it with its own or confirm the judgment in case the Trade and Industry Affairs Tribunal can ask for changes in the grounds and reasoning of the District Court. Trade and Industry Appeals Tribunal may therefore send the case back to the District Court if it is deemed to be necessary (article 8:115 and 8:116 *GALA*). The Trade and Industry Affairs Tribunal can also decide that the *ACM* must take a new decision.

5.3 Follow-on Proceedings (private enforcement)

This Section provides an overview of follow-on proceedings in the Netherlands for competition law cases.

5.3.1 Rules applicable to follow-on procedures

The *DCCP* sets out the procedural rules applicable to civil courts. The 1998 Act does not provide for an explicit statutory basis for damages for breach of competition law. An infringement of competition law will qualify as a tort (Article 6:162 of the Dutch Civil Code¹¹⁶⁸, hereafter *DCC*). Article 6:162 *DCC* also stipulates that a victim is entitled to compensation for losses incurred as a result of a wrongful act. An injunction may be requested on the basis of Article 3:296 *DCC*. Depending on the circumstances, a victim of a competition law infringement may also base its claim on breach of contract (Article 6:74 *DCC*), unjust enrichment (Article 6:212 *DCC*) or undue payment (Article 6:203 *DCC*) with a view to recovering sums paid pursuant to an illegal arrangement.

5.3.2 Competent Court

Civil claims for breach of competition law must be brought before one of the 11 District Courts. Damage claims up to € 25,000 must be brought before the sub-district court and in all other cases the civil section of the District Court (civil court) is competent. Cases initially brought before the sub-district court may be appealed to the civil court, on questions of law and facts. Cases initially brought before the civil court may be appealed to the Courts of Appeal, on questions of law and facts. Appeal in cassation is available before the Supreme Court in The Hague, on question of law only.

5.3.3 Timeframe

According to article 3:310 of the Dutch Civil Code the statutory limitation for wrongful act claims is five years, starting when the claimant becomes aware of both the damage and the liable person. This article is applicable to all wrongful act claims regarding a contractual obligation and compensation of damage or payment of a penalty under the Dutch Civil Code. In follow-on cases, the five-year limitation period will, in any event, start running on the day of the adoption of a decision imposing fines. A claim for compensation of damages is time barred after 20 years following the occurrence that caused the damage or led to the penalty becoming due.

¹¹⁶⁸ http://wetten.overheid.nl/BWBR0001827/geldigheidsdatum_23-01-2014

There is a time limit of three months to submit an appeal both before the Court of Appeal and the Supreme Court (articles 339 (1) and article 402 (1) *DCCP*). An appeal shall have the effect to stay the execution of the court's judgment (articles 145, 350 and 404 *DCCP*).

5.3.4 Admissibility of evidence

The basic rule for allocating the burden of proof is laid down in Article 150 of *DCCP*. According to this article the plaintiff has to prove their case. In follow-on actions, in the event of tort, the claimants must prove:

- that the infringed rule seeks to protect the claimant's interests (referred to as the *Schutznorm*);
- the existence of damage; and
- the causal link between the damage and the unlawful act.

Pursuant to Article 16 (1) of EU Regulation 1/2003, Dutch courts cannot rule counter to a final decision of the Commission. Decisions from national competition authorities, including the *ACM*, are not formally binding on Dutch courts (article 152 (2) *DCCP*), but in practice the courts will follow the findings of the *ACM*.

Evidence may be supplied to the court in any appropriate form except where the law provides otherwise (Article 152 (1) *DCCP*). Appeals in second instance are heard *de novo*, allowing additional new evidence, fact finding and legal argumentation (articles 128, 129, 130 and 348 *DCCP*). Expert evidence, e.g. from accountants or economic experts is admissible.¹¹⁶⁹ The defendant bears the evidential burden in relation to the facts that support specific defences, as the passing-on defence.¹¹⁷⁰ The court may reverse the burden of proof for reasons of fairness.

5.3.5 Interim Measures

Preliminary injunctions are frequently requested in separate interlocutory proceedings before the provisional relief judge (*voorzieningenrechter, kort geding*) at the level of the District Court (articles 254 and further *DCCP*). The judgment of the provisional relief judge can be declared immediately enforceable, regardless of any appeal. The decision in interlocutory proceedings does not prejudice proceedings on the merits, but it is quite common that interlocutory proceedings are not followed by an action on the merits.¹¹⁷¹ The successful plaintiff in interlocutory proceedings does not have an obligation to bring an action on the merits within a certain time limit.

Interlocutory proceedings generally take no more than two months from issuance of the writ of summons to the judgment. Appeals of the interlocutory judgment are available to Courts of Appeal. There is a time limit of four weeks to submit an appeal (article 339 (2) *DCCP*). A second appeal may be brought before the Supreme Court and needs to be submitted in eight weeks after the judgment (article 402 (2) *DCCP*).

¹¹⁶⁹ Netherlands report on Antitrust, 2012, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/netherlands_en.pdf

¹¹⁷⁰ Although there is no explicit statutory rule or conclusive case law on the availability of the passing on defence, the prevailing view is that this defence is indeed available (*voordeelsverrekening*, article 6:100 *DCC*). Indirect purchasers have legal standing to bring an action for damages. Defendants are therefore not prevented from invoking the passing on defence against them. Civil Court Arnhem, case 208812, 16 January 2013, in *TenneT TSO B.V., Saranne B.V. v ABB B.V., Holdings B.V. Ltd*. In this judgment the Court in paragraphs 4.30-4.32 ruled the following: *The court does not consider passing-on (of damages) to be a part of the assessment of damages. The court indicated that such 'benefits' can only be deducted if there is a sufficient causal relationship between such benefits and the tortious act by ABB. Furthermore, it must be reasonable that such benefits are to be deducted from the damages caused by ABB.* This case was about the Gas Insulated Switchgear cartel. Appeal is brought against this judgment before the Court of Appeal in Arnhem-Leeuwarden and the judgment of the Civil Court in Arnhem is now suspended because the adversarial principle had been infringed. Court of Appeal Arnhem-Leeuwarden, case 200.126.185, 10 September 2013 in *ABB B.V., Holdings B.V. Ltd v TenneT TSO B.V., Saranne B.V.*

¹¹⁷¹ The International Comparative Legal Guide to Competition Litigation 2014, available at: <http://www.iclg.co.uk/firms/pels-rijcken-and-droogleever-fortuijn>

5.3.6 Rulings of the court

The hearings shall be held in public (Articles 27 *DCCP*). However, the courts may determine that the hearing in court will be conducted wholly or partly with closed doors. The judgment is given orally and in writing (Article 28 *DCCP*). The Courts of Appeal can uphold or revoke the judgment of the District Court. The Supreme Court can uphold or revoke the judgment of the Court of Appeal. If the Supreme Court revokes the judgment, and there should still be judged on some questions of fact or law, it may refer the case back to a lower court for review of the substance of the matter (articles 420-424 *DCCP*). Again, appeal to the Supreme Court is possible against a new ruling. Courts do not take into account the amount of fines imposed by competition authorities when calculating the awards.

5.3.7 Rules applicable to the enforcement of court judgments

Articles 430 – 620 *DCCP* contain the rules applicable to the enforcement of court judgments in the Netherlands. These articles regulate the enforcement, the execution, of a judicial decision awarded in the Netherlands in which the debtor is ordered to perform (article 430 *DCCP*). The debtor is the person against whom execution is levied. Bailiffs (*deurwaarder*) are authorised to levy enforcement. Two conditions must be satisfied in order to use the coercive measures: one must be in possession of a writ of execution, which is an enforceable judgment, and this writ must first have been notified to the party upon whom enforcement will be levied.¹¹⁷²

The court of first instance has jurisdiction for all enforcement disputes, regardless of which judge pronounced the ruling to be enforced, even if the Court of Appeal or the Supreme Court delivered the ruling. The court with territorial jurisdiction is either the court that is assigned competence by the general rules of law on jurisdiction, or the court in the territorial jurisdiction within which the attachment has been or will be levied, or the court in the territorial jurisdiction within which the property concerned is located, or the court in the territorial jurisdiction within which the enforcement will take place (article 438 *DCCP*).

The main coercive measure is the executory seizure (article 443 *DCCP*) under a writ of attachment. Executory attachment can be levied on: movable property that is not registered property; bearer rights or rights to order, to registered shares or other registered securities; under a third party (by garnishee order); on immovable property; on ships and on aircrafts.

Article 438 *DCCP* contains the rules regarding the disputes relating to enforcement. In an enforcement dispute the debtor may attempt to prevent the enforcement. The debtor may not make any further substantive objections to the ruling at this stage. Enforcement disputes are usually handled in interlocutory proceedings. The court may, for instance, suspend execution for a certain period or lift the attachment. The District Court has jurisdiction for all enforcement disputes, regardless of which judge pronounced the ruling to be enforced. The court is competent even if the Courts of appeal or Supreme Court delivered the ruling.

5.4 Alternative dispute resolution mechanisms

Settlements mediation and arbitration are used in (competition law) cases as a method for an alternative dispute resolution in the Netherlands.¹¹⁷³

Arbitration is governed by articles 1020 - 1076 *DCCP*. Numerous actions for damages have been instituted before the court of arbitration by a large number of public authorities for the bid-rigging cases in the construction sector.¹¹⁷⁴ The outcome of the arbitration proceedings

¹¹⁷² European Commission, European Judicial Network in civil and commercial matters – Enforcement of judgments – the Netherlands, available at: http://ec.europa.eu/civiljustice/enforce_judgement/enforce_judgement_net_en.htm

¹¹⁷³ Netherlands report on Antitrust, 2012, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/netherlands_en.pdf, p. 17.

¹¹⁷⁴ A legal person was founded to bring representative action claims to court on 16 June 2013. It concerns the "Foundation for Recourse and Recovery of Damages and Costs resulting from Construction Fraud" (*Stichting Regres en Verhaal Schade en Kosten Bouwfraude*), http://vorige.nrc.nl/dossiers/bouwfraude/parlementaire_enquete/article1619721.ece and see also Netherlands

remains, however, outside the public domain. The main alternative dispute regulation scheme in the Netherlands is the *De Geschillencommissie*. The threshold to initiate arbitration proceedings is much lower as consumers do not need the assistance of a lawyer and do not need to pay the costs of procedure from their counterpart if they lose their case.

In addition, the Dutch Act on Collective Settlements of Mass Claims (*Wet Collectieve afwikkeling massaschade*, hereafter *WCAM*) facilitates the collective settlement of mass damages when one or more parties agree to pay damages to all those affected. This instrument has been used for recovering damage but so far not by victims of competition law infringements. On 27 July 2005 the *WCAM* took effect in the Netherlands. The *WCAM* lays down in Articles 7:907-910 *DCC* and 1013-1018 *DCCP* that class settlements can be approved and declared binding by the Amsterdam Court of Appeal. The *WCAM* provides for collective redress in mass damages on the basis of a settlement agreement concluded between associations representing a group of affecting persons to whom damage was allegedly caused and one or more parties that are held liable for this damage. A person entitled to compensation can notify in writing, within a certain period, that he or she does not wish to be bound to the agreement on the basis of article 7:908 (2) *DCC*, in other words can opt-out. In that case, the declaration that the agreement is binding shall have no consequences for such person.

The *WCAM* does not deal with the stage of reaching a settlement. The settlement must be reached out of court and is a prerequisite for the parties to apply to the court (Article 7:907 (1) *DCC*). The court cannot hear a case under the *WCAM* without a settlement having been reached, as the settlement must be attached to the petition starting the procedure, and the petition itself must include a short description of the settlement agreement (Article 1013 (2) *DCCP*). The settlement does not need to establish that the liable party is indeed liable, but only that the liable party and the organisation representing the injured parties have agreed that the liable party will pay compensation to the injured parties.

6 Contextual Information

This Section provides contextual information on the judicial system in the Netherlands related to the general efficiency and factors influencing the application of competition law rules.

6.1 Duration and cost of competition law cases

Regarding the costs, both the District court and the Trade and Industry Appeals Tribunal shall have the exclusive jurisdiction to condemn a party to pay the costs which another party has reasonably incurred in connection with the appeal proceedings (articles 8:74, 8:75 and 8:108 *GALA*). Also the registry fee paid by the person who lodged the notice of appeal can be refunded. The average registry fee in judicial review cases is € 318,- (as of 1 January 2014 €328,-)¹¹⁷⁵. However, there is no 'losing-party pays principle' in Dutch administrative law.

Fines are calculated with the 2009 policy guidelines on the setting of fines (Fining Code 2009).¹¹⁷⁶ The fines are imposed on the natural or legal person to whom the infringement can be attributed. Fines for breach of the cartel prohibition may not exceed € 450,000 or 10 per cent of the company's turnover, whichever is higher.¹¹⁷⁷ Pursuant to the 1998 Act, fines of up to € 450,000 can be imposed on principals and de facto managers for breach of the cartel prohibition. The *ACM* may mitigate fines when an infringer has, of its own motion, compensated victims of its anticompetitive practices (article 14 (c) of the Fining Code 2009). The *ACM* may also impose fines in the case of non-cooperation or for breaking the seals

report on Antitrust, 2012, available at:
http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/netherlands_en.pdf, p. 16.

¹¹⁷⁵ <http://www.rechtspraak.nl/Naar-de-rechter/Bestuursrechter/Kosten/Pages/Griffierecht.aspx>

¹¹⁷⁶ Available at: <https://zoek.officielebekendmakingen.nl/stcrt-2013-11214.html> and
<https://www.acm.nl/en/publications/publication/6722/NMa-New-policy-rules-on-fines-have-come-into-effect/> (end of press release contains a link to the guidelines).

¹¹⁷⁷ The fine for offenders other than individuals is set according to the following formula: Starting point × seriousness factor (article 2.6 of the Fining Code 2009) + increase/decrease for additional circumstances (article 2.12 of the Fining Code 2009).

during a dawn raid up to an amount of € 450,000 or 1 % of the turnover in the preceding financial year on undertakings and a maximum of € 450,000 on individuals (article 69 (1) of the 1998 Act and articles 5:10 and 5:20 *GALA*).

The number of cases in which civil damages have been awarded is very limited in the Netherlands. The cases where civil damages have been asked are *Elevators*¹¹⁷⁸, *Gas Insulated Switchgear*¹¹⁷⁹, *Air Cargo*¹¹⁸⁰, and *Paraffin Wax*.¹¹⁸¹ An increasing number of follow-on actions are being brought before Dutch courts. Currently, actions are pending in *Sodium Chlorate and the Beer case*¹¹⁸².

Because of the complex nature of the actions for damages for infringement of the competition rules, these cases take years to reach a decision. Moreover, national proceedings are suspended as long as the European Commission or the European Courts are involved. Civil proceedings on the merits have an average duration of one to three years at each level of jurisdiction, depending mostly on the complexity of the matter, the workload of the court and the parties' procedural attitude. However, because of lack of case law in antitrust cases, it is impossible to say precisely how long proceedings take. Companies often prefer to ask for interim injunctions. As mentioned above, there are also numerous actions for damages pending before the court of arbitration for the construction sector. However, the outcome of the arbitration proceedings remains outside public domain.

In Dutch civil procedural law, the main rule is that the party who is declared liable is required to pay the costs of the procedure (article 237 *DCCP*). A court order to pay costs includes the bailiff fee, the court fees paid up front and an amount for the salary of the attorney¹¹⁸³ (respectively articles 237, 240 and 239 - 241 *DCCP*). The defendant can only recover an attorney salary as fixed by the court. The salary is in general substantially lower than the actual legal costs.¹¹⁸⁴ The amount of the court or registry fee depends on the type of dispute and the amount involved.¹¹⁸⁵

6.2 Influencing Factors

The Netherlands is the only European Member States where a collective settlement of mass claims can be declared binding on an entire class on an opt-out basis. The Netherlands has an open international market economy because of tax rules for companies and therefore has a high proportion of international businesses active within its territory. This makes the Netherlands an attractive venue for settling international mass claims. Moreover, the principle of extraterritoriality applies to the 1998 Act whereby the place of establishment of the undertakings is not relevant.

¹¹⁷⁸ Rechtbank Rotterdam, 17 July 2013 (LJN: 5504), available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2013:5504&keyword=%22artikel+101+VWEU%22> and Rechtbank Midden-Nederland, 13 March 2013 (LJN: CA1922) available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBMNE:2013:CA1922&keyword=%22artikel+101+VWEU%22>.

¹¹⁷⁹ Rechtbank Oost-Nederland, 16 January 2013 (LJN: BZ0403), available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBONE:2013:BZ0403&keyword=Tennet%2fABB>

¹¹⁸⁰ Rechtbank Amsterdam, 7 March 2012 (LJN: BV8444), available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2012:BV8444&keyword=equilib>

¹¹⁸¹ Rechtbank Den Haag, 1 June 2013 (LJN:CA1870), available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2013:CA1870>.

¹¹⁸² http://www.studienvereinigung-kartellrecht.de/downloads/201300621_swaak.pdf, page 1.

¹¹⁸³ Parties in civil cases must be represented by a lawyer. The sole exceptions are for cases where the sub-district court judge has jurisdiction (article 79 (1) and (2) of the *DCCP*) and for administrative and criminal cases. As previously noted, in administrative proceedings it is up to the court to condemn a party to pay the costs of procedure which another party has incurred.

¹¹⁸⁴ <http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-civiel-recht/Pages/Liquidatietarief-rechtbanken-en-gerechtshoven.aspx>

¹¹⁸⁵ The level of court fees is based on the tariffs as set down in the Tariffs in Civil Procedures Act (*Wet Tarieven in Burgerlijke zaken*).

6.3 Obstacles/Barriers

Costs of litigation may be a dissuasive factor to initiate actions for breach of antitrust rules. There is a disincentive for individual consumers to take disputes to a civil court, because the consumer may lose in court and therefore needs to pay the costs of lawyers and the registry and bailiff fee. Moreover, a reversal for the burden of proof for damage as well as causal link could facilitate private enforcement.

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COUNTRY FACTSHEET - POLAND

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Abbreviations used

Act 2007	<i>Ustawa o ochronie konkurencji i konsumentów z 16 lutego 2007 r.</i> (Act on Competiiton and Consumer Protection of [16 February 2007])
EU	European Union
President	President of the Office of Competition and Consumer Protection
OCCP	Office of Competition and Consumer Protection
SOKiK	<i>Sąd Ochrony Konkurencji i Konsumentów</i> (Court of Competition and Consumer Protection)
TFEU	Treaty on the Functioning of the European Union

1 Overview of the National Legal Framework

The national legal system in the Republic of Poland (hereinafter “**Poland**”) is a Civil Law system. It is based on the hierarchy of the sources of law.

There are four main ranks of laws (from the highest to the lowest):

- Constitution
- International agreements
- Statutes (acts)
- Regulations

Apart from the above acts the Constitution also provides for municipal acts of law, which are generally applicable on the territory of the municipalities they were issued by¹¹⁸⁶.

The administration of justice in Poland consists of the following courts¹¹⁸⁷:

- Supreme Court (*Sąd Najwyższy*)
- Common courts (*sądy powszechne*)
- Administrative courts (*sądy administracyjne*)
- Military courts (*sądy wojskowe*)

The system of common courts includes district (*rejonowe*), regional (*okręgowe*) and appellate (*apelacyjne*) courts.

The system of administrative courts includes voivodship administrative courts (*wojewódzkie sądy administracyjne*) and the High Administrative Court (*Naczelny Sąd Administracyjny*).

The Supreme Court exercises judicial supervision over judgments of all other courts in order to ensure consistency in the interpretation of laws and judicial practice.

A Constitutional Tribunal (*Trybunał Konstytucyjny*) also exists in Poland, which has the competence to, *inter alia*, rule on the constitutionality of national legislation and international agreements.

2 National Legislation establishing competition law rules

This Section provides an overview of national legislation establishing competition law rules. Table 2.1 presents a list of relevant competition law instruments in Poland.

Private enforcement in Poland is almost non-existent. Due to the lack of practice, it is therefore not obvious what the legal grounds are on which the claim should be based. In the Polish legal system the general principle applies – *da mihi factum, dabo tibi ius*, which means that it is not necessary for the claimant to specify the legal basis of the claim for the case to be reviewed by the court. Academics state that private enforcement can be based on the Civil Code (contractual and tort liability, unjust enrichment) and UZNK.¹¹⁸⁸ However the practitioners state that it would be very difficult or ineffective to base private enforcement claims on the basis of contractual liability or UZNK, therefore only tort liability and unjust enrichment applies. Therefore in this factsheet only tort liability and unjust enrichment have been mentioned.

¹¹⁸⁶ Articles 82(2) and 94 of the Constitution of the Republic of Poland of 2 April 1997.

¹¹⁸⁷ Chapter VIII of the Constitution.

¹¹⁸⁸ A. Jurkowska-Gomułka, Antitrust Private Enforcement - Case of Poland. Yearbook of Antitrust and Regulatory Studies 2008 nr 1; M. Sieradzka „Class action as an instrument of private enforcement protection of consumer interests due to competition rules infringement”, Lex Wolters Kluwer, Warsaw, 2012,

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
Act on Competition and Consumer Protection (<i>Ustawa o ochronie konkurencji i konsumentów</i>)	16 February 2007 (date of entry in force: 21 April 2007)
Act on Competition and Consumer Protection (<i>Ustawa o ochronie konkurencji i konsumentów</i>)	15 December 2000 (date of entry in force: 1 April 2001)

2.1 General legislation

The Act on Competition and Consumer Protection of 16 February 2007 (*Ustawa o ochronie konkurencji i konsumentów z 16 lutego 2007 r.*, hereinafter the “2007 Act”)¹¹⁸⁹ provides for the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereafter ‘TFEU’).

The 2007 Act replaced the previous Act on Competition and Consumer Protection of 15 December 2000 (*Ustawa o ochronie konkurencji i konsumentów z 15 grudnia 2000 r.*, hereinafter the “2000 Act”). The main differences with the 2000 Act affecting the application of Articles 101 and 102 TFEU (former Articles 81 and 82 TEC) were the following:

- The 2007 Act explicitly states that the National Competition Authority (hereafter ‘NCA’) can determine that the behaviour of an undertaking falls under Art. 101 and 102 of TFEU;
- Under the Act 2007 it is no longer possible for the NCA to issue a decision ruling that the undertaking’s behaviour was not found to be a restriction of competition, in case no breach of articles on abuse of dominance and anticompetitive agreements was found;
- Following entry into force of the 2007 Act, the proceedings before the NCA are no longer initiated upon external initiative, but *ex officio*. It does not prevent an entity to notify the NCA that competition rules may have been infringed. However, the NCA is no longer obliged by such a notification to initiate antitrust proceedings.

The 2007 Act entered into force on 21 April 2007. It regulates institutional, substantive and procedural issues of Polish competition law. It empowers the Council of Ministers to issue several implementing regulations, such as the Regulation on the mode of proceedings with leniency motions, the block exemption and sector specific exemptions.

Article 1 of the 2007 Act determines the conditions for the development and protection of competition as well as the principles of protecting the interests of undertakings and consumers in the **public interest**. This means that the 2007 Act is not intended to protect private interests of consumers or entrepreneurs and a case which does not involve public interest proceedings shall not be initiated before the NCA.

The 2007 Act in Article 4(1) provides a definition of an undertaking. For the purposes of the Act “undertaking” includes natural and legal persons and organisational entities without a legal personality but with legal capacity granted by a statute, organising or rendering public utility services, as well as associations of undertakings.

Article 1(2) stipulates that the 2007 Act regulates the principles and measures of counteracting competition-restricting practices and practices infringing collective consumer interests, as well as anti-competitive concentrations of undertakings and their associations, where such practices or concentrations have or may have an impact on the territory of the Republic of Poland. The Act therefore also applies the principle of extraterritoriality.

¹¹⁸⁹ English version available under the following link: http://www.uokik.gov.pl/competition_protection.php

Article 6(1) of the 2007 Act prohibits agreements¹¹⁹⁰ which have as their object or effect the elimination, restriction or any other infringement of competition on the relevant market. The legal sanction for the abovementioned agreements is the nullity, in part or in whole, of the entire agreement.

Article 9 of the 2007 Act prohibits the abuse of a dominant position. The legal sanction for the practices which constitute an abuse of a dominant position is nullity in full or in a respective part.

Article 6 and 9 of the 2007 Act practically mirror the provisions of Articles 101 and 102 TFEU, however the open catalogue of exemplifying forbidden practices is longer.¹¹⁹¹

Damages for breach of competition law may be granted under the “ordinary” legal basis for contractual or tort liability (respectively Articles 471 and 415 of the Civil Code) and in case of entrepreneurs also under the Act on Combating Unfair Competition (hereinafter “**UZNK**”) (Article 18).

Article 83 of the 2007 Act states that for matters not regulated in the Act, the provisions of the Administrative Procedure Code of 14 June 1960 (*Ustawa z 14 czerwca 1960 r. Kodeks postępowania administracyjnego*) shall apply, which is a general rule. However, the 2007 Act determine some exceptions to the general rule: matters related to evidence are regulated by Articles 227-315 of the Civil Procedure Code of 17 November 1964 (*Ustawa z 17 listopada 1964 r. Kodeks postępowania cywilnego*), in all aspects which are not already governed by the 2007 Act. Another exception is that inspection of the premises and objects which is subject to consent of the courts is regulated by the provisions of Criminal Procedure Code of 6 June 1997 (*Ustawa z 6 czerwca 1997 r. Kodeks postępowania karnego*) (for all matters not specified in the Act 2007).

Reform of legislation

In March 2013, the President of the Polish NCA presented a draft amendment to the 2007 Act, which anticipated some far-reaching changes. In terms of anticompetitive practices, the most important concern modifications to the leniency programme and the President’s new power to impose personal liability on individuals for antitrust infringements. Individuals, i.e. natural persons performing managerial functions in an undertaking may be subject to personal liability if they intentionally allow for an infringement of the prohibition of anticompetitive agreements by their company. However individuals may only be fined (up to PLN 2 million, approximately EUR 500 thousand) if the company is held liable. The NCA may only impose a financial fine.

2.2 Industry-specific legislation

In addition to generally applicable legislation mentioned above, there are specific competition law rules which relate to:

- Telecommunication sector (responsible authority: the President of the Office of Electronic Communications – *Prezes Urzędu Komunikacji Elektronicznej*)

¹¹⁹⁰ According to Article 4(5) of Act 2007 “agreement” shall mean:

- agreements concluded between undertakings, between associations of undertakings and between undertakings and their associations, or certain provisions of such agreements;
- concerted practices undertaken in any form by two or more undertakings or associations thereof;
- resolutions or other acts of associations of undertakings or their statutory organs.

¹¹⁹¹ The Polish catalogue apart from the practices exemplified in art. 101 TFEU, envisages also two more practices: limiting access to the market or eliminating from the market undertakings which are not parties to the agreement, and collusion between undertakings entering a tender or between those undertaking and the tender organiser of the terms and conditions of bids, particularly as regards the scope of works and price.

- Postal sector (responsible authority: the President of the Office of Electronic Communications – *Prezes Urzędu Komunikacji Elektronicznej*)
- Energy sector (responsible authority: the President of the Energy Regulatory Office – *Prezes Urzędu Regulacji Energetyki*)
- Railway transport sector (responsible authority: the President of the Office of Rail Transportation)
- Aviation sector (responsible authority: the President of the Civil Aviation Authority – *Prezes Urzędu Lotnictwa Cywilnego*)

3 The National Competition Authority

This Section describes the National Competition Authority in Poland, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the President of the Office of Competition and Consumer Protection

The President of the Office of Competition and Consumer Protection (*Prezes Urzędu Ochrony Konkurencji i Konsumentów*, hereinafter “the President”) is the Polish national competition authority.

The Office of Competition and Consumer Protection (hereafter ‘OCCP’) was established in 1990 as the Antimonopoly Office (*Urząd Antymonopolowy*). In 1996, as a result of the central administration reform, the OCCP received its current name. The 2000 Act introduced the office of the President as the main body for competition and consumer protection in Poland. The President performs all the functions – adopts decisions, imposes fines, releases guidelines, acts as a party to the proceedings etc. The Office is an administrative body with a supportive role, which helps the President performing his functions.

The President is the central government administration authority responsible for the competition and consumer protection matters. He/she is appointed and supervised by the Prime Minister. The Prime Minister nominates the President from persons selected in a specific open and competitive recruitment process. The law prescribes certain requirements that have to be met by all the candidates. The most important requirements are the following: possession of Polish citizenship, holding minimum 6 years of employment track record, including minimum 3 years on managerial positions, possession of education and knowledge in the fields for which the President is responsible.

The term of office is not specified – the Prime Minister appoints the President for an indefinite period of time, and also has the prerogative to dismiss him/her at any time.

3.2 The reform of the President of the Office of Competition and Consumer Protection

In 2007, as a result of the adoption of the new Act on Competition and Consumer Protection, a significant change was made with regard to the procedural rules on antitrust proceedings initiated before the Polish competition authorities. The proceedings on anticompetitive practices, as of 2007, are initiated by the President *ex officio*, regardless of the existence of a complaint/motion to launch the proceedings. The President is no longer bound by such a motion and has the competence to decide whether or not to take an action.

Under the 2007 Act the President can no longer adopt a decision stating that the practice is not anticompetitive (it does not infringe the articles that prohibit anticompetitive agreements or abuse of dominant position).

Another change brought by the 2007 Act concerned the term of office of the President. Under the current legislation there is no term of office specified, the President is appointed for an indefinite time and is subject to dismissal at any time by the Prime Minister.

3.3 Composition and decision-making

The President is a one-person body, conducting proceedings and adopting decisions. There is no advisory or decision board, however the President performs its competences with the assistance of the OCCP.

The OCCP comprises the central office in Warsaw, and nine regional offices. The territorial and substantive jurisdiction of the regional offices is regulated by the Prime Minister. The tasks of the central office mainly concern handling cases on competition-restricting practices that are taking place on the national or broader scale as well as all merger cases. The regional offices are responsible for the protection of local and regional markets from anticompetitive practices.

The OCCP works as the Commission, with case-handlers handling the cases. All decisions are signed by the President.

Departments are further divided into units according to the subject matter criteria.

3.4 Cooperation with other entities

Cooperation with international institutions and organisations dealing with competition and consumer protection lies within the President's competences. The President is responsible for fulfilling the obligations placed on Poland as an EU Member State with regard to competition and consumer protection. In particular the President is the competent authority within the meaning of Article 35 of the 1/2003 Regulation.

In addition to cooperation with the European Commission and other Member States on the basis of Regulation 1/2003, the OCCP also participates in the activities of:

- Organisation for Economic Co-operation and Development (OECD);
- International Competition Network;
- European Competition Authorities Network;
- Central European Competition Initiative;
- International Consumer Protection and Enforcement Network.

The Department of International Relations and Communication is directly responsible for international cooperation matters¹¹⁹².

As regards cooperation with national entities dealing with competition and consumer protection, the President cooperates in particular with national regulatory authorities, i.e. the President of the Office of Electronic Communications and the President of the Energy Regulatory Office.

3.5 Investigations

There are two types of proceedings envisaged by the 2007 Act:

- Explanatory proceedings (art. 47-85 of the 2007 Act) and
- Antimonopoly proceedings (art. 86-93 of the 2007 Act)

In practice explanatory proceedings are instituted to initially verify signals, notifications or information gathered by the OCCP on possible infringements of competition rules and in

¹¹⁹² http://www.uokik.gov.pl/kompetencje_prezesa_uokik_w_zakresie_wspolpracy_miedzynarodowej.php

order to conduct sectoral inquiries. The explanatory investigation may precede the antimonopoly proceedings. It should not last longer than 30 days, or, in particularly complicated matters, no longer than 60 days.

The antimonopoly investigation in antitrust cases should be finished within five months of its initiation. However, and unlike in merger control cases, in case the stipulated time elapses, the President's actions are not rendered invalid as he still has the competence to proceed with the case. The party has to be notified about such a fact and the notification has to be justified by the President.

The antimonopoly investigation regarding anticompetitive practices cannot be instituted if one year has elapsed since the end of the year when the practices were ceased¹¹⁹³.

Both types of proceedings can only be instituted *ex officio*¹¹⁹⁴. Even if any natural or legal person is entitled to submit to the President a written notification on the potential existence of competition-restricting practices, the President is not bound to launch an investigation. Article 86 of the 2007 Act provides the requirements of such a notification.¹¹⁹⁵

3.6 Decision-making

The investigation initiated by the President may end either by the issuance of a decision or by the discontinuance of proceedings.

In cases of anticompetitive practices, there are three types of final decisions which may be adopted by the President:

3. Decision recognising that the practice restricts competition and ordering to refrain from it: This occurs if an infringement of a prohibition specified in Articles 6 or 9 of the Act 2007, or Articles 101 or 102 TFEU has been declared (Article 10 of the Act 2007);
4. Decision declaring that the practice, which no longer infringes Articles 6 or 9 of the Act 2007, or Articles 101 or 102 TFEU, restricted competition and was discontinued (Article 11 of the Act 2007);¹¹⁹⁶
5. Commitment decision (Article 12 of the Act 2007): A commitment decision is a type of decision that can be undertaken in the course of the antimonopoly proceedings, if it was rendered plausible that an undertaking infringed Article 6 or 9 of the 2007 Act or Article 101/102 TFEU and this undertaking has committed to take, or discontinue, certain

¹¹⁹³ Article 93 of the Act 2007.

¹¹⁹⁴ As of 2007. The only exception are merger cases where the proceedings may be instituted also upon a motion.

¹¹⁹⁵ According to Article 86(2) of the Act 2007, the notification may include in particular:

- indication of the undertaking which is accused of applying competition-restricting practices;
- description of the actual state being the basis of the notification;
- indication of the provision of the Act 2007 or TFEU, the infringement of which concerns the notification
- making the infringement of provisions of the Act 2007 or TFEU plausible;
- data of the entity submitting the notification

Any documents that may constitute the evidence that the provisions of the Act 2007 has been infringed shall be attached to the notification.

¹¹⁹⁶ This type of decision is adopted by the President in a situation when an undertaking has infringed art. 6 or 9 but at the time of adopting the decision by the President the anticompetitive practice has been ceased. The President is still allowed to impose a fine for such practice. The practice may be ceased in the course of antitrust proceedings or even before the NCA has instituted the proceedings. The aim of this provision is to show that such practices are illegal in order to prevent similar infringements in the future. Polish legal doctrine indicates that, although the provision in 2007 Act that introduces this type of decision indicates that it may be adopted in case of 101 or 102 infringement, it may be problematic on the grounds of the Regulation 1/2003. The 1/2003 Regulation provides, in its Article 5, the closed list of decisions that may be undertaken by the NCAs and it does not envisage the type of decision in question (the Commission can adopt it according to art. 7(1) of the Regulation). Therefore in practice the NCA discontinues the proceedings in such cases.

actions in order to put an end to the infringement of competition rules. In the commitment decision, the President requires the undertaking to fulfil the undertaken commitments. This decision is similar to a commitment decision under the EU law (Article 9 of the 1/2003 Regulation).

In the course of the investigation (before the adoption of a final decision) the President may also adopt a temporary decision in case it has been made plausible that any further exercise of the practice being subject to the proceedings may cause serious and hard-to-remove threats to competition (Article 89 of the Act 2007). Such a decision obliges the undertaking to cease certain actions in order to prevent those threats.

The President has the power to impose a fine on an undertaking, up to 10% of the company's revenue in case it has infringed competition law, *inter alia*, when it has committed an infringement of Article 101 or 102 TFUE. A fine up to EUR 50 million can also be imposed on an undertaking if it, even unintentionally, provided the OCCP with incorrect or misleading data in course of the proceedings, or did not cooperate during the inspection¹¹⁹⁷. The President also has the competence to impose a fine up to EUR 10 thousand for each day of delay in execution of his decisions or court judgments in cases concerning *inter alia*, anti-competitive practices¹¹⁹⁸. Not only a company but also a person holding a managerial position in the undertaking may in certain situations be fined a maximum amount of 50 times the amount of average remuneration in Poland¹¹⁹⁹.

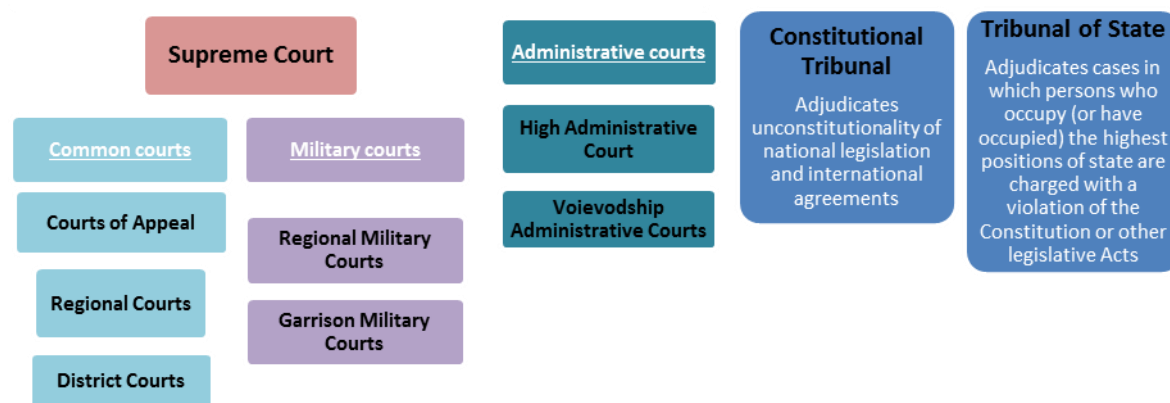
4 Competent courts

This Section provides an overview of the courts competent for competition law rules in Poland.

The judicial process in Poland is adversarial (where two advocates represent the positions of the parties before a judge/ judges).

Figure 4.1 provides an overview of the Polish judicial system.

Figure 4.1 Judicial System in Poland



4.2 Judicial review

There are three courts competent for public enforcement actions (judicial review) regarding both national and EU competition rules:

¹¹⁹⁷ Article 106(1) of the Act 2007.

¹¹⁹⁸ Article 107 of the Act 2007.

¹¹⁹⁹ Article 108 of the Act 2007.

- First Instance: Regional Court in Warsaw, the Court of Competition and Consumer Protection (*Sąd Ochrony Konkurencji i Konsumentów*, hereinafter 'SOKiK');
- Second Instance: Court of Appeal in Warsaw;
- Cassation: Supreme Court.

The courts competent to review the President decisions are centrally located in Warsaw and have the exclusive competence to adjudicate in these matters.

The SOKiK is the XVII Division of Competition and Consumer Protection within the Regional Court in Warsaw. It is a Civil Court which has exclusive jurisdiction over appeals from decisions and orders of the President. The SOKiK ruling is effective not only *inter partes* (as with all judgments of the Regional Court and Court of Appeal) but also *erga omnes*, i.e. .

The court cannot base its judgment on the findings of the President – it has to conduct its own evidentiary proceedings.

At first instance, cases are generally reviewed by one judge¹²⁰⁰. There are currently 12 judges adjudicating in the SOKiK¹²⁰¹.

In case the judgment of the SOKiK is appealed, the Court of Appeal in Warsaw, VI Civil Division (*Sąd Apelacyjny w Warszawie VI Wydział Cywilny*) is the competent court to review the appeal. The VI Civil Division of the Court of Appeal in Warsaw is not reserved only for competition cases. At second instance, cases are examined by a panel of three judges. There are currently 21 judges adjudicating in the VI Civil Division.¹²⁰²

4.3 Private enforcement – follow on cases

Common Civil Courts are competent for private enforcement cases, regardless of whether the plaintiff has based their claim on national or EU legislation.

In case damages are sought on the basis of the Polish Civil Code, general rules apply and the action should be brought to the District Court¹²⁰³. However, if the value of the object of the litigation exceeds PLN 75 thousand (approximately EUR 18 thousand) then the District court is competent in the first instance¹²⁰⁴.

Class actions are reviewed by the Regional Court regardless of the value of the object of the litigation.

If the District Court is the relevant court at first instance, the Regional Court reviews the case in second instance. If a Regional Court at first instance court then an appeal from its judgment should be brought to the Court of Appeal.

The competent courts are not located centrally. The general rule is that the action should be brought to the court located in the region where the defendant has his/her place of residence (*actor sequitur forum rei*)¹²⁰⁵.

An appeal in cassation may be brought to the Supreme Court if the value of the object of litigation amounts to at least PLN 50 thousand (approximately EUR 12 thousand).

5 Proceedings related to breaches of Competition Law rules

This Section presents an overview of proceedings related to breaches of competition law rules in Poland both for judicial review and follow-on proceedings.

¹²⁰⁰ Article 47 § 1 of the Civil Procedure Code

¹²⁰¹ The list of the judges is available on the website of the Regional Court in Warsaw:
<http://www.warszawa.so.gov.pl/lista-sedziow.html>

¹²⁰² <http://www.waw.sa.gov.pl/index.php?p=m&idg=mg,77,137>

¹²⁰³ Article 16 of the Civil Procedure Code.

¹²⁰⁴ Article 17 § 4 of the Civil Procedure Code.

¹²⁰⁵ Article 27 of the Civil Procedure Code.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in Poland is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Party to the proceedings before the President, i.e. undertaking within the meaning of Article 4 of the 2007 Act.	Any natural or legal person.
How can an action be filed?	It has to be lodged with the SOKiK through the President who can revoke or change the decision if he/she agrees with the appeal, otherwise he/she has to submit it to the SOKiK without delay.	The action should be filed in the common court in the place of residence/registered office of the defendant.
With which authorities can the action be filed?	The SOKiK has the exclusive competence to decide on appeals from the President's decisions.	District court (or a Regional Court if the value of the object of litigation exceeds PLN 75 thousand)
Burden of proof	The burden of proof rests with the claimant.	The burden of proof rests with the claimant.

Since 2010, it is possible to file a class action in cases concerning *inter alia* consumer protection. Under the Act on pursuing claims in group proceedings of 17 December 2009 (*Ustawa o dochodzeniu roszczeń w postępowaniu grupowym z 17 grudnia 2009 r.*)¹²⁰⁶, a class action can be filed for a group of at least 10 people (natural and legal persons as well as organisational entities without legal personality or with legal capacity granted by a statute) by their representative. As mentioned above, class actions must be brought before the regional court which reviews it in a panel of three judges.

5.2 Judicial Review Proceedings

This Section presents judicial review proceedings in competition law cases in Poland.

5.2.1 Rules applicable to the judicial review of NCA decisions

The procedural law applicable to proceedings in competition law cases is governed first by rules of procedure specially designed for competition law cases (Articles 479(1)- 479(35) of the Civil Procedure Code). All issues which are not regulated by this *lex specialis* (i.e. provisions that regulates competition law proceedings in the first place) are governed by the main rules on civil proceedings.¹²⁰⁷

When general rules are applied, the appealing party is considered as the plaintiff, the President as the defendant and the appeal as a statement of claims.

¹²⁰⁶ Ustawa o dochodzeniu roszczeń w postępowaniu grupowym z 17 grudnia 2009 r., Journal of Laws 2010 no 7, position 44.

¹²⁰⁷ Until May 2012 competition law cases were conducted on the basis of special provisions on commercial proceedings. Since May 2012 the general rules on civil procedure applies to commercial litigation. However, if a decision in antitrust proceedings before the President was issued before the date of entry into force of the change in question, then the „old” provisions on commercial procedure apply.

5.2.2 Competent Court

The appeal of the President's decision has to be submitted with the President. If the President considers the appeal justified, he/she may revoke or change the decision in question, in its entirety or in part. The new decision may be appealed. If the President does not agree with the appeal he/she passes it to the SOKiK which rules on law and on facts.¹²⁰⁸

In the second instance, the Court of Appeal in Warsaw is exclusively competent to review judgments of the SOKiK on law and on facts. The cassation appeal on law from the second instance court judgment can be lodged to the Supreme Court irrespective of the value of the object of the appeal.

5.2.3 Timeframe

The appeal must be challenged before the SOKiK (through the President) within two weeks from the delivery of the decision. In case the President does not agree with it in full he/she has to forward it to the SOKiK without delay.¹²⁰⁹

The appeal from a judgment issued in the first instance may be appealed within two weeks from the delivery of the judgment with the justification¹²¹⁰ (the party has one week to file a motion for justification requesting the court to provide the reasons for its ruling).

The cassation appeal from the judgment issued in the second instance may be lodged within 2 months from the date of delivery of the judgment with justification (the appellate court justifies its rulings *ex officio*).

5.2.4 Admissibility of Evidence

The burden of proof lies with the claimant. All evidence is provided on the motion of the parties. Parties can produce new evidence, which was not subject to review in the proceedings before the President. All evidence should be indicated in the Appeal – subsequent evidence motions may be not admitted by the court (the court has discretionary power there). The catalogue of evidence (i.e. the type of evidence that can be presented) is open and there is no hierarchy between them.

5.2.5 Interim Measures

Under the Polish Civil Procedure, it is also possible to apply for interim measures in competition law cases.

There is no special procedure as regards competition cases. The provisions of the Civil Procedure Code (Articles 730 – 757) apply.

According to Article 730 of the Civil Procedure Code, interim relief can be claimed by each person who is a party to or a participant in the proceedings, if she/he makes the claim and the legal interest in granting the relief is plausible.

Legal interest in granting the interim relief exists when the lack of it prevents or seriously impedes enforcement of the judgment or in any other way prevents or seriously impedes the attainment of the objectives of the proceedings in question.

5.2.6 Rulings of the court

The hearings of the court are oral and generally public unless the court decides to make them confidential.

According to Article 479(31a) of the Civil Procedure Code, the SOKiK may **dismiss an appeal** (after considering the merits of the case) on the President's decision if there are no

¹²⁰⁸ Article 81 of the Act 2007.

¹²⁰⁹ The Act does not specify a timeframe for this, with the President only needing to act promptly without delay. The amendment to the Act foresees a timeframe being included.

¹²¹⁰ The judgment without justification contains only the operative part of the judgment that states whether the court agreed with the appeal or not. The party has 2 weeks to file a motion to justify the judgment.

grounds to accept it. The court may **set aside the appeal** (without considering the merits) if it was lodged after the deadline or it was inadmissible due to other reasons, as well as when in the specified time the defects were not supplemented.

In case the court **allows the appeal**, it either dismisses or changes in part or in full the challenged decision and rules on the merits of the case. At the same time the court decides whether the decision was issued without legal basis or in flagrant violation of the law.

If the court confirms that the practices in questions infringed competition law, legal actions resulting from them are null and void *ex lege*¹²¹¹ in full or in part. They are void *ex tunc*¹²¹².

5.3 Follow-on Proceedings (private enforcement)

This Section presents the follow-on proceedings in Poland for competition law cases.

5.3.1 Rules applicable to follow-on procedures

The Act does not contain any specific provisions on private enforcement.

The Polish Civil Code provisions regulating contractual and tort liability are the main rules applicable to private enforcement of both national and EU law.

Since the private enforcement is almost non-existent in Poland it is not clear on what basis

Article 415 of the Civil Code¹²¹³ which constitutes the system of general tort liability in Poland, states that whoever has by his own fault caused damage to another person shall be obliged to redress it. In order to successfully apply Article 415, it is necessary to prove that the challenged practice was unlawful. Moreover, the fault on the side of the undertaking, which committed anticompetitive practice, has to be proven.

Article 405 of the Civil Code contains rules on unjust enrichment. Benefits that result from unlawful actions, including antitrust infringements, may be regarded as unjust enrichment¹²¹⁴.

Findings of a final antitrust decision of the President are binding for civil courts. In case a practice has been declared as anticompetitive by the President, courts cannot subsequently declare it as being in accordance with competition law provisions. This rule does not apply to commitment decisions, since they are not final.

As regards the procedural rules, the general provisions of the Civil Procedure Code apply.

5.3.2 Competent Court

Polish common civil courts are competent in private enforcement cases (they can rule on both law and fact), regardless of whether a plaintiff has based his/her claim on national or EU legislation.

When the action is brought on the basis of the Civil Code a district court is the relevant court (see exception in section 4 above).

5.3.3 Timeframe

The time limit for bringing an action based on general rules of tort liability is three years from the time an injured party has found out about damage and about the entity who is liable for it. However it cannot exceed 10 years from the date when the infringement took place¹²¹⁵.

An appeal from the first instance judgment may be brought within 14 weeks from delivery of the judgment with justification and a cassation appeal may be brought within two months from the delivery of the second instance judgment.

¹²¹¹ Ex lege – the law itself specifies that there are void.

¹²¹² Ex tunc – from the beginning, as if they have never existed.

¹²¹³ Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny, Journal of Laws no 16 position 93 with changes.

¹²¹⁴ A. Jurkowska-Gomułka, „Antitrust Private Enforcement – Case of Poland”, Yearbook of Antitrust Regulatory Studies, vol. 2008, 1(1).

¹²¹⁵ Article 442¹ § 1 of the Civil Code.

5.3.4 Admissibility of evidence

The same rules apply as to evidence in judicial review cases (see section 5.2.4. above).

5.3.5 Interim Measures

The same rules apply as to interim measures in judicial review cases (see section 5.2.5. above).

5.3.6 Rulings of the court

The court can either allow or dismiss a statement of claims. It can also reject the action without looking into the merits of the case.

With a follow on action, the court can declare a clause of a contract or practice void in part or in full, due to a breach of competition law and order damages.

5.3.7 Rules applicable to the enforcement of court judgments

Enforcement of the court judgments is regulated by the Civil Procedure Code in Articles 758 – 1095¹.

Execution proceedings are conducted before district courts and bailiffs. They are initiated on the basis of a writ of execution. Writ of execution is an enforcement title, which is *inter alia*, a judgment of the court (ruling on private enforcement), with an enforcement clause. The enforcement clause is awarded by the court on the creditor's motion.

The writ of execution entitles a bailiff to commence the execution of the judgment.

5.4 Alternative dispute resolution mechanisms

The Polish Civil Procedure Code in Articles 183[1] – 183[15] regulates the institution of mediation. The provisions stipulates, *inter alia*, that mediation is voluntary and confidential, conducted by an impartial mediator and can be instituted either on the basis of a mediation agreement signed by the parties or of a court's decision sending the parties to mediation.

However, almost all of the competition law related disputes are resolved before Polish courts. Alternative dispute resolution (“ADR”) methods are used only in a small fraction of all commercial disputes in Poland. However growing interest in ADR, especially arbitration, is noticeable among entrepreneurs. There are no specific mechanisms for competition matters. The majority of competition law related disputes conducted before ADR bodies concern private law provisions on combating unfair competition.

The most popular arbitration bodies dealing with commercial disputes in Poland are:

- Court of Arbitration at the Polish Chamber of Commerce in Warsaw;¹²¹⁶
- Court of Arbitration at the Polish Confederation Lewiatan¹²¹⁷.

6 Contextual Information

This Section presents contextual information on the judicial system in Poland.

6.1 Duration and cost of competition law cases

In private enforcement cases, the general rule in commercial proceedings applies as to the court costs: 5 % of the value of the object of the litigation, but no less than PLN 30 and no more than PLN 100 000 (approx. EUR 24 000). In class action it is 2%.

As regards judicial review the court cost of the appeal from the President's decision is PLN 1000 (approx. EU 240). Therefore judicial review is generally less expensive than follow-on actions.

¹²¹⁶ <http://www.sakig.pl>

¹²¹⁷ <http://www.sadarbitrazowy.org.pl/en/>

Additional costs may occur in the course of the proceedings, for example if an opinion of an expert witness or a complex economic analysis has been ordered. The court indicates in the judgment the total amount of the costs of the proceedings that generally have to be satisfied by the losing party. These costs include the costs of legal representation calculated on the basis of the minimum rates defined in the Minister of Justice's regulation. However these amounts are diametrically lower than the actual legal representation costs incurred by the parties.

The total costs of the proceedings differ significantly depending on various factors, especially the rate applied by the acting law firm which is connected *inter alia* with the complexity of the case.

Average duration of the commercial cases in Poland amounts to approximately more than one year in first instance, depending on the place of the proceedings (in Warsaw it can be even 2 years). Average duration of the proceedings in all instances amounts to 3 -5 years (5 in Warsaw).¹²¹⁸

6.2 Influencing Factors

No specific factors which influence the application of competition law rules in Poland were identified.

6.3 Obstacles/Barriers

In private enforcement cases some of the barriers are the long duration of the cases, a complicated subject matter, the availability and costs of evidence, problems with determining the amount of incurred loss and lack of information.

¹²¹⁸ Urząd Ochrony Konkurencji i Konsumentów, "Biuletyn: Prawo konkurencji na co dzień, Naruszenie prawa konkurencji a możliwość dochodzenia roszczeń przez konsumentów", no 6, 2007

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COUNTRY FACTSHEET - PORTUGAL

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Abbreviations used

ANACOM	National Authority for Communications
CPC	Civil Procedural Code
CRSC	Competition Regulatory and Supervisory Court
DGCC	Directorate General for Commerce and Competition
ECJ	European Court of Justice
ECN	European Competition Network
ERSE	Energy Services Regulatory Authority
EU	European Union
GRAO	General Regime of Administrative Offences
NCA	National Competition Authority
NCAs	National Competition Authorities
PCA	Portuguese Competition Authority
SGEI	Services of General Economic Interest
SRAs	Sector-specific Regulatory Authorities
TFEU	Treaty on the Functioning of the European Union

1 Overview of the National Legal Framework

The national legal system of the Portuguese Republic (hereinafter “Portugal”) falls under the Civil Law tradition. It is clearly influenced by German laws, especially regarding criminal and civil legislation, and also by the French national legal system with relation to civil and administrative legislation and the political structure of the State. It can be described as a hierarchical system where the fundamental law is the Constitution. The other main sources of law are: Laws (approved by the Parliament), Decree-laws (which depend on the Government’s initiative, but in many occasions also on the authorisation of the Parliament) and Regulations.

The current Constitution of Portugal was adopted on 2 April 1976.¹²¹⁹ The Constitution is a written Constitution, composed of 296 articles. It includes an extensive catalogue of fundamental rights and provides the principles governing the political balance of powers between the parliament, the executive and the judiciary. The political system is of a mixed nature, with powers divided between the parliament and the president¹²²⁰, and can be defined as a particular (moderate) form of the semi-presidential system.¹²²¹ The Constitution also provides a section dedicated to the organisation of the economy stating that it is a primary duty of the state “to ensure the efficient operation of the markets, in such a way as to guarantee a balanced competition between businesses, counter monopolistic forms of organisation and repress abuses of dominant positions and other practises that are harmful to the general interest”¹²²².

As regards the Administration of Justice, the Constitution guarantees the independence of the Courts and ensures the autonomy of the Public Prosecutor’s Office. The organisation of the judiciary is provided in the text of the Constitution and also in the Law 3/99, of 13 January - Law on the Organisation and Functioning of the Judicial Courts¹²²³ (*Lei 3/99 de 13 de Janeiro - Lei de Organização e Funcionamento dos Tribunais Judiciais*¹²²⁴) and Law n° 63/2013, 26 of August – Law on The Organization of the Judiciary System (*Lei n° 62/2013 de 26 de Agosto – Lei da Organização do Sistema Judiciário*¹²²⁵). The Portuguese judicial system includes judicial courts and administrative courts, both falling within the appellate jurisdictions of two supreme courts: respectively, the Supreme Court of Justice and the Administrative Supreme Court¹²²⁶. This fundamental distinction is without prejudice to the Constitutional Court’s own jurisdiction, which is defined *ratione materiae*, only ruling on issues related to the constitutionality of the rules. As regards the hierarchy of the judicial courts, it comprises of three levels: the courts of first instance, the second instance courts - *Tribunais de Relação* (as a rule, the courts of appeal) - and, at the highest level, the Supreme Court (*Supremo Tribunal de Justiça*)¹²²⁷. There is also a network of Peace Courts, which deal mainly with cases of small economic value (civil patrimonial issues but also indemnity cases arising from some criminal complaints), from a dispute resolution and social peace standpoint. Their decisions are enforced by the first instance courts.

¹²¹⁹ The original text is available at <http://www.parlamento.pt/Parlamento/Documents/CRP1976.pdf> . The English version of the text currently in force is available at http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf .

¹²²⁰ For further developments, see JJ Gomes Canotilho, *Direito Constitucional e Teoria da Constituição*, 1998 Almedina, and also, JJ Gomes Canotilho/Vital Moreira, *Os poderes do Presidente da República*, 1991 Coimbra Editora.

¹²²¹ According to M. Duverger’s typology.

¹²²² Article 81 f).

¹²²³ Available at <http://www.dre.pt/pdf1s/1999/01/010A00/02080227.pdf> .

¹²²⁴ See also Law n.º 52/2008, 28 of August, applicable to a limited number of judicial districts and available at https://www.csm.org.pt/ficheiros/legislacao/lei08_052.pdf .

¹²²⁵ Available at <http://www.dre.pt/pdf1s/2013/08/16300/0511405145.pdf>

¹²²⁶ FRA, http://fra.europa.eu/sites/default/files/fra_uploads/1541-access-to-justice-2011-country-PT.pdf

¹²²⁷ European e-Justice: https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-pt-en.do?member=1 . For further details, see, for instance, the study available at: <http://www.dgpi.mj.pt/sections/english-version/strategic-planning/annexes/the-portuguese-judicial/the-portuguese-judicial2566/> .

2 National Legislation establishing competition law rules

This section provides an overview of national legislation establishing competition law rules. Table 2.1 presents a list of relevant competition law instruments in Portugal.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
Law n ^o 19/2012, of 8 May, New Competition Act ¹²²⁸ (<i>Lei n^o 19/2012, de 8 de Maio, Novo Regime Jurídico da Concorrência</i> ¹²²⁹) (22 March, 2012, entry into force 7 July 2012
Law n ^o 18/2003, of 11 June, Competition Act (<i>Lei n^o 18/2003, de 11 de Junho, Regime Jurídico</i> ¹²³⁰ <i>da Concorrência</i>)	10 April, 2003 entry into force 16 June 2003

2.1 General legislation

The principal source of national legislation currently in force for the enforcement of competition law rules is the new Competition Act - Law n^o 19/2012, of 8 May (hereafter also mentioned as the 2012 Act) that was adopted by the Portuguese Parliament on 22 March 2012 and entered into force on 7 July 2012. Formerly the competition law regime derived essentially from Law n^o 18/2003 of 11 June, which had been adopted following the modernisation process undertaken by the European Commission at the European level. The new Competition Act also abrogated Law n^o 39/2006 of 25 August (*Lei n^o39/2006, de 25 de Agosto*), which regulated, in a separate instrument, the special Leniency programme (now included in Chapter VIII of the 2012 Act: *Immunity from fines or reduction of fines in cartel cases*).

The new Competition Act establishes the general competition regime covering anticompetitive practices, abuses of dominant position and merger control. It provides for the enforcement of both national and European competition law provisions (namely Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereafter 'TFEU')).

According to Article 2, it applies to all economic activities, whether permanent or occasional, in the private, public and cooperative sectors, covering prohibited practices and concentrations of undertakings "*on Portuguese territory or whenever these practices have or may have an effect there*". Hence, concerning the question of extraterritoriality, the wording of this article supports the application of national competition rules to foreign undertakings whose acts or behaviour are formed and/or implemented on Portuguese territory, following the reasoning of the European Court of Justice (ECJ) in cases *Dyestuffs* and *Wood Pulp*¹²³¹.

Article 3 provides the notion of undertaking, defined as "*any entity that has an economic activity comprising the supply of goods or services in a specific market, irrespective of its legal status or means of financing*". It also states that "*a group of undertakings is deemed to be a single undertaking, even if the undertakings themselves are legally separate entities*" provided that such undertakings make up an economic unit or maintain certain interdependence ties.

Prohibited practices are provided for in Chapter II. The wording of these provisions is very similar to Articles 101 and 102 TFEU. Article 9 prohibits agreements, concerted practices and decisions by associations of undertakings which have as their object or effect the prevention, distortion or restriction of competition in the domestic market, in whole or in part, and to a considerable extent. The abuse of a dominant position is prohibited in Article 11.

¹²²⁸ Available at http://www.concorrencia.pt/vEN/News_Events/Noticias/Documents/Lei19_2012_En.pdf

¹²²⁹ Available at http://www.concorrencia.pt/vPT/A_AdC/legislacao/Documents/Nacional/Lei_19_2012-Lei_da_Concorrencia.pdf

¹²³⁰ Available at <http://www.dre.pt/pdf1s/2003/06/134A00/34503461.pdf>

¹²³¹ See, for instance, the opinion of José da Cruz Vilaça and José Gomes in *Lei da Concorrência, Comentário Conimbricense*, Almedina 2013, pages 31 and 32.

Both articles provide examples of the infringements, similarly to Articles 101 and 102 TFEU. In addition, any restrictive agreement under Article 9 may be exempt if it respects the conditions for justification provided for in Article 10, again, mirroring the criteria of Article 101 (3) of The Treaty. Thus, article 10 establishes that agreements, concerted practices or decisions by associations of undertakings “*may be considered justified, should they thereby contribute to improving production or distribution of goods or services or to promoting technical or economic progress if cumulatively they: a) Allow the users of these goods or services an equitable part of the resulting benefit; b) Do not impose on the undertakings concerned any restrictions which are not indispensable to the attainment of these objectives; c) Do not afford such undertakings the possibility of eliminating competition from a substantial part of the market for the goods or services at issue.*”. Article 10 also provides that the mentioned prohibited practices may be considered justified “*where, although they do not affect trade between Member States, they do fulfil all other requirements for application of a regulation adopted in accordance with the provisions of article 101 (3) of the Treaty on the Functioning of the European Union*”.

The 2012 Act also prohibits (in Article 12) the abuse of economic dependence, intended to prevent the possibility of one or more undertakings abusing the economic dependence of a supplier or customer that has no equivalent alternative, to the extent that such a practice affects the way the market or competition operate.

The New Competition Act also contains a more comprehensive regime regulating the **administrative offence proceedings regarding prohibited practices**. Indeed Section II of Chapter II governs a vast set of procedural issues, among others: time limits, requests of information, initiation of investigation, powers of inquiry, search (including of private premises) and seizure, settlement proceedings, prosecution proceedings, oral hearings, evidence, publicity and secrecy. However, where no special provision of the 2012 Act is applicable, the provisions of the General Regime of Administrative Offences (GRAO)¹²³² shall apply in a subsidiary manner. Finally, where the application of the GRAO provisions proves to be insufficient, criminal procedural provisions may also apply in a subsidiary manner, according to article 41 of the GRAO. However it should be emphasised that this scenario became less likely after the approval of the 2012 Act in the light of the mentioned completeness of its administrative offences proceedings regime¹²³³.

The Judicial review procedural regime is provided for in Chapter IX of the 2012 Act. Here, again, the law states that subsidiary provisions of the GRAO shall apply where no specific provisions exist in the 2012 Act regulating issues related to the lodging, processing and court hearings of appeals. Ultimately, this renders possible the application of procedural criminal law provisions also in this ambit as GRAO defines it as its subsidiary regime (this is further described below).

As regards private enforcement of competition law, the same general rules of Portuguese civil law (covering liability in tort and contractual liability) and civil procedural law are applicable to stand-alone and to follow-on actions. This is further described in Section 5 below.

2.2 Industry-specific legislation

As stated above, the Competition Act applies to all economic activities, across all sectors of the economy. Even those undertakings entrusted with the management of services of general economic interest (hereafter ‘SGEI’) and legal monopolies are subject to its provisions, “to the extent that its enforcement does not create an obstacle to the fulfilment of

¹²³² *Regime Geral do Ilícito de Mera Ordenação Social, aprovado pelo Decreto-Lei nº 433/82, de 27 de Outubro* (General Regime of Administrative Offences, approved in Decree Law nº 433/82 of 27 October)

¹²³³ Mirroring the aim of simplifying the law, “*separating clearly the rules on competition enforcement procedures from the rules on penal procedures with a view to ensure effective enforcement of competition law*”, as expressed in the Memorandum of Understanding on Specific Economic Policy Conditionality for Portugal, available at http://economico.sapo.pt/public/uploads/memorandotroika_04-05-2011.pdf.

their specific mission” (Article 4). The Portuguese Competition Authority (hereafter PCA) has the competence to enforce competition law rules across any sector¹²³⁴.

However, Article 5 of the 2012 Act establishes a principle of mutual cooperation between the PCA and the Sector-specific Regulatory Authorities (hereafter SRAs) with relation to the application of competition law to industries subject to specific legislation. The New Competition Act does not provide for any legal definition of what should be understood by Regulatory Authority, though the Statute of the Competition Authority enumerates a list of public bodies¹²³⁵. Two entities should be highlighted in this context, especially taking into account the nature of their Statutes and the scope of their regulatory and enforcement powers: the Regulatory Authority for Communications (ANACOM)¹²³⁶ and the Energy Services Regulatory Authority (ERSE).

Communications

Law n° 5/2004 of 10 February (*Lei n° 5/2004 de 10 de Fevereiro*)¹²³⁷ is the specific legal instrument for the Electronic Communications sector. In accordance with Article 5, the ANACOM is charged with promoting competition in the provision of electronic communications networks, electronic communications services and associated facilities and services, also contributing to the development of the Internal Market of the EU.

Energy

Energy markets (the electricity and gas sectors) are regulated through a number of distinct legal instruments many of which implement European Directives. Decree-Law n° 212/2012 of 25 September (*Decreto Lei n° 212/2012, de 25 de Setembro*)¹²³⁸ contains the Statute of the Energy Services Regulatory Authority. Law n° 9/2013 of 28 January (*Lei n° 9/2013, de 28 de Janeiro*)¹²³⁹ approved the new enforcement rules for the Energy Sector, featuring some remarkable similarities with the Competition Act regime.

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in Portugal, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Portuguese Competition Authority

The Portuguese Competition Authority (hereafter PCA) was created in 2003, by Decree Law n° 10/2003 of 18 January¹²⁴⁰ (*Decreto Lei n° 10/2003 de 18 de Janeiro*), which approved its Statutes. According to its Statutes and also to the 2012 Act provisions, the PCA is a public entity, with statutory independence, entrusted with regulatory, supervisory and disciplinary powers (Article 7 of the Statutes and Article 5 of the 2012 Act) in order to ensure compliance with national and European competition rules in Portugal. Moreover it has regulatory powers on competition across all sectors of the economy, including the regulated sectors.

Therefore, under the current legal framework, the PCA is competent to identify and investigate prohibited practices with a negative effect on free competition, on the grounds of

¹²³⁴ <http://www.concorrenca.pt/vPT/Paginas/HomeAdC.aspx>

¹²³⁵ Yet very different in nature, independence and in terms of their economic regulation powers.

¹²³⁶ Statutes available in english at <http://www.anacom.pt/render.jsp?contentId=974442>

¹²³⁷ Establishes the legal regime applicable to electronic communications networks and services and to associated services, and defines the assignments of the national regulatory authority in this field, in respect of the transposition of Directives nos 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC, all of the European Parliament and of the Council of 7 March 2002, and of Directive 2002/77/EC of the Council of 16 September. Available in English at <http://www.anacom.pt/render.jsp?contentId=975162>.

¹²³⁸ Available at: http://www.erse.pt/pt/aerse/Documents/DL%20212_2012.pdf. Amends the Statute of the Energy Services Regulatory Authority in respect of the transposition of the directives 2009/72/EC and 2009/73/EC of the European Parliament and of the Council of 13 July 2009, concerning common rules for the internal market in natural gas.

¹²³⁹ Also in respect of the complete transposition of directives 2009/72/EC and 2009/73/EC of the European Parliament and of the Council of 13 July 2009. Text available at <https://dre.pt/pdf1sdip/2013/01/01900/0052300537.pdf>

¹²⁴⁰ Available at http://www.concorrenca.pt/SiteCollectionDocuments/AdC/Lei_organica_DL10-2003.pdf

the violation of national and EU provisions. It is also competent to issue recommendations on restrictive practices, propose laws to the competent institutions and approve regulations in order to enforce compliance for competition rules. Besides the PCA decides on anti-trust cases (imposing sanctions and / or preventive measures) and on notifications of mergers and acquisitions.

3.2 The reform of the Competition Authority

Before the establishment of the current Competition Authority, the enforcement of competition law rules in Portugal was shared by two distinct bodies: the Council of Competition (*Conselho da Concorrência*) and the Directorate General for Commerce and Competition (*Direcção Geral do Comércio e Concorrência*, hereafter DGCC). DGCC was competent to conduct merger control proceedings although the Council of Competition could issue opinions and final decisions were taken by the Minister responsible for competition policy.¹²⁴¹

In order to make the regulation of competition law rules more effective, this two-body structure was abolished, the Council of Competition was formally dissolved and the competences formerly belonging to the DGCC were entrusted to a new public institution gathering supervisory, investigative and sanctioning powers, enjoying statutory independence from the government¹²⁴² and financial and administrative autonomy. This legal reform was part of a wider process of legal modernisation and was followed by the approval of other pieces of legislation containing a new substantive and procedural regime of competition law, more harmonised with the existent European legislation¹²⁴³.

3.3 Composition and decision-making.

According to its Statutes, the organs of the Competition Authority are the Board and the Single Auditor (Article 10).

The Board is responsible for conducting Competition Authority services and is responsible for the enforcement of the competition law regime for the promotion and defence of competition (Article 11). The Board is chaired by the president of the PCA and has three to five members,¹²⁴⁴ appointed by means of a resolution of the Cabinet of Ministers, upon proposal of the Economy Minister, after hearing the Finance and Justice Ministers. Currently the Board consists of three members.

The Sole Auditor is responsible for controlling the legality and economy of the Competition Authority's financial and asset management. The officer is appointed from among registered statutory auditors or statutory audit firms by joint decision of the Ministers of Finance and Economy.

3.4 Cooperation with other entities

According to Article 6 of Decree Law 10/2003 18 of January and Article 5 of the 2012 Act, the sector-specific regulators and the PCA shall cooperate in the enforcement of competition law, under the terms of the law, and can enter into bilateral or multilateral protocols for such a purpose. The terms of this cooperation are further described in Articles 34 and 35 of the 2012 Act. In particular, when applying interim measures in the context of a market subject to sector-specific regulation, the PCA shall request the opinion of the regulator concerned. In addition, whenever the PCA is aware of prohibited practices falling in the scope of or having an effect on a regulated market, it shall inform immediately the Regulatory Authority so as to allow this authority to issue an opinion. Conversely, regulatory agencies shall inform the PCA when they become aware of a possible infringement of the Competition Act. Furthermore,

¹²⁴¹ For further developments see, for instance, the 2003 OECD report available at <http://www.oecd.org/portugal/34720984.pdf>

¹²⁴² Yet, regarding merger control, Law 10/2003 of 18 January, still provided, in article 34, the possibility of bringing an "extraordinary appeal" to the Minister responsible for competition policy, against merger prohibition decisions taken by the PCA which could jeopardise fundamental interests of the economy.

¹²⁴³ Above all the competition act approved by Law n° 18/2003, of 11 June.

¹²⁴⁴ The number of members appointed is a political decision taken by the Cabinet of Ministers

before taking a final decision¹²⁴⁵ they shall inform the PCA of the draft decision. In those cases the PCA is empowered to either suspend the decision to initiate prosecution proceedings or to pursue the matter, within an adequate time limit.

In the light of Regulation No. 1/2003 and the subsequent decentralisation process in the enforcement of EU competition law provisions, the PCA works in close cooperation with the European Commission and other NCAs in the ambit of the European Competition Network (hereafter ECN).

It is worth recalling that pursuant to Regulation No. 1/2003, NCAs are relieved of their competence to apply Article 101 or 102 TFEU if the European Commission has initiated proceedings for the adoption of a decision. If they had already been acting on a case, however, the European Commission shall only initiate proceedings after consultation with the relevant NCA.

Beyond the cooperation within the ECN, the PCA is a member of the European Competition Authorities Association. The PCA also cooperates bilaterally with other European competition agencies.

3.5 Investigations

As regards investigation powers and procedures it is worth noting that a key aspect of the new Portuguese Competition Act is the adoption, in its Article 7, of what the doctrine has been calling the principle of opportunity. Contrary to the rule under the previous competition regime, this principle means that since the approval of the New Competition Act, in 2012, the Competition Authority, *guided by the criterion of public interest* may define priorities in the handling of cases, having the power to choose which cases to pursue. In particular, when making that judgment, the PCA will consider *the priorities in competition policy* (published annually in its website) *and the elements of fact and of law brought by the parties to the file, as well as the seriousness of the alleged infringement, the likelihood of being able to prove its existence and the extent of investigation required* in each case.

According to Article 17 of the 2012 Act, investigations are initiated *ex officio* or following a complaint. Any natural or legal person may denounce a prohibited practice by filling in the form available on the PCA's Internet site. Following a preliminary investigation into the complaint, the Board may (after the complainant presents his observations) decide to close the file or to continue its investigation. The complainant may appeal the decision that closes the file to the Specialised Competition Court.

At any event, whether the PCA finds that there are sufficient grounds to initiate proceedings, the investigation comprehends two separate stages. During the first stage, the PCA collects evidence and undertakes inquiries needed to determine the existence of the infringement and to identify those involved. The PCA has powers of inquiry, search (including search of private premises) and seizure. This phase ends (within 18 months) with a decision to initiate prosecution proceedings against the party concerned (who will, then, be notified of the statement of objections) or, on the contrary, with a decision that closes the case: either with the imposition of a sanction following a settlement procedure, the imposition of conditions, or with a decision that closes the file based on the lack of sufficient elements of evidence.

During the second phase (the prosecution proceedings) the party concerned is given the opportunity to present a written reply and may involve the collection of complementary evidence and an oral hearing.

In accordance with Article 34 of the 2012 Act, the PCA is entitled to issue **interim measures** at any point in the proceedings, in order to suspend practices thought to be on the point of doing serious and irreparable harm to competition. Normally the parties concerned will be heard before the adoption of these temporary measures.

¹²⁴⁵ A final decision on regulatory matters though in the context of cases that may also involve the infringement of competition law provisions.

With relation to **evidence**, the 2012 Act states that any evidence not prohibited by law is admissible and shall be analysed in accordance with the rules of experience. Even confidential information, for reasons of business secret, may be used as evidence by the Authority. Article 31 n° 5 has generated considerable controversy as it allows the PCA to use as evidence in proceedings in progress or to be initiated, information collected in the course of previous proceedings (provided that the undertakings were duly informed of that possibility when targeted with requests of information).

As regards **publicity**, in principle, all cases must be public. Yet, the PCA can decide that it shall remain subject to secrecy until the final decision, in order to protect the course of the investigation or the rights of the parties concerned. Exceptionally, regarding proceedings subject to secrecy, the PCA can also refuse access to file to the party concerned until the notification of the statement of objections.

3.6 Decision-making

At the end of the prosecution proceedings the PCA will render a final decision which may:

- close the case by imposing conditions;
- impose a sanction in the context of settlement proceedings;
- close the case without any conditions or sanctions being imposed;
- declare the existence of a prohibited practice in which case¹²⁴⁶ the decision may be accompanied by an admonition, the imposition of sanctions (including fines, accessory sanctions and periodic penalty payments) or the imposition of behavioural and structural measures (the latter as *ultima ratio*).

With respect to anti-competitive agreements that do not affect trade between Member States, the PCA may consider them justified if they respect all other requirements for application of a regulation adopted under Article 101(3) TFEU. Yet, the Competition Authority has the right to withdraw this benefit if it considers that the prohibited practice in question produces effects incompatible with the said requirements.

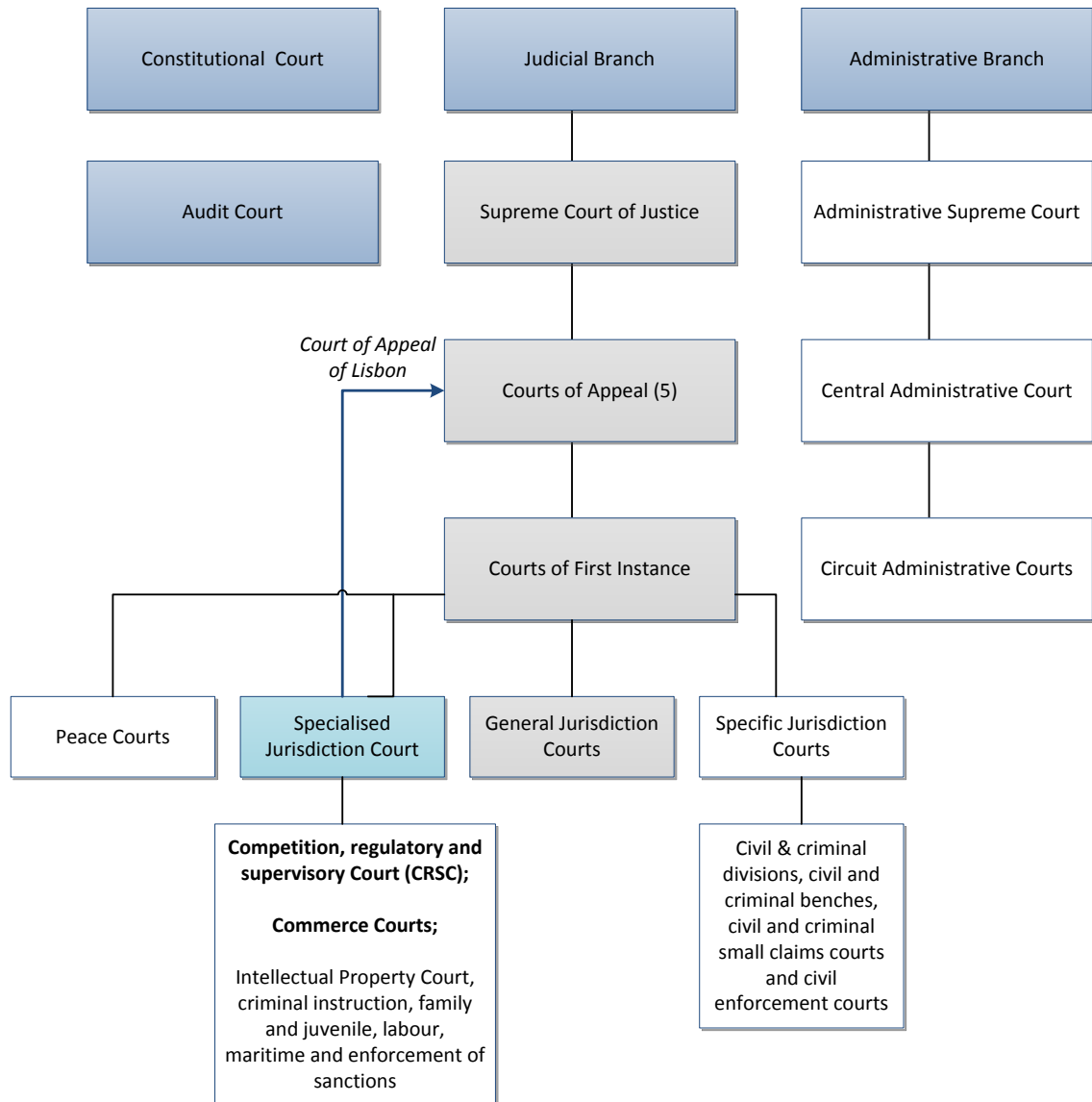
Penalties may be applied not only to undertakings but also to individuals: either members of the board of the company or other persons in charge of management or supervision responsibilities, provided that they knew or should have been aware of the infringement.

¹²⁴⁶ Unless the prohibited practice at stake is justified according to the criteria set out in Article 10 CA or to the requirements derived from a regulation adopted under Article 101 (3) TFEU.

4 Competent courts

This Section presents the courts competent in Portugal for competition law matters. Figure 4.1 provides an overview of the court system in Portugal

Figure 4.1 Court system in Portugal



Source: Expert's own

It should be noted that all relevant cases for the purposes of this field study fall under what is described as the Judicial Branch of the system. However, while follow-on actions follow the same procedure as any other civil proceeding in Portugal (from the first instance court to the Supreme Court of Justice), the judicial review of public enforcement decisions is committed to a specialised court for competition matters and, on appeal, to the Court of Appeal of Lisbon which shall be the court of last instance.

All courts in Portugal may in principle be called to address a case involving the application of European law provisions. Where applicable, national courts will make use of the reference for a preliminary ruling as provided for in the Treaty.

The system also comprehends the Constitutional Court, the Audit Court, the arbitration tribunals and the so called peace courts.

4.1 Competent courts for judicial review of the NCA's decisions

As regards judicial review of the PCA decisions, there is a specialised court in Portugal competent to deal with competition, regulatory and supervisory issues. As stated in Article 84 of the 2012 Act, the **Competition, Regulation and Supervision Court** (hereafter CRSC) handles all the appeals against the decisions by the Competition Authority. This court was established in 2012 by Decree-Law n° 67/2012 20 of March¹²⁴⁷, and is geographically located in Santarém, a village close to Lisbon. CRSC's jurisdiction covers the whole national territory. The Decree-Law provides that this court shall function with two divisions. Currently the court is composed of four public prosecutors and four judges who are handling all the cases. Appeals against CRSC's rulings are handled by the competent Court of Appeal (*Tribunal da Relação*), which is the **Court of Appeal of Lisbon**, according to Law n° 62/2013, 26 of August¹²⁴⁸ (Article 188 n° 5). When the Court of Appeal of Lisbon decides over a public enforcement case it rules only on matter of law and shall be the court of last instance.

Before the establishment of the CRSC, the appeals against the decisions issued by the PCA were brought before the Commerce Court of Lisbon. The appeals against the Commerce Court's rulings could be brought before any of the five Courts of Appeal existing in Portugal

4.2 Private Enforcement actions

With relation to private enforcement, as explained above, no specific provisions exist. General rules of civil law (namely on contractual liability or tort liability) and civil procedural law apply (essentially the *Civil Code*¹²⁴⁹ and the *Code of Civil Procedure*¹²⁵⁰). It is a matter that concerns the civil jurisdiction. The judicial courts follow a certain jurisdictional hierarchy and divide themselves into three instances : the courts of first instance, which are, in general, the county courts; the courts of second instance, which are as a rule the Courts of Appeal (ruling on facts and law); and lastly, the Supreme Court of Justice that only rules on matter of law.¹²⁵¹

This means that any judicial **court of first instance** may be handling follow-on actions based on a PCA decision or on decisions taken by the European Commission. Appeals against first instance court's rulings will be handled by the territorially competent **Court of Appeal** (*Relação*) and at the highest level of the hierarchy a judicial review by the **Supreme Court of Justice** (located in Lisbon) may be possible, according to the **admissibility criteria**.

Indeed, apart from the previously described jurisdictional hierarchy, any appeal must respect the admissibility criteria provided for in the civil code, in particular, the criteria based on the value of the proceedings and on the value of the courts' ceilings.

Thus, as a rule, the Supreme Court of Justice only hears and determines the appeals on proceedings whose value exceeds the ceiling (*Alçada*) set for the Courts of Appeal and these decide on proceedings whose value exceeds the thresholds set for the first instance courts. The thresholds currently in force have the following values: the ceiling set for the Courts of Appeal is 30.000€ and for the first instance courts is 5.000€.

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings related to breaches of competition law rules in Portugal.

¹²⁴⁷ Available at http://www.concorrencia.pt/vPT/A_AdC/legislacao/Documents/Nacional/DL_67_2012.pdf .

¹²⁴⁸ Available at <https://dre.pt/pdf1sdip/2013/05/09000/0281202816.pdf> .

¹²⁴⁹ Approved by Decree-Law n° 47/344 of 25 November (1966) as amended.

¹²⁵⁰ Law n° 41/2013 of 26 June (The new Code of Civil Procedure) and Decree-Law n° 329-A/95 12 of December (The old Code of Civil Procedure).

¹²⁵¹ The Court is thus not considered as a Court of Third Instance.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in Portugal is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	The party concerned (natural or legal person) and, on appeal against the CRSC, also the PCA and the Prosecutor Office.	Any natural or legal person
How can an action be filed?	A two stage process applies. Undertakings may challenge the decisions of the PCA at first Instance at the CRSC. They can then appeal the decision to the Court of Appeal of Lisbon (last instance).	Through the lodgement of a civil claim, seeking the annulment of an agreement and compensation or simply claiming damages on the grounds of tort liability.
With which authorities can the action be filed?	The specialised CRSC. On appeal against the judicial ruling, the Court of Appeal of Lisbon (last instance).	Common Judicial Courts: first instance courts; on appeal the competent court of appeal and finally the Supreme Court of Justice (last instance).
Burden of proof	The burden of proof rests with the PCA and the Public Prosecutor Office ¹²⁵² .	The burden of proof rests with the applicant.

5.2 Judicial Review Proceedings

This Section presents the judicial review proceedings in Portugal for competition law cases.

5.2.1 Rules applicable to the judicial review of NCA decisions

The procedure follows the provisions of the 2012 Act. Article 87, in particular, regulates the subject of the appeal against a final decision by the PCA. The above mentioned General Regime of Administrative Offences (GRAO) is also subsidiary applicable to public enforcement proceedings (and, ultimately, criminal procedural provisions *ex vi*. Article 74 n^o 4 GRAO) as regards **judicial review procedure**. Indeed, article 83 of the 2012 Act determines that “*except where there is a different provision in the present law*” **regarding the lodging, processing and court hearings of appeals**, GRAO’s provisions shall apply in a subsidiary manner.

5.2.2 Competent Court

The Competition, Regulation and Supervisory Court (CRSC) is the competent court to deal with appeals against final decisions by the PCA, as stated in Article 88 of the 2012 Act. CRSC rulings, which rule on matter of law and facts, may be appealed to “*the competent Court of Appeal*” (Court of Appeal of Lisbon) as provided by Articles 89 of the 2012 Act and 188 n^o 5 Law n^o 62/2013, 26 August. Under these circumstances the Court of Appeal is competent to rule on matter of law, only (Article 75 n^o 1 RGCO) and is the last instance.

5.2.3 Timeframe

The lodgement of the complaint against the PCA decision must be done within a non-extendable time limit of 30 working days (Article 87 of the 2012 Act. Regarding appeals

¹²⁵² Yet, under the terms of article 10 n^o 2 of the 2012 Act, it is the responsibility of the defendant which invoke justification for agreements, concerted practices and decisions by associations of undertakings, to provide evidence that the conditions for justification established in the same article are entirely fulfilled.

brought before the Lisbon Court of Appeal the applicable time limit is of 10 days, as provided by the subsidiary provisions of the GRAO (Article 74).

5.2.4 Admissibility of Evidence

Once the appeal has been lodged, the PCA will submit, within a similar timeframe, all due documentation to the Public Prosecutor Office, containing all relevant information and may also provide evidence. The Public Prosecutor Office may join further evidence before sending the proceedings to the Judge, an act that is the equivalent of a formal Accusation.

The Court may decide, considering the evidence provided and the nature of the questions brought before the court¹²⁵³, that a hearing is not necessary, ruling by dispatch. In that case either the party concerned or the PCA and the Public Prosecutor may oppose such a decision (Article 87 n° 5 of the 2012 Act), requiring an oral hearing.

According to Article 87 of the 2012 Act, should there be a court hearing, the admissible evidence will cover all the evidence presented in the hearing (including testimonial evidence) and the evidence previously presented during the administrative phase of the proceedings.

5.2.5 Interim Measures

As regards the effects of the appeal, its **lodgement will not suspend the effects** of the challenged decision with the exception of PCA's decisions imposing structural measures. The 2012 Act, in Article 84, allows the party concerned to request for the suspension of the said effects, arguing that otherwise he would suffer from a considerable harm. Yet, the effectiveness of this request will depend on the payment of a guarantee in lieu, within the time limit set by the court.

5.2.6 Rulings of the court

As stated above the Court may issue a decision by simple dispatch without recourse to a court hearing. Should there be a hearing it shall be an oral and public hearing.

The Public Prosecutor Office depends on the agreement of the PCA to withdraw the charge.

The Competition, Regulatory and Supervisory Court enjoys **full jurisdiction** where assessing cases deriving from an appeal against a decision by the PCA which imposed a fine or a periodic penalty payment. In addition, according to Article 88 of the new Competition Act, the tribunal is entitled either to reduce or increase the amount of the penalty at stake. Hence, the new competition regime in Portugal renders possible the *Reformatio in pejus*, contrary to the principle firmly established in the ambit of the Portuguese criminal procedural law and applicable under the previous competition legal framework.

According to article 87 n° 9 of the 2012 Act the PCA can appeal against the CRSC's rulings on its own initiative.

At the Court of Appeal, judicial review proceedings follow the relevant subsidiary provisions of the GRAO (72-A to 75 and 85) and the Criminal Procedural Code. Once again, the ruling may be issued without the recourse to an oral hearing¹²⁵⁴: and this is frequent given that the Court of Appeal rules on matter of law, only. When the Court decides that there is the need for an oral hearing or at request of the parties, a public oral hearing shall take place: usually this offers the occasion for the presentation of final allegations by the lawyers representing the parties.

The Court of Appeal's jurisdiction is limited by the terms of the appeal and the principle of the prohibition of *reformatio in pejus* (article 72-A RGCO).

5.3 Follow-on Proceedings (private enforcement)

This Section presents the follow-on proceedings in Portugal for Competition Law cases.

¹²⁵³ Namely where facts are not in dispute and the discussion is focused on matters of law.

¹²⁵⁴ The ruling will then be issued in 15 days by the judges assembled "*at the conference*", (na conferência) in the terms of article 417 n° 9 of the Code of Criminal Procedure.

5.3.1 Rules applicable to follow-on procedures

General provisions of civil law and civil procedure are applicable, in particular Article 438 of the Civil Code which provides the fundamental criterion for tort liability. In order to request compensation, the claimant shall then prove that there is a casual link between one's unlawful behaviour and the damages that he suffered.

Any natural or legal person may invoke damages in order to seek compensation by lodging a complaint before a first instance judicial court (civil proceedings). On appeal the case may reach the territorially competent Court of Appeal (*Tribunal da Relação*) and in last instance the Supreme Court of Justice, depending on the fulfilment of the admissibility criteria (action's economic value).

The same procedure applies to follow on and to stand alone damages actions.

Representative claims, intended to protect the so-called *diffuse interests* are allowed by the Portuguese legal framework, though this mechanism has not been used for the purposes in analyses. It is called *Popular Action* and is ruled by Law nº 83/95 of 31 August in accordance with article 52, nº 3 of the Portuguese Constitution. Popular actions may be brought by any citizens or associations promoting the protection of the said diffuse interests, comprising public health, consumer rights, environment and cultural heritage. This mechanism features important similarities with class actions.

Collective claims are also allowed by the Civil Procedural Code, as provided for in articles 30 and 31.

5.3.2 Competent Court

The competent courts are the judicial courts of first instance. On appeal the court of Appeal (*Relação*) territorially competent will handle the case, given the fulfilment of the admissibility criteria already outlined, in particular the criteria concerning the value of the proceedings and court ceilings. The same applies to a possible subsequent appeal to the Supreme Court of Justice, which would rule the case as a court of last instance and on matters of law, only.

5.3.3 Timeframe

Follow-on actions for damages shall respect a timeframe of 3 years from the moment when the claimant became aware of his right for compensation (Article 498 of the Civil Code)¹²⁵⁵. The time limit to bring appeals against the first and the second instance decisions is of 30 days (article 638 of the Civil Procedural Code).

5.3.4 Admissibility of evidence

Again, general procedural rules as provided in the Portuguese Civil Code and Civil Procedural Code will apply. In principle all types of evidence (documentary, testimonial, expert evidence) are allowed and will be freely assessed by the Court according to his prudent conviction and experience, including, of course, the evidence provided by the original NCA decision and any judgements upholding it, supporting and easing the proof of the existence of damages. Further evidence may be allowed also on appeal (article 662 Code of Civil Procedure).

5.3.5 Interim Measures

The new Code of Civil Procedure (hereafter CPC, which entered into force in September 2013) provides for a number of interim measures that may be decided by the court once the following common criteria are fulfilled: the existence of a *fumus boni iuris* as for the right invoked by the plaintiff and for the existence of an unlawful situation; the recognition of a situation of urgency, with the risk of a substantial and irreparable harm for the plaintiff (*periculum in mora*). The CPC regulates this in Articles 362- 409. In principle, interim

¹²⁵⁵ As regards other private enforcement actions: in contractual liability cases the respective timeframe amounts to 20 years (Article 309 Civil Code). Yet, proceedings can be brought at any time to obtain the declaration of nullity of any anti-competitive agreements (Article 286).

measures do not have any influence on the substance of the case. Yet, Article 369 of the CPC allows for the so-called conversion of the interim measures proceedings into a principal action, provided that the claimant presents a formal request and the judge concludes that the facts of the case are sufficiently established.

5.3.6 Rulings of the court

Rulings are issued by the court of first instance within 30 days after the end of the court hearings which are oral and public. The Court's jurisdiction is limited by the total amount of the compensation requested by claimant.

As a result of follow-on actions damages may be granted to the claimant. Both the loss suffered and the loss profit may be claimed according to the Portuguese procedure. The amount of the indemnities granted in the context of a follow-on action shall be the necessary to place the claimant in the position he would have been into in the absence of a competition law infringement.

The final decision also rules on courts fees. The losing party pays for the procedural costs in the right proportion of its loss.

The Court of Appeal rules on matter of law and facts, and may determine the repetition of the first instance judgement in order to gather further evidence. The review procedure follows the provisions of articles 652 to 670 of the CPC and court hearings are written.

On appeals to the Supreme Court of Justice the Court rules on matter of law, only. The procedure is written but the Court may, ex officio or at request of any party, exceptionally invite the parties to present their final allegations at an oral hearing (article 681 CPC).

5.3.7 Rules applicable to the enforcement of court judgments

Specific rules regarding antitrust cases do not exist in the Portuguese legal framework. The Code of Civil Procedure provides a separate section dedicated to judicial enforcement actions (as opposed to the so-called declarative actions, for the recognition of rights and the imposition of injunctions).

Enforcement in this context may be defined as the legal action through which a citizen or a legal person calls on a court to take appropriate measures to ensure that effective reparations are made in compensation for the infringement of one of his or its rights. It can refer to the payment of a sum of money or the fulfilment of a positive or negative obligation.

Enforcement actions are handled by civil courts following a special procedure provided for in CPC. The competent court is the court of first instance in which the case was heard.

An enforcement solicitor (registered at the Chamber of Solicitors) is appointed by the applicant or by the Court in order to conduct the main tasks involved in enforcement proceedings, from notifications and publications to seizure of the debtor assets, under the supervision of the Judge. Special provisions apply to bailiffs, exempting certain types of assets (for instance debtor's assets considered essential for the domestic household, professional instruments, etc). Apart from these exceptions any debtor's assets may in principle be seized and subject to enforcement.

Decisions issued in enforcement proceedings may be appealed. Article 852 of the CPC renders applicable the same regime that applies to declarative civil actions.

5.4 Alternative dispute resolution mechanisms

In Portugal there is an Alternative Dispute Resolution Office, which is a public administration body, part of the Directorate General for Justice Policy (Ministry of Justice), in charge of promoting the creation and the functioning of the existing *arbitration centres*, the justice of the *peace courts* and *mediation systems*.

Alternative dispute resolution by means of mediation and arbitration is available in Portugal and may be used in the context of competition law litigation.

Mediation systems cover public mediation in the fields of labour, family and criminal justice but also mediation in commercial and civil matters since the entry into force of Law n° 29/2013¹²⁵⁶ of 19 of April, establishing general principles applicable to mediation and the mediation regime for civil and commercial matters¹²⁵⁷.

As regards **arbitration**, Law n° 63/2011, in force since 14 March 2012, established in Portugal a new voluntary arbitration regime¹²⁵⁸. Decree-Law n° 60/2011 of 6 May created the National Network of Arbitration Centres.

The possibility of using arbitration in the context of competition law disputes¹²⁵⁹ is a subject that has been attracting growing attention in Portugal and several commentators have written on this topic¹²⁶⁰. Further developments are expected to occur in this field in line with the common perception, among lawyers, that arbitration offers substantial advantages and may play at least a complementary role with relation to formal resolution mechanisms.

However, to the best of our knowledge, so far only in a very limited number of cases these mechanisms have been used in the context of competition law-related disputes

Apart from the above mentioned alternative methods there is also the possibility, used very often in the ambit of judicial litigation, of bilateral private settlements and the withdrawal of judicial requests, under the rules of the civil procedure.

Finally it should be noted that innovative provisions have been introduced in the New Competition Act, allowing for the conclusion of settlements between the investigated undertakings and the PCA.

6 Contextual Information

This Section provides contextual information on the judicial system in Portugal.

6.1 Duration and cost of competition law cases

No information from official statistics is available on the duration of competition law cases. Yet, with relation to private enforcement, taking into account existing aggregate statistics concerning civil proceedings, the average duration in 2012 was 29 months¹²⁶¹. With respect to judicial reviews in public enforcement cases, the recent establishment of the CRSC does not allow reliable predictions. However, formerly, the Commercial Court of Lisbon was understood as taking about two years to decide¹²⁶².

Fines imposed on undertakings in anti-trust cases cannot exceed 10% of the turnover of the year preceding the final decision of the PCA. Fines imposed on natural persons cannot exceed 10% of their annual income in the last full year when the prohibited practice occurred. When determining the amount of the fine, the PCA shall consider a number of aspects such as: the seriousness of the infringement, the nature and size of the market affected, the duration of the infringement, the advantages gained by the party concerned, and previous administrative offenses committed (according to article 69 of the 2012 Act).

¹²⁵⁶ Lei n° 29/2013 de 19 de Abril, Estabelece os princípios gerais aplicáveis à mediação realizada em Portugal, bem como os regimes jurídicos da mediação civil e comercial, dos mediadores e da mediação pública. Available at <http://arbitragem.pt/noticias/mediacao-lei-29-2013.pdf>

¹²⁵⁷ In respect of the transposition of the Directive 2008/52 EC of the European Parliament and the Council of 21 May 2008, on certain aspects of mediation in civil and commercial matters.

¹²⁵⁸ English version available at <http://arbitragem.pt/legislacao/2011-12-14--lav/lav-english.pdf>

¹²⁵⁹ JAMES BRIDGEMAN, "The Arbitrability of Competition Law Disputes", in European Business Law Review 2008

¹²⁶⁰ For example the article written by Cláudia Trabuco and Mariana Gouveia, available at

http://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/miscellaneous/A_arbitrabilidade_das_questoes_de_concorrencia_C_Trabuco_e_M_Gouveia.pdf

¹²⁶¹ http://www.dgpi.mj.pt/sections/siej_pt/destaques4485/alguns-indicadores5979/downloadFile/file/Resultados_2012_20131031.pdf?nocache=1383238256.15

¹²⁶² See for instance ICLG Publication Chapters, Portugal Chapter, Competition Litigation, 2014.

Procedural fees (court fees and court expenses) are required in all judicial actions as provided for in specific regulation. The amount to be charged will depend essentially on the criteria of the value and complexity of the case. The general rule is that the losing party in judicial proceedings must bear the costs. In case of partial conviction they are proportionally divided between the parties.

A limited number of acts undertaken by the PCA require the payment of fees, under the terms defined in Article 94 of the 2012 Act and in a regulation.

General principles on the determination of lawyers' fees derive from the Law providing the Statutes of the Portuguese Bar Association, the main criteria being: adequacy; the importance and complexity of the services provided; the intellectual creativity required by the case; the urgency of the case; how much time is spent; the responsibilities assumed; professional practices.

6.2 Influencing Factors

The changes introduced in Portuguese Competition Law through the adoption of the new Competition Act shall impact the framework of competition in the country; in particular, the adoption of the principle of opportunity by the PCA may play a significant role in terms of the improvement of its efficiency. On the other hand the changes relative to powers of investigation acquired by the PCA may also have a huge impact in the development of competition rules in the Portuguese case.

6.3 Obstacles/Barriers

Regarding *private enforcement* proceedings it seems clear that there is a low level of familiarity of judges and practitioners as regards EU Competition law rules; this may be seen as a decisive factor contributing to the (non) application of the EU law provisions. For instance, in the text of a considerable number of rulings, the direct applicability of the EU competition law provisions is still a matter for discussion. On its turn the Supreme Court of Justice has occasionally revealed some resistance to assimilate well-established notions of EU competition law¹²⁶³ such as the criterion of affectation of trade between Member States¹²⁶⁴. On the other hand, with respect to first instance courts, it should be noted that the recently created specialised Court for competition matters (CRSC) only deals with public enforcement cases. Hence, despite the recent reform of the national competition legal framework, generalist civil courts remain competent to deal with private enforcement cases.

Another possible deterring factor refers to the complexity of the economic assessments implied by cases where the application of Articles 101 and 102 TFUE is at stake. Some commentators also refer to the *interpretative dependency* of national courts *vis a vis* the European Courts¹²⁶⁵ and the European Commission as an influencing factor contributing to the judges' preference for the application of national legislation in this ambit..

Another relevant topic, related to judicial *reviews in public enforcement cases* regards the recent adoption of a principle allowing the *Reformatio in Pejus* in the decisions rendered by the CRSC. Various commentators have argued that this legal provision (Article 88 of the 2012 Act) may imply a breach of the Portuguese constitution also jeopardising the right to a fair trial¹²⁶⁶. The same line of reasoning applies to the principle of the presumption of innocence in face of the norm of Article 84 of the 2012 Act, which provides that appeals shall not suspend the effects of the decision.

¹²⁶³ For further developments see Miguel Sousa Ferro and L. Rossi in "Private Enforcement of Competition Law in Portugal", *Revista Concorrência e Regulação*, ano III, nº 10, Junho 2012.

¹²⁶⁴ Rather adopting the notion according to which the affectation of trade between Member States implies the existence of trade between undertakings established in distinct Member States.

¹²⁶⁵ An argument already mentioned in 1999 by Nuno Ruiz in an article available at <http://www.gddc.pt/atividade-editorial/pdfs-publicacoes/7778-a.pdf>. More recently, an article by Joaquim Duarte and Tânia Faria, commenting the decision rendered by the Court of Appeal of Oporto, in 12 Abril 2010, available at <http://www.uria.com/documentos/publicaciones/2592/documento/articuloUM.pdf?id=3022>.

¹²⁶⁶ See José da Cruz Vilaça /Maria João Melícias in the Commentary to the New Competition Act (Comentário Conimbricense) pages 815-820.

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- Decree-Law nº 329-A/95, 12 of December (Previous Code of Civil Procedure)
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- Law nº 60/2011, of 6 May (National Network of Arbitrations Centres)
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COUNTRY FACTSHEET - ROMANIA

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Abbreviations used

ANCOM	National Authority for Management and Regulation in Communications of Romania
EU	European Union
FTE	Full Time Equivalent
NATO	North Atlantic Treaty Organization
NCA	National Competition Authority
TFEU	Treaty on the Functioning of the European Union
TEC	Treaty establishing the European Community

1 Overview of the National Legal Framework

The national legal system in Romania is a Civil Law system, with a great part of the laws based on the French principles of law. There is a hierarchy within the Romanian legal system, with the Constitution representing the highest source of law, followed by laws and Government ordinances.

The current Romanian Constitution was adopted on 21 November 1991 and, following a national referendum, entered into force on 8 December 1991. In 2003, in view of Romania's accession to NATO and the EU, the Constitution was amended. The amended version was approved through another national referendum and entered into force on 29 October 2003.¹²⁶⁷

The Constitution is a written Constitution, composed of 156 articles. The text of the Constitution sets out the form of the state, the fundamental rights and freedoms of citizens, the main public institutions and their prerogatives. Moreover, the Constitution organises the separation of powers between the executive and the parliament, with the judiciary responsible for supervising the execution of laws.

The administration of justice is provided in Chapter VI of the Constitution, containing provisions relating to the organisation of the courts and the appointment of judges. The general principle is that court decisions are binding only with respect to the case concerned; with the exception of decisions issued by the High Court of Cassation and Justice in relation to the interpretation of certain insufficiently clear legal provisions that have effects towards everybody (*erga omnes*).

At the top of the Romanian court hierarchy is the High Court of Cassation and Justice, followed by 15 Courts of Appeal, 41 General Tribunals, 4 Specialised Tribunals and 176 Courts of First Instance. In Romania, special military courts are also organised when required. Further information on the courts' structure in Romania is provided in Section 4 below.

2 National Legislation establishing competition law rules

This Section provides an overview of national legislation establishing competition law rules. Table 2.1 contains the competition law instrument applicable in Romania.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
Law on Competition No 21/1996 (<i>Legea concurenței nr. 21/1996</i>)	10 April 1996, entry into force 1 February 1997
Emergency Ordinance No 121/2003 for the modification and completion of the Law on Competition No 21/1996 (<i>Ordonanță de urgență nr. 121/2003 pentru modificarea și completarea Legii concurenței nr. 21/1996</i>)	4 December 2003, entry into force 10 December 2003
Law on Competition No 21/1996 republished on 16 August 2005 (<i>Legea concurenței nr. 21/1996 republicată la data de 16 august 2005</i>)	16 August 2005, entry into force 19 August 2005
Emergency Ordinance No 75/2010 for the modification and completion of the Law on Competition No 21/1996 (<i>Ordonanță de urgență nr. 75/2010 privind modificarea și completarea Legii concurenței nr. 21/1996</i>)	30 June 2010, entry into force 6 July 2010
Law No 149/2011 approving the Emergency Ordinance no 75/2010 for the modification and	5 July 2011, entry into force 14 July 2011

¹²⁶⁷ Available at <http://www.cdep.ro/pls/dic/site.page?id=339>

completion of the Law on Competition No 21/1996 (*Lege nr. 149/2011 pentru aprobarea Ordonanței de urgență a Guvernului nr. 75/2010 privind modificarea și completarea Legii concurenței nr. 21/1996*)

2.1 General legislation

The Law on Competition No 21/1996 (*Legea concurenței nr. 21/1996 republicată*) (hereafter the 'Law on Competition')¹²⁶⁸ provides for the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereafter 'TFEU') and mirrors the provisions of EU Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty establishing the European Community (hereafter 'TEC') (now Articles 101 and 102 TFEU).

The Law on Competition was adopted in 1996 and entered into force the following year. Since then this piece of legislation was amended on several occasions. Thus, there was a first amendment in 2003 and the following one in 2005, when Romania was conforming its national competition provisions to the provisions of the TEC in view of its accession to the European Union, which implied the republication of the Law on Competition. Two other important amendments took place in 2010 and 2011 respectively.

As stipulated in Article 1, the purpose of this law is to protect, maintain and enhance competition on the market in view of promoting the consumers' interests. The provisions of the Law on Competition are applicable to undertakings (i.e. corporations or individuals), associations of undertakings and public bodies that engage in activities that prevent, restrict or distort competition. Undertakings as meant by the Law on Competition represent any economic operator engaged in an activity of goods or services provision on a given market, regardless of its legal status and financing, as defined in the case law of the European Union

The public body in charge with the enforcement of the applicable competition rules is the Romanian Competition Council¹²⁶⁹ (hereafter 'the Competition Council').

The Law on Competition establishes the principle of extraterritoriality. Thus, according to Article 2 (4) thereof, the Competition Council is competent to investigate and sanction all anticompetitive deeds taking place on the Romanian territory and also those that occurred outside Romanian territory provided they have an effect on the latter, even if not carried out by Romanian undertakings.

Article 5 of the Law on Competition mirrors the provisions of Article 101 TFEU and prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition within the Romanian market or a part thereof. Paragraph (2) of the same article regulates the individual exemption provided in Article 101 (3) TFEU. Thus, an agreement or concerted practice may be exempted from the application of Article 5 (1) if one can prove that such agreement or practice may 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, without imposing unnecessary restrictions or eliminating competition.

Article 6 prohibits the abuse of dominant position. The wording of this provision mirrors that of Article 102 TFEU.

There is a special provision (i.e. Article 61) within the Law on Competition regulating *follow-on* claims. Thus, the persons that suffered damages as a result of breaches of competition rules (both national and EU) have the right to bring an action based on infringement decisions issued by the Competition Council or the European Commission before the ordinary civil courts to recover such damages.

¹²⁶⁸ An unofficial updated version available at

http://www.consiliulconcurentei.ro/uploads/docs/items/id8047/legea_concurentei_nr21_consolidata.pdf

¹²⁶⁹ www.consiliulconcurentei.ro

In addition to the main piece of legislation (i.e. the Law on Competition), secondary legislation exists (i.e. guidelines and regulations) issued by the Competition Council setting out more detailed rules with regard to the application of the main competition provisions. In general the guidelines and the regulations¹²⁷⁰ issued by the Competition Council mirror the provisions of the secondary legislation and the guidelines adopted by the European Commission with regard to the application of the Treaty competition provisions.

2.2 Industry-specific legislation

In addition to the generally applicable legislation mentioned above, Romania has enacted certain competition law rules that relate to specific sectors.

2.2.1 Natural monopolies

Article 4 of the Law on Competition provides exceptions to the general principle according to which the prices of products and services are set freely based on the functioning of the supply and demand mechanism. Thus, the Public Finances Ministry may set prices in cases of natural monopolies. Furthermore, the Government has the ability to enforce a control mechanism over prices in sectors where the competition is limited as a result of a legal provision or of a monopoly. At the same time, under exceptional circumstances (e.g. economic crisis, major disequilibrium between supply and demand) the Government may enforce temporary measures aimed at combatting price increases¹²⁷¹.

2.2.2 Fair commercial practices

Law No 11/1991¹²⁷² on combatting unfair competition sets out the general principles on how undertakings should behave lawfully on the market. This instrument contains provisions relating to lawful commercial practices, poaching of clients or employees of competitors, revealing trade secrets etc. More specific provisions regarding such matters are included in Law No 158/2008¹²⁷³ regarding misleading advertising and comparative advertising that transposes Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising. Thus unfair competition practices committed through comparative advertising that may harm one's competitors are prohibited.

2.2.3 Transport

Following the entry into force of the Government Emergency Ordinance No 21/2011 regarding the organisation and the functioning of the Supervision Council¹²⁷⁴, that transposes Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, the Railway Supervision Council was established as an entity without legal personality that functions within the Competition Council. This body has the following attributions: monitors the tariffs set by the administrator of the railway infrastructure and the activity of the railway markets; assesses and adopts compulsory decisions with regards to the complaints filed by the operators who consider that they were unfairly treated by the administrator of the railway infrastructure or by the railway transport operator etc.

¹²⁷⁰ <http://www.consiliulconcurentei.ro/ro/documente-oficiale/concurenta/cadrul-legislativ/concurenta-regulamente.html>

¹²⁷¹ Article 4 of the Law on Competition does not specify the sectors where such provisions can apply.

¹²⁷² Available at <http://www.legi-internet.ro/legislatie-itc/altele/lege-privind-concurenta-neloiala.html>

¹²⁷³ Available at http://www.dreptonline.ro/legislatie/lege_publicitate_inselatoare_comparativa_158_2008.php

¹²⁷⁴ Available at: http://www.consiliulferoviar.ro/uploads/docs/legislatie/oug_21_2011.pdf

2.2.4 Communications

According to the Government Emergency Ordinance No 22/2009 establishing the National Authority for Management and Regulation in Communications of Romania (hereafter 'ANCOM')¹²⁷⁵, the Competition Council and ANCOM must collaborate in view of enforcing the provisions of the legislation regarding competition and the field of electronic communications and of postal services. This piece of legislation transposes the provisions of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in Romania, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Romanian Competition Council

The Romanian Competition Council is the authority in charge of the enforcement of competition rules in Romania. It was established through the 1996 Law on Competition and began its activities in 1997.

The Competition Council is an autonomous institution, thus it has the ability to set out its organisational structure and the attributions of its personnel, through regulations adopted by the Competition Council itself.

3.2 The reform of the Competition Council

According to Article 17 of the Law on Competition, the members of the Competition Council Plenum are independent and cannot hold other functions, except academic ones. Furthermore, they do not represent the authority that has appointed them and should act independently when taking decisions.

An important step towards this independence was taken in 2011 through the adoption of Law No 149/2011 approving the Emergency Ordinance no 75/2010 for the modification and completion of the Law on Competition No 21/1996 which changed the appointment procedure of the Competition Council Plenum members. Under the former procedure, the proposals were made by the Government after the candidates were heard by special commissions within the Parliament; now the proposals are initiated by the Competition Council Advisory Board. Nevertheless, the Government and the Parliament's special commissions still play an important role since the proposed candidates have to be heard by the latter and approved by the former.

3.3 Composition and decision-making

The alleged competition breaches are investigated by the competition inspectors that issue a Statement of Objections with the relevant findings. Afterwards, the Competition Council Plenum hears both the investigation team and the investigated undertakings and issues a decision. Such decisions may be challenged in court by the interested party.

The Competition Council Plenum is composed of seven members: the president, two vice-presidents and four competition counsellors. The members carry out their activity, deliberate and adopt decisions in plenum or in commissions. A valid quorum is reached in the Plenum if at least five of its members are present, while the commission functions in the presence of 3 members: one vice-president and two competition counsellors.

The Competition Council Plenum is competent, *inter alia*, to analyse the statement of objections and adopt a final decision, to give clearance for economic concentrations, to draft

¹²⁷⁵ Available at

http://www.ancom.org.ro/en/uploads/links_files/OUG_22_2009_ANCOM_consolidat_27_12_2011_en.pdf

annual reports, to modify its internal rules and secondary competition legislation, to issue opinions and recommendations and to draft legislative proposals regarding competition matters. Nevertheless, the Competition Council Plenum may delegate their attributions to the commissions concerning alleged infringements of competition rules and economic concentrations.

Within the Competition Council, there are several directorates such as: the Consumer Goods Directorate, the Services Directorate, the Industry and Energy Directorate, the Bids Directorate, the Research Directorate, the Litigation and Legal Affairs Directorate, the State Aid Directorate, the External Relations Directorate. Recently a Cartel Office was established as well.

In the exercise of their duties, the members of the Competition Council are assisted by competition inspectors that belong to the staff thereof; being empowered by law to conduct inspections and to investigate alleged anticompetitive deeds. Also, they may send out requests of information to undertakings. Their powers are similar to those assigned to the competition inspectors within the Directorate General for Competition and are subject to similar conditions as the ones set out in Regulation (EC) No. 1/2003.

3.4 Cooperation with other entities

Among the attributions of the Competition Council stipulated within Article 26 of the Law on Competition, it must represent Romania vis-à-vis the European Union institutions. Furthermore, the Competition Council promotes information exchange and cooperation with competent international organisations or institutions as well as with other national competition authorities.

Pursuant to Regulation No 1/2003, the Council cannot investigate a case on the basis of Articles 101 and 102 TFEU if the European Commission has initiated its own investigation.

Article 36 of the Law on Competition reiterates the provisions of Regulation No 1/2003, according to which the Competition Council may conduct inspections at the European Commission's or other national competition authorities' request.

Within Romania, the Competition Council cooperates closely with the National Authority for Consumers' Protection, the National Authority for Management and Regulation in Communications ('ANCOM') and other public bodies.

3.5 Investigations

The Competition Council has the competence to launch an investigation either *ex officio* or on the basis of a complaint lodged by an individual having a legitimate interest. Usually the investigations launched at the Competition Council's own initiative are triggered by the conclusions reached after conducting sector enquiries.

In case there are indications that a market is not working as well as it should and that breaches of competition rules might be a contributory factor, the Competition Council carries out investigations specific sectors of the economy and into types of agreements across various sectors – sector inquiries, based on orders issued by the Competition Council President. Such inquiries imply sending requests for information to undertakings and following an analysis of the information obtained, a report is issued and interested parties are invited to submit their comments and observations.

Persons that have been affected by anti-competitive deeds may lodge a complaint before the Competition Council. They can use a template for complaints and guidelines published by the Competition Council on its website¹²⁷⁶. Following a preliminary assessment regarding the complaint, the Competition Council may decide to close the file or to carry on with the investigation.

¹²⁷⁶ Available at http://www.consiliulconcurentei.ro/uploads/docs/items/id6509/formular_de_plangere.pdf

Investigations (either *ex officio* or based on a complaint) are launched through orders issued by the President of the Competition Council following a decision issued by the Competition Council Plenum. At the same time, the President of the Competition Council appoints the inspector–rapporteur in charge with drafting the Statement of Objections, sending it to the parties, receiving the observations formulated by the parties to it and presenting it before the Competition Council Plenum.

Usually, an investigation starts with an unannounced inspection conducted at the headquarters of the concerned undertakings. Based on the information gathered and on the documents seized during the dawn-raid, the inspectors may send a request for further information to the investigated undertaking or to other entities that might possess information regarding the investigation in question.

The competition inspectors have the power to interview employees of the investigated undertakings or other persons that might offer relevant information. Moreover, the competition inspectors are empowered by law to search premises such as the employees' homes and domiciles in case there are suspicions that relevant information and documents might be found there. Such means of investigation may be used only after the competent judge issues a search warrant.

The investigation finishes when a Statement of Objections, containing the object of the investigation, the facts, the applicable legal provisions and the conclusions regarding a possible breach of competition rules, is sent to the investigated parties. The undertakings have the possibility to submit observations to the Statement of Objections and to present their point of view within the hearings organised before the Competition Council Plenum. In order to preserve the confidentiality of the parties' information, the hearings are not public.

3.6 Decision-making

The Competition Council Plenum sits in formations of at least five of its members during hearings. Following the hearing, the Plenum meets to deliberate and to adopt a final decision. Such decisions shall be adopted by the simple majority of votes of the entire number of members. In other words, four out seven members of the Plenum must vote in favour of a decision, and all these four members must have been present in the hearings.

In order to speed up the procedure of adopting decisions in certain areas, the Competition Council Plenum may delegate the adoption of decisions with regards to the infringement of competition rules and economic concentration authorisations on one of the above mentioned commissions. In such cases, two out of three of the commission members must vote in favour of a decision.

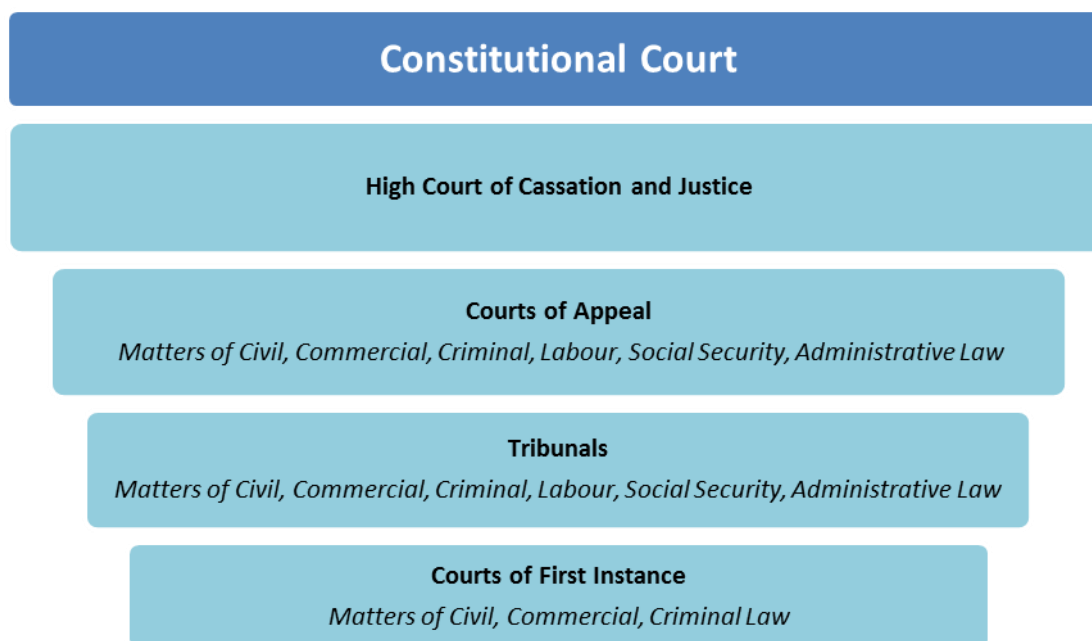
Following the hearings, the Competition Council Plenum will either decide to close the file in the absence of proof of anti-competitive practice or take action, by imposing a fine against the investigated undertakings, by requesting the undertakings to terminate the practice, with or without a financial penalty, by ordering interim measures, by accepting commitments or by formulating recommendations. The decision of the Competition Council is communicated to the parties and a confidential version thereof is published on the website.

The decisions issued by the Competition Council may be challenged in court by the interested parties. In case a fine was imposed through the decision, the interested party must demand the competent court to be granted an interim injunction in what concerns the execution of the fine.

4 Competent courts

This Section presents the competent courts in Romania. Figure 4.1 firstly provides an overview of the court system in Romania.

Figure 4.1 Court system in Romania¹²⁷⁷



The court system in Romania is centrally organised. Within the same court, specialised sections are organised according to the details given in the figure above. Such sections are competent to hear all matters relating to that specific branch of law.

With regard to the courts' competence in matters related to the application of Articles 101 and 102 TFEU, a distinction has to be made between the courts competent to hear cases relating to the judicial review of decisions issued by the Competition Council, which are the Bucharest Court of Appeal at first instance and the High Court of Cassation and Justice at second instance, and those competent to hear *follow-on* private enforcement actions, which are the general ordinary courts. These are described in turn below.

4.1 Judicial review of the Competition Council decisions

The decisions issued by the Competition Council with regard to the application of competition rules may be challenged before the Bucharest Court of Appeal within 30 days as of the date the decision is communicated to the parties. The decisions issued by the Bucharest Court of Appeal may be appealed, on law and facts, before the High Court of Cassation and Justice, whose decisions are final and irrevocable.

Even though there are no specialised courts competent to hear matters related to the application of the competition rules, within the Bucharest Court of Appeal there is a special section competent to hear cases related to the judicial review of the Competition Council decisions – Section VIII for administrative and fiscal matters. Within the High Court of Cassation and Justice (also located in Bucharest), there is a similar section – Section for administrative and fiscal matters.

Both courts have competence to hear cases related to the application of EU competition rules, as well as national competition rules.

¹²⁷⁷ The figure was drawn bearing in mind the provisions of the Romanian Constitution available at <http://www.cdep.ro/pls/dic/site.page?id=339> and of the Law No 304/2004 on the judicial organisation available at <http://www.just.ro/Sectiuni/SistemulJudiciarinRomânia/Legeaprivindorganizareajudiciarănr3042004/tabid/275/Default.aspx>.

Cases related to the judicial review of Competition Council decisions are heard by a single judge before the Bucharest Court of Appeal and by panels composed of three judges on appeal before the High Court of Cassation and Justice.

4.2 Follow-on private enforcement actions

There are no special provisions within the Law on Competition regarding which courts are competent to hear *follow-on* private actions. Therefore the competence is established bearing in mind the general provisions concerning courts' competence stipulated within the Civil Procedure Code¹²⁷⁸. Thus, depending on the value of the claimed damages, the case begins either before the Courts of First Instance, in case the claims are below Lei 200,000 (EUR 45,159), or before the Tribunals, in case the claims amount to more than Lei 200,000 (EUR 45,159).

The decisions issued by the Courts of First Instance or Tribunals in such matters may be appealed, on both facts and law, before the Upper Courts. Depending on the value of the claims, the interested parties are entitled to a two-instance process if the claims are below Lei 500,000 (EUR 112,897) or to a three-instance process if the claimed damages amount to more than Lei 500,000 (EUR 112,897).

Before the First Instance Court, the matter is heard by a single judge, while in the second instance the matter is heard by a two-judge panel and by a three-judge panel for the third instance.

The same courts are competent to hear matters concerning *follow-on* private enforcement actions deriving from infringements of both national and EU competition provisions.

According to the Civil Procedure Code, the territorial jurisdiction belongs to the local courts corresponding to the defendant's address or main place of business, or the place where the damage was caused or where the anti-competitive practice took place. The Civil Procedure Code contains a special provision with regard to alternative territorial competence in actions filed by consumers regarding damages incurred by them¹²⁷⁹. Thus, the prejudiced consumer has the possibility to file such actions also before the court corresponding to its domicile. Moreover, the Civil Procedure Code stipulates the possibility for the consumers and the undertaking responsible for the harm incurred by the former to choose the court that is to hear such matters but only after the right to damages is born¹²⁸⁰.

Council Regulation (EC) No 44/2001¹²⁸¹ is also applicable. Therefore, in such cases, claimants have the choice of bringing an action before the courts of the state where the defendants are domiciled or before the courts of the state where the harmful event occurred.

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of the court proceedings in place in Romania related to breaches of Competition Law rules, from the commencement of an investigation to the time a decision is reached.

5.1 Legal standing in judicial review and *follow-on* proceedings

The legal standing in cases of judicial review and *follow-on* cases in Romania is described in Table 5.1 below.

¹²⁷⁸ Available at http://www.just.ro/Sectiuni/PrimaPagina_MeniuDreapta/NoileCoduri/tabid/1473/Default.aspx

¹²⁷⁹ Article 113 (1) point 8 of the Civil Procedure Code

¹²⁸⁰ Article 126 (2) of the Civil Procedure Code

¹²⁸¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Any natural or legal person that may prove an interest	Any natural or legal person that suffered direct or indirect damages as a result of a breach of competition rules ¹²⁸²
How can an action be filed?	A two-instance process applies. Undertakings may challenge the Competition Council decisions at first Instance at the Bucharest Court of Appeal. The latter's decision may be appealed before the High Court of Cassation and Justice ¹²⁸³	A complaint may be filed with the ordinary civil courts ¹²⁸⁴
With which authorities can the action be filed?	The judicial review is carried out by the Bucharest Court of Appeal at first instance and by the High Court of Cassation and Justice in appeal	<i>Follow-on</i> actions may be heard by Courts of first instance if the claim does not exceed Lei 200,000 (EUR 45,159) and by Tribunals if the claim exceeds this amount. The courts competent to hear the case at second instance are the upper courts corresponding to the Courts of First Instance and Tribunals.
Burden of proof	The party challenging the decision must prove there was an error in fact and in law when the Competition Council issued the decision	The burden lays on the claimant who needs to prove that they have suffered loss as a result of the infringement previously established by the Competition Council

5.2 Judicial Review Proceedings

This Section provides an overview of the rules applicable to judicial review proceedings in Romania.

5.2.1 Rules applicable to the judicial review of NCA decisions

Article 47¹ of the Law on Competition contains a special provision according to which the decisions of the Competition Council may be challenged before the Bucharest Court of Appeal. Nevertheless, this piece of legislation does not contain all the necessary rules for conducting the entire procedure applicable to the judicial review of such decisions. Thus, the rules set out within the Law on Competition are complemented with the rules applicable to trials before administrative courts as they were established through the Law No 554 of 2 December 2004 on administrative judicial proceedings¹²⁸⁵ and through the Civil Procedure Code.

All hearings are public; nevertheless, if the court considers that the parties' interests might be harmed in any way because of this, it orders that the hearings be conducted in private. The hearings have an oral character, but the court may order the parties to provide a written version of the pleadings delivered orally.

¹²⁸² Article 61 of the Law on Competition

¹²⁸³ Article 47¹ of the Law on Competition

¹²⁸⁴ According to the rules applicable to tort claims stipulated within the Civil Code and the Civil Procedure Code

¹²⁸⁵ Available at <http://www.scj.ro/legi/Lege%20nr.%20554%20din%202004.html>

5.2.2 Competent Court

As already set out in Section 4 and in Figure 5.1, the competent court to hear matters related to judicial review of Competition Council decisions is the Bucharest Court of Appeal at first instance, and the High Court of Cassation and Justice in appeal on both law and facts.

5.2.3 Timeframe

The decisions issued by the Competition Council regarding the application of national and EU competition rules may be challenged within 30 days as of the date when the decision is communicated to the concerned party¹²⁸⁶.

Following the decision of the Bucharest Court of Appeal, the interested party may lodge an appeal against this judgment before the High Court of Cassation and Justice within 30 days as of the communication date of the decision of the first instance judgment (if the judicial review at first instance began after 15 February 2013¹²⁸⁷ or 15 days as of the same date (if the judicial review began before 15 February 2013).

5.2.4 Admissibility of Evidence

Since there are no express provisions within the Law on Competition regarding this matter, the provisions of the Civil Procedure Code will be applicable.

Thus, under the Romanian legal system, evidence is submitted by the parties in courts under strict judicial control. At the parties' request and upon approval of the competent court, experts on different areas may provide evidence in a specific case.

The evidence may be produced also by lawyers, if agreed by the parties, in a fast-track procedure; such procedure is similar to the deposition procedure used in litigation in the United States¹²⁸⁸.

As a rule, all evidence must be submitted before the facts of the case are discussed. By way of exception, evidence can also be produced before the trial begins if there is the risk of its loss or if future difficulties might arise in relation to its submission.

The Civil Procedure Code provides that written evidence legally protected by secrecy or confidentiality may not be brought before the court. Therefore, documents and information that were granted a confidential nature during the administrative procedure should also be considered as such by the court when ruling on a claim for damages.

5.2.5 Interim Measures

There are no express provisions regarding the adoption of interim measures by the courts competent to hear the judicial reviews of the decisions issued by the Competition Council. Nevertheless, one may rely on the general provisions of the Civil Procedure Code and in case after a preliminary assessment there is evidence that the alleged anti-competitive practice may cause serious and irreparable harm to competition, the court may order interim measures for a limited period of time but not later than the moment a final decision is adopted by the court.

In cases where the interested party (i.e. the party challenging the decision of the Competition Council) wants to be granted an interim relief in what concerns the execution of the fine, then it must file a demand with the competent court (i.e. the same court competent to hear the judicial review of the decision in question).

5.2.6 Rulings of the court

After reviewing the decision of the Competition Council, the competent court will uphold, annul or modify the decision in question.

¹²⁸⁶ Article 47 (1) of the Law on Competition

¹²⁸⁷ The date when the New Civil Procedure Code entered into force

¹²⁸⁸ Even though the Civil Procedure Code provides this possibility, it is not used in practice.

According to the Law on Competition, the Competition Council may impose sanctions or penalties on the investigated undertakings. The fines imposed by the Competition Council may range between 0.5% and 10% of the turnover of the undertaking in the financial year preceding the year in which the undertaking was sanctioned.

The same piece of legislation provides for the possibility to criminally prosecute natural persons that were involved in anti-competitive agreements¹²⁸⁹. Thus, natural persons that have been involved, following active consideration and in bad faith, in anticompetitive practices prohibited by Article 5 of the Law on Competition¹²⁹⁰ may be fined or imprisoned for a period of 6 months to 3 years¹²⁹¹.

The court competent to assess the judicial review is entitled to uphold the decision as it is, to modify it in what concerns the infringements, to modify the fine by increasing/diminishing the amount thereof imposed by the Competition Council or to entirely annul the decision.

5.3 Follow-on Proceedings (private enforcement)

This Section provides an overview of follow-on proceedings in Romania.

5.3.1 Rules applicable to *follow-on* procedures

As stipulated above, *follow-on* actions shall be considered under the rules applicable to tort actions provided for within the Civil Code and the Civil Procedure Code.

The principles applicable to such actions are set out within Chapter IV – Civil Liability of the Civil Code. Thus:

- (i) any person responsible for an anti-competitive practice that caused damage to another person has the obligation to repair the damage;
- (ii) in case the damage was caused by more than one person, they will be held jointly liable;
- (iii) the losses caused by the infringement are to be recovered in full; including both the effective loss (*damnum emergens*), lost profits (*lucrum cessans*) and the expenses incurred for avoiding or limiting the prejudice.

The same chapter of the Civil Code provides the conditions that must be fulfilled in order for the victim to be compensated for the damage:

- (i) occurrence of an anti-competitive deed;
- (ii) the defendant's fault, regardless of its form (negligence, wilfulness);
- (iii) the existence of the damage caused to the claimant;
- (iv) causality link between the infringement and the damage caused to the claimant.

There is a special provision¹²⁹² within the Law on Competition that stipulates the right of specific bodies (i.e. registered consumer protection associations and professional or employers' associations having these powers within their statutes or being mandated in this respect by their members) to bring representative damages actions on behalf of consumers.

All hearings are public; nevertheless, if the court considers that the parties' interests might be harmed in any way because of this, it orders that the hearings be conducted in private. The hearings have an oral character, but the court may order the parties to provide a written version of the pleadings delivered orally.

¹²⁸⁹ Article 60 of the Law on Competition

¹²⁹⁰ Please refer above to Section 2.1 – General legislation.

¹²⁹¹ There was criminal prosecution case, but no sanctions were imposed.

¹²⁹² Article 61 (5) of the Law on Competition

5.3.2 Competent Court

Since there are no special provisions within the Law on Competition regarding the courts' competence to hear follow-on claims, the general rules set out by the Civil Procedure Code are applicable. In case the claimed damages amount to more than Lei 200,000 (EUR 45,159), the Tribunals are competent to hear such actions at first instance, and in case the claim is lower than that, the Courts of first instance become competent.

The decisions issued by the above mentioned courts may be appealed, on facts and law, before the upper courts. Depending on the value of the claims, the interested parties are entitled to a two-instance process if the claims are below Lei 500,000 (EUR 112,897) or to a three-instance process if the claimed damages amount to more than Lei 500,000 (EUR 112,897).

5.3.3 Timeframe

Article 61 (5) of the Law on Competition establishes a special limitation period (i.e. two years as of the date the decision of the Competition Council or of the European Commission becomes final and irrevocable) to bring a *follow-on* action before the competent court in order to recover the damages incurred as a result of an anti-competitive practice.

As set out above in Section 5.3.2, the claimants have at their disposal a two-instance process or a three-instance process, depending on the value of the claim. The party that is not satisfied with the decision adopted by the court at first instance may file an appeal within 30 days as of the communication date of the decision. This decision may be reviewed by the upper court if the interested party files an action within 30 days as of the communication of the decision issued in appeal.

5.3.4 Admissibility of evidence

The *follow-on* actions are based on final and irrevocable decisions issued by the Competition Council or the European Commission.

Such decisions enjoy the *res judicata* effect, according to which there is a two-fold legal presumption: on the one hand, the undertaking having committed an anti-competitive deed is not entitled to the re-examination of the facts and, on the other, the claimant can avail itself of the findings within the final decision in what concerns the existence of the anti-competitive practice.

Nevertheless, the claimant still has to prove that it has suffered loss as a result of the infringement and that there is a causality link between such infringement and the damages incurred.

Taking into account the fact that there are no special provisions, except the ones mentioned above, in what concerns the evidence that might be produced in such cases, the general rules established in the Civil Procedure Code are applicable, as already mentioned above in Section 5.2.4.

5.3.5 Interim Measures

There are no special provisions regarding the granting of interim measures in case of private enforcement actions. Thus, the general provisions within the Civil Procedure Code become applicable in such cases. There is a special procedure: the *presiding judge's order* stipulated in Article 996 *et seq* within the Civil Procedure Code. According to this procedure, the competent court to hear a *follow-on* action may grant interim measures in case there seems to be a right of the affected party and such right might be affected if the interim measures in question are not granted.

The same court that is competent to hear the *follow-on* claim is also competent to grant a *presiding judge's order*. The most important aspect of this procedure is that the court may not pre-judge the damages claim itself; the interim measures must be limited to preserving the right of the claimant.

5.3.6 Rulings of the court

Since in Romania there is a total lack of practice in what concerns *follow-on* private enforcement actions, one may only make an assessment based on the applicable legislative provisions and on the case-law of the Court of Justice of the European Union¹²⁹³.

The Law on Competition does not contain any specific provisions on how damages caused by anti-competitive practices are to be determined. Therefore, the general rules governing tort claims provided within the Civil Code apply. The guiding principle is that the claimant having suffered damages must be compensated in a manner that brings them back to the situation prior to the infringement.

Moreover, the victim of an anti-competitive practice is entitled to obtain an indemnification provided that it proves that it has lost the opportunity to obtain an advantage or to avoid damage. In such cases the indemnification shall be established proportionally with the likelihood of obtaining the advantage or of avoiding the damage, bearing in mind the circumstances and the actual situation of the victim.

Punitive damages are not allowed under Romanian law. There is also the possibility for the victim to recover the attorneys' fees and all the fees incurred when conducting such a lawsuit (e.g. experts, travel expenses).

In order to qualify for recovery, damages must not have been already recovered (e.g. based on an insurance policy). Future damages, if certain to occur, can also give rise to compensation.

The Law on Competition includes specific provisions on passing on overcharges. According to Article 61 (2) thereof if a good or a service is purchased at an excessive price, it cannot be considered that no damage was caused due to the fact that the respective good or asset was resold.

5.3.7 Rules applicable to the enforcement of court judgments

There are no special provisions within the Law on Competition concerning the rules applicable to the enforcement of court judgments in case of *follow-on* proceedings. Therefore, the general rules contained within the Civil Procedure Code and Council Regulation (EC) No 44/2001¹²⁹⁴ are applicable in such cases.

According to the above mentioned legal provisions, in case the undertakings, that have the obligation to pay damages according to the court judgment, refuse to comply with the measures ordered by the court, then the person entitled to receive such damages may file a request with the competent judicial bailiff which, in exchange of a fee, shall recover the damages on behalf of the former.

5.4 Alternative dispute resolution mechanisms

Articles 2267-2278 of the Civil Code contain substantial provisions on Alternative Dispute Resolution (hereafter 'ADR') mechanisms, while the Civil Procedure Code contains procedural rules governing settlements before the court. Thus, the parties, at any time during the trial or prior to the trial, may agree upon the value of the damages and methods of reparation.

Also, since such claims have a patrimonial nature, they may be referred to arbitration.

Law No 192/2006¹²⁹⁵ (hereafter 'the Mediation Law'), whose latest updated version transposes Directive 2008/52/EC¹²⁹⁶, has introduced mediation as an alternative dispute

¹²⁹³ The Romanian Competition Council has repeatedly stated that the principles established by the Court of Justice of the European Union regarding private actions are applicable within Romanian jurisdiction.

¹²⁹⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

¹²⁹⁵ Law No 192/2006 regarding mediation and the mediator profession

¹²⁹⁶ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters

resolution method. Thus, the parties to a dispute may voluntarily refer their dispute (including claims for damages incurred as a result of anti-competitive practices) to mediation, including after having filed a lawsuit in court. In such cases, the parties are legally bound to prove that they have participated in a consultation regarding the mediation's advantages. The Mediation Law also applies to disputes regarding consumer protection.

6 Contextual Information

This Section provides contextual information on the judicial system in Romania related to the general efficiency of your Member State's judicial system, to factors influencing the application of competition law rules and to obstacles and barriers encountered when accessing justice.

6.1 Duration and cost of competition law cases

There are no official statistics on length or the cost of cases. Regarding the costs and bearing in mind the length of the procedure and the workload that attorneys have to put up with, such costs may amount to EUR 100,000.¹²⁹⁷

6.2 Influencing Factors

Romania joined the EU in 2007 and at that moment the Competition Council had only 10 years of experience. Therefore, the application of EU competition law rules remains quite limited even today. The fact that a great part of the business environment is dominated by multinational companies and foreign investors has influenced the activity of the Competition Council, increasing the number of investigations conducted. Nevertheless, the investigations of the Competition Council are also aimed at domestic actors.

6.3 Obstacles/Barriers

As stated above in Section 6.1, the judicial review procedure before the competent courts is quite lengthy and implies high costs. Despite these implications, in almost all the cases the parties contest the sanctioning decisions imposed by the Competition Council.

The Romanian justice system has undergone a substantial change in the past few years especially through the adoption of the new Codes¹²⁹⁸ and of new legislative acts which are aimed at smoothing the procedures before the courts. Recently a new piece of legislation – Law No 296/2013¹²⁹⁹ amending Law No 304/2004 regarding judicial organisation¹³⁰⁰ was enacted. This amendment provides for the establishment of specialised tribunals that would take over commercial and unfair competition matters, but the scope of activity of such tribunals has not been finally decided. It remains unclear whether private enforcement actions (*stand alone* and *follow-on*) will be deferred to such tribunals.

¹²⁹⁷ Estimate made by national expert based on experience as an attorney in judicial review cases.

¹²⁹⁸ In 2011, the new Civil Code entered into force, in 2013 the new Civil Procedure Code entered into force and in the following year the new Criminal and Criminal Procedure Codes are expected to enter into force.

¹²⁹⁹ Available at:

http://www.dreptonline.ro/legislatie/lege_296_2013_modificare_legea_304_2004_organizare_judiciara.php

¹³⁰⁰ Available at:

<http://www.just.ro/Sectiuni/SistemulJudiciarînRomânia/Legeaprivindorganizareajudiciarănr3042004/tabid/275/Default.aspx>

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- Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)
- EU Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 TEC (Article 101 and 102 of the TFEU)
- Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising
- Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters

National Legislation

- Romanian Constitution
- Law No 11/1991 on combatting unfair competition
- Law on Competition No 21/1996 as amended (Legea concurenței nr. 21/1996 modificata si completata)
- Law No 304/2004 regarding judicial organisation
- Law No 554/2004 on administrative judicial proceedings
- Law No 192/2006 regarding mediation and the mediator profession
- Law No 158/2008 regarding misleading advertising and comparative advertising
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- Civil Code of 2009
- Civil Procedure Code of 2010
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- Railway Supervision Council website: <http://www.consiliulferoviar.ro/ro/despre-noi.html>

COUNTRY FACTSHEET- SPAIN

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Abbreviations used

EU	European Union
TFEU	Treaty on the Functioning of the European Union
Law 6/1985	Organic Law 6/1985 of 1 July, on the Judiciary
LEC	Ley de Enjuiciamiento Civil (Law 1/2000, on Civil Procedure)
Law 29/1998	Law 29/1998, of 13 July, on the Administrative jurisdiction.
Law 15/2007	Law 15/2007, on the Defence of Competition
RD 261/2008	Royal Decree 261/2008 of 22 February 2008
Law 3/2013	Law 3/2013, which created the Markets and National Competition Commission
NCA	National Competition Authority
CNC	Comisión Nacional de la Competencia (previous NCA)
CNMC	Comisión Nacional para los Mercados y la Competencia (current NCA)

1 Overview of the National Legal Framework

The Spanish legal system is derived from the Civil Law system and follows a hierarchical structure. The (written) law enjoys primacy within the system of sources as defined in Article 1 of the Civil Code. The case law of the courts and the doctrine from the Supreme Court complement the sources of the Spanish legal system. Spain's territorial organisation rests on the so-called "Estado de las Autonomías" (State of Autonomies), a unique system conferring asymmetric competences to the different Autonomous Communities. Therefore, a scheme equivalent to a Federal Law system exists. The Spanish Constitution was adopted in 1978¹³⁰¹. The Constitution is a written Constitution, composed of 169 articles. It lays down the constitutional foundations of the State, in addition to the constitutional rights and freedoms of citizens and the organisation of the public powers. The Constitution declares that Spain is a social and democratic state subject to the rule of law, which advocates liberty, justice, equality and political pluralism as the overriding values of its legal system.

Title VI of the Constitution is given over to the judiciary and Article 117 thereof states that the principle of jurisdictional unity is the basis for the organisation and operation of the courts. The organisation of the Spanish judicial system is set up in the Organic Law 6/1985 of 1 July on the Judiciary (*Ley Orgánica del Poder Judicial*) (hereafter "Law 6/1985"). According to this law, the State is organised regionally, for judicial purposes, into municipalities, areas, provinces and Autonomous Communities. The National High Court (*Audiencia Nacional*) and the Supreme Court (*Tribunal Supremo*) have jurisdictional authority throughout the national territory.

Spain follows a system of dual instance which determines the hierarchy of the courts within a system of appeals.

2 National Legislation establishing competition law rules

This section provides an overview of national legislation establishing competition law rules. Table 2.1 presents a list of the relevant competition law instruments in Spain within the period covered by the study.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
<i>Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia</i> (Law 3/2013, of 4 June 2013, which creates the Markets and National Competition Commission)	4 June 2013, entry into force 6 June 2013
<i>Ley 15/2007, de 3 de julio, de Defensa de la Competencia</i> (Law 15/2007, of 3 July 2007, on the Defence of Competition)	3 July 2007, entry into force 1 September 2007

2.1 General legislation

Law 15/2007, on the Defence of Competition (*Ley 15/2007, de Defensa de la Competencia*) (hereafter 'Law 15/2007')¹³⁰², is structured in five titles that regulate, respectively, the (i) substantive rules on competition, (ii) the institutional aspects, (iii) the National Competition Commission, (iv) the procedural questions and (v) the sanctioning system.

In this regard, an initial caveat should be made concerning the National Competition Commission, since its structure has changed after the approval of Law 3/2013, which

¹³⁰¹ Available at: <http://www.boe.es/legislacion/enlaces/documentos/ConstitucionCASTELLANO.pdf>

¹³⁰² English version available at <http://www.cncompetencia.es/Default.aspx?TabId=81>

created the Markets and National Competition Commission (hereafter, “Law 3/2013”)¹³⁰³. Until the approval of this law, the authority in charge of the application of both national competition law (Law 15/2007) and EU Competition law (articles 101 and 102 TFEU) was the National Competition Commission (*Comisión Nacional de la Competencia*) (hereafter “CNC”).

Law 3/2013 merged this institution with the seven Spanish sector regulators (the National Energy Commission; the Telecommunication Market Commission; the National Postal Sector Commission; the National Gambling Commission; the Airport Economic Regulatory Commission; the Audio-visual Media Council; and the Railway Regulatory Committee). Therefore, the new Markets and National Competition Commission (*Comisión Nacional de los Mercados y la Competencia*) (hereafter, “CNMC”) is the competent organ for the enforcement of Spanish and EU competition rules¹³⁰⁴. Consequently, Law 3/2013 abrogates the sections of Law 15/2007 relating to the CNC. For the sake of clarity, we will refer to the National Competition Authority (hereafter “NCA”) in all future references to the authority in charge of the application of Competition rules in Spain.

It is worth noting, however, that the substantive provisions of Law 15/2007 have not been affected by the new law but only the institutional organization. This legislative framework is completed by Royal Decree 261/2008 of 22 February 2008 (*Real Decreto 261/2008, de 22 de febrero, por el que se aprueba el Reglamento de Defensa de la Competencia*) (hereafter, “RD 261/2008”)¹³⁰⁵ which approves the Regulation for the Defense of Competition. This Regulation addresses fundamental issues for the implementation of the Competition Act 15/2007 of 3 July 2007.

In this regard, Article 1 of Law 15/2007 prohibits all agreements, collective decisions or recommendations, or concerted or consciously parallel practices, which have as their object, produce or may produce the effect of prevention, restriction or distortion of competition in all or part of the national market.

Despite the fact that this provision mirrors Article 101 of the Treaty on the Functioning of the European Union (hereafter “TFEU”, there is an important difference between both, since Article 1 of Law 15/2007 includes the so called “consciously parallel practices” within the scope of the prohibition, whereas article 101 TFEU does not. A consciously parallel practice would be a prohibited conduct in respect of which there is neither an agreement nor any coordination or cooperation between the companies involved. However, as some practitioners point out, it must be noted that consciously parallel practices seem to be a rather awkward category of Spanish competition law¹³⁰⁶. Indeed, in a number of cases the NCA has not acknowledged a difference between concerted practices and consciously parallel practices, and has instead used both expressions as if they were equivalent¹³⁰⁷. Article 2 of Law 15/2007 prohibits any abuse by one or more undertakings (entities which carry out an economic activity in the market) of their dominant position in all or part of the national market. The wording of this provision mirrors that of Article 102 TFEU.

The prohibitions mentioned above shall not apply to conducts which, due to their small impact on the market, are not capable of significantly affecting competition. The following conducts shall be considered to be of minor importance¹³⁰⁸: a) Conducts between actual or potential competitors when the combined market share is no greater than 10% in any of the affected relevant markets and b) conducts between companies that are neither actual nor

¹³⁰³ Available at <http://www.boe.es/boe/dias/2013/06/05/pdfs/BOE-A-2013-5940.pdf>

¹³⁰⁴ More particularly, article 5(1)(f) of Law 3/2013 provides that the CNMC is the competent authority for the application in Spain of articles 101 and 102 TFEU.

¹³⁰⁵ English version available at: <http://www.cncompetencia.es/Inicio/Legislacion/NormativaEstatal/tabid/81/Default.aspx>

¹³⁰⁶ See ALLENDESALAZAR, R., MARTINEZ-LAGE, P. and VALLINA, R.: *Oligopolies, Conscious Parallelism and Concertation in European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Hart Publishing, Oxford/Portland: [http://www.eui.eu/RSCAS/Research/Competition/2006\(pdf\)/200610-COMPed-Allendesalazar.pdf](http://www.eui.eu/RSCAS/Research/Competition/2006(pdf)/200610-COMPed-Allendesalazar.pdf)

¹³⁰⁷ Decision of the NCA of 16 February 2005 in Case 582/04, *Autoescuelas Extremadura*.

¹³⁰⁸ Article 1 of RD 261/2008

potential competitors, if neither one of them has a market share of more than 15% in any of the affected relevant markets. However, when competition is restricted in a relevant market by the cumulative effect of parallel agreements for sale of goods or services reached by different suppliers or distributors, the market share percentage thresholds fixed in the foregoing subparagraphs will be lowered to 5%. A cumulative effect will not be found to exist if less than 30% of the relevant market is covered by parallel networks of agreements.

The principle of extraterritoriality is applicable in Spain for the application of national competition law rules. The NCA can apply Spanish competition law (Law 15/2007) to any conduct or abuse of dominant position occurred outside Spain, provided that it has an effect on the Spanish territory. It is therefore irrelevant that the author of the conduct is a foreign company. In any event, Articles 101 TFUE and 102 TFUE apply to agreements or conduct having an effect on trade between Member states.

2.2 Industry-specific legislation

There are no industry-specific competition rules in Spain. However, under the previous institutional system (before the adoption of Law 3/2013), the NCA was obliged to request a non-binding report to the different regulators in particular sectors, such as telecommunications.

At present, the relationship between the enforcement of competition rules and the supervision of the regulated sectors is even closer, since the functions of these authorities have been merged into only one (see above and Section 3 below).

3 The National Competition Authority

This Section describes the NCA in Spain, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the National Competition Commission (CNC)

Law 15/2007 created a State-level single institution, independent of the government, the CNC, which integrated the previous Competition Service and Competition Tribunal, created under the previous competition Law 16/1989.

3.2 The reform of the CNC into the CNMC

As stated above (see section 2.1 *supra*), the institutional structure of the Spanish NCA was recently modified by Law 3/2013, which merged the former CNC with the regulators of the different markets, creating the new Markets and National Competition Commission (CNMC), aiming at, *inter alia*, ensuring an effective competition across all production sectors and markets to the benefit of consumers and users, as stated in Article 1 of Law 3/2013.

It should be underlined that the function of the defence of competition as set out in Law 15/2007 is entirely allocated to the newly created CNMC and that the reform will not affect the substantive content of Law 15/2007, which is only modified as regards the organisation and functions of the NCA (see below).

The current CNMC became operational on 7 October 2013 and therefore its activity so far has been very limited.

3.3 Composition and decision-making

The CNC had a pyramidal structure, with two separate bodies: the Directorate of Investigation (in charge of the functions of case handling, investigation, study and drafting of reports) and the Council (in charge of case resolution, composed of the President of the CNC and six Council Members, one of whom is the Vice-president). Both bodies carried out independently their respective functions of handling and resolving under the supervision and coordination of the President, with the support of a range of common services.

As for the current organ in charge of the application of competition rules, the CNMC, it is composed of the President and the Council of the CNMC, with the President chairing both the CNMC and the Council. The Council comprises ten members: President, Vice-President and eight members, appointed by the Government, with the Spanish Congress of Deputies holding a right of veto on proposed candidates. Council members hold office for six years and may not be re-elected.

For competition matters, a Competition Directorate is established as executive body, in charge of case handling and investigation. Three other Directorates have been established for the investigation of regulatory supervision matters in the sectors of telecommunications and audiovisual services, energy and transport and postal services.

The Competition Directorate has been assigned all of the investigation functions set out in Law 15/2007.

The Council is the decision-making body in charge of resolving and ruling on the matters assigned to the CNMC and resolving infringement proceedings. The Council may act in two formations: Plenum (*Pleno*) or Chamber (*Salas*), with two *Salas* existing, one dedicated to competition issues and another to regulatory supervision. The *Pleno* of the Council will resolve on matters on which there is a difference of opinion between the *Sala* of Competition and the *Sala* of Regulatory Supervision, and on matters that, on account on their special impact on the competitive functioning of the markets or activities subject to supervision, are expressly claimed by the *Pleno*.

3.4 Cooperation with other entities

Cooperation and coordination mechanisms with the government (Council of Ministers), the judiciary, the autonomous regions, the NCAs of other EU Member States and the EU Commission established by Law 15/2007 remain in place.

Existing coordination mechanisms with industry regulators will be greatly improved, as these regulators have been merged into the CNMC by Law 3/2013. One of the aims of the recent reform is to reinforce the relationship with these industry regulators in order to achieve synergies, economies of scale and improved efficiency.

3.5 Investigations

Proceedings under Law 15/2007 remain unchanged: case preparation and handling is undertaken by the Competition Directorate of the CNMC, with case resolution undertaken by the Council of the CNMC, acting either in *Pleno* or in *Sala* of Competition.

The proceedings are initiated *ex officio* by the Competition Directorate either on its own initiative, upon request of the Council of the CNMC or on the basis of a complaint submitted by any natural or legal person. Annex I of the Royal Decree 261/2008, of 22 February 2008, on Defence of Competition (which further develops the provisions of Law 15/2007) provides a template for the complaint. Following the complaint, the Competition Directorate may conduct a reserved inquiry (*trámite de información reservada*) on undertakings involved when rational signs are observed of the existence of prohibited conduct.

Following this preliminary investigation, the Competition Directorate may decide to close the file or institute the proceedings and notify the interested parties. During the proceedings, the Directorate may ask for information from the relevant undertakings or their employees, including access and sealing of premises, books and other documents, with the undertaking's consent (or with a judicial authorisation) and other measures.

Once the preparation and handling of the proceedings are concluded, the Competition Directorate submits the case file to the Council, for further evidence and allegation by interested parties as requested by the parties or *ex officio* by the Council. Once concluded, the Council takes a decision declaring whether there has been an infringement of the competition rules or not.

The duration of the proceedings is 18 months, but this term may be suspended or extended as stated in Article 37 of Law 15/2007. The proceedings expire if no resolution is taken within this timeframe taking into account possible suspensions or extensions.

3.6 Decision-making

Under the new Law 3/2013, the tasks of case resolution and decision-making which were carried out by the Council of the CNC are now performed by the *Pleno* of the Council or the *Sala* of Competition of the Council of the CNMC. For decision-making purposes, the *Pleno* requires the presence of the Chairman (President or person deputized in case of absence, vacancy or sickness), Council Secretary and five Members. The *Sala* of Competition requires the presence of the Chairman (the CNMC President or person deputized), the Council Secretary and two Members. Decisions are adopted by majority vote of the attendees. In the event of a tie, the Chair has the casting vote.

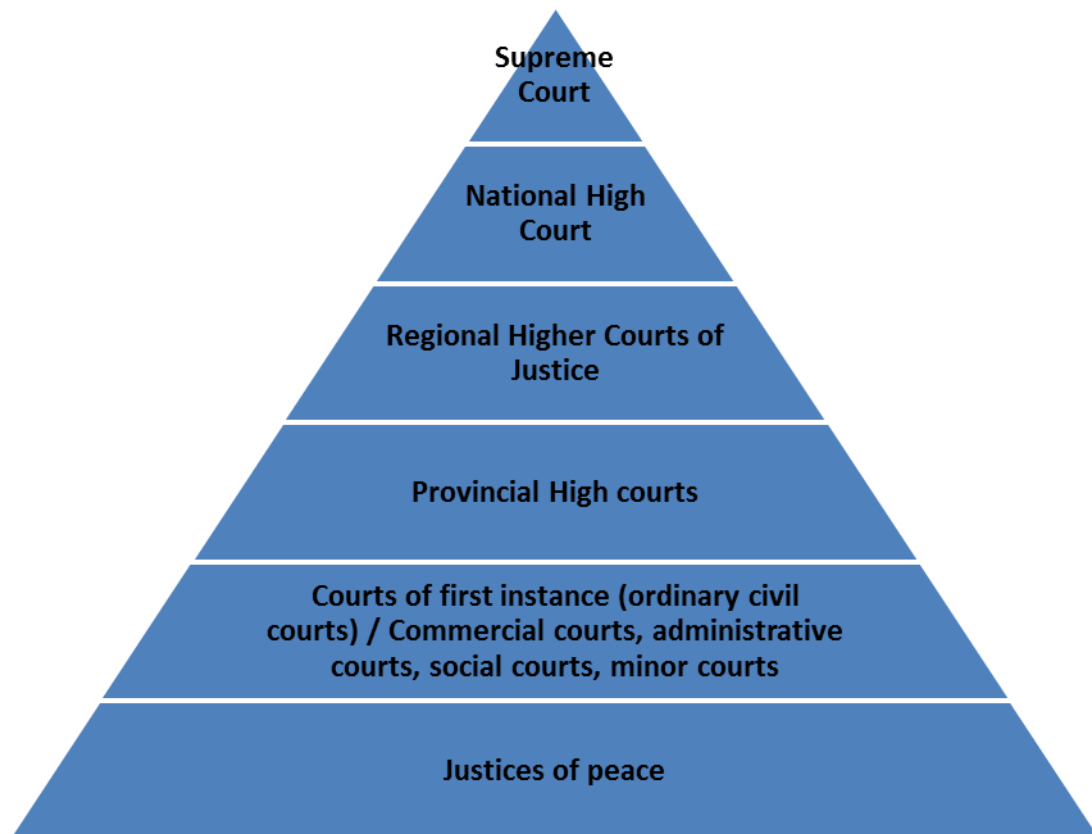
Law 3/2013 provides for cross-reporting between the *Sala* of Competition and the *Sala* of Regulatory Supervision when required for better transparency and proper functioning of the NCA and the existence of effective competition in the markets, as well as in competition defence proceedings in the sectors covered by the Law.

As regards the decisions that may be adopted by the authority after having initiated the proceedings and conducted a preliminary investigation, it can either decide to issue a Statement of objections (*Pliego de concreción de hechos*) to the parties or decide to close the proceedings (*archivo de las actuaciones*) when there is no evidence of a breach of the competition rules. After having sent a Statement of objections (and after having received the submissions of the parties), the authority might either adopt a decision accepting commitments (in case these are offered by the parties, (*terminación convencional*) or adopt a decision declaring the existence of an infringement and imposing a fine on the parties.

4 Competent courts

This Section describes the competent courts in Spain. An overview of the court system is firstly provided in Figure 4.1 below.

Figure 4.1 Court system in Spain



Source: the expert's own

4.1 Competent courts for the application of competition rules in cases of private antitrust enforcement

Private antitrust enforcement actions can be divided in two general categories: direct antitrust claims in which a plaintiff seeks a declaration that a contractual clause or a commercial conduct is null for being contrary to competition rules (seeking damages or not), and actions for civil responsibility (*acciones de responsabilidad civil*), limited to seeking damages, either under a follow-on action or not. In this regard, it must be noted that follow-on litigation was until 2007 the only way of seeking damages in antitrust proceedings in Spain. However, Law 15/2007 introduced the possibility for any harmed person to access the courts directly without the need to wait for a prior administrative decision. These stand-alone actions fall outside the scope of this study.

Since the object of the present study is the examination of follow-on actions and the substantive application of competition rules by the courts exclusively, the terms “follow-on actions” and “damages claims” will be used indistinctively to refer to private enforcement actions aimed at claiming damages relating to a decision by the NCA.

Follow-on actions may be lodged either before the commercial courts (*juzgados de lo mercantil*), which are specialised civil courts that are directly entrusted with the application of both national and EU competition rules, or before the ordinary civil courts (*juzgados de primera instancia*), since they are limited to seeking damages and do not extend to the interpretation and application of competition rules (and are therefore not distinct from any other civil compensatory claim)¹³⁰⁹.

¹³⁰⁹ See GUTIERREZ, A., *Chapter 24: Spain*, The Private Competition Enforcement Review, 5th edition, 2012.

As regards the territorial organisation of these courts, the State is organised regionally, for judicial purposes, into municipalities, areas, provinces and Autonomous Communities. The ordinary civil and commercial courts have jurisdiction over a specific municipality or area. The judgments from these courts can be appealed before the Provincial Courts (*Audiencia Provincial*) of each province. The judgments of these courts may finally be appealed in cassation to the Supreme Court, which has jurisdiction throughout the national territory.

All of the courts have only one judge with the exception of the Supreme Court, the National High Court, the Regional Higher Courts of Justice and the Provincial Courts, which are collegiate courts (composed of minimum 3 judges)¹³¹⁰.

4.2 Competent courts for the application of competition rules in judicial review

For public enforcement actions, the decisions adopted by the NCA may be appealed to the National High Court (*Audiencia Nacional*) and subsequently in cassation to the Supreme Court, for the review of matters of law. The judgments of the Supreme Court are final and irrevocable.

There have been cases where the claimant has also filed an appeal before the Constitutional Court on the basis of breaches of their fundamental rights derived from inspections, raids etc. However, the Constitutional Court cannot be considered as a third instance in judicial review cases since these recourses are normally not linked to the main issue in dispute.

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings in Spain related to breaches of competition law rules.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in Spain is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Any natural or legal person with a legitimate interest	Any party that has suffered the damage (in the case of consumers, an action may be filed by consumers' associations that are mandated to protect their interests) Also, if one party contributing to any damage has compensated the victim in full, it has the right to start proceedings against the other contributing parties
How can an action be filed?	By lodging a judicial-administrative claim before the National High Court	By lodging a damage claim under Article 1902 of the Spanish Civil Code before the competent civil court
With which authorities can the action be filed?	National High Court	Competent civil or commercial court
Burden of proof	The general principle under Spanish law is that the burden of proof relies on the claimant.	The applicant must prove the harm suffered and the causal link between the infringement of competition rules

¹³¹⁰ More information available on the website of the Ministry of Justice (*Ministerio de Justicia*): http://www.mjusticia.gob.es/cs/Satellite/es/1215197982704/Estructura_P/1288781211749/Detalle.html

	Judicial Review	Follow on
	Therefore, the party challenging the decision must provide evidence that the NCA erred in fact and in law when adopting its decision.	and such harm.

5.2 Judicial Review Proceedings

This Section presents the judicial review proceedings in Spain.

5.2.1 Rules applicable to the judicial review of NCA decisions

Article 48 of Law 15/2007 provides that the decisions adopted by the NCA may be appealed in administrative judicial proceedings in accordance with Law 29/1998, of 13 July, on the Administrative Jurisdiction (*Ley 29/1998, de 13 de Julio, Reguladora de la Jurisdicción Contencioso-Administrativa*)(hereafter “Law 29/1998”)¹³¹¹.

5.2.2 Competent Court

The decisions of the NCA may be appealed before the National High Court and subsequently in cassation to the Supreme Court.

5.2.3 Timeframe

In accordance with Article 46 of Law 29/1998, the decisions of the NCA must be challenged before the National High Court within two months from its notification to the parties. This timeframe is applicable to all appeals within the administrative jurisdiction, and hence not only restricted to competition cases.

The judgment of the National High Court might be subsequently appealed in cassation before the Supreme Court within 10 days from the day after of the notification of the judgment.

5.2.4 Admissibility of Evidence

In proceedings of judicial review of decisions of the NCA, the principles regarding the admissibility of evidence under the Spanish Civil Procedure Law (*Ley de Enjuiciamiento Civil*) (hereafter “LEC”)¹³¹² apply. The general rule is that evidence must be submitted by the parties (*principio de aportación de parte*) and not by the judge. Notwithstanding this, article 218 LEC allows for some exceptions to this principle.

5.2.5 Interim Measures

Article 727 LEC foresees the adoption by the courts of precautionary measures requested by the parties, which are deemed necessary to ensure the effectiveness of the judicial protection that may be granted in the subsequent judgment. This article provides for a non-exhaustive list of interim measures, such as:

- seizure of assets to ensure the enforcement of judgments,
- drawing up of inventories of assets under the conditions laid down by the court;
- provisional filing of claims when they refer to assets or rights likely to be entered in public registers;
- court orders to halt an activity provisionally or to refrain temporarily from engaging in a particular type of behaviour, or a temporary prohibition on interrupting or halting the provision of a service that is being performed;

¹³¹¹ Available at: <http://www.boe.es/boe/dias/1998/07/14/pdfs/A23516-23551.pdf>

¹³¹² Available at: <http://www.boe.es/buscar/act.php?id=BOE-A-2000-323>

- seizure and confiscation of revenue obtained from an activity regarded as illegal, the banning or cessation of which is demanded in the application, with the consigning or confiscation of the amounts being demanded by way of remuneration of intellectual property;
- temporary confiscation of copies of works or objects which are deemed to have been produced in breach of intellectual and industrial property rules, plus confiscation of the equipment used to produce them;

As regards proceedings of judicial review of NCA decisions, the National High Court may order interim measures, which may consist of the suspension of the execution of the decision of the NCA and of the fine that might have been imposed.

5.2.6 Rulings of the court

In cases of judicial review, the decision of the NCA will either be upheld or annulled (totally or partially) by the court. As a consequence, the judgments of the National High Court might confirm, reduce or annul the fines imposed by the NCA.

The proceedings always begin with a written statement of complaint. Thereafter, in *juicios verbales* (oral procedure for claims of not more than €3 006 and special proceedings on leases or summary proceedings), all the subsequent stages of allegation, decisions on matters of form, presentation and examination of evidence, and the conclusions of the parties are conducted orally at a public hearing. Under the ordinary procedure (*juicio ordinario*), the response to the complaint is in writing. Thereafter the proceedings are conducted orally; there is a preliminary hearing at which procedural issues are resolved, evidence is presented and ruled admissible and a date set for the court hearing. At the hearing the evidence admitted is examined and the parties present their conclusions¹³¹³.

5.3 Follow-on Proceedings (private enforcement)

This Section presents follow-on proceedings in Spain.

5.3.1 Rules applicable to follow-on actions

The general legal basis for claiming damages caused by an antitrust infringement (either under a follow-on action or not) is Article 1902 of the Civil Code, which states that “any person who by action or omission causes damage to another by fault or negligence is obliged to repair the damage caused”.

The procedure in follow-on actions either before a commercial court or an ordinary civil court is ruled by the provisions of the LEC

5.3.2 Competent Court

Commercial courts are specialised civil courts (in every region) that are directly entrusted with the application of competition rules, both national and EU. The judgments from these courts can be appealed before the Provincial Courts (*Audiencia Provincial*) of each province.

Follow-on actions, which are limited to seeking damages and do not extend to the interpretation and application of competition rules, may be lodged before the commercial courts or before the ordinary civil courts (see Section 4.1, *supra*)

5.3.3 Timeframe

Claims for damages, for an infringement of antitrust rules or any other type of infringement, are limited to one year under Article 1968 of the Spanish Civil Code, counting from the day the plaintiff was aware of the damage. It must be noted that in follow-on actions, the date of the decision of the NCA declaring the breach of the competition rules may not coincide with the moment in which the plaintiff was aware of the harm.

¹³¹³ http://ec.europa.eu/civiljustice/org_justice/org_justice_spa_en.htm

5.3.4 Admissibility of evidence

Article 328 LEC provides that a party to the proceedings may request that the other party submit to the court documents that are not available to it and are related to the object of the proceedings.

These petitions for disclosure normally affect only to the parties to the proceedings, but the court may also require a third party to produce documentary evidence if deemed fundamental for the final decision. Unjustified failure to produce the evidence requested will lead the court to take its decision on the basis of the evidence available. However, the court is also empowered to issue a formal request to the party in default if the circumstances dictate. Under this instrument, the court may order one party to submit documents related to administrative proceedings, including leniency applications¹³¹⁴. Article 15bis of the Civil Procedure Law states that competition authorities cannot be forced by civil courts to submit information obtained in the course of a leniency application. However, this special rule does not enjoin the civil court – typically at the request of a damage seeker – from requiring defendants to submit information prepared and filed in the context of the leniency application with the Competition Authority.

Finally, it must be noted that the use of economic evidence (i.e: expert report quantifying the economic value of the damages) is particularly important in follow-on cases, since the courts have no discretion on granting damages.

5.3.5 Interim Measures

See section 5.2.5 above.

5.3.6 Rulings of the court

In cases of follow-on actions, Spanish tort law has a purely compensatory nature. Therefore, the courts may declare an obligation to grant damages to the claimant in order to restore the situation to what it was prior to the harm caused.

5.3.7 Rules applicable to the enforcement of court judgments

It is necessary to have a final court decision or other instrument that permits enforcement (a judgment, an arbitration decision, court decisions approving or confirming court settlements and agreements reached during the procedure, etc.).

Regarding the authorization of the enforcement, the general rule is to involve a judicial authority, although in the case of foreclosure, and provided that this has been expressly agreed, the sale of the mortgaged property may be carried out via a notary.

As for the competent court for ordering enforcement, it is the judge in the ordinary civil courts who issued the judgment to be enforced. If the enforceable instrument is not a judgment, there are special rules for assigning competence which usually indicate that the judge in the place of residence of the defendant is competent.

5.4 Alternative dispute resolution mechanisms

In Spain, settlement of a competition cases is possible in judicial proceedings. The legal basis for civil settlements is Article 1809 of the Spanish Civil Code, which contemplates the possibility of agreements between private parties in order to avoid or terminate litigation. Article 2 of Law 60/2003 of 23 December on Arbitration and article 2 of Law 5/2012 on mediation in civil and commercial matters provide that private arbitration and mediation are allowed in relation to disputes on issues under the free control of the parties, which include damages disputes.

¹³¹⁴ Article 15bis LEC states that competition authorities cannot be forced by civil courts to submit information obtained in the course of a leniency application. However, this special rule does not limit the capacity of the civil court – to require defendants to submit information prepared and filed in the context of the leniency application with the Competition Authority.

A distinction can be made between judicial and extra-judicial settlement, depending on whether it is submitted to the court for approval. Moreover, the courts should verify whether an agreement between the parties is possible at the beginning of the trial¹³¹⁵ and once the subject matter of the proceedings has been defined¹³¹⁶. If a settlement is reached, the court will assess whether there is any legal obstacle to it and, if not, it will officially approve the settlement. Once approved by the court, the settlement has the same effect as a judgment.

As regards arbitration, Article 24(f) of Law 15/2007 provides that the parties can submit a dispute involving competition issues to the NCA under the provisions of Law 60/2003 of 23 December on Arbitration.

6 Contextual Information

This Section presents contextual information on the national judicial system in Spain.

6.1 Duration and cost of competition law cases

In 2012, statistics showed that the average duration of judicial administrative cases (among which we find judicial review of decisions of NCAs) before the National High Court and the Supreme Court was of approximately 19,9 and 16,5 months, respectively.¹³¹⁷

As for the duration of ordinary proceedings before the commercial courts in first instance, approximately 50% of the proceedings last between 6 and 8 months and 20% last more than 7 months¹³¹⁸.

As regards costs and legal fees, the costs of judicial proceedings in competition law cases correspond to the fine imposed by the NCA (which the parties challenge) or the amount claimed as compensation in follow-on cases. The maximum fine that the NCA can impose on undertakings for a breach of competition law rules amounts to 10% of their turnover¹³¹⁹.

Litigation costs are paid by the losing party (up to one third of the value of the action). If the claim is partially rejected each party will bear its own costs and the common costs will be shared equally.

6.2 Influencing Factors

The Spanish NCA has become in recent years one of the most active ones regarding the application of EU competition rules¹³²⁰. However, this is not a necessary consequence of the presence of international companies in Spain, but rather of the interpretation that the NCA does of the notion of “practices which may have impact on trade between Member States”, which, in the case of the Spanish NCA is rather large.

¹³¹⁵ Article 415 of the Civil Procedure Law.

¹³¹⁶ Article 428 of the Civil Procedure Law.

¹³¹⁷ Statistics obtained from the report of the Spanish Judiciary “*La Justicia Dato a Dato 2012*”, available at: www.poderjudicial.es.

¹³¹⁸ Statistics obtained at the website of the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial*): <http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpi/cgpi/geo/duraciones.html&ordenjur=Mercantil&procedimiento=Ordinarios&ambito=&codigo=>

¹³¹⁹ Article 61 of Law 15/2007.

¹³²⁰ <http://ec.europa.eu/competition/ecn/statistics.html>. The active application of EU competition rules by the Spanish NCA has become more obvious in recent years. Most of the cases before the courts in recent decisions are hence still pending. Precedents not applying EU rules but in which court referred to those rules when adjudicating to interpret national law have not been taken into account.

6.3 Obstacles/Barriers

Some obstacles to the development of antitrust private enforcement in Spain are the following¹³²¹:

- Absence of specific rules for claims of antitrust damages: Spanish general tort law imposes high standards of evidence for proving damages on plaintiffs.
- The high cost of the proceedings in relation to potential benefit: civil proceedings can be very expensive and lengthy in relation to the amount of damages that might be awarded.

¹³²¹ See GUTIERREZ, A., *Chapter 24: Spain*, The Private Competition Enforcement Review, 5th edition, 2012.

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COUNTRY FACTSHEET - SLOVAK REPUBLIC

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The views expressed within the report are those of the consultants alone and do not necessarily represent the official views of the European Commission.

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Abbreviations used

ADR	Alternative Dispute Resolution
AMO	Antimonopoly Office of the Slovak Republic
ECN	European Competition Network
EU	European Union
NCA	National Competition Authority
TEC	Treaty establishing the European Community
TFEU	Treaty on the Functioning of the European Union

1 Overview of the National Legal Framework

The legal system in the Slovak Republic is derived from the Civil Law system. One of its basic characteristics is the hierarchy of norms. The Constitution is the highest source of law followed by Statutes and Regulations.

The current Constitution of the Slovak Republic was adopted on 1 September 1992¹³²². It is a written Constitution, composed of 156 articles. It sets out the constitutional foundations of the State as well as the guarantees for the rights and freedoms of citizens and the organisation of public power. The Constitution organises the separation of powers between the executive and the parliament, with the judiciary responsible for supervising the execution of laws.

Provisions related to the administration of justice are included in Chapter 7 of the Constitution (Articles 124 - 148), regulating the organisation of the courts and the nomination of judges. Slovak law does not recognise the rule of precedent, applicable in Common Law systems, with judges not generally bound by judicial decisions given in other cases. The general rule is that judgments are binding only in the case concerned.

The Slovak Republic is divided into 54 judicial districts with 54 District Courts as the courts at the lowest level. Further information on the court structure in the Slovak Republic is provided in Section 4 below.

2 National Legislation establishing competition law rules

This Section describes the national legislation in the Slovak Republic establishing competition law rules.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
<p><i>Zákon 136/2001 Z. z. o ochrane hospodárskej súťaže a o zmene a doplnení zákona Slovenskej národnej rady č. 347/1990 Zb. o organizácii ministerstiev a ostatných ústredných orgánov štátnej správy Slovenskej republiky v znení neskorších predpisov</i> (Act No. 136/2001 Coll. on Protection of Competition on Amendments and Supplements to Act of the Slovak National Council No. 347/1990 Coll. on Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic of 27 February 2001, as amended)</p> <p>Amendments of the Act : Act No. 465/2002 Coll. Act No. 204/2004 Coll. Act No. 68/2005 Coll. Act No. 165/2009 Coll. Act No. 387/2011 Coll.</p>	<p>27 February 2001, entered into force on 1 May 2001 (last Amendment of the Act entered into force on 1 January 2012)</p>

2.1 General legislation

Act No. 136/2001 Coll. on Protection of Competition on Amendments and Supplements to Act of the Slovak National Council No. 347/1990 Coll. on Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic of 27 February 2001, as

¹³²² Available at <http://www.epi.sk/8056/Ustava-Slovenskej-republiky-Obsah--Constitution-of-the-Slovak-Republic-Content-45065.aspx>.

amended (*Zákon č. 136/2001 Z. z. o ochrane hospodárskej súťaže a o zmene a doplnení zákona Slovenskej národnej rady č. 347/1990 Zb. o organizácii ministerstiev a ostatných ústredných orgánov štátnej správy Slovenskej republiky v znení neskorších predpisov*) (hereinafter the 'Competition Act')¹³²³, provides for the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU') and mirrors the provisions of Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 TEC (currently Articles 101 and 102 TFEU)¹³²⁴, hereinafter 'Regulation 1/2003'.

The Competition Act was adopted to harmonise the national competition legislation with the Community acquis and to introduce to the legislation lessons learned from practical experience. The Act on Protection of Competition has been amended five times so far, with the last amendment entering into force on 1 January 2012.

The Amendment of the Competition Act No. 465/2002 Coll. excluded block exemptions from the Ban of Agreements Restricting Competition.

The primary goal of the Amendment of the Competition Act No. 204/2004 Coll. was to comply with the changes occurring in the EU, in connection with the modernisation of antitrust through Regulation No. 1/2003. It primarily aimed at ensuring flexibility when assessing agreements restricting competition and at decentralising competences connected with the application of the Articles 101 and 102 TFEU. This Amendment also strengthened the sanction policy of the Antimonopoly Office of the Slovak Republic (hereinafter 'AMO'), and brought changes to the leniency programme. In compliance with Regulation 1/2003, the Amendment introduced a new type of decision by which the AMO, instead of sanctioning undertakings for anticompetitive behaviour, it could approve commitments submitted by them, if these commitments eliminated possible restrictions of competition. This Amendment also introduced the possibility to conduct inspections in the private premises of undertakings¹³²⁵ upon the court's approval as well as the possibility for interested parties to participate in the relevant proceedings as *amicus curiae*.

The Amendment of the Competition Act No. 68/2005 Coll. increased the powers of the AMO concerning abuses of dominant position. After this Amendment the definition of abuse of dominant position included not only the 'direct or indirect imposition of unfair trade conditions' but also 'imposition of disproportionate prices'.

The Amendment of the Competition Act No. 165/2009 Coll. brought changes in the handling of mergers, ensuring more convergence with the EU Merger Regulation¹³²⁶ and introduced the possibility to notify also 'intended concentrations'. The Amendment contained also new provisions concerning the leniency programme where 'targeted inspections' were implemented in line with the European Competition Network ('ECN') Leniency Model Programme. Furthermore, it set the maximum fine for undertakings which failed to provide the requested information, correct information or obstructed the inspections. As such, the AMO was empowered to impose a fine of up to 1% of the undertakings' annual turnover for these infringements. Furthermore, a vague provision enabling the AMO to intervene in specific sectors that were also supervised by specific regulators, such as telecommunications, postal services, energy, etc., was eliminated.

The last Amendment of the Competition Act No. 387/2011 Coll. introduced changes in merger control. It intended to make the process of merger regulation quicker, as well as

¹³²³ Available at <http://www.antimon.gov.sk/571/act-on-protection-of-competition.axd>.

¹³²⁴ Available at <http://webcache.googleusercontent.com/search?q=cache:WxpNoUkpDPAJ:eur-lex.europa.eu/LexUriServ/LexUriServ.do%3Furi%3DOJ:L:2003:001:0001:0025:en:PDF+%&cd=1&hl=en&ct=clnk&gl=be>.

¹³²⁵ According to the Slovak Competition Act, Article 3, as undertaking is considered an entrepreneur pursuant to special legislation (Article 2 of the Slovak Commercial Code), as well as natural and legal persons, their associations, and associations of these associations, with respect to their activities and conduct that are, or may be, related to competition, regardless of whether or not these activities and conduct are aimed at making a profit.

¹³²⁶ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1-22.

more efficient in terms of financial and personnel resources. The most significant changes include the change in the notification criteria and the introduction of a so called ‘two-stage process’ of merger control. The AMO is obliged to issue a final decision on merger control within 25 working days (in less complicated cases) or within 90 working days (in particularly complicated cases).

According to Article 2, the Competition Act applies to undertakings, State administration authorities during the performance of State administration, territorial self-administration authorities during the performance of self-administration and transferred performance of State administration, and special interest bodies during the transferred performance of State administration. It also applies to all activities and conduct of undertakings that restrict or may restrict competition, except where competition is restricted by undertakings providing services in the public interest pursuant to special legislation, if application of the Competition Act effectually or legally prevents them from fulfilling their tasks pursuant to that legislation.

Articles 4 - 6 of the Competition Act prohibit cartels, enforcing the provisions of Article 101 TFEU, with Article 8 prohibiting the abuse of dominant position, as provided for in Article 102 TFEU.

More specifically, Article 4 prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition within a market, in accordance with the provisions of Article 101 TFEU.

Article 8 prohibits abuses of a dominant position. The wording of this provision mirrors that of Article 102 TFEU.

The **principle of extraterritoriality** is reflected in Article 2(4) of the Competition Act. Accordingly, the Act also applies to activities and actions that have taken place abroad, provided that they lead, or may lead, to restriction of competition in the domestic market (i.e. in the Slovak market).

It is important to mention that in the Slovak Republic there was a confusion whether the principle of parallel application of national competition law and EU competition rules is not contrary to the principle *ne bis in idem*. Nevertheless, such questions were clarified with case *ENVI-PAK*¹³²⁷, where the impugned conduct was found to infringe both the Article 8 of the Slovak Competition Act as well as Article 102 TFEU. As a consequence both the AMO and the national courts are competent to fully apply Articles 101 and 102 TFEU in parallel to Slovak national competition law.

2.2 Industry-specific legislation

The Slovak Competition Act does not include any rules applicable to specific sectors. The relevant articles of the Competition Act apply to all sectors and constitute an *ex post* control of the market.

Nonetheless, there are laws in the Slovak Republic, which regulate specific sectors and provide for *ex ante* control¹³²⁸.

The Slovak Office for Regulation of Network Industries (URSO) is the regulatory body for specific sectors. The AMO and the URSO are independent offices, with distinct competences in order to ensure an appropriate level of competition in the market; in view of their distinct competences they do not cooperate closely.

¹³²⁷ 1S/249/2010-571 *ENVI-PAK s.r.o. v Antimonopoly Office of the Slovak Republic* (Decision of the Regional Court Bratislava of 1.12. 2011), 8Szhpu/1/2012 *ENVI-PAK s.r.o. v Antimonopoly Office of the Slovak Republic* (Decision of the Highest Court of the Slovak Republic of 23.5.2013)

¹³²⁸ The postal sector (Act No. 507/2001 of 8 December 2001 on postal services); the electronic communications sector (Act No. 351/2011 of 22 October 2011 on electronic communications); the electricity and gas sector (Act No. 251/2012 of 31 August 2012 on energy). These laws are in compliance with the relevant EU legal instruments.

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in the Slovak Republic, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Antimonopoly Office of the Slovak Republic

The Antimonopoly Office of the Slovak Republic was first established with Act No. 188/1994 Coll. on Protection of Competition which stipulated its competences, the relevant competition rules and procedures.

The Competition Act (No. 136/2001 Coll.), similarly to the previous Act No. 188/1994 Coll. on Protection of Competition, provided the AMO with the responsibility to protect competition in the Slovak Republic. Therefore, the AMO was made the National Competition Authority in the Slovak Republic. It is an independent central State administration body and is the only body entrusted with the application of competition rules in the Slovak Republic. The AMO has three executive divisions dealing with the three main types of conduct regulated in the Competition Act, i.e. agreements restricting competition, abuses of dominant position and concentrations. These divisions are responsible for investigating the relevant cases and issuing decisions initially, thus the relevant divisions have both investigative and decision-making powers.

More specifically, the AMO¹³²⁹:

- a) conducts investigations in the relevant market;
- b) issues a decision that an undertaking's conduct or activity is prohibited pursuant to the Competition Act or the TFEU; it orders the undertaking in question to refrain from such conduct and imposes upon it the obligation to remedy the unlawful state of affairs;
- c) issues a decision that the Competition Act has been violated by a State administration authority during the performance of State administration, by a territorial self-administration authority during the performance of self-administration and transferred performance of State administration, and a special interest body during the transferred performance of State administration;
- d) proceeds and decides on all matters regarding the protection of competition ensuing from the provisions of the Competition Act or the TFEU;
- e) controls the observance of decisions issued during the proceedings before the AMO;
- f) issues an opinion according to special legislation;
- g) ensures international relations with other NCAs;
- h) submits an application to a Slovak court to approve inspections to be conducted by the European Commission, so that the European Commission is able to perform its activities pursuant to the TFEU;
- i) submits an application to the court to approve an inspection necessary for the performance of its activities;
- j) proposes further measures for the protection and promotion of competition.

3.2 The reform of the Antimonopoly Office

The AMO is an independent administrative authority whose role is to guarantee free competition and to ensure the proper functioning of the market. Parts 3, 4 and 5 of the Competition Act outline its competences, powers and composition. The AMO is responsible

¹³²⁹ Article 22 of the Competition Act 136/2001 Coll.

for the implementation of the provisions relating to cartels, abuse of dominant position and merger control. Investigations take place in the public interest, on the basis of administrative law procedures according to the Slovak Civil Procedure Code and the Competition Act.

The AMO aims at protecting the interests of consumers as well as companies against anti-competitive practices. It is required to sanction anti-competitive practices by fines and / or penalties. It must also take all necessary measures to stop the offenses. The AMO also plays an important role in the prevention of infringements. Finally, it is expected to educate businesses about their responsibilities under the national and EU competition law in order to encourage them not to engage in prohibited behaviour such as cartels and abuse of dominant position.

In order to make Slovak competition rules more effective the Competition Act has undergone several amendments, as already outlined in Section 2.1.

3.3 Composition and decision-making

The AMO is headed by the Chairperson. In case of his/her absence, the AMO's Deputy Chairperson substitutes the Chairperson in the exercise of his/her duties¹³³⁰.

The Chairperson is appointed and recalled by the President of the Slovak Republic on the basis of a proposal from the Government. The Chairperson's term of office is five years. Any citizen who is eligible to be elected to the National Council of the Slovak Republic (i.e. the Slovak Parliament) may be appointed as Chairperson of the AMO.

The same person may be appointed Chairperson of the AMO for a maximum of two consecutive terms of office. This position is incompatible with various other activities¹³³¹. The Deputy Chairperson is appointed and recalled by the Chairperson of the AMO.

The Council of the AMO Office ('Council') is competent to decide on appeals and review decisions outside appellate proceedings. The Council also decides on the reopening of proceedings and is also allowed to decide about the prosecutor's protest in the cases where the head of a central body of State administration issues a decision pursuant to special legislation¹³³². The Council consists of the Council Chairperson, the Council Deputy Chairperson and five members. The Chairperson of the AMO is simultaneously the Council Chairperson. The Deputy Chairperson of the AMO is simultaneously the Council Deputy Chairperson. An employee of the AMO is not allowed to be a member of the Council.

Council members are appointed and recalled by the Government of the Slovak Republic following a proposal from the Chairperson of the AMO. Usually, these are professionals with long experience in the field of competition law and regulation. The term of office of Council members is five years. Council members are appointed in such a way that the term of office will end for a maximum of three of them during the course of one calendar year. Further information on the decision-making process is provided in Section 3.6 below.

The executive divisions of the AMO are responsible for investigating agreements restricting competition and potential abuses of dominant position, including under Articles 101 and 102 TFEU, as well as issue decisions in these matters in the first instance. The Council of the AMO decides on appeal in these matters in the second instance.

¹³³⁰ See Articles 14 - 21 of the Competition Act 136/2001 Coll.

¹³³¹ Constitutional Act No. 357/2004 Coll. on Protection of Public Interest in the Performance of Posts of Public Officials, e.g. the Chairman of the Office should operate in the public interest, should not conduct any business activities beside its function as a Chairman or abuse his/her position in order to gain for himself/herself or his/her close relatives any benefits.

¹³³² Article 63(1) and Article 69(2) of Act No. 71/1967 Coll. on Administrative Proceedings (Rules of Administrative Procedure).

3.4 Cooperation with other entities

The AMO can cooperate with antitrust authorities of other EU Member States and third countries as well as with the European Commission¹³³³. The AMO can also request information, including confidential information, from other sectors' regulatory bodies as well as all public institutions or administrative bodies¹³³⁴.

Pursuant to Regulation No. 1/2003, the AMO is relieved of its competence to apply Article 101 or 102 TFEU if the European Commission has initiated proceedings for the adoption of a decision. If the AMO had already been acting on a case, however, the European Commission shall only initiate proceedings after consultation with the AMO.

3.5 Investigations

The AMO has the competence to begin proceedings on its own initiative or if petitioned by a participant to the proceedings¹³³⁵. Proceedings concerning agreements restricting competition and abuse of dominant position are always commenced at the AMO's own initiative. The AMO is required to inform those submitting a petition in writing of any further actions it has taken regarding the matter within two months following the date of receipt of the request.

Guidelines and a template for complaints are available on the website of the AMO¹³³⁶.

Following a preliminary investigation of the issue, the AMO may decide to close the file or to continue its investigation. If it continues its investigation, the AMO may ask for information from the undertakings in question or their employees¹³³⁷. The AMO can also carry out searches, proceed to the seizure of documents and ask for expert opinion.

If the officer responsible for the investigation finds that there are sufficient grounds to hold that the undertakings in question have engaged in anti-competitive practices, the concerned undertakings will be notified of this. Following the undertakings' notification, they have a right to access to the AMO's file.

3.6 Decision-making¹³³⁸

The Office has three executive divisions dealing with the three main types of conduct defined in the Competition Act (i.e. agreements restricting competition, abuse of dominant position, concentrations). As already mentioned in Section 3.3., the AMO's executive divisions are responsible for investigating and rendering decisions, including on the infringement of Articles 101 and 102 TFEU. Thus, executive divisions are entrusted with both investigative and decision-making powers¹³³⁹. The evidence to be used is determined on a case-by-case basis.

A party to the proceedings has the right to lodge an appeal if it disagrees with a decision of the AMO. The appeal is heard by the Council of the AMO composed of 7 members – the Chairman, the Deputy Chairman of the AMO and 5 external experts outside of the AMO (Council Members). The Council reviews the entire procedure of the first instance AMO decision, completes the evidence if necessary, and issues a decision. The Council of the

¹³³³ Article 31 of the Competition Act.

¹³³⁴ Article 22 of the Competition Act.

¹³³⁵ Articles 25-32 of the Competition Act.

¹³³⁶ Available at <http://www.antimon.gov.sk/588/how-to-submit-an-incentive.axd>.

¹³³⁷ Article 22 of the Competition Act.

¹³³⁸ Articles 33 - 35 of the Competition Act.

¹³³⁹ For example, carrying out the investigation, the formal opening of proceedings, preparing and addressing the Statement of Objections (or equivalent) to the parties, drafting the proposal for a decision on substance, drafting the proposal for a decision on sanctions, taking the decision on substance and taking the decision on sanctions.

AMO may amend, uphold or annul the first instance AMO decision or stop the proceedings for the following procedural reasons¹³⁴⁰:

- a) if one of the parties to the proceedings died or has ceased to exist without a legal successor;
- b) if a party to the proceedings has withdrawn his/her petition for the commencement of the proceedings;
- c) if a petitioner does not comply with the AMO's request to remove deficiencies from the petition within a specified time limit;
- d) if another NCA is already dealing with or has decided on the same matter.

The AMO stops the proceedings by issuing a decision if:

- a) the only party to the proceedings died or has ceased to exist without a legal successor;
- b) the party to the proceedings has withdrawn his/her appeal or petition for the reopening of the proceedings;
- c) the reason for the proceedings has not been provided or has ceased to exist;
- d) during the commenced proceedings it has been found out that the undertaking, which was the only party to the proceedings, should not be a party to the proceedings;
- e) the AMO is already dealing with or has decided on the same matter;
- f) there is a restriction of competition whose effects are exclusively manifested in a foreign market, unless an international contract/agreement published in the Collection of Laws of the Slovak Republic and binding on the Slovak Republic provides otherwise;
- g) it has not been proven within the proceedings that a party to the proceedings has violated the provisions of the Competition Act;
- h) it has been established during the commenced proceedings that activities or other conduct performed by undertakings abroad do not, and cannot, lead to a restriction of competition in the domestic market;
- i) the European Commission is already dealing with or has decided on the same matter according the TFEU.

The time periods for the second instance proceedings before the AMO Council are identical to those of the first instance proceedings before the AMO's executive divisions. The AMO must issue a decision within six months following the date on which the proceedings commenced. In complicated cases, the AMO's Chairperson may allow, more than once, an appropriate extension of the time limit for issuing a decision for a maximum of 24 months in total. If the AMO is unable to make a decision within six months, it is required to notify the party to the proceedings thereof and indicate the reasons for the delay.

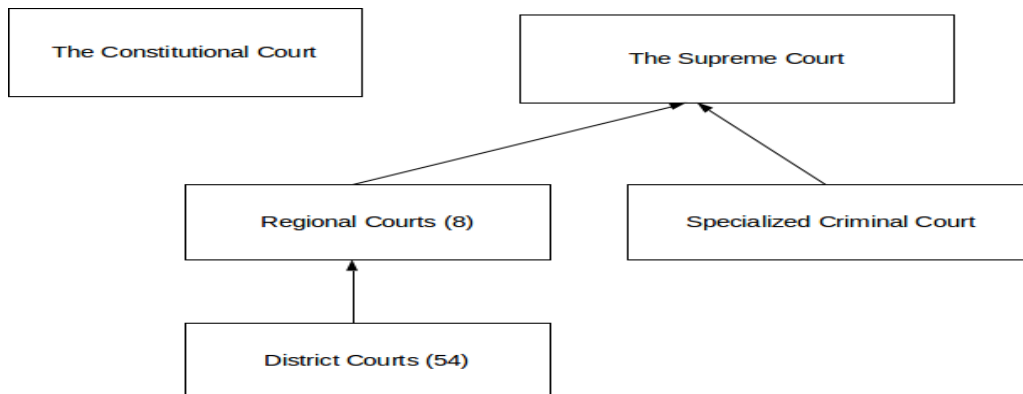
Parties to the proceedings before the AMO Council may file an action against the decision issued by the Council before the Regional Court of Bratislava and, at second instance, before the Supreme Court of the Slovak Republic, as discussed in more detail in Section 5.2. Both of them are general courts not specialised in competition law matters. The court may uphold the AMO Council decision or annul it and return the case to the AMO to be re-decided (either by the AMO executive divisions or the Council of the AMO, depending on the case) or reduce the sanction that was imposed.

4 Competent courts

This Section presents the competent courts in the Slovak Republic. Figure 4.1 firstly presents in a graphic manner the court system.

¹³⁴⁰ Article 32 of the Competition Act.

Figure 4.1 Court system in the Slovak Republic¹³⁴¹



An overview of the courts which are competent for the application Articles 101 and 102 TFEU in the Slovak Republic is provided in the sub-sections below.

The court system of the Slovak Republic is unitary, i.e. there are no different branches of administering justice (e.g. civil, criminal and administrative). Furthermore, the judicial process is adversarial, i.e. there are opposing advocates who represent the positions of their clients before the court.

4.1 Administration of justice

Justice in the Slovak Republic is administered by the ordinary courts and the Constitutional Court of the Slovak Republic.

Courts are independent and impartial when exercising their authority. The President of each court is in charge of the way the judicial proceedings are conducted.

4.2 Types of courts

The following types of courts exist in the Slovak Republic:

- District courts (54) – (*54 Okresných súdov* – see figure 4.1)
- Regional courts (8) – (*8 Krajských súdov* – see figure 4.1)
- Supreme Court of the Slovak Republic – (*Najvyšší súd SR* – see figure 4.1)
- Specialised Criminal Court – (*Špecializovaný trestný súd* – see figure 4.1)
- Constitutional Court – (*Ústavný súd* – see figure 4.1)

4.3 Hierarchy of courts¹³⁴²

District courts act as courts of first instance in civil and criminal cases, unless otherwise stipulated by rules governing court proceedings. They also hear electoral cases, where stipulated by specific legal provisions.

Regional courts act as courts of second instance in civil and criminal cases. The rules governing court proceedings specify the civil and criminal cases in which Regional courts act as courts of first instance. Furthermore, Regional courts act as first instance courts in administrative cases, unless otherwise stipulated by law. Regional courts may also hear other cases, if so provided in the legislation.

The Supreme Court of the Slovak Republic is competent to decide:

¹³⁴¹ Further information is available at http://wwwold.justice.sk/a/wfn.aspx?pg=lb&htm=14/crt_sys.htm.

¹³⁴² Pursuant to Act No. 757/2004 Coll. on courts and amending certain other acts.

- on appeals brought against decisions of the Regional courts and the Specialised Criminal Court;
- on extraordinary appeals brought against decisions of District courts, Regional courts, the Specialised Criminal Court and the Supreme Court;
- on disputes between courts and public authorities;
- on the referral of a case to a court other than the competent court, if the regulation on legal proceedings so stipulates¹³⁴³;
- in other cases where the Act on Courts or an international treaty so stipulates¹³⁴⁴.

The **Supreme Court** conducts a review of courts' decision-making in resolved cases, i.e. it only reviews how lower courts applied/interpreted the law. The Supreme Court promotes the uniform interpretation and consistent application of laws and other general legally binding regulations:

- through its judgments;
- by adopting opinions aimed at ensuring consistency in the way Acts and other general legally binding regulations are interpreted;
- by publishing valid court decisions of primary importance in the 'collection of opinions' of the Supreme Court and decisions of the courts of the Slovak Republic.

In case of breach of procedural rights in the judicial proceedings, the parties may submit a constitutional complain to the **Constitutional Court of the Slovak Republic**¹³⁴⁵.

With respect to the adjudication of competition law cases by courts, in the case of **public enforcement actions** (judicial review), the party to the proceedings before the AMO may file an action against the AMO decision to the **Regional Court of Bratislava**. The decision of the Regional Court of Bratislava can be challenged before the **Supreme Court of the Slovak Republic**. Both of them are general courts not specialised in competition law matters. The Regional Court of Bratislava does not comprise any special sections or senates specialised in competition matters. Competition law cases at both instances (i.e. before the Regional Court of Bratislava and the Supreme Court of the Slovak Republic) are being decided by senates comprising three judges. The court may uphold the AMO decision or annul it and return the case to be re-decided, or reduce the sanction imposed.

Concerning **private enforcement follow-on actions**, competent to hear actions for damages resulting from the violation of competition law rules is the **District Court of Bratislava II**. This court, as a general court not specialised only in competition law cases, is the only court competent in the Slovak Republic to adjudicate private enforcement actions. Appeals against the decision of the District Court of Bratislava II are filed with **the Regional Court of Bratislava** while, at last instance, an action may be brought before the **Supreme Court of the Slovak Republic**.

No information on the number of legal professionals involved in competition law cases is available.

5 Proceedings related to breaches of Competition Law rules

This Section describes the proceedings related to breaches of competition law rules in the Slovak Republic.

¹³⁴³ Pursuant to Act No. 71/1967 Coll. on Administrative Proceedings (Rules of Administrative Procedure).

¹³⁴⁴ Pursuant to Act No. 757/2004 Coll. on courts and amending certain other acts.

¹³⁴⁵ Pursuant to Act no. 38/1993 Coll. on the organisation of the Constitutional Court, on proceedings before the Constitutional Court and on its competences.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in the Slovak Republic is described in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Any natural and legal person that is affected by the AMO decision ¹³⁴⁶ .	Natural and legal persons, consumers, consumer associations (for more details see below).
How can an action be filed?	Filing an administrative judicial review action before the Regional Court of Bratislava.	Filing an action before a civil court.
With which authorities can the action be filed?	The Regional Court in Bratislava. Appeals against decisions of the Regional Court in Bratislava (<i>odvolanie</i> ¹³⁴⁷) are heard by the Supreme Court of Slovak Republic. In case there is a breach of constitutionally guaranteed rights, the decision of the Supreme Court can be challenged before the Constitutional Court.	The District Court in Bratislava II. Appeals against decisions of the District Court are heard by the Regional Court of Bratislava. The decisions of the Regional Court can be challenged before the Supreme Court of the Slovak Republic in some instances. If there is a breach of constitutionally guaranteed rights, the decision of the Supreme Court can be challenged before the Constitutional Court.
Burden of proof	The burden of proof rests with the AMO.	The burden of proof rests with the applicant.

Concerning the legal standing in follow-on actions, the right to pursue private enforcement greatly depends on the type of claim which is put forward in such proceedings.

- **Damages** can be claimed by anybody who incurred damage as a consequence of a breach of competition law¹³⁴⁸. It follows that associations of consumers or of professionals are usually not entitled to pursue such actions.
- **Non-material satisfaction** can be claimed by consumers and consumer associations¹³⁴⁹. In some cases, however, competitors of the undertaking that infringed the competition law rules can pursue non-material satisfaction¹³⁵⁰. Associations of professionals are never entitled to non-material satisfaction.
- **Injunctions** can be pursued by consumers and associations of consumers¹³⁵¹. Consumers under Slovak law are sometimes also legal entities, not only natural persons¹³⁵². Non-consumers or associations of professionals are generally not entitled to injunctions. In some cases, however, competitors of the undertaking infringing competition law can seek injunctions¹³⁵³.

¹³⁴⁶ Section 247 of the Civil Procedure Code.

¹³⁴⁷ Section 250ja of the Civil Procedure Code.

¹³⁴⁸ Sections 41, 757, 373 of the Commercial Code.

¹³⁴⁹ Section 3(5) of the Consumer Act.

¹³⁵⁰ Section 44 et al. of the Commercial Code; See, e.g. the decision of the Supreme Court, 1 Obdo V 19/2007.

¹³⁵¹ Section 42 of the Competition Act; Section 3(5) of the Consumer Act.

¹³⁵² Section 2(a) of the Consumer Act.

¹³⁵³ Section 44 et al. of the Commercial Code; See, e.g. the decision of the Supreme Court, 1 Obdo V 19/2007.

- **Unjust enrichment** can be claimed by anyone to whose detriment the undertaking that infringed the competition law rules gained some unjustified benefit¹³⁵⁴. More specifically, as unjustified enrichment is defined the benefit gained from: a performance without a legal reason; a performance from a null and void legal act; a performance from a legal title that fell off; unfair sources¹³⁵⁵. If it is impossible to identify the person to whose detriment the benefit was gained, the unjustified enrichment must be returned to the State.

5.2 Judicial Review Proceedings

This Section presents the judicial review proceedings in the Slovak Republic.

5.2.1 Rules applicable to the judicial review of NCA decisions

Any natural and legal person that is affected by an administrative decision, including a decision of the AMO, can seek its judicial review¹³⁵⁶. The adjudication of the relevant cases takes place under the Civil Procedure Code (*Občiansky súdny poriadok*).

5.2.2 Competent Court

Challenges against the decisions of the AMO are heard by the Regional Court of Bratislava. Appeals (*odvolanie*) against the Regional Court's judgments are heard by the Supreme Court of the Slovak Republic¹³⁵⁷. If constitutionally guaranteed rights are alleged to have been breached, the decision of the Supreme Court can be cancelled by the Constitutional Court¹³⁵⁸.

5.2.3 Timeframe

The application for judicial review has to be filed within two months from the day that the decision of the AMO became effective (i.e. from the day the decision was delivered)¹³⁵⁹. The appeal against the Regional Court's decision has to be filed within 15 days from the delivery of the first instance decision¹³⁶⁰. The appeal against the Supreme Court's decision before the Constitutional Court has to be filed within two months from the delivery of the Supreme Court's decision¹³⁶¹.

5.2.4 Admissibility of Evidence

The Regional Court is not bound by the evidence collected during the proceedings before the AMO. The court can admit new evidence, examine again existing evidence or follow the evidence as collected by the AMO¹³⁶². This applies to both the Regional Court as well as the Supreme Court proceedings. The Constitutional Court does not admit any evidence as it is not a continuation of the case, but hears only a claims for violations of constitutionally guaranteed rights.

5.2.5 Interim Measures

The applicant can ask for a suspension of the effects of the AMO decision¹³⁶³. The same court that adjudicates the judicial review case also decides on the imposition of interim

¹³⁵⁴ Section 451 of the Civil Code.

¹³⁵⁵ Section 451(2) of the Civil Code.

¹³⁵⁶ Section 247 of the Civil Procedure Code.

¹³⁵⁷ Section 250ja of the Civil Procedure Code.

¹³⁵⁸ Article 127 of the Constitution of the Slovak Republic.

¹³⁵⁹ Section 250b(1) of the Civil Procedure Code.

¹³⁶⁰ Section 204(1) of the Civil Procedure Code.

¹³⁶¹ Section 53(3) of Act No. 38/1993 Coll. on organisation of the Constitutional Court, proceedings before it and position of its judges (see Section 5.1).

¹³⁶² Article 250i of the Civil Procedure Code.

¹³⁶³ Article 250c of the Civil Procedure Code.

measures. The only interim measure available in judicial review cases is the suspension of the effects of the AMO decision; however, it is at the court's discretion to grant it. Section 250c of the Procedural Code stipulates that the court can do so if the 'immediate execution of the objected decision could cause a serious harm.'

5.2.6 Rulings of the court

The administrative court can either uphold or revoke the decision and return the case back to the AMO. If the decision is revoked, the AMO is bound by the legal reasoning of the court¹³⁶⁴. The proceedings before the Regional Court are usually oral; however, the court can decide that an oral hearing is not required and thus conduct the whole proceedings in writing. The decision is however always pronounced in public, as required by the Constitution.

If the Regional Court's judgment is appealed, the Supreme Court can also either uphold or revoke the decision of the first instance court and return the case back to it. As a rule, proceedings before the Supreme Court are only written, unless the public interest requires the opposite, or the court wants to hear new pieces of evidence. The court can also arrange an oral hearing if it considers it necessary¹³⁶⁵.

5.3 Follow-on Proceedings (private enforcement)

This Section describes follow-on proceedings in the Slovak Republic.

5.3.1 Rules applicable to follow-on procedures

The adjudication of follow-on actions by courts takes place in accordance with the rules of the Civil Procedure Code. Depending on the claim and person pursuing the claim, the entitlement to sue can be based on the Consumer Act, the Competition Act, the Commercial Code or the Civil Code (see Section 5.1).

5.3.2 Competent Court

Only the District Court of Bratislava II. is competent to hear private enforcement cases¹³⁶⁶. Appeals against the decisions of the District Court are heard by the Regional Court of Bratislava.

Appellate review (*dovolanie*) is to be filed with the Supreme Court of the Slovak Republic¹³⁶⁷. It is permitted only in very limited cases (e.g. violation of fundamental procedural rights, insufficient collection of evidence, wrong legal assessment, existence of new evidence, etc.).

If there is a breach of constitutionally guaranteed rights (e.g. the right to a fair trial, the right to property, etc.), the decision of the Supreme Court can be cancelled by the Constitutional Court with the filing of a constitutional complaint (*ústavná sťažnosť*)¹³⁶⁸.

5.3.3 Timeframe

In general, there is no time limitation for bringing civil actions. Some claims, however, might be subject to prescription periods (e.g. for damages, non-material satisfaction, etc.) under either the Civil or the Commercial Code. The prescription periods which arguably should apply to private enforcement actions (follow-on) are the ones set in the Commercial Code, i.e. four years from the day when the right could have been for the first time asserted before the court. Others argue that the prescription period should be based on the Civil Code, in which case it would be two years from the day that the entity suffering the damage learnt about the damage and the liable person; in any case, the right to compensation for

¹³⁶⁴ Section 250ja(4) of the Civil Procedure Code.

¹³⁶⁵ Section 250ja of the Civil Procedure Code.

¹³⁶⁶ Section 12 of Act No. 371/2004 Coll. on seats and districts of courts.

¹³⁶⁷ Article 236 of the Civil Procedure Code.

¹³⁶⁸ Article 127 of the Constitution of Slovak Republic.

damages/unjustified enrichment is prescribed within three years from the commission of the act which gave rise to the right to compensation and, if the act was intentionally committed, within ten years from the commission of the act. It should be noted that claims for injunctions do not prescribe under the Civil Code.

First instance decisions take on average 13.8 months to be issued¹³⁶⁹. The appeal against the first instance judgment has to be filed within 15 days of its receipt¹³⁷⁰. The second instance decision takes also on average 13.8 months¹³⁷¹. The appellate review has to be filed within one month from the date when the Regional Court's judgment was delivered to the party. The constitutional complaint has to be filed within two months from the day that the decision of the Supreme Court or the Regional Court became effective, i.e. was delivered to the party and was not appealed within the prescribed period¹³⁷². Proceedings before the Constitutional Court take on average 4 months¹³⁷³.

5.3.4 Admissibility of evidence

In the first instance (District Court of Bratislava II), any lawfully acquired evidence can be presented before the court. In the second instance (Regional Court of Bratislava), it is still possible to present some new evidence under certain circumstances¹³⁷⁴. In the third instance (Supreme Court), no new evidence can be presented¹³⁷⁵.

5.3.5 Interim Measures

The civil court which hears the case can also decide on interim measures, such as preliminary injunctions or preservation of evidence orders. Generally, interim measures are issued only upon request, provided that there is a need to temporarily regulate the relationship between the parties in a certain way, or there is a fear that the decision will be enforceable de facto if such a measure is not issued¹³⁷⁶. In the application for such measure, the applicant has to prove its urgency. Interim measures are issued in ex parte proceedings. The measures are immediately enforceable upon their receipt, but can be appealed, though without any suspensive effect. Interim measures do not have any influence on the substance of the case.

5.3.6 Rulings of the court

Proceedings before first instance courts, including the District Court of Bratislava II, usually include oral hearings. Proceedings at second instance courts, including the District Court of Bratislava, can also include oral hearings, but only if this is necessary because, e.g. the court wants to hear the evidence.

The first instance court can either entirely reject the claim, or grant it partially or entirely. The following types of actions (and related outcomes) are possible:

- a) a declaratory action clarifying the invalidity of a contract or of the part of the contract that was infringing competition law;
- b) an action for damages seeking compensation for the actual harm and lost profits that the injured party suffered as a consequence of the anti-competitive practices;

¹³⁶⁹ Court statistics available at <http://www.justice.gov.sk/Stranky/Sudy/Statistika-priemerna-dlzka-konania.aspx>.

¹³⁷⁰ Section 204(1) of the Civil Procedure Code.

¹³⁷¹ For Regional Courts, the average is available only together with District Courts.

¹³⁷² Section 53(3) of the Act No. 38/1993 Coll. on organization of Constitutional Court

¹³⁷³ Macejkova, Iveta. *Ochrana ústavnosti a ústavy SR v rozhodovacej činnosti Ústavného súdu SR*, 2012.

¹³⁷⁴ Section 250a(1) of the Civil Procedure Code. Sections 213(4) and 205a(1) stipulate that the appellate court hears the evidence that was suggested but not heard at first instance; furthermore, newly proposed evidence will be heard provided that, e.g. the plaintiff could not furnish it at the first instance proceedings, the evidence concerns the jurisdiction of the court, or the evidence is meant to prove that the first instance proceedings suffered from procedural flaws, etc.

¹³⁷⁵ Section 243a(2) of the Civil Procedure Code.

¹³⁷⁶ Section 74 of the Civil Procedure Code.

- c) an action for non-material satisfaction of non-material harm suffered by the injured consumer, or by consumers in general (when the application is filed by a consumer association).
- d) an action for unjust enrichment for the recovery of unjustified benefits acquired by the perpetrator of the anti-competitive practice (e.g. account of profits).
- e) an action for an injunction aimed at preventing further anti-competitive acts by the undertaking infringing competition law.

Court fees are usually born by the losing party. In case of partial success, the costs will be split between the parties according to the ratio of success. Attorneys' fees can be recovered only to extend prescribed by the law.

5.3.7 Rules applicable to the enforcement of court judgments

Judgments issued in civil proceedings are enforced by independent executors, i.e. State entrusted professionals that perform a forced execution of different enforcement titles, including civil court decisions. The executor carries out enforcement activities independently. In the exercise of his/her activities he/she is bound by the court decision issued in the enforcement proceedings and by the Constitution, laws and other legal instruments.

Act No. 233/1995 Coll. on Courts Executors and Enforcement Practice (Enforcement Code) regulates how the executors enforce court decisions. Depending on the claim granted in the judgment (e.g. damages, injunctions, etc.), there are different ways for their enforcement.

The most problematic is the enforcement of civil injunctions. Injunctions are generally enforced through the imposition of fines. However, the maximum amount of fines that can be imposed by the courts, on the proposal of the executor, is set by the Enforcement Code at EUR 30,000. Fines are recovered by the State. If the maximum amount has already been reached, no further fines can be imposed. At the same time, in cases of non-compliance with the court decisions criminal liability may be incurred – even though this rarely happens.

All pecuniary claims can be enforced by means of forced sale of property, confiscation of funds in bank accounts, etc.

5.4 Alternative dispute resolution mechanisms

There are no specific provisions related to Alternative Dispute Resolution (ADR) in competition law cases. In general, however, parties to a dispute can always settle, even without the consent of the court. Also, arbitration and mediation are available for these types of private law disputes¹³⁷⁷. Nonetheless, in practice competition law disputes are not usually resolved through any of the abovementioned ADR mechanisms, even though the parties are not precluded from doing so.

6 Contextual Information

This section describes contextual information relating to the national judicial system in the Slovak Republic.

6.1 Duration and cost of competition law cases

Information specifically on competition law cases are not available from official statistics. Generally, in 2012, the first instance and second instance commercial cases lasted on average 13.8 months¹³⁷⁸ (each instance). We are also unaware of any cost estimates specific to competition law cases, or civil law cases in general.

¹³⁷⁷ Act No. 420/2004 Coll. on mediation (transposing into the national legal order Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters); Act No. 244/2002 Coll. on arbitration.

¹³⁷⁸ Court statistics <http://www.justice.gov.sk/Stranky/Sudy/Statistika-priemerna-dlzska-konania.aspx>.

6.2 Influencing Factors

No specific factors influencing the national system were identified.

6.3 Obstacles/Barriers

General problem is the length of judicial proceedings and small expertise of Slovak judges in the field of competition law. The cost of litigation is generally modest, so it cannot be said to be an obstacle of enforcement.

Annex 1 Bibliography

Legislation

- Act No. 251/2012 of 31 August 2012 on energy
- Act No. 351/2011 of 22 October 2011 on electronic communications
- Act No. 250/2007 Coll. on protection of consumer (Consumer Act)
- Act No. 136/2001 Coll. on protection of competition (Competition Act)
- Act No. 371/2004 Coll. on seats and districts of courts
- Act No. 757/2004 Coll. on courts and amending certain other acts
- Act No. 420/2004 Coll. on mediation
- Act No. 244/2002 Coll. on arbitration
- Act No. 507/2001 of 8 December 2001 on postal services
- Act No. 233/1995 Coll. on Courts Executors and Enforcement Practice (Enforcement Code)
- Act No. 38/1993 Coll. on organization of Constitutional Court
- Act No. 38/1993 Coll. on organization of the Constitutional Court of the Slovak Republic
- Act No. 513/1991 Coll. Commercial Code (Commercial Code)
- Act No. 40/1964 Coll. Civil Code (Civil Code)
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- The website of the NCA
- Requests to the relevant institutions based on Act no. 211/2001 Coll. - Information Freedom Act
- Private consultations
- Published decisions of the competent courts

COUNTRY FACTSHEET - SLOVENIA

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Abbreviations used

1999 Act	1999 Prevention of Restriction of Competition Act
Act – 1	2008 Prevention of Restriction of Competition Act - 1
CO	Code of Obligations
CPO	Competition Protection Office
EU	European Union
RS	The Republic of Slovenia
SCPA	Slovenian Competition Protection Agency
TFEU	Treaty on the Functioning of the EU

1 Overview of the National Legal Framework

The legal system of the Republic of Slovenia (hereinafter ‘Slovenia’) is based on the Civil Law system. Customary law is not, therefore, a part of the legal system, although customs do enjoy certain recognition by the Slovenian legislature¹³⁷⁹. Legislation is mostly based on German, Austrian, Italian and, to a certain degree, French law. Slovenia is unitary state.

The highest legal act is the Constitution of the Republic of Slovenia (*Ustava Republike Slovenije (RS)*). The Constitution was adopted on 23 December 1991¹³⁸⁰ and contains 175 articles. Lower general acts include statutes (*zakoni*) and executive acts (*izvršilni akti*), which are divided into two main categories: decrees¹³⁸¹ (*uredbe*) and rules (*pravilniki*). Local authorities adopt ordinances (*odlok*)¹³⁸². The main individual acts (administrative and judicial) are: decisions (*odločbe, sodbe*) and orders (*sklepi*).

All legal norms must be in compliance with the Constitution. Statutes and other acts must comply with generally accepted principles of international law and with international treaties that are binding on Slovenia. Executive acts and local ordinances must, in addition, be in conformity with statutes. General acts issued in the exercise of public authority (*splošni akti za izvrševanje javnih pooblastil*) must be in accordance with the Constitution, statutes and executive acts. All individual acts (i.e. acts of State authorities, local authorities and holders of public authority) must be based on valid statutes or statutory regulations¹³⁸³. Primacy of the EU law is set in Article 3.a of the Constitution. Pursuant to this article, all legal acts and decisions, adopted within international organisations to which Slovenia has transferred part of its sovereign rights, must be applied in Slovenia in line with the internal regulations of these organisations¹³⁸⁴.

Administration of justice is regulated in section IV.(f) of the Constitution, titled ‘System of Government’. This section provides for the independence of the judicial branch, the organisation and competencies of courts, the election of judges and the participation of lay judges. The doctrine of judicial precedent is not recognised in Slovenia, although lower courts usually follow the case-law of higher courts, and especially the Supreme Court of the Republic of Slovenia (*Vrhovno Sodišče RS*).

The court structure in Slovenia is discussed in detail in Section 4.

2 National Legislation establishing competition law rules

The purpose of this Section is to outline the national legislation relevant to the competition law. Table 2.1 summarises the list of the legislative instruments in Slovenia.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
Zakon o Elektronskih Komunikacijah - 1 (Electronic Communications Act – 1)	31 December 2012
<i>Zakon o Preprečevanju Omejevanja Konkurence</i>	1 April 2008

¹³⁷⁹ For instance, pursuant to Article 12 of the Code of Obligations (*Obligacijski Zakonik*), the relations between commercial subjects are assessed based on the customary practice between the parties and business customs. ‘Sources of Law’, <https://e-justice.europa.eu/content_member_state_law-6-si-en.do?member=1>, retrieved on 29 October 2013.

¹³⁸⁰ Official Gazette RS, no. 33/1991 from 23 December 1991, available at http://zakonodaja.gov.si/rpsi/r01/predpis_USTA1.html.

¹³⁸¹ These are occasionally translated as regulations.

¹³⁸² ‘Sources of Law’, <https://e-justice.europa.eu/content_member_state_law-6-si-en.do?member=1>, retrieved on 29 October 2013.

¹³⁸³ *ibid.*

¹³⁸⁴ *ibid.*

- 1

(Prevention of Restriction of Competition Act - 1)

<i>Energetski Zakon</i> (Energy Act)	30 September 1999
<i>Zakon o Varstvu Konkurence</i> (Protection of Competition Act)	25 March 1993

2.1 General legislation

The Protection of Restriction of Competition Act - 1¹³⁸⁵, adopted in 2008 (hereinafter 'Act – 1'), abrogated the 1999 Protection of Restriction of Competition Act¹³⁸⁶ (hereinafter '1999 Act') and is currently the primary competition law statute. Articles 6 and 9 are almost a verbatim translation of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Act - 1 also contains provisions for the implementation of Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty Establishing the European Community (currently Articles 101 and 102 of TFEU). In addition, Article 8(1) of Act - 1 regarding block exemptions provides for the reasonable application of EU legislation also to cases for which only the national legislation is relevant (i.e. cases which affect only the national market).

The 1993 Protection of Competition Act (hereinafter '1993 Act')¹³⁸⁷ is rarely used as most of its provisions have been abrogated with the adoption of subsequent legislation (predominately the 1999 Act and Act – 1). With the enactment of the 1999 Act, sections II, IV, VI and VII¹³⁸⁸ of the 1993 Act were abrogated. The 1999 Act regulated, apart from antitrust, also the restriction of competition by the State. The 1993 Act continued to apply to all issues not regulated by the 1999 Act. Today, the provisions of the 1993 Act still in force are those regulating unfair competition (Articles 13, 26 and 27) and dumping (Articles 16 and 16)¹³⁸⁹.

Act – 1, compared to the 1999 Act, defined certain terms in greater detail (e.g., the notion of the relevant market). It also gave new competencies to the (former) Competition Protection Office of RS (*Urad za Varstvo Potrošnikov RS*, 'CPO'), as well as changed the decision-making procedure for the finding of infringements of competition law and the imposition of fines. The entire statute is in compliance with the EU legislation (regarding, e.g. the burden of proof, the cooperation of the national NCA with the European Commission and the NCAs of other Member States, the new definition of dominant position, the leniency programme).

Act – 1 regulates restrictive practices, concentrations of undertakings, restriction of competition by the State; it contains measures to prevent restrictive practices and concentrations which significantly impede effective competition, where they cause or may cause effects on the territory of Slovenia. In addition, it determines the authority for the protection of competition, its powers and the proceedings to be followed before it¹³⁹⁰. As 'undertaking' is considered any entity engaged in an economic activity, irrespective of its legal status and ownership affiliation; it refers also to any association of undertakings, which

¹³⁸⁵ Official Gazette RS, no. 36/2008 from 11 April 2008 and later amendments, available at http://zakonodaja.gov.si/rpsi/r01/predpis_ZAKO5071.html. The English version is available at: http://www.varstvo-konkurence.si/fileadmin/varstvo-konkurence.si/pageuploads/ZPOmK-1-consolidated_version.pdf.

¹³⁸⁶ Official Gazette RS, no. 56/1999 from 13 July 1999 and later amendments, available at http://zakonodaja.gov.si/rpsi/r02/predpis_ZAKO1662.html.

¹³⁸⁷ Official Gazette RS, no. 18/1993 from 25 March 1993 and later amendments, available at http://zakonodaja.gov.si/rpsi/r05/predpis_ZAKO1875.html

¹³⁸⁸ These sections refer to the following matters: Restriction of competition (II); Illicit speculation (IV); Market restriction with authority acts and deeds (VI); and Protection of competition (VII).

¹³⁸⁹ Repas, M. *Konkurenčno Pravo v Teoriji in Praksi; Omejevalna Ravnanja in Nadzor Koncentracij* (Uradni List RS, Ljubljana, 2010) 83-84.

¹³⁹⁰ Article 1 of Act – 1.

is not directly engaged in an economic activity, although it affects or may affect the conduct of undertakings on the market¹³⁹¹.

Articles 6 and 9 of Act – 1, as mentioned above, reproduce almost verbatim Articles 101 and 102 TFEU, with the difference that Articles 6 and 9 refer to the territory of Slovenia. Article 7 contains provisions on restrictions of minor importance, while Article 8 regulates block exemptions.

In 2011 a new institutional framework for the protection of competition was set with the amendment of the Act – 1¹³⁹². The 1999 Act stipulated that the CPO was the competent authority for the implementation of the 1999 Act. Act – 1 initially retained the CPO as the competent authority. However, due to the criticism on the lack of CPO's autonomy, a new authority was established in January 2012, the Slovenian Competition Protection Agency (*Javna Agencija RS za Varstvo Konkurence*, 'SCPA')¹³⁹³.

Behaviour or actions taking place outside Slovenia may be taken into consideration when assessing if an undertaking violated Act - 1 when such behaviour had or may have had an effect on competition in Slovenia¹³⁹⁴.

Damages for breach of competition law may be claimed under the general provisions of the Code of Obligations (*Obligacijski Zakonik*, hereinafter 'CO'¹³⁹⁵) governing civil liability¹³⁹⁶. The competent court must immediately inform the NCA about any civil proceedings for damages based upon breach of Articles 6 or 9 or Articles 101 and 102 TFEU¹³⁹⁷.

In principle, the Government (*Vlada*), State authorities, local community authorities and holders of public authority may not restrict the free operation of undertakings in the market¹³⁹⁸. However, regulations, which in accordance with the Constitution aim at the protection of human rights and economic and social relations are deemed not to restrict free operation of undertakings in the market¹³⁹⁹.

Notwithstanding Articles 65 and 66, the Government may lay down market restrictions in the following three cases, which are listed exhaustively¹⁴⁰⁰:

(a) if serious disturbances in the market and in supplies for the population have occurred or are likely to occur due to a natural disaster, epidemics, a state of emergency or similar circumstances, or when there are disturbances in other fields, if they pose a threat to the safety and health of the population;

¹³⁹¹ Article 3(1/1) of Act – 1.

¹³⁹² Official Gazette RS, no. 26/2011 from 8 April 2011, available at <http://www.uradni-list.si/1/objava.jsp?urlid=201126&stevilka=1153>.

¹³⁹³ Repas, M., 'Vpliv Ekonomskega Pristopa na Presajo Vezanih in Paketnih Prodaj v Konkurenčnem Pravu EU' (2011) *LeXonomica*, Journal of Law and Economics, Vol. III, No. 1, 105.

¹³⁹⁴ Pipan Nahtigal, N., and Lahovnik, T., 'Cartel Regulation - The application of competition regulation in 48 jurisdictions worldwide' (2013) *Law Business Research Ltd*, 282.

¹³⁹⁵ Articles 131 ff. of the CO, Official Gazette RS, no. 83/2001 from 25 October 2001, available at http://zakonodaja.gov.si/rpsi/r03/predpis_ZAKO1263.html.

¹³⁹⁶ Article 62 of Act – 1.

¹³⁹⁷ According to Article 62(4) of Act-1.

¹³⁹⁸ Articles 64, 65 and 66 of Act – 1. Article 66 of Act – 1 stipulates, by way of example the actions of the Government and other authorities which are deemed as restricting the competition.

¹³⁹⁹ Article 65(2) of Act – 1. This in particular refers to regulations laying down: (a) conditions for trade in goods and services, specifying the properties of goods or the method of providing services for sanitary, veterinary, phytopathological and environmental protection or regulations aimed at ensuring safety at work; (b) price control measures in accordance with a specific law; (c) the method of operation of undertakings with a view to protecting customers in accordance with a specific statute; (d) obligatory standards; (e) the obligation of legally specified undertakings to carry out their activity for users. Thus, this Article enlists the actions, which by the way of example, may influence competition in the market. Zabel, B., 'Omejevanje Trga z Oblastnimi Akti in Dejanji' in Grilc, P. (ed) *Zakon o Preprečevanju Omejevanja Konkurence (ZPOmK – 1) s Komentarjem* (GV Založba, Ljubljana, 2009) 549.

¹⁴⁰⁰ *ibid* 553.

(b) if significant disturbances in the market have occurred or are likely to occur due to a lack of goods which are indispensable for the production or processing of other goods, or for the everyday life of the population; or

(c) if there is a need to meet the demand for products, raw materials and reproduction materials, which are of specific or strategic importance for the defence of Slovenia¹⁴⁰¹.

These restrictions may be imposed by the Government only if the reasons for introducing them cannot be eliminated by imposing other measures on the undertakings, by regulating imports, or by adopting economic policy measures¹⁴⁰².

Consequently, the Government may:

(a) prohibit the trade in specific goods, impose restrictions in the trade of specific goods in terms of quantity and quality, or determine specific conditions for the trade in specific goods or types of goods;

(b) oblige specific undertakings to put into circulation certain quantities or types of goods, and to make them available or deliver them to specific users in accordance with a set order of priority;

(c) oblige specific undertakings to create reserves, within which they must keep certain quantities and types of goods¹⁴⁰³.

The Government must cancel a restriction immediately after the reason for which it was prescribed has ceased to exist, or when the situation can be addressed by the introduction of other measures¹⁴⁰⁴. If the Government does not cancel the measures within six months of their adoption, it must notify the National Assembly (*Državni Zbor*) and report to it the effects of these measures¹⁴⁰⁵. The difference between Articles 65(2) and 67 in conjunction with Article 69 is that Article 65(2) actions do not represent restrictions in accordance with Act – 1, while Article 67 in conjunction with Article 69 refers to restrictions, which are allowed¹⁴⁰⁶.

2.2 Industry-specific legislation

The legal instruments mentioned under Section 2.1 regulate competition law in Slovenia in general, without taking into consideration the specific characteristics of certain industries or sectors.

The Energy Act (*Energetski Zakon*, hereinafter 'EA')¹⁴⁰⁷, which partially implements EU legislation¹⁴⁰⁸, contains several provisions ensuring protection of competition in the energy market in accordance with the principles of impartiality and transparency, taking into account consumer protection and performance of effective control over the supply of energy¹⁴⁰⁹. The State is obliged to promote market rules and competition in the energy market¹⁴¹⁰. In addition, State and local authorities are responsible for the effectiveness of public services, while individual producers or suppliers must be treated impartially. The competent authority in this sector is the Energy Agency of RS (*Javna Agencija RS za Energijo*). No rules requiring the cooperation of the Energy Agency with the SCPA have been identified.

¹⁴⁰¹ Article 67 of Act – 1.

¹⁴⁰² Article 68 of Act – 1.

¹⁴⁰³ Article 69(1) Act – 1.

¹⁴⁰⁴ Article 69(3) of Act – 1.

¹⁴⁰⁵ Article 69(4) of Act – 1.

¹⁴⁰⁶ Zabel, B., 'Omejevanje Trga z Oblastnimi Akti in Dejanji' in Grilc, P. (ed) *Zakon o Preprečevanju Omejevanja Konkurence (ZPOmK – 1) s Komentarjem* (GV Založba, Ljubljana, 2009), 549.

¹⁴⁰⁷ Official Gazette RS, no. 79/1999 and later amendments, available at: http://zakonodaja.gov.si/rpsi/r00/predpis_ZAKO1550.html.

¹⁴⁰⁸ A draft new Energy Act is currently going through the legislative procedure; this new act will implement all relevant EU legislation.

¹⁴⁰⁹ Article 3 of the EA.

¹⁴¹⁰ Article 11 of the EA.

The Electronic Communications Act (*Zakon o Elektronskih Komunikacijah – 1*)¹⁴¹¹ provides for the protection of competition in the field of electronic communications¹⁴¹². The Act is in accordance with the relevant EU legislation¹⁴¹³. The competent authority in this sector is the Electronic Communications Networks and Services Agency of RS (*Agencija za Komunikacijska Omrežja in Storitve RS*), which was established only recently¹⁴¹⁴ and succeeded the former Post and Electronic Communications Agency of RS (*Agencija za Pošto in Elektronske Komunikacije RS*). The entire Section VIII. of the Act is dedicated to the protection of competition¹⁴¹⁵. The Electronic Communications Networks and Services Agency of RS is an independent State authority. However, it is obliged to cooperate with the SCPA, the European Commission and the Body of European Regulators¹⁴¹⁶.

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in Slovenia, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the Slovenian Competition Protection Agency

The Slovenian Competition Protection Agency ('SCPA') was established with the Ruling on the Establishment of the Slovenian Competition Protection Agency (*Sklep o Ustanovitvi Javne Agencije RS za Varstvo Konkurence*)¹⁴¹⁷. The Agency started operating on 1 January 2012¹⁴¹⁸. The functioning of the SCPA is regulated primarily by Act – 1 and secondarily by the Public Agencies Act (*Zakon o Javnih Agencijah*)¹⁴¹⁹.

The SCPA is independent and autonomous in the performance of its tasks and responsibilities. None of the State authorities may direct or give instructions to any of the Agency's employees in reference to the procedures or decisions thereof. Exceptionally, the National Parliament or the Government may give general instructions, however not in relation to individual cases¹⁴²⁰.

The SCPA comprises the following organisational units¹⁴²¹: the Sector for Economic Analysis¹⁴²², the Sector for Legal Affairs and Investigative Activities¹⁴²³ and, within it, the

¹⁴¹¹ Official Gazette RS, no. 109/2012 from 31 December 2012, available at: http://zakonodaja.gov.si/rpsi/r05/predpis_ZAKO6405.html.

¹⁴¹² Article 2(1) of the Electronic Communications Act.

¹⁴¹³ Article 2(2) of the Electronic Communications Act. The national legislation is in compliance with the following EU Directives: Directive 2002/19/EC, Directive 2009/140/EC, Directive 2002/20/EC, Directive 2002/21/EC, Directive 2002/22/EC, Directive 2009/136/EC, Directive 2002/58/EC, Directive 2002/77/EC, Directive 2006/24/EC.

¹⁴¹⁴ Ruling of the Establishment of the Communications Networks and Services Agency of the RS, Official Gazette RS, no. 41/2013 from 13 May 2013, available at http://zakonodaja.gov.si/rpsi/r00/predpis_SKLE9540.html.

¹⁴¹⁵ Articles 88 – 111 of the Electronic Communications Act.

¹⁴¹⁶ Article 88 of the Electronic Communications Act.

¹⁴¹⁷ Official Gazette RS, no. 61/2011 from 29 July 2011, available at <http://www.uradni-list.si/1/content?id=104815>.

¹⁴¹⁸ Article 36 of the Ruling on the Establishment of the Slovenian Competition Protection Agency.

¹⁴¹⁹ Official Gazette RS, no. 52/2002 from 14 June 2002 and later amendments, available at: http://zakonodaja.gov.si/rpsi/r04/predpis_ZAKO2024.html.

¹⁴²⁰ Article 5(4) of Act – 1.

¹⁴²¹ SCPA, Organiziranost, retrieved from: http://www.varstvo-konkurence.si/si/o_agenciji/organiziranost/, 30 October 2013.

¹⁴²² This sector conducts economic analysis and in addition has expert and advisory functions, particularly in the areas of: defining the relevant geographic and product markets; the notification of concentrations; cartels; abuses of dominant position; monitoring and analysing market conditions, which are important for the development of fair and free competition; reviewing and analysing statistical data.

¹⁴²³ This sector determines the existence of unlawful restrictive agreements (horizontal and vertical); determines whether an undertaking has a dominant market position and abuses that position; assesses compliance with the

Department of Legal Affairs¹⁴²⁴. They have the responsibility for supervising the implementation of Act – 1, as well as Articles 101 and 102 TFEU in Slovenia. The SCPA's tasks can be divided into three major groups¹⁴²⁵:

- monitoring and analysing market conditions, which are important for ensuring effective competition in the market; conducting procedures and issuing decisions in accordance with the law; as well as providing the Parliament and the Government with opinions on general issues within its competences;
- deciding whether the provisions of Act – 1 and Articles 101 and 102 of TFEU have been infringed, in accordance also with the statute regulating minor offenses, since the SCPA is also the minor offense procedure authority;
- filing an action to declare invalid contracts and agreements under Article 6(1)¹⁴²⁶ and 44(3)¹⁴²⁷ of Act – 1.

Civil servants of the SCPA and persons cooperating with it who come into contact with confidential information in the performance of their tasks are obliged to treat such information as confidential¹⁴²⁸. This obligation continues to apply after the termination of the employment or any other relationship the person has with the SCPA. Processing of personal data is allowed only to the extent necessary for the implementation of the tasks under Act - 1. The SCPA may disclose information to administrative bodies, other State authorities and holders of public authorisations, on the basis of a substantiated written request by the principal or an authorised person, which clearly indicates the relevant information is necessary for the body to carry out its statutory responsibilities. In addition, the SCPA may also disclose information to the European Commission and authorities of EU Member States responsible for the protection of competition in accordance with the procedure in Regulation (EC) No. 1/2003, as well as to authorised authorities of third countries when so determined by international treaties binding on Slovenia¹⁴²⁹. The Agency will reject requests for access to public information, if the request aims at revealing the confidentiality of the source of the information and business secrets.

3.2 The reform of the Competition Council

The first NCA, the Competition Protection Office (CPO) of RS, was established already with the enactment of the 1999 Act. At first, this authority was a body under the responsibility of the Ministry of the Economy (*Ministrstvo za Gospodarstvo*). The CPO was independent in the performance of its tasks¹⁴³⁰. CPO decisions could only be challenged before the courts and not before the Ministry¹⁴³¹. Nevertheless, the CPO, as a body under the Ministry, was subjected to ministerial control and, thus, enjoyed a lower level of financial and administrative independence, putting in question its overall independence. To address these concerns the SCPA was established, providing the new authority with greater independence and autonomy. Most importantly, the SCPA is no longer a body under the Ministry, but an independent public agency.

competition rules and forms and provides expert assistance in the preparation of applications to the court; performs acts in accordance with regulations governing antitrust and provides assistance in the investigations conducted by the European Commission or other NCAs.

¹⁴²⁴ The department determines whether unlawful restrictive agreements (horizontal and vertical), market dominance and abuses of that position exist; assesses whether concentrations are compatible with the competition rules and forms; and provides technical assistance in the preparation of applications to the court.

¹⁴²⁵ Article 12 of Act – 1.

¹⁴²⁶ Article 6(1) of Act – 1 prohibits restrictive agreements and is verbatim translation of Article 101 TFEU.

¹⁴²⁷ Article 44(3) of Act -1 refers to mergers and actions performed prior to issuing the decision on their compliance with the competition rules.

¹⁴²⁸ Article 13.a of Act – 1.

¹⁴²⁹ Article 13.b of Act – 1.

¹⁴³⁰ Article 14 of the 1999 Act, which corresponds to Article 13 of Act – 1.

¹⁴³¹ Article 18(3) of the 1999 Act.

3.3 Composition and decision-making

There are two bodies within the SCPA: the Council (*Svet*) and the Director (*Direktor*)¹⁴³². The Council (or Panel) is composed of five members¹⁴³³. The Director is also the Chairman of the Council (*Predsednik Sveta*)¹⁴³⁴. The members of the Council are appointed by the National Assembly¹⁴³⁵, upon the Government's proposal. The candidates are selected according to their expertise and qualifications in the SCPA's field of work¹⁴³⁶.

The Director is also appointed by the National Assembly upon the Government's proposal. The Minister of Economic Development and Technology (*Ministrstvo za Gospodarski Razvoj in Tehnologijo*) holds an open competition in order to select the candidate for the position of Director¹⁴³⁷. Both the Director and the members of the Council are appointed for the period of five years and may be re-appointed.

The Council's tasks and responsibilities include:

- adoption of the Agency's Rules of procedure;
- adoption of the annual report on the work of the Agency;
- appointment of the Panel which decides upon minor offenses;
- deciding on the dismissal of the Director, Chairman or a member of the Panel;
- performing other tasks within the competence of the Agency, unless another authority is competent¹⁴³⁸.

The Council performs its tasks at meetings convened by the Chairman of the Council on his/her own initiative or at the request of at least two members of the Council¹⁴³⁹. The deliberation of the Council is valid only if a majority of its Members are present at the meeting.

The Director represents the SCPA. He also manages and organises its functioning¹⁴⁴⁰. The Director is in charge of:

- conducting proceedings against undertakings, including the investigations;
- authorising employees to conduct investigations under Act – 1;
- issuing the individual administrative acts that the Agency is competent to issue – including decisions and orders (unless the competency is given to the Council)¹⁴⁴¹. SCPA decisions on infringements of Articles 101 and 102 TFEU are adopted by the SCPA Director.

Apart from these two bodies, there is also a special Minor Offense Panel (*prekrškovni senat*) comprising three members. The members of this panel are chosen from the members of the Council, as well as other employees of the SCPA. The Minor Offense Panel is in charge of rendering decisions on fines for minor offenses¹⁴⁴².

¹⁴³² Article 12.a of Act – 1.

¹⁴³³ Article 12.b(1) of Act – 1.

¹⁴³⁴ Article 12.b(2) of Act – 1.

¹⁴³⁵ The member is appointed, if majority of the present Members of the National Assembly votes for him.

¹⁴³⁶ Article 12.b(4) of Act – 1.

¹⁴³⁷ Article 12.h(1) of Act - 1.

¹⁴³⁸ Article 12.č(1) of Act - 1.

¹⁴³⁹ Article 12.d(1) of Act - 1.

¹⁴⁴⁰ Article 12.i(1) of Act - 1.

¹⁴⁴¹ Article 12.i(3) of Act - 1.

¹⁴⁴² Article 12.s of Act – 1.

3.4 Cooperation with other entities

State authorities, local community authorities, holders of public authority and other persons and organisations with access to information required for the adoption of a decision must provide to the SCPA, upon its request, the required information free of charge¹⁴⁴³.

The SCPA is also obliged to cooperate with other authorities. First, it is involved in designing the State competition policy. In addition, it is engaged in bilateral relations and international treaties concerning protection of competition¹⁴⁴⁴. The SCPA also cooperates in the investigations of the European Commission or other EU Member States NCAs. Authorised persons¹⁴⁴⁵ of the SCPA may carry out investigations at the request of the European Commission or another EU Member State's NCA, in accordance with Act – 1. The SCPA must also support the officials and other persons authorised by the European Commission to carry out investigations in accordance with Article 20 of Regulation (EC) No. 1/2003. Furthermore, it may allow other Member States' NCAs, the European Commission, and other persons, authorised by the latter, to cooperate with the authorised persons of the Agency in carrying out investigations in accordance with Article 22 of Regulation (EC) No. 1/2003. The police are also obliged to provide assistance to these persons when performing their tasks.

3.5 Investigations

The Agency may *ex officio* issue an order on the commencement of a procedure (i.e. an investigation - *sklep o uvedbi postopka*) when it suspects that Articles 6 or 9 of Act - 1, or Articles 101 or 102 of TFEU have been infringed¹⁴⁴⁶. Submission of a complaint is not required under Act – 1 in order for the SCPA to commence a procedure¹⁴⁴⁷. Information on the infringement may be provided by another undertaking, but the SCPA is not obliged to initiate an investigation; this remains at its discretion¹⁴⁴⁸. It should be noted that no templates or guidelines for the submission of complaints have been identified.

Additionally, even prior to issuing an order on the commencement of an investigation, the SCPA may address a request for information to undertakings, members of management or supervisory boards and persons employed by the undertakings. This request may be either formal or informal. However, should the Agency opt for a formal request, it must include therein: the legal basis of the request; the purpose of the request; specify the required information; an appropriate time-limit within which the information must be provided; and a notice on the penalty to be imposed for supplying incorrect, incomplete or misleading information, or for failing to provide information within the specified time-limit. No judicial protection is allowed against such order¹⁴⁴⁹. If the party fails to reply to this formal request, a fine of EUR 50,000 may be imposed. At the same time, the SCPA issues an order specifying a new time-limit for the submission of the required information. Non-complying undertakings may be subject to further fines until the sum of penalty payments from individual orders reaches 1% of the undertaking's annual turnover in the preceding business year.¹⁴⁵⁰ The undertaking under investigation is obliged to submit all documents; nonetheless it is not obliged to admit infringement of the provisions of the Act – 1 or Articles 101 and 102 of TFEU¹⁴⁵¹.

¹⁴⁴³ Article 14 of Act – 1.

¹⁴⁴⁴ Article 12.I of Act - 1.

¹⁴⁴⁵ The term refers to the employees of the SCPA or other professionals, who are authorized by the Director for performing various tasks under the provisions of the Act – 1, such as conducting investigations.

¹⁴⁴⁶ Article 21 of the Act – 1.

¹⁴⁴⁷ Repas, M. *Konkurenčno Pravo v Teoriji in Praksi; Omejevalna Ravnanja in Nadzor Koncentracij* (Uradni List RS, Ljubljana, 2010) 408.

¹⁴⁴⁸ Ibid.

¹⁴⁴⁹ Article 27 of Act – 1.

¹⁴⁵⁰ Article 27(5) of Act – 1.

¹⁴⁵¹ Article 27(3) of Act – 1.

In general, only undertakings against whom a procedure has been initiated have legal standing in the relevant proceedings. The entity submitting a complaint is not a party to the investigation. A natural/legal person asking to participate in the procedure to protect his/her own legal interests must lodge a reasoned application within 30 days from the day the order for the commencement of the investigation is published on the website of the SCPA. The decision granting the status of a 'party' is rendered by the SCPA¹⁴⁵².

Parties have the right to review documents of the case-file and make transcripts and copies at their own expense, unless otherwise stated¹⁴⁵³.

The order for the commencement of an investigation contains a description of the act considered to be infringing national or EU competition law, the relevant provisions, and the grounds for the commencement of the investigation¹⁴⁵⁴.

An extract of the order is published on the Agency's website, indicating the undertakings to which the decision applies, a brief statement of the grounds for the initiation of the investigation, the relevant provisions of Act – 1, and a request to persons and entities to provide the Agency with any information that could be relevant for the case¹⁴⁵⁵.

If the alleged infringement concerns Articles 101 or 102 TFEU, the SCPA also conducts an investigation. If, in the course of the investigation, it is determined that Articles 101 and 102 TFEU are not infringed since the trade between EU Member States has not been affected, the Agency issues an order terminating the procedure in this segment; this order cannot be subject to judicial review¹⁴⁵⁶.

After the commencement of the procedure, the SCPA issues an order for inspection (*sklep o preiskavi*) of undertaking under investigation. The order specifies: the subject-matter and purpose of the inspection; the date on which the inspection will begin; the authorised person in charge of the inspection; the powers inspectors are entrusted with¹⁴⁵⁷; and a notice on a penalty that can be imposed if the undertaking refuses to cooperate or obstructs the inspection¹⁴⁵⁸. The order is served personally to the undertaking to be inspected right before the inspection begins. In exceptional cases, when necessary to ensure that the undertaking does not have the opportunity to alter the results of the inspection, the order on the commencement of an investigation is served at the same time as the order for inspection¹⁴⁵⁹.

Inspections are conducted by employees of the SCPA, whereby specific professional tasks may be carried out by specialised organisations, institutions or individuals (called 'authorised persons'), provided this is not in conflict with the public interest or the interests of the parties¹⁴⁶⁰. Authorised persons may, for instance, enter and inspect premises, land and means of transport; examine the books, contracts, papers, business correspondence, business records and other information relating to the business of the undertaking, irrespective of the medium on which they are stored; take or obtain in any form copies of or extracts from business books and other documentation; seal any business premises and business books and other documentation for the period of and to the extent necessary for the inspection; seize items and business books and other documentation for a period of up to 20 working days; require an oral or written explanation from the employees; examine papers disclosing the identity of persons¹⁴⁶¹. If any item is seized, the authorised person must make a note in the inspection report as to where the items were found, describe them

¹⁴⁵² Article 16 of Act – 1.

¹⁴⁵³ Article 18 of Act – 1.

¹⁴⁵⁴ Article 24 (1) of Act – 1.

¹⁴⁵⁵ Article 24 (3) and (4) of Act – 1.

¹⁴⁵⁶ Article 25 of Act – 1.

¹⁴⁵⁷ Article 29 of Act – 1.

¹⁴⁵⁸ Article 28(1) of Act – 1.

¹⁴⁵⁹ Article 28(3) of Act – 1.

¹⁴⁶⁰ Article 29(1) of Act – 1.

¹⁴⁶¹ Article 29(2) of Act – 1.

and issue a certificate of confiscation¹⁴⁶². Inspections are, as a rule, carried out between 6:00 and 22:00, causing minimum disturbance to the undertaking's operations¹⁴⁶³. If there are reasonable grounds to suspect that certain documentation is being kept at the premises of an undertaking against which the procedure has not been initiated, or at the employees' residence, the Agency must obtain a court order (*sodno odločbo*) from a judge of the competent court in Ljubljana to search the relevant premises. During the inspection of residences, two adults must be present as witnesses¹⁴⁶⁴.

It is worth noting that Article 28(1) of Act -1, which regulated the elements that orders of inspection should contain, was deemed unconstitutional¹⁴⁶⁵, as violating Article 36(1) of the Constitution on the inviolability of dwellings. However, since the provision has not been repealed, it still applies.

In order to ensure the undertakings' right to defense, a decision adopted by the SCPA may not be based on facts and evidence that the parties have not been given the possibility to reply to¹⁴⁶⁶. Oral hearings are conducted only if the SCPA considers that an oral hearing needs to be conducted in order to clarify or establish essential facts¹⁴⁶⁷.

After the inspection has been completed, the SCPA prepares a report on the inspection, mentioning: the place and date the report was prepared; the name and title of the authorised person who prepared the report; a brief description of the way the inspection was conducted; a list of statements given by the representatives or employees of the undertaking against which the inspection was conducted; and a list of documents and other items that the SCPA obtained during the inspection. The report is then served to the undertaking, which may provide comments within 15 days¹⁴⁶⁸.

3.6 Decision-making

Decisions in individual cases are rendered by the Panel and its Chairman¹⁴⁶⁹. The Panel comprises all of the Council's Members, whereby one of them is the Chairman. The decision is rendered in accordance with the rules of administrative procedure and is based on the report prepared by the authorised person, after the conclusion of the inspection¹⁴⁷⁰.

When the SCPA intends to issue a decision establishing a violation of Articles 6 or 9 of the Act - 1 or Articles 101 or 102 TFEU, it must serve the parties with a summary of the relevant facts and the evidence obtained. The SCPA must set a reasonable time-limit within which the parties may provide their comments on the summary. The time-limit may not be longer than 45 days¹⁴⁷¹.

The procedure is usually completed with the rendering of a decision establishing an infringement or an order terminating the procedure¹⁴⁷². The decision establishing a violation

¹⁴⁶² Article 29(3) of Act – 1.

¹⁴⁶³ Article 29(5) of Act – 1.

¹⁴⁶⁴ Article 33 of Act – 1.

¹⁴⁶⁵ The Decision no. U-I-40/12-31 was adopted on 11 April 2013, following the application of the Supreme Court of RS.

¹⁴⁶⁶ Article 19 of Act – 1.

¹⁴⁶⁷ Article 20 of Act – 1.

¹⁴⁶⁸ Article 34 of Act – 1.

¹⁴⁶⁹ Article 12.n(1) of Act - 1.

¹⁴⁷⁰ Article 12.o(2) of Act - 1.

¹⁴⁷¹ Article 36 of Act – 1.

¹⁴⁷² Repas, M. *Konkurenčno Pravo v Teoriji in Praksi; Omejevalna Ravnanja in Nadzor Koncentracij* (Uradni List RS, Ljubljana, 2010) 418.

may also contain the requirement for the undertaking concerned to end the violation¹⁴⁷³. The decision is published on the SCPA's webpage¹⁴⁷⁴.

The SCPA must adopt a decision within two years after issuing an order on the commencement of an investigation¹⁴⁷⁵. All decisions must state their grounds, whereas the orders (e.g. orders terminating proceedings, imposing interim measures) must contain also information on the available means of judicial protection, unless the undertakings cannot challenge the relevant order¹⁴⁷⁶.

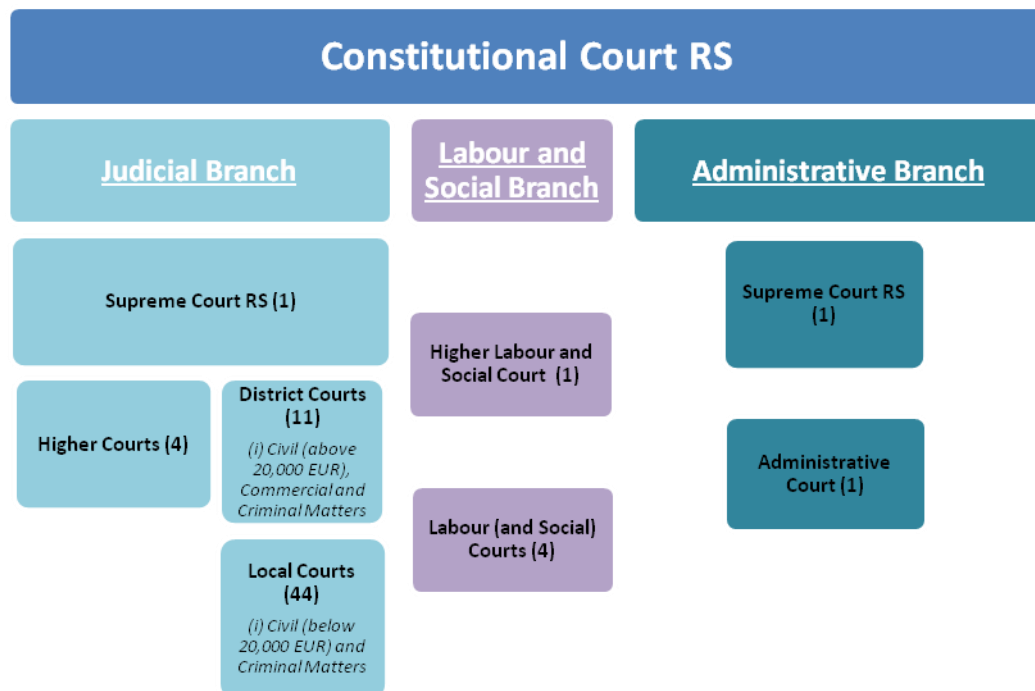
If an infringement of Articles 6 or 9 of the - 1 or Articles 101 or 102 TFEU is determined but it is considered as a minor offence, the Minor Offense Panel is then comprised to issue a decision in accordance with Act - 1. When rendering its decision on the infringement of Articles 6 and 9 of the Act – 1 or Articles 101 or 102 TFEU¹⁴⁷⁷, the Minor Offense Panel complies with the same provisions as the Panel¹⁴⁷⁸. Fines are imposed in accordance with Articles 73, 76 and 78 of Act – 1.

The SCPA may request an undertaking, to which the decision was addressed, to provide a report on the fulfilment of the commitments, obligations and measures imposed on it with the SCPA decision¹⁴⁷⁹.

4 Competent courts

An overview of the courts competent for the application Articles 101 and 102 TFEU in Slovenia is provided below. Figure 4.1 provides an overview of the court system in Slovenia.

Figure 4.1 Court system in Slovenia



¹⁴⁷³ Article 37(1) of Act – 1.

¹⁴⁷⁴ A list of published decisions is available at: http://www.varstvo-konkurence.si/si/zakonodaja_in_dokumenti/ostali_dokumenti/primeri_omejevalna_ravnanja/.

¹⁴⁷⁵ Article 37(5) of Act – 1.

¹⁴⁷⁶ Article 22(1) and (2) of Act – 1.

¹⁴⁷⁷ Article 12.s(6) of Act – 1.

¹⁴⁷⁸ Articles 12.n(2) and 12.r of Act – 1.

¹⁴⁷⁹ Article 41 of Act – 1.

Judicial protection is available against all decisions and orders of the SCPA, unless this possibility is explicitly excluded¹⁴⁸⁰. The law governing administrative disputes (the Administrative Dispute Act – *Zakon o upravnem sporu*)¹⁴⁸¹ applies *mutatis mutandis* to challenges of SCPA decisions, unless otherwise provided by the Act - 1.

There are no specialised courts in Slovenia for adjudicating competition law cases. Until August 2013, requests for the judicial review of SCPA decisions were filed with the Supreme Court RS (*Vrhovno Sodišče RS*), where the procedure was led by a panel of three judges¹⁴⁸². With the amendment of the Courts Act (*Zakon o Sodiščih*)¹⁴⁸³ competence to adjudicate the relevant cases lies exclusively with the Administrative Court RS (*Upravno Sodišče RS*). The procedure is still conducted by a panel of three judges¹⁴⁸⁴. The Administrative Court provides legal protection in administrative affairs and has the status of a higher court.

The seat of the Administrative Court is in Ljubljana. There are also three branch offices in the larger Slovenian towns (Maribor, Celje and Nova Gorica). The Court has purely national competence. Thirty-one judges serve at the Administrative Court (since one of the judges has been transferred to another authority)¹⁴⁸⁵ and there are 38 other employees. Since there are several branches of the Administrative Court, the decision-making process is actually decentralised (whereas it was centralised when competence lied with the Supreme Court)¹⁴⁸⁶.

Appeals (i.e. an ordinary legal remedy) and revisions (i.e. an extraordinary legal remedy allowed only for grave violations of procedural rules) against the decisions of the Administrative Court are brought before the Supreme Court of RS. In competition law matters, only revision is allowed. The Supreme Court RS can only decide on the interpretation of the law by the Administrative Court, while it is bound by the facts of the case as determined at the earlier instances.

A person, who intentionally or due to negligence infringed the provisions of Articles 6 or 9 of Act - 1 or Articles 101 or 102 TFEU is liable for the damage caused by such infringement¹⁴⁸⁷. Courts are bound by the final decisions of the SCPA and the European Commission establishing the existence of the infringement. This obligation is without prejudice to the rights and obligations pursuant to Article 267 of TFEU. Act – 1 stipulates that the statute of limitations for claiming compensation under the Article 62(1) is suspended from the date the SCPA or the European Commission have initiated their investigation to the date such procedure has been finally concluded.

Follow-on cases where applicants seek compensation for damages they suffered due to breaches of Articles 101 or 102 TFEU are brought before courts of general jurisdiction. There are 44 local (*okrajna sodišča*), 11 district (*okrožna sodišča*) and 4 higher courts (*višja*

¹⁴⁸⁰ Article 55 of Act – 1. Judicial protection is not available for the following orders: an order on the commencement of the investigation (Article 24(2)); an order on the termination of the investigation since there are no grounds to find a violation of Articles 101 and 102 TFEU (Article 25(2)); an order requesting information from the undertakings (Article 27(2)); an order for inspection (Article 28(4)); an order for the termination of the investigation as an investigation has also been initiated by the Commission or other Member States' NCAs (Article 40(2) and (3)), etc. However, these orders may be subject to judicial review during the judicial proceedings challenging the validity of the final SCPA decision (M. Repas, 2010, 406).

¹⁴⁸¹ Official Gazette RS, 105/2006 from 12 October 2006, available at: http://zakonodaja.gov.si/rpsi/r02/predpis_ZAKO4732.html.

¹⁴⁸² Article 56(1) of Act – 1.

¹⁴⁸³ Official Gazette RS, no. 19/1994 and later amendments. Relevant is the amendment published in Official Gazette RS, no. 63/2013 from 26 July 2013, available at: http://zakonodaja.gov.si/rpsi/r02/predpis_ZAKO332.html.

¹⁴⁸⁴ Article 48(6) and (8) of the Courts Act.

¹⁴⁸⁵ The list of employed judges: http://www.sodisce.si/urs/zaposleni/seznam_sodnikov/, retrieved on 31 October 2013.

¹⁴⁸⁶ Kocmut, M., 'Izključitev Pravice Pritožbe' in Grilc, P. (ed) *Zakon o Preprečevanju Omejevanja Konkurence (ZPOmK – 1) s Komentarjem* (GV Založba, Ljubljana, 2009) 225.

¹⁴⁸⁷ Article 62 of Act – 1.

sodišča) in Slovenia. Local courts are competent at first instance for disputes where the value of the claim does not exceed EUR 20,000. These courts are competent to adjudicate cases where the plaintiff is a natural person¹⁴⁸⁸. If the claim exceeds EUR 20,000, and in any case, where the plaintiff is a legal person¹⁴⁸⁹, competence lies with the district courts¹⁴⁹⁰. These courts also have exclusive competence over follow-on cases for claiming damages. Furthermore, they have purely national competence. The number of employees differs at each district court.

First instance decisions (by either local or district courts) are appealed before the higher courts within 15 days from the day the first instance judgment is delivered¹⁴⁹¹. Higher courts can decide on the interpretation of law by the lower court, on the facts of the case or on whether the procedural rules were observed during the proceedings before the first instance court¹⁴⁹².

Only extraordinary legal remedies can be filed against higher courts' decisions, i.e. a revision, a repeat procedure or a request for the protection of legality. The conditions for lodging one of these are strict and include only grave violations of procedural rules, misinterpretation of material law or wrongful determination of the facts of the case.

Appeals against decisions of the higher courts may be brought before the Supreme Court RS only when the higher court decides as a first instance court. In this case, the Supreme Court RS acts as a second instance court.

As a measure of last resort a constitutional complaint may be lodged with the Constitutional Court of RS. A constitutional complaint against a court decision can be filed if a natural or legal person believes that an individual act of State organs, municipal organs or other authorised public organs violated his or hers human rights or fundamental freedoms¹⁴⁹³. The individual before lodging a constitutional complaint must first exhaust other available legal remedies. Individuals who have a legal interest may also file a petition to initiate the procedure for the review of the constitutionality of a statute or of the constitutionality or legality of an executive act¹⁴⁹⁴.

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings related to breaches of competition law rules in Slovenia.

5.1 Legal standing in judicial review and follow-on proceedings

As mentioned in Section 4, **challenges against SCPA decisions** are heard by the Administrative Court. Since Act – 1 does not determine the entities that have the legal standing to bring such challenges, the provisions of the Administrative Dispute Act are applicable. As such, only individuals who had the position of a party or a third-party participant during the investigation leading to the issuance of the administrative act - in this case the decision of the SCPA - have the requisite legal standing, if their rights have been violated. Both conditions must be fulfilled concurrently. If an individual/undertaking did not participate in the SCPA procedure, it must first try to obtain the position of a party/third party participant in the SCPA procedure through the exercise of exceptional legal remedies, i.e. by requesting the reopening of the procedure¹⁴⁹⁵. This does not mean that these individuals

¹⁴⁸⁸ Article 100 of the Courts Act.

¹⁴⁸⁹ These litigations are deemed as commercial disputes.

¹⁴⁹⁰ Article 101 of the Courts Act.

¹⁴⁹¹ Article 333(1) of the Civil Procedure Act.

¹⁴⁹² Article 338(1) of the Civil Procedure Act.

¹⁴⁹³ Constitutional Court RS Official web page, <<http://www.us-rs.si/o-sodiscu/institucija/pogosta-vprasanja/2-v-katerih-primerih-lahko-posameznik-ali-pravna-oseba-vlozi-vlogo-na-ustavno-sodisce/>>, retrieved on 31 January 2014,

¹⁴⁹⁴ Ibid

¹⁴⁹⁵ Article 96(1/9) of the Administrative Procedure Act.

must have actually participated in the SCPA investigation, but rather that they have been recognised as parties or third-party participants. Furthermore, the entity/undertaking must also demonstrate that its rights were violated by the SCPA decision, since *actio popularis* is not recognised in Slovenia. Theoretically, the State Attorney (a State autonomous organ), may also act as the plaintiff, in accordance with the Government's authorisation¹⁴⁹⁶. The defendant in judicial review cases is the Republic of Slovenia, represented by the SCPA¹⁴⁹⁷. Therefore, consumers may not be the plaintiffs in such actions, since they have not been involved in the procedure in front of the SCPA.

Judicial review is initiated with the filing of a lawsuit by the rightful plaintiff within 30 days from the day that the disputed decision was served to him/her. The lawsuit is filed in writing and in person to the Administrative Court RS¹⁴⁹⁸.

The burden of proof in judicial protection cases lies with plaintiff. However, the plaintiff is prevented from introducing new facts or presenting new evidence that was not presented during the procedure before the SCPA¹⁴⁹⁹.

As far as **follow-on actions** are concerned, the legal standing is broader. Any person, who intentionally or by negligence infringes the provisions of Articles 6 or 9 of the Act – 1 or Articles 101 or 102 TFEU is liable for the damage caused by such infringement¹⁵⁰⁰. Therefore, the plaintiff is the person who suffered the damage whereas the defendant is the person/undertaking that inflicted it.

The plaintiff files the lawsuit in writing to the competent court. As stated in Section 4, the competent court is determined in accordance with the value of the claimant and the seat of the defendant.

The burden of proof in follow-on actions lies with the plaintiff. In general, in claims for damages, the plaintiff must prove the unlawfulness of the defendant's action, the damage inflicted and the causal link between the two. The defendant must also prove that he is not culpable for the infringement (reversed burden of proof). Since the decision of the SCPA already states the unlawfulness of defendant's action (the intentional or by negligence violation of Articles 6 or 9 of Act – 1 or Articles 101 or 102 of TFEU), the plaintiff does not need to prove that. He/she must only prove that he/she suffered damage and the causal link between the two.

In general, consumers may act as plaintiffs in follow-on actions, although such lawsuits are extremely rare due to the hardship to prove the causal link¹⁵⁰¹.

The legal standing in cases of judicial review and follow-on cases in Slovenia is summarised in Table 5.1 below.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Individuals (including undertakings), who had the position of a party or a third-party participant during the investigation leading to the adoption of the SCPA decision and whose rights or legal	Individuals who suffered damages from the intentional or negligent violation of the relevant competition law provisions (including consumers)

¹⁴⁹⁶ Kerševan, E., '4. Poglavje Sodno Varstvo' in Grilc, P. (ed) *Zakon o Preprečevanju Omejevanja Konkurence (ZPOMK – 1) s Komentarjem* (GV Založba, Ljubljana, 2009) 466-467.

¹⁴⁹⁷ *ibid.*

¹⁴⁹⁸ *ibid* 468.

¹⁴⁹⁹ Article 57 of Act – 1.

¹⁵⁰⁰ Article 62 of Act – 1.

¹⁵⁰¹ Vlahek, A., 'Postopek pred Sodišči' in Grilc, P. (ed) *Zakon o Preprečevanju Omejevanja Konkurence (ZPOMK – 1) s Komentarjem* (GV Založba, Ljubljana, 2009)496.

	Judicial Review	Follow on
	benefits were violated; consumers cannot act as plaintiffs	
How can an action be filed?	Lawsuit in writing and in person with the competent court	Lawsuit in writing and in person with the competent court
With which authorities can the action be filed?	Administrative Court RS (at first instance); Supreme Court RS (at second instance)	Local or district Court (at first instance); higher court (at second instance); Supreme Court (at third instance)
Burden of proof	With the plaintiff	Both with the plaintiff (required to prove that he/she suffered a damage and the causal link between the infringement of competition law rules and his/her damages) and the defendant (required to prove that he/she is not culpable)

5.2 Judicial Review Proceedings

This Section describes judicial review proceedings in Slovenia relating to competition law cases.

5.2.1 Rules applicable to the judicial review of NCA decisions

Act – 1 contains several provisions regarding the judicial review process. It provides the general basis for exercising the right to judicial review¹⁵⁰² and determines the applicable statutes: Act – 1 and, complementary, the Administrative Dispute Act¹⁵⁰³. The Administrative Dispute Act applies only: (a) when Act – 1 does not regulate a certain matter; (b) when the provisions of the Administrative Dispute Act are not in discordance with the Act – 1; and (c) when the provisions of the Administrative Dispute Act are not in conflict with the purpose of Act – 1¹⁵⁰⁴. In addition, the Civil Procedure Act (*Zakon o Pravdnem Postopku*)¹⁵⁰⁵ also applies if the Administrative Dispute Act does not regulate a certain matter¹⁵⁰⁶.

5.2.2 Competent Court

The courts competent for the judicial review of SCPA decisions are, at first instance, the Administrative Court RS and, at second instance, the Supreme Court RS.

5.2.3 Timeframe

The SCPA decisions finding an infringement of competition law rules must be challenged before the Administrative Court within 30 days from the day the disputed decision was served to the party challenging it¹⁵⁰⁷. These cases are considered as urgent and are tried by

¹⁵⁰² Articles 54 and 55 of Act – 1.

¹⁵⁰³ Article 54 of Act – 1.

¹⁵⁰⁴ Kerševan, E., '4. Pglavje Sodno Varstvo' in Grilc, P. (ed) *Zakon o Preprečevanju Omejevanja Konkurence (ZPOmK – 1) s Komentarjem* (GV Založba, Ljubljana, 2009) 463.

¹⁵⁰⁵ Official Gazette RS, no. 26/1999 and later amendments, available at: <http://zakonodaja.gov.si/rpsi/r02/predpis_ZAKO1212.html>.

¹⁵⁰⁶ Article 22 of the Administrative Dispute Act.

¹⁵⁰⁷ Kerševan, E., '4. Pglavje Sodno Varstvo' in Grilc, P. (ed) *Zakon o Preprečevanju Omejevanja Konkurence (ZPOmK – 1) s Komentarjem* (GV Založba, Ljubljana, 2009) 468.

the courts in priority¹⁵⁰⁸. Revision against the decision of the Administrative Court may be filed within 30 days from the delivery of the decision¹⁵⁰⁹

5.2.4 Admissibility of Evidence

The plaintiff may not introduce during the judicial proceedings new facts or present new evidence that was not presented during the investigation of the case by the SCPA¹⁵¹⁰. This refers to both instances.

This means that the court may also not produce evidence *ex officio*. The court decides on the basis of the file, as compiled by the SCPA¹⁵¹¹. Nonetheless, the court may assess the facts of the dispute differently than the SCPA¹⁵¹².

5.2.5 Interim Measures

Act – 1 does not contain any provisions concerning the adoption of interim measures during the judicial review procedure. Therefore, in this respect the Administrative Dispute Act is applicable¹⁵¹³. In general, the judicial review procedure before the Administrative Court does not affect the execution of the SCPA decision¹⁵¹⁴. The Administrative Court may suspend, upon the plaintiff's request, the execution of the SCPA decision until it issues its final decision, if execution of the SCPA decision may cause the plaintiff irreparable damage¹⁵¹⁵. The court decides in accordance with the principle of proportionality, considering the public benefit and the benefit to the parties. The plaintiff may also request the issuance of a temporary injunction to temporarily remedy the situation with regard to the disputed legal relationship, if such arrangement is necessary; this is particularly the case for continuing legal relationships¹⁵¹⁶. The temporary injunction is issued by the panel of the competent court (in this case the Administrative Court)¹⁵¹⁷.

The court must decide on the request for a temporary injunction within seven days after receiving the request. It may condition the issuance of the temporary injunction upon the plaintiff's obligation to lodge a security for any damage that may occur to the other party¹⁵¹⁸. The parties may appeal against the temporary injunction within three days of its issuance. The appeal does not suspend the execution of the temporary injunction. The competent court must decide on the appeal against the temporary injunction within 15 days from the receipt of the appeal¹⁵¹⁹.

5.2.6 Rulings of the court

The court, in general, is bound by the plaintiff's claim, as set in the lawsuit. As a general rule, in administrative law disputes the plaintiff may request: (a) annulment of the administrative act; (b) amendment of the administrative act; and (c) issuance of a decision, when the

¹⁵⁰⁸ Article 55(5) of Act – 1.

¹⁵⁰⁹ Article 83(1) of the Administrative Dispute Act.

¹⁵¹⁰ Article 57 of Act – 1.

¹⁵¹¹ Kerševan, E., '4. Pglavje Sodno Varstvo' in Grilc, P. (ed) *Zakon o Preprečevanju Omejevanja Konkurence (ZPOmK – 1) s Komentarjem* (GV Založba, Ljubljana, 2009) 476 and Pipan Nahtigal, N., and Lahovnik, T., 'Cartel Regulation - The application of competition regulation in 48 jurisdictions worldwide' (2013) Law Business Research Ltd 283.

¹⁵¹² Kerševan, E., '4. Pglavje Sodno Varstvo' in Grilc, P. (ed) *Zakon o Preprečevanju Omejevanja Konkurence (ZPOmK – 1) s Komentarjem* (GV Založba, Ljubljana, 2009) 476-477.

¹⁵¹³ Article 32 of the Administrative Dispute Act.

¹⁵¹⁴ Kerševan, E., '4. Pglavje Sodno Varstvo' in Grilc, P. (ed) *Zakon o Preprečevanju Omejevanja Konkurence (ZPOmK – 1) s Komentarjem* (GV Založba, Ljubljana, 2009) 470.

¹⁵¹⁵ Article 32(2) of the Administrative Dispute Act.

¹⁵¹⁶ Article 32(3) of the Administrative Dispute Act.

¹⁵¹⁷ Article 32(4) of the Administrative Dispute Act.

¹⁵¹⁸ Article 32(5) of the Administrative Dispute Act.

¹⁵¹⁹ Article 32(6) of the Administrative Dispute Act.

administrative authority in question has failed to issue an administrative act¹⁵²⁰. It should be noted that the court may annul an administrative decision, although the plaintiff requested merely its amendment. The court may, as well, order the defendant to issue an administrative decision, even though the plaintiff requested the court to amend an administrative act. However, the court may amend an administrative act only if the plaintiff expressly requested so¹⁵²¹. For cases concerning the judicial review of SCPA decisions, only annulment or amendment of the decision in question is possible.

In addition, the court, *ex officio*, considers whether the provisions regulating the procedure before the SCPA have been materially violated¹⁵²². The court, in principle, issues a ruling without a hearing¹⁵²³.

The parties may review the case file and conduct other actions (e.g. make copies)¹⁵²⁴. Decisions of the Administrative Court are not subject to further appeal, although it is possible to initiate a procedure before the Constitutional Court on constitutional grounds¹⁵²⁵.

5.3 Follow-on Proceedings (private enforcement)

This Section describes follow-on proceedings relating to competition law cases in Slovenia.

5.3.1 Rules applicable to follow-on procedures

Act – 1 contains only two provisions regarding follow-on proceedings: a substantive one, establishing the right of injured parties to compensation (Article 62)¹⁵²⁶, and a procedural one, obliging courts to cooperate with the SCPA and the European Commission (Article 63)¹⁵²⁷. The issues of liability and compensation for damages are regulated in the CO¹⁵²⁸. Follow-on procedures before the district courts or the local courts are conducted in accordance with the provisions of the Civil Procedure Act.

5.3.2 Competent Court

Competent to adjudicate follow-on actions are the courts of general jurisdiction, usually district courts, which give rulings as first instance courts. At second instance competent to adjudicate appeals against decisions of district courts are the higher courts, while at third instance competence lies with the Supreme Court RS. Further information is available in Section 4.

5.3.3 Timeframe

In Slovenia there is no special statute of limitations for competition law cases. Therefore, the general statute of limitations concerning liability for damages applies¹⁵²⁹. For non-business

¹⁵²⁰ Kerševan, E., '4. Pglavje Sodno Varstvo' in Grilc, P. (ed) *Zakon o Preprečevanju Omejevanja Konkurence (ZPOmK – 1) s Komentarjem* (GV Založba, Ljubljana, 2009) 468.

¹⁵²¹ *ibid.*

¹⁵²² Article 27(3) of the Administrative Disputes Act.

¹⁵²³ Article 59 of Act – 1. This provision is considered as incomplete, since it does not take into account cases where the court must conduct a hearing (e.g. if it must determine the facts of the dispute once again). Kerševan, E., '4. Pglavje Sodno Varstvo' in Grilc, P. (ed) *Zakon o Preprečevanju Omejevanja Konkurence (ZPOmK – 1) s Komentarjem* (GV Založba, Ljubljana, 2009) 480.

¹⁵²⁴ Article 18 of Act – 1.

¹⁵²⁵ Pipan Nahtigal, N., and Lahovnik, T., 'Cartel Regulation - The application of competition regulation in 48 jurisdictions worldwide' (2013) *Law Business Research Ltd* 283.

¹⁵²⁶ This Article stipulates the right of the injured party to seek compensation for the damages sustained due to the violation of Article 6 or 9 of the Act – 1 or Articles 101 or 102 TFEU.

¹⁵²⁷ Pursuant to Article 63 of Act – 1, courts must send to the SCPA and the European Commission a copy of any decision adopted with respect to the application of Articles 101 or 102 TFEU at the same time they serve the decision to the parties. Communication between the Court and the European Commission may be conducted directly or through the SCPA.

¹⁵²⁸ Articles 131-132 and 164-171 of the CO.

¹⁵²⁹ Article 352 of the CO.

liability, the statute of limitations is three years from the day that the injured party became aware of the damage and of the liable person (subjective statute of limitations)¹⁵³⁰. In any case, the statute of limitations is five years from the day that the damage was inflicted (objective statute of limitations)¹⁵³¹. For contractual liability, the statute of limitations is the one set for that particular contractual obligation¹⁵³². Actions for damages due to violations of competition law rules may be based both on non-contractual and on contractual liability, depending on the entity filing the action and the facts of the case.

It is worth noting that the question of when the subjective statute of limitations starts, i.e. when the party becomes aware of the damage¹⁵³³, remains ambiguous. In certain cases, this occurs only with the issuance of the SCPA or the court decision (especially when actions are brought by consumers). However, this matter must be assessed in each individual case as it is impossible to give uniform answer¹⁵³⁴.

It is important to stress that pursuant to Act – 1, the statute of limitations for claims for compensation for damages is suspended from the date that a procedure is commenced before the SCPA or the European Commission until the date that procedure has been finally concluded¹⁵³⁵.

5.3.4 Admissibility of evidence

The court is bound by the decision of the SCPA (or the court which rendered the decision in the judicial review procedure) and of the European Commission. However, the court is bound only with respect to the unlawfulness of the undertaking's actions and not with respect to the finding whether compensation for damages is due (causal link, damage and culpability). Consequently, the plaintiff would have to prove the causal link in his/her particular case and the extent of the damage, while the defendant would need to prove that he should not be held culpable for the damage (reversed burden of proof). The fact that an infringement of competition law rules has been determined by the SCPA, the European Commission or a court does not necessarily imply that the undertaking is liable for compensation¹⁵³⁶.

5.3.5 Interim Measures

Interim measures may be ordered in follow-on procedures in accordance with Articles 266 and following of the Enforcement and Securing of Civil Claims Act (*Zakon o Izvršbi in Zavarovanju*)¹⁵³⁷.

If the judicial proceedings have not been initiated, competence to order the interim measures lies with the court which would be competent to decide on the application for enforcement¹⁵³⁸. If the judicial proceedings have commenced, competent is the court before which the proceedings are pending¹⁵³⁹.

¹⁵³⁰ Article 352(1) of the CO.

¹⁵³¹ Article 352(2) of the CO.

¹⁵³² Article 352(3) of the CO.

¹⁵³³ According to Slovenian case-law, an important question is when the plaintiff obtained all necessary information to determine the extent of his damages; Vlahek, A., 'Postopek pred Sodišči' in Grilc, P. (ed) *Zakon o Preprečevanju Omejevanja Konkurence (ZPOmK – 1) s Komentarjem* (GV Založba, Ljubljana, 2009) 512.

¹⁵³⁴ *ibid.*

¹⁵³⁵ Article 62(3) of Act -1.

¹⁵³⁶ Vlahek, A., 'Postopek pred Sodišči' in Grilc, P. (ed) *Zakon o Preprečevanju Omejevanja Konkurence (ZPOmK – 1) s Komentarjem* (GV Založba, Ljubljana, 2009) 495.

¹⁵³⁷ Official Gazette RS, no. 51/1998 from 17 July 1998 and later amendments, available at: http://zakonodaja.gov.si/rpsi/r08/predpis_ZAKO1008.html.

¹⁵³⁸ Article 266(1) of the Enforcement and Securing of Civil Claims Act.

¹⁵³⁹ Article 266(2) of the Enforcement and Securing of Civil Claims Act.

Temporary injunctions may be issued before, during or even after the judicial proceedings, until the decision is executed¹⁵⁴⁰. The court which would be competent to decide on the application for enforcement based on an enforceable title is also competent to decide on the application for a temporary injunction¹⁵⁴¹.

Article 270 of the Enforcement and Securing of Civil Claims Act regulates the conditions for granting temporary injunctions for pecuniary claims. The court issues a temporary injunction if the creditor proves that it is probable that the claim exists or that he/she will be awarded the claim against the debtor. The creditor must demonstrate that there is a danger that the claim may not be enforced because the debtor will alienate, conceal or in any other way dispose of the property in question. The creditor is not required to prove the danger if it is likely that the debtor may suffer only minor damage by the sought injunction. It is considered that a danger exists if the claim is to be enforced abroad, unless the claim is to be enforced in an EU Member State. Article 271 determines the types of temporary injunctions that may be issued in such cases.

5.3.6 Rulings of the court

The court may determine that all four elements of liability are present and grant the plaintiff's claim. In contrast, the court may hold that one or more of the elements of liability are not present and dismiss the claim. The court may not amend the decision of the SCPA, the judicial review court or European Commission.

The hearing before the court is public¹⁵⁴², unless there are compelling reasons that require otherwise (e.g. if the confidentiality of the procedure must be ensured), in which case the public must leave the court room (with the exception of the parties, their legal and statutory representatives, assignees and interveners)¹⁵⁴³. Court hearings are oral in all instances¹⁵⁴⁴. It is of outmost importance that the parties submit all relevant facts and evidence necessary to prove their statements at the main hearing. Parties can also make a statement on the opposing party's allegations and evidence. If not, they are precluded from making such points later in the procedure, unless they were not able to do so without their own fault¹⁵⁴⁵. The judgment (its operative part) is pronounced in public. The judgment's reasoning is not always publicly pronounced, depending on whether the main hearing was public or behind closed doors¹⁵⁴⁶.

5.3.7 Rules applicable to the enforcement of court judgments

Enforcement of court judgments is conducted pursuant to the provisions of the Enforcement and Securing of Civil Claims Act. The provisions of the Civil Procedure Act are used complementarily¹⁵⁴⁷. No provisions referring specifically to follow-on actions in competition law cases exist.

The court competent to adjudicate claims for the enforcement of court judgments is the local court. The creditor must file an application which must be based on an enforceable instrument¹⁵⁴⁸. Enforceable instruments are: (a) enforceable court judgments or court settlements, (b) enforceable notaries' acts, (c) other documents which are considered as enforceable instruments according to a statute or ratified and published international treaty or legal act of the EU, which is directly applicable in Slovenia¹⁵⁴⁹. As court judgments are

¹⁵⁴⁰ Article 267 of the Enforcement and Securing of Civil Claims Act.

¹⁵⁴¹ Article 266(3) of the Enforcement and Securing of Civil Claims Act.

¹⁵⁴² Article 293 of the Civil Procedure Act.

¹⁵⁴³ Article 294 of the Civil Procedure Act.

¹⁵⁴⁴ Article 284 of the Civil Procedure Act.

¹⁵⁴⁵ Article 286 of the Civil Procedure Act.

¹⁵⁴⁶ Article 322 of the Civil Procedure Act.

¹⁵⁴⁷ Article 15 of the Enforcement and Securing of Civil Claims Act.

¹⁵⁴⁸ Article 40(1) of the Enforcement and Securing of Civil Claims Act.

¹⁵⁴⁹ Article 17(1) of the Enforcement and Securing of Civil Claims Act.

also considered arbitration judgments, decisions and payment or other orders of a court or arbitration panel. Court settlements are settlements concluded in front of a court¹⁵⁵⁰.

The court judgment is enforceable if it has become final and if the deadline for voluntary fulfilment of the obligation has expired. The deadline for voluntary compliance with the obligation starts the day after the debtor was served with the decision. If only a part of the decision has become enforceable, enforcement may be allowed only with respect to this part. The court may authorise the execution of the court judgment also if it has not yet become final, if a statute stipulates that the appeal does not suspend enforcement¹⁵⁵¹. Court settlements are enforceable if the claim from the settlement is due. The maturity of the claim is proven with the record on the settlement, a public document or a certified document¹⁵⁵².

5.4 Alternative dispute resolution mechanisms

No special alternative dispute resolution mechanisms are available in Slovenia for competition law disputes.

Alternative dispute resolution mechanisms are available pursuant to the provisions of the Act on Alternative Dispute Resolution in Judicial Matters (*Zakon o Alternativnem Reševanju Sodnih Sporov*)¹⁵⁵³. These mechanisms may be used for any commercial (including competition), labour, family and other types of disputes, unless otherwise determined by the law¹⁵⁵⁴.

The District Court of Ljubljana offers mediation for civil, family and commercial law disputes. There are also other institutions providing alternative dispute resolution services, such as *Center za mediacijo*¹⁵⁵⁵, *Zavod Rakmo*¹⁵⁵⁶, *Zavod Mirabi*¹⁵⁵⁷.

Any pecuniary claim may be subject to an arbitration agreement, while other types of civil claims may be subject to arbitration only if the parties are allowed to settle that claim, pursuant to Arbitration Act (*Zakon o Arbitraži*)¹⁵⁵⁸. The parties must agree on using arbitration in an arbitration agreement. Competition law disputes, and in particular follow-on actions, are amongst those disputes that can be settled through arbitration.

The Permanent Court of Arbitration¹⁵⁵⁹, attached to the Chamber of Commerce and Industry of Slovenia (*Gospodarska Zbornica Slovenije*), is an autonomous and independent institution, offering arbitration and conciliation services. There are also several specialised arbitration providers in Slovenia, such as the European Centre for Dispute Resolution (*Evropski Centar za Reševanje Sporov*)¹⁵⁶⁰.

6 Contextual Information

This Section provides contextual information on the judicial system in Slovenia.

¹⁵⁵⁰ Article 18 of the Enforcement and Securing of Civil Claims Act.

¹⁵⁵¹ Article 19 of the Enforcement and Securing of Civil Claims Act.

¹⁵⁵² Article 20 of the Enforcement and Securing of Civil Claims Act.

¹⁵⁵³ Official Gazette RS, no. 97/2009 from 30 November 2009 and later amendment, available at: <http://zakonodaja.gov.si/rpsi/r08/predpis_ZAKO5648.html>.

¹⁵⁵⁴ Article 2(1) of the Act on Alternative Dispute Resolution in Judicial Matters.

¹⁵⁵⁵ Webpage: <<http://www.mediacija.si/>>.

¹⁵⁵⁶ Webpage: <<http://www.mediacija.com/>>.

¹⁵⁵⁷ Webpage: <<http://www.mirabi.org/>>.

¹⁵⁵⁸ Official Gazette RS, no. 45/2008 from 9 May 2008, available at: <http://zakonodaja.gov.si/rpsi/r08/predpis_ZAKO5288.html>.

¹⁵⁵⁹ More information is available here: <<http://www.sloarbitration.eu/index.php>>.

¹⁵⁶⁰ Webpage: <<http://www.ecdr.si/slo/o-nas/splosne-informacije/>>.

6.1 Duration and cost of competition law cases

Information on duration of competition law cases is not available.

The average duration for judicial proceedings is the following¹⁵⁶¹:

- for civil law cases before local courts: 13.2 months;
- for civil law cases before district courts: 15.2 months;
- for commercial law cases before district courts: 14.2 months;
- for administrative law cases before the Administrative Court: 8.6 months;
- appeals in civil law cases before higher courts: 4.6 months;
- appeals in commercial law cases before the higher courts: 4,7 months.

The costs of judicial proceedings include the court fees, attorneys' fees, costs of possible translations, costs of experts and enforcement officers' fees. Information on costs is not transparent. Furthermore, there is the lack of analysis in this field, so it is difficult to predict the extent of the costs, especially for lay persons. In general, costs depend on the complexity of each individual case (e.g. if translators or other experts are needed)¹⁵⁶².

The relevant legislation is the following: the Court Fees Act (*Zakon o Sodnih Taksah*)¹⁵⁶³, the Attorney's Fee Act (*Zakon o Odvetniški Tarifi*)¹⁵⁶⁴ and Free Legal Aid Act (*Zakon o Brezplačni Pravni Pomoči*)¹⁵⁶⁵.

6.2 Influencing Factors

There are no specific influencing factors for the application of competition law rules in Slovenia.

6.3 Obstacles/Barriers

One of the most topical issues in Slovenia in the last decade is the backlog of court cases. The situation has improved over the last few years further to the conviction of Slovenia by the European Court of Human Rights in the *Lukenda v. Slovenia* case¹⁵⁶⁶. The Government and competent authorities have been implementing numerous projects in order to reduce the backlog. However, the situation is still far from satisfying. As a result, many judicial review or follow-on cases are not adjudicated in due time.

One of the greatest obstacles in relation to access to justice concerning the application of competition law rules is the difficulty to prove the exact amount of damages in follow-on actions¹⁵⁶⁷.

¹⁵⁶¹ Ministry of Justice, *Zaveza za Izboljšanje Stanja v Sodstvu med Vlado RS in Vrhovnim Sodiščem RS*, 4 JUNIJ 2013, available at: http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/mp.gov.si/PDF/131002_podpisana_ZAVEZA.pdf.

¹⁵⁶² Pipan Nahtigal, N., 'Country Report Slovenia, Annex 46' in *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union*, CONTRACT JLS/2006/C4/007-30-CE-0097604/00-36 (2007) 11-12.

¹⁵⁶³ Official Gazette RS, no. 67/2008 from 4 July 2008 and later amendments, available at: http://zakonodaja.gov.si/rpsi/r09/predpis_ZAKO4729.html.

¹⁵⁶⁴ Official Gazette RS, no. 48/2001 from 13 Jun 2001 and later amendments, available at: http://zakonodaja.gov.si/rpsi/r05/predpis_ZAKO1265.html.

¹⁵⁶⁵ Official Gazette RS, no. 37/2008 from 15 April 2008 and later amendments, available at: http://zakonodaja.gov.si/rpsi/r05/predpis_ZAKO1265.html.

¹⁵⁶⁶ Application no. 23032/02 from 6 October 2005, available at: <http://echr.ketse.com/doc/23032.02-en-20051006/view/>.

¹⁵⁶⁷ Vlahek, A., 'Postopek pred Sodišči' in Grilc, P. (ed) *Zakon o Preprečevanju Omejevanja Konkurence (ZPOmK – 1) s Komentarjem* (GV Založba, Ljubljana, 2009) 501, and Bratina, T., 'Ekonomske Vidike Določanja Odškodnin v Primeru Kršitev Pravil Konkurenčnega Prava' (2012) *LeXonomica*, Journal of Law and Economics, Vol. IV, No. 1, 88.

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COUNTRY FACTSHEET - SWEDEN

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Abbreviations used

Act	Swedish Competition Act (2008:579)
Commission	European Commission
EU	European Union
KKV	Swedish Competition Authority
Regulation No 1/2003	Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty
TFEU	Treaty on the Functioning of the European Union

1 Overview of the National Legal Framework

The Swedish legal system is based on Civil Law and the hierarchy of laws.

With reserve to influence from EU law, the Constitution is the highest primary source of law followed by statutes and regulations. Other recognised sources of law are preparatory works, case-law and academic literature.

The Swedish Constitution consists of four fundamental laws¹⁵⁶⁸: the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. The organisation and working procedures of the Parliament (*Riksdag*) are regulated in detail in the *Riksdag* Act, which occupies an intermediate position between fundamental law and ordinary law.

The administration of justice is regulated in chapter 11 of the Instrument of Government, holding provisions on the courts of law, independent administration of justice, appointment and legal status of judges and other employees, citizenship requirement and judicial review. This part of the Constitution was most recently amended in 2010.

The courts of law consist of the Supreme Court, the courts of appeal and the district courts, which are courts of general jurisdiction, and the Supreme Administrative Court, the administrative courts of appeal and the administrative courts, which are general administrative courts. Other courts may be established in accordance with the law. This is so as regards the Market Court, which is competent to deal inter alia with certain marketing cases and competition cases.

2 National Legislation establishing competition law rules

This Section describes the national legislation in Sweden establishing competition law rules.

Table 2.1 List of relevant competition law instruments

Legislative instrument	Date of adoption
The Competition Act (2008:579) (<i>Konkurrenslagen</i>)	18 June 2008, in force from 1 November 2008

2.1 General legislation

The Swedish Competition Authority (*Konkurrensverket*, hereinafter – KKV) enforces the provisions of Articles 101 and 102 of the TFEU on the basis of the Swedish Competition Act (*Konkurrenslagen* 2008:579)¹⁵⁶⁹. The Competition Act holds prohibitions against anti-competitive co-operation¹⁵⁷⁰ and abuse of a dominant position¹⁵⁷¹ modelled on Articles 101 and 102 of the TFEU.

The Competition Act replaced the 1993 Competition Act (*Konkurrenslagen* 1993:20) that was enacted in connection with Sweden’s accession to the EEA. The 2008 amendments were mainly due to the adoption of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation No 1/2003). Since 2008, the Competition Act has been modified four times¹⁵⁷².

¹⁵⁶⁸ Swedish Constitution is available at: <http://www.riksdagen.se/en/How-the-Riksdag-works/Democracy/The-Constitution/>.

¹⁵⁶⁹ Swedish Competition Act is available in English language at http://www.kkv.se/upload/Filer/ENG/Publications/The_Swedish_Competition_Act.pdf.

¹⁵⁷⁰ Chapter 2, section 1 of the Competition Act.

¹⁵⁷¹ Chapter 2, section 7 of the Competition Act.

¹⁵⁷² Information available at: <http://www.notisum.se/rnp/sls/fakta/a0080579.htm>.

The purpose of the Competition Act is to eliminate and counteract obstacles to effective competition in the field of production of and trade in goods, services and other products¹⁵⁷³.

The Act does not apply to agreements between employers and employees relating to wages and other conditions of employment¹⁵⁷⁴.

The principle of extraterritoriality applies to the Competition Act meaning that the Act applies to behaviour or actions that have effect on Swedish territory¹⁵⁷⁵. The Act does not clarify whether there is a need for a concrete effect or possible effect on the national market would suffice for this principle to apply.

The Act refers to Regulation No 1/2003 and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings by stating that these Regulations “contain provisions that are relevant to the implementation of this Act”¹⁵⁷⁶.

According to the Competition Act, an undertaking is defined as a natural or legal person engaged in activities of an economic or commercial nature. To the extent that such activities involve the exercise of authority they do not fall within the scope of the definition¹⁵⁷⁷.

The provisions of the Act that relate to agreements also apply to decisions by an association of undertakings and concerted practices of undertakings¹⁵⁷⁸.

The Act contains specific definitions as regards primary agricultural associations and taxi undertakings¹⁵⁷⁹.

Under the Act, “agreements between undertakings shall be prohibited if they have as their object or effect, the prevention, restriction or distortion of competition in the market to an appreciable extent, if not otherwise regulated in this act”¹⁵⁸⁰.

The Act prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the market¹⁵⁸¹. It mirrors Article 101 of the TFEU, but without the criteria that the trade between Member States needs to be affected.

The Act prescribes that any agreements or provisions included in agreements that are prohibited are also void¹⁵⁸².

The Act prescribes that “[a]ny abuse by one or more undertakings of a dominant position on the market shall be prohibited”. A second paragraph to the provision mirrors Article 102(2) of the TFEU¹⁵⁸³.

According to the Act, the KKV may issue an injunction towards an undertaking to terminate an infringement to any of the prohibitions of Article 101 or 102 in the Treaty or its national equivalences in the Act¹⁵⁸⁴.

As opposed to the European Commission and many other National Competition Authorities, the KKV does not have an independent power to issue competition fines or to prohibit concentrations. In order to have fines imposed, the Competition Authority must institute

¹⁵⁷³ Chapter 1, section 1 of the Competition Act.

¹⁵⁷⁴ Chapter 1, section 2 of the Competition Act.

¹⁵⁷⁵ See prop. 1999/2000:140, s. 181 and SOU 2000:4, s. 106.

¹⁵⁷⁶ Chapter 1, section 3 of the Competition Act.

¹⁵⁷⁷ Chapter 1, section 5 of the Competition Act.

¹⁵⁷⁸ Chapter 1, section 6 of the Competition Act.

¹⁵⁷⁹ Chapter 1, sections 7 and 8 of the Competition Act.

¹⁵⁸⁰ Chapter 2, section 1 of the Competition Act.

¹⁵⁸¹ Chapter 2, section 1, second paragraph of the Competition Act mirrors (a) to (e) in Article 101, first paragraph of the TFEU. Chapter 2, section 2 of the Competition Act mirrors Article 101 second paragraph of the TFEU.

¹⁵⁸² Chapter 2, section 6 of the Competition Act.

¹⁵⁸³ Chapter 2, section 7 of the Competition Act.

¹⁵⁸⁴ Chapter 3, section 1 of the Competition Act.

proceedings before a designated court of first instance, the Stockholm District Court (*Stockholms tingsrätt*)¹⁵⁸⁵.

If the KKV decides not to take action on a complaint, the Competition Act provides for a subsidiary right for the undertaking concerned to bring an action claiming an injunction before the Swedish Market Court (hereinafter called a *follow-on injunction petition*)¹⁵⁸⁶.

The Act also provides that if an undertaking intentionally or negligently infringes any of the prohibitions contained in Article 101 or 102 of the Treaty or its national equivalents in the Act, the undertaking is obliged to compensate the damage that is caused thereby¹⁵⁸⁷.

2.2 Industry-specific legislation

Sweden has no industry-specific legislation relating to the enforcement of Articles 101 and 102 of the TFEU.

3 The National Competition Authority

This Section describes the National Competition Authority (NCA) in Sweden, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the KKV

The KKV was established in 1992 in view of Sweden's accession to the EEA.

The competences of the KKV are regulated in the Regulation (2007:1117) with instructions for the *Konkurrensverket*, the early *Regleringsbrev* (yearly Regulatory letters) and other tasks assigned by the Government directly to the authority.

The competences of the KKV in the area of competition law follow from the Competition Act.

3.2 The reform of the KKV

As stated above, the Competition Act was amended in 2008 inter alia due to the entering into force of Regulation No 1/2003.

In 2009, a new provision was inserted into the Competition Act concerning anti-competitive sales activities by public entities¹⁵⁸⁸. According to this provision, a certain conduct by the State, a municipality or a county council within a sales activity may be prohibited through an injunction, if such conduct 1) distorts, by object or effect, the conditions for effective competition in the market, or 2) impedes, by object or effect, the occurrence or the development of such competition. Cases concerning such injunctions are tried by the Stockholm District Court on application by the KKV. If the KKV in a particular case decides not to apply for an injunction, a follow-on injunction petition may be brought by an undertaking that is affected by the conduct or activity in question.

The KKV has also during recent years been given the power to supervise the application of the public procurement rules in Sweden and notably impose fines in case of violations of these rules. This competence together with the competence relating to anti-competitive sales activities by public entities are at the moment occupying large parts of the resources of the KKV.

¹⁵⁸⁵ Chapter 3, sections 5-11 of the Competition Act.

¹⁵⁸⁶ Chapter 3, section 2 of the Competition Act.

¹⁵⁸⁷ Chapter 3, sections 25 and 26 of the Competition Act.

¹⁵⁸⁸ Chapter 3, section 27 of the Competition Act.

In later years, the KKV has also enhanced the importance of economic theory by employing a chief economist and establishing a department called the Office of the Chief Economist¹⁵⁸⁹.

3.3 Composition and decision-making

Led by Director General Dan Sjöblom, the KKV is divided into eight departments. The management group consists of the Director General and the heads of departments.

The KKV has approximately 135 employees; most of them are lawyers and economists¹⁵⁹⁰.

3.4 Cooperation with other entities

The KKV can and does cooperate with antitrust authorities in other jurisdiction as well as with the European Commission.

3.5 Investigations

The KKV's powers to investigate competition issues are set out in the Competition Act¹⁵⁹¹. Thus, the KKV may, where this is necessary for the performance of its duties under the Act, require 1) undertakings or other parties to supply information, documents or other material, 2) persons who are likely to be in a position to provide relevant information to appear at a hearing, or 3) a municipality or county council engaged in activities of an economic or commercial nature to account for the costs of and revenues from these activities¹⁵⁹².

Upon application by the KKV, the Stockholm District Court may decide that the Authority may carry out an inspection on the premises of an undertaking to establish where it has infringed any of the prohibitions contained in Articles 101 and 102 of the TFEU, or its equivalences in the Competition Act, where 1) there is reason to believe that an infringement has been committed, 2) the undertaking does not comply with an obligation imposed or there is a risk of evidence being withheld or tampered with, and 3) the importance of the action taken is sufficient to outweigh the interference or other inconvenience caused to the parties affected by it¹⁵⁹³.

Such a decision may also under specific circumstances refer to an undertaking other than that to be investigated¹⁵⁹⁴.

Inspections may also concern homes and other premises of the board and employees of the undertaking which is subject to investigation¹⁵⁹⁵.

A decision about an inspection may be issued with the party referred to in the application being given the opportunity to be heard if it is thought that the inspection would otherwise be undermined¹⁵⁹⁶.

The party being inspected has the right to summon a legal representative and the KKV may request assistance from the Enforcement Service in carrying out the measures¹⁵⁹⁷.

Furthermore, the Competition Act allows and regulates examinations requested by the European Commission or an authority in another Member State¹⁵⁹⁸. The KKV may also

¹⁵⁸⁹ Annual report of the KKV 2012, p. 50, available at: http://www.kkv.se/upload/Filer/Om_Konkurrensverket/arsredovisning_2012.pdf.

¹⁵⁹⁰ Annual report of the KKV 2012, p. 49, available at: http://www.kkv.se/upload/Filer/Om_Konkurrensverket/arsredovisning_2012.pdf.

¹⁵⁹¹ Chapter 4 of the Competition Act.

¹⁵⁹² Chapter 5, section 1 of the Competition Act.

¹⁵⁹³ Chapter 5, section 3 of the Competition Act.

¹⁵⁹⁴ Chapter 5, section 6 of the Competition Act.

¹⁵⁹⁵ Chapter 5, section 5 of the Competition Act. The powers of the KKV during an investigation are stated in Chapter 5, section 6 of the Competition Act.

¹⁵⁹⁶ Chapter 5, section 7 of the Competition Act.

¹⁵⁹⁷ Chapter 5, sections 9 and 10 of the Competition Act.

render legal assistance to an authority in a State with which Sweden has entered into an agreement on the provision of legal assistance in competition cases¹⁵⁹⁹.

3.6 Decision-making

The independence of the authority is guaranteed by the Swedish constitution.

The webpage of the KKV provides detailed guidelines on the competition rules and their application by the KKV.

The KKV has inter alia elaborated “questions and answers” section on its webpage and a webpage in Swedish “Tell us about competition problems” (*Tipsa oss om konkurrensproblem*)¹⁶⁰⁰. This webpage provides a question formula, but undertakings and consumers are also encouraged to telephone the KKV in order to discuss whether they are confronted with a competition law problem.

Normally, the KKV will send a copy of the complaint for comments to the party having allegedly infringed the competition rules (if this is not considered to undermine later investigations). Thus, in the procedure before the KKV the complainant and the alleged infringing company act as opposing parties. All documents submitted are publicly available, except for information classified as business secret.

The procedure at the KKV adheres to the general Swedish law on administrative procedure (*Förvaltningslagen, 1986:223*). According to these rules, a party has a general right to access the file¹⁶⁰¹. However, according to case law¹⁶⁰², the complaining company is generally not regarded as a party as such and is entitled only to the access file the same as the general public. If it is practically feasible, which it usually is considered to be, a party is entitled to an oral hearing¹⁶⁰³. There are no specific regulations relating to evidence or hearing of witnesses. However, before delivering a decision against a party, the KKV is obligated to actively communicate any relevant information to that party¹⁶⁰⁴.

Non-confidential versions of the KKV’s decisions are published on the KKV website.

4 Competent courts

This Section describes the competent courts in Sweden.

As mentioned above, the KKV may issue an injunction against an undertaking to terminate an infringement and such an obligation takes effect immediately, unless other provision is made¹⁶⁰⁵. Such decisions are subject to appeal to the *Market Court*¹⁶⁰⁶. The KKV may combine the injunction with a conditional fine (*vite*). A request for the conditional fine to be imposed, if the undertaking has not observed the injunction, is brought by the KKV either to

¹⁵⁹⁸ Chapter 5, sections 14-20 of the Competition Act. Chapter 5, sections 14 and 15 of the Competition Act provide that chapter 5, sections 1 and 3-13 (see above) also apply when the KKV takes action at the request of a competition authority of another Member State. Chapter 5, section 16 provides that chapter 5, sections 6 and 9-13 about inspections also apply when the KKV at the request of the Commission carries out an inspection as laid down in Regulation No 1/2003. When the Commission has ordered an inspection pursuant to Regulation No 1/2003, chapter 5, section 17 provides that the Swedish Enforcement Authority on the application of the KKV may decide on enforcement assistance in order to enable such inspection to be implemented. Questions concerning prior authorization concerning Regulation No 1/2003 are examined by the Stockholm District Court at the request of the KKV.

¹⁵⁹⁹ Chapter 5, sections 19 and 20 of the Competition Act.

¹⁶⁰⁰ Information available at: http://www.kkv.se/t/Page_404.aspx.

¹⁶⁰¹ Section 16 of the Competition Act.

¹⁶⁰² See, inter alia, case RÅ 1994 not. 338.

¹⁶⁰³ Section 14 of the Competition Act.

¹⁶⁰⁴ Section 17 of the Competition Act.

¹⁶⁰⁵ Chapter 3, section 1 of the Competition Act.

¹⁶⁰⁶ Chapter 7, section 1 of the Competition Act.

the district court within whose jurisdiction the company in question has domicile, or to the Stockholm District Court, which is always the competent court¹⁶⁰⁷.

Where the KKV decides in a particular case *not* to impose an injunction to terminate an alleged infringement, the *Market Court* may do so at the request (a follow-on injunction petition) of an undertaking that is affected by the infringement (with the exception of decisions based on Article 13 of the Regulation No 1/2003)¹⁶⁰⁸.

In case the KKV finds that the infringement is intentional or negligent and that competition fine should be imposed on the undertaking, the KKV must request the Stockholm District Court to impose such a fine. Before the KKV institutes such proceedings, the undertaking is given an opportunity to express its views on the draft summons application¹⁶⁰⁹.

Appeals against judgments and decisions of the Stockholm District Court are lodged with the Market Court¹⁶¹⁰.

Both the Stockholm District Court and the Market Court are organised centrally and their jurisdiction is exclusive as regards judicial review cases. They have competence as regards purely national competition cases as well as other competences. As with all Swedish courts, the courts rule on both law and facts.

According to the Competition Act¹⁶¹¹, if an undertaking intentionally or negligently infringes any of the competition law prohibitions (including Articles 101 and 102 of the TFEU), the undertaking must compensate the damage that is caused thereby. The rights to such damages lapse if no action is brought within ten years from the date when the damage was caused. The action is brought either to the district court within whose jurisdiction the company in question has domicile, or to the Stockholm District Court, which is always the competent court¹⁶¹².

Follow-on damages actions before the Stockholm District Court may be joined with the corresponding judicial review case of the KKV's injunction decision¹⁶¹³.

Both the Stockholm District Court and the Market Court are located in Stockholm, the capital of Sweden.

Cases with the Stockholm District Court are decided by four judges, two of which should be legally qualified judges and two should be experts in economics.

Cases with the Market Court are decided by seven judges, three of which (the chairman, the vice-president and one of the ordinary judges) must be legally qualified judges and four must be experts in economics.

5 Proceedings related to breaches of Competition Law rules

This Section provides an overview of proceedings related to breaches of competition law rules.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in Sweden is described in Table 5.1 below.

¹⁶⁰⁷ Chapter 6, sections 1 and 2 of the Competition Act.

¹⁶⁰⁸ Chapter 3, section 2 of the Competition Act.

¹⁶⁰⁹ Chapter 3, section 5 of the Competition Act.

¹⁶¹⁰ Chapter 7, section 2 of the Competition Act.

¹⁶¹¹ Chapter 3, section 25 of the Competition Act.

¹⁶¹² Chapter 3, section 26 of the Competition Act.

¹⁶¹³ Chapter 8, sections 6 and 7 of the Competition Act.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	<p>Appealable KKV decisions (incl. injunctions): the addressee of the KKV decision. Anyone affected by the alleged infringement.</p> <p>Competition fines: proceedings are brought by the KKV before the Stockholm District Court with possible appeal to the Market Court.</p>	<p>Damages: Anyone claiming to have suffered damages.</p> <p>Follow-on injunction petition: A company who is affected by the alleged infringement.</p>
How can an action be filed?	<p>Appealable KKV decisions (incl. injunctions): appeal (written) to the Market Court.</p> <p>Competition fines: the KKV in writing initiates proceedings with the Stockholm District Court. The ruling of the Stockholm District Court can be appealed by both parties to the Market Court.</p>	<p>Damages: action (filed in writing) at Stockholm District Court or any other district court.</p> <p>Follow-on injunction petition: when the KKV decides not to pursue a matter, an effected company may petition (in writing) the Market Court to issue an injunction against the alleged infringement.</p>
With which authorities can the action be filed?	<p>Appealable KKV decisions (incl. injunctions): Market Court.</p> <p>Competition fines: ruling of the Stockholm District Court can be appealed to the Market Court.</p>	<p>Damages: Stockholm District Court or a district court where the defendant has domicile.</p> <p>Follow-on injunction petition: Market Court.</p>
Burden of proof	<p>Appealed general KKV decisions: with the appellant.</p> <p>Appealed injunctions: with the KKV.</p> <p>Competition fines: with the KKV.</p>	<p>Damages: with the claimant as regards the existence and size of the damage claim (not as regards the decision of the KKV or Commission).</p> <p>Follow-on injunction petition: by the party petitioning the injunction.</p>

5.2 Judicial Review Proceedings

This Section presents judicial review proceedings in Sweden for competition law cases.

5.2.1 Rules applicable to the judicial review of NCA decisions

The KKV decisions in general (incl. injunctions): the Competition Act supplemented by the Court Matters Act (*Årendelagen (1996:242)*).

Competition fines: the Competition Act supplemented by rules in the Swedish Code of Judicial Procedure (*Rättegångsbalken*).

5.2.2 Competent Court

Appealable KKV decisions (incl. injunctions): the Market Court. The ruling of the Market Court cannot be appealed.

Competition fines: the KKV initiates proceedings before the Stockholm District Court in order to have this court to impose fines. The judgment of the Stockholm District Court may be appealed to the Market Court. The ruling of the Market Court cannot be appealed.

5.2.3 Timeframe

The KKV decisions in general (incl. injunctions): the appeal is to be brought before the Market Court within three weeks of the decision¹⁶¹⁴. Handling time in the Market Court is approximately one year.

Competition fines: the competition fine petition must be brought to the Stockholm District Court within five years from when the infringement seized¹⁶¹⁵. The ruling of the Stockholm District Court is to be appealed within three weeks¹⁶¹⁶. Handling time in the Market Court is one to two years.

5.2.4 Admissibility of Evidence

Any relevant evidence may be presented, including the hearing of experts. It does not matter whether the evidence has been presented during the proceedings at the KKV or not.

5.2.5 Interim Measures

The relevant courts may decide on interim measures according to the rules in the Code of Judicial Proceedings. For example, the Market Court can inhibit an injunction issued by the KKV¹⁶¹⁷. Another example is that both a district court and the Market Court can order sequestration in order to secure property to cover a petitioned competition fine¹⁶¹⁸.

5.2.6 Rulings of the court

Appealable KKV decisions (incl. injunctions): the Market Court may uphold, revoke or change the decision of the KKV. It may also change the amount of the conditional fine.

Competition fines: the Stockholm District Court and the Market Court decide the amount of the competition fine. The KKV's petition may also be dismissed by the courts.

In relation to both matters mentioned above, the procedural provisions allow procedures solely in writing if the parties agree to this, but this is highly unusual. At least one oral hearing per instance is expected. All court judgements are made public in writing. The Market Court's judgements are made accessible at the court's website.

5.3 Follow-on Proceedings (private enforcement)

This Section presents follow-on proceedings in Sweden for competition law cases.

5.3.1 Rules applicable to follow-on procedures

The Competition Act as supplemented by rules in the Swedish Code of Judicial Procedure.

5.3.2 Competent Court

Damages: the Stockholm District Court or any district court with in whose jurisdiction the defendant is domiciled. Appeals go to the Market Court. The ruling of the Market Court cannot be appealed.

Follow-on injunction petition: the Market Court. The ruling of the Market Court cannot be appealed.

¹⁶¹⁴ Section 23 of the Swedish Law on Administrative Procedure (*Förvaltningslagen*)

¹⁶¹⁵ Chapter 3, section 20 of the Competition Act.

¹⁶¹⁶ Chapter 8, section 2 of the Competition Act, combined with Chapter 50, section 1 of the Code of Judicial Procedure (*Rättegångsbalken*).

¹⁶¹⁷ Chapter 2, section 3, paragraph 2 of the Competition Act.

¹⁶¹⁸ Chapter 3, section 21 of the Competition Act.

5.3.3 Timeframe

Damages: a claim for damages must be made within ten years from when the damage incurred¹⁶¹⁹. Handling time in a district court is one to two years. Appeal of the judgement must be brought within three weeks¹⁶²⁰. Handling time in the Market Court is one to two years.

Follow-on injunction petition: handling time one to two years in the Market Court.

5.3.4 Admissibility of evidence

Any relevant evidence may be presented, including the hearing of experts. It does not matter whether the evidence has been presented during the proceedings at the KKV or not.

5.3.5 Interim Measures

The relevant courts may decide on interim measures according to the rules in the Code of Judicial Proceedings. For example, in a case of follow-on injunction petition, the Market Court can issue an interim injunction¹⁶²¹. In damages cases, the courts can order sequestration in order to secure property to cover the damages claim¹⁶²².

5.3.6 Rulings of the court

Damages: the court may grant damages or dismiss the action.

Follow-on injunction petition: the court may issue an injunction, with or without a conditional fine, or dismiss the petition.

In relation to both matters mentioned above, the procedural provisions allow procedures solely in writing (if the parties agree to this), but this is highly unusual. At least one oral hearing per instance is expected. All court judgements are made public in writing. The Market Court's judgements are available at the court's website.

5.3.7 Rules applicable to the enforcement of court judgments

Damages: the plaintiff can request enforcement of awarded damages with the Enforcement Authority (*Kronofogdemyndigheten*). The authority's decisions can be appealed to certain district courts, serving as special courts, and further to the appellate courts (*Hovrätterna*) and the Supreme Court (*Högsta domstolen*). The enforcement is carried out by the Enforcement Authority¹⁶²³.

Follow-on injunction petition: the injunction is usually combined with a conditional fine¹⁶²⁴. The conditional fine is executed by the district court within whose territorial jurisdiction the addressee of the injunction holds domicile or by Stockholm District Court¹⁶²⁵. Both the KKV and the petitioning company can apply for execution¹⁶²⁶.

5.4 Alternative dispute resolution mechanisms

General measures of mediation or arbitration (not specific to competition procedures) may be used, but if so, it will not be publicly known. It is therefore very difficult to tell how frequent such alternative dispute resolution mechanisms are used. As far as it is known, these alternatives are not commonly used in Swedish competition law.

¹⁶¹⁹ Section 2 of the Law (1981:130) on Statutory Limitation (*Preskriptionslagen*).

¹⁶²⁰ Chapter 8, section 2 of the Competition Act, combined with Chapter 50, section 1 of the Code of Judicial Procedure (*Rättegångsbalken*).

¹⁶²¹ Chapter 3, section 3 of the Competition Act.

¹⁶²² Chapter 15, section 1 of the Code of Judicial Procedure.

¹⁶²³ The proceeding is regulated in the Enforcement Code (*Utsökningsbalken*).

¹⁶²⁴ Chapter 6, section 1 of the Competition Act.

¹⁶²⁵ Chapter 6, section 2 of the Competition Act.

¹⁶²⁶ *Ibid.*

In all cases, the courts will act to mediate a settlement.

Bilateral negotiations are to the best of our knowledge not used to resolve competition law disputes.

6 Contextual Information

This Section provides a contextual overview of the judicial system in Sweden.

6.1 Duration and cost of competition law cases

There are no official statistics on the duration of competition cases. However the following is estimated. Damages: one to two years in a district court and one to two years in the Market Court. Court fee is EUR 50. Legal fees range from EUR 50,000 to 500,000 per party and instance. As a main rule, the losing party bears the winning party's costs, however, the court will rule on whether the claimed costs are reasonable.

Follow-on injunction petition: one to two years in the Market Court. No application fee to the court. Legal fees range from EUR 50,000 to 500,000 per party. As a main rule, the losing party bears the winning party's costs, however, the court will rule on whether the claimed costs are reasonable.

Appeal of the KKV's decisions (including injunctions) takes approximately one to two years in the Market Court. If the appellant is successful, the reasonable costs are covered by the KKV. Costs range from around EUR 30,000 to, in extreme cases, EUR 300,000. The appellant never needs to cover the KKV's costs.

Competition fines: one to two years in a district court and one to two years in the Market Court. Legal fees range from EUR 50,000 to 500,000 per party and instance. If the KKV manages the procedure with in-house counsels, its costs are lower and usually do not exceed EUR 100,000. As a main rule, the losing party bears the winning party's costs, however the court will rule on whether the claimed costs are reasonable.

6.2 Influencing Factors

No particular factors which influence the application of (EU) competition law rules in Sweden were identified.

6.3 Obstacles/Barriers

As noted above, private parties may not enforce – other than claiming damages – the competition rules directly before national courts, but must first make a complaint to the KKV. This may complicate and extend the duration of proceedings, even though parties have the possibility of asking the KKV not to undertake any measure in order for the party to make use of the follow-on injunction petition as described above.

Annex 1 Bibliography

Legislation

- *Rättegångsbalken (Swedish Code of Judicial Procedure)*
- *Utsökningsbalken (Enforcement Code)*
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- *Preskriptionslagen (1981:130) (Law on statutory limitation)*
- *Lag (1985:206) om viten (Law on Conditional Fines)*
- *Förvaltningslagen (1986:223) (Swedish Law on Administrative Procedure)*
- *Lagen (1996:242) om domstolsärenden (The Court Matters Act)*
- *Konkurrenslagen (2008:579) (The Competition Act)*

Books and Articles

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COUNTRY FACTSHEET - UNITED KINGDOM

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Abbreviations used

BIS	Department for Business, Innovation and Skills
CAA	Civil Aviation Authority
CC	Competition Commission
CDO	Competition Disqualification Order
CMA	Competition and Markets Authority
CPR	Civil Procedures Rules
GEMA	Gas and Electricity Markets Authority
EU	European Union
NCA	National Competition Authority
NIAER	The Office for the Regulation of Gas and Electricity in Northern Ireland
NHS	National Health Service
NMD	Non Ministerial Department
OFCOM	Office of Communications
OFGEM	The Gas and Electricity Markets Authority
OFWAT	The Water Services Regulation Authority
OFT	Office of Fair Trading
ORR	Office of Rail Regulation
PACE	Police and Criminal Evidence
RSC	Rules of the Supreme Court
SO	Statement of Objections
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom

1 Overview of the National Legal Framework

The United Kingdom has three legal systems: English law (which is applicable in England and Wales), Northern Irish law (which is applicable in Northern Ireland) and Scots law (which is applicable in Scotland). English law and Northern Irish law are common law systems whereas Scots law is based on civil-law principles, with common law elements. The discrepancies in the different legal systems arise from the political union of previously independent nations. Regarding the existence of Scots law, Article 19 of the *Treaty of Union* ensured that Scotland would retain a separate legal system.¹⁶²⁷ Regarding the existence of Northern Ireland law, the *Acts of Union* of 1800 contained provisions entitling separate courts to be formed in Ireland, with Northern Irish law stemming from these provisions.¹⁶²⁸

The origins of the common law system stem from customary law and it is case-centred. In contrast with the codified civil law legal systems, common law relies on a body of precedent which binds future decisions (otherwise known as *stare decisis*). It is also worth noting that following the *Act of Judicature*, courts have the power and the duty to base their decisions in line with common law and equity.¹⁶²⁹

The United Kingdom has an *unwritten constitution* which is reinforced by the doctrine of *parliamentary sovereignty*. The doctrine of *parliamentary sovereignty* was introduced by the *Bill of Rights of 1688*.¹⁶³⁰ The main source of law in the United Kingdom is Legislation in the form of *Acts of Parliament*. In addition to *Acts of Parliament*, delegated Legislation exists in the form of *Orders in Council*, *bylaws*, *statutory instruments* and *professional regulations*. Importantly, case law is an essential source of law due to the doctrine of *binding precedent*.¹⁶³¹ Moreover, legislation often codifies common law derived from established case law. Following the United Kingdom's accession to the European Communities on January 1st 1973, European Law became a formal source of law in the United Kingdom.¹⁶³²

The administration of justice in the United Kingdom is organised as follows: criminal cases in England, Wales and Northern Ireland are brought before *Magistrates' Courts*, the *Crown Court*, the divisional courts of the *High Court* and the criminal division of the *Court of Appeal*. In Scotland, criminal cases are brought before the *Sheriff Court* or the *Justice of the Peace court*. Civil cases in England, Wales, Northern Ireland and Scotland cases are brought before *county courts*, the *High Court* and the civil division of the *Court of Appeal*, however, the *Court of Session* is Scotland's supreme civil court. The *Supreme Court* of the United Kingdom is the final court of appeal in the UK for all cases except for criminal cases in Scotland. This highest Court of Appeal for criminal cases in Scotland is the *High Court of Justiciary*. Further information on competent courts is provided in Section 4 below.

2 National Legislation establishing competition law rules

This Section presents the national legislation in the United Kingdom establishing competition law rules.

¹⁶²⁷ Article 19 of the *Treaty of Union* coming into force on 1st May 1707.

¹⁶²⁸ Article 8 of the *Act of Union* of 1800 and the *Union with Ireland Act of 1800*, coming into force on 1st January 1801.

¹⁶²⁹ The *Judicature Act* of 1873 combined the historically separate courts of common law and equity (prior to the *Judicature Act*, the *Court of Chancery* had jurisdiction over all matters of equity).

¹⁶³⁰ Following the English Civil War the *Bill of Rights of 1688* curtailed royal powers. Royal powers were further reduced by the *Declaration of Indulgence of 1687*.

¹⁶³¹ The doctrine of binding precedent is analogous to the doctrine of *stare decisis*. Binding precedent requires lower courts to follow the precedent set by case law in higher courts.

¹⁶³² For more information see the *Treaty between the Member States of the European Communities and the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland concerning the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and the European Atomic Energy Community* of 22 January 1972.

The Enterprise and Regulatory Reform Act 2013 ¹⁶³³	Adopted on 25 April 2013. Depending on the provision, the entry into force is either the date of adoption, the 25 June 2013 or on a future date yet to be established.
The Enterprise Act 2002 ¹⁶³⁴	Adopted on 7 November 2002. Came into force on 20 June 2003.
The Competition Act 1998 ¹⁶³⁵	Adopted on 9 November 1998. Came into force on 1 March 2000.
The Fair Trading Act 1973 ¹⁶³⁶	Repealed by the Competition Act 1998 and the Enterprise Act 2002.
The Restrictive Trade Practices Act 1976 ¹⁶³⁷	Repealed by the Competition Act 1998 and the Enterprise Act 2002.
The Resale Prices Act 1976 ¹⁶³⁸	Repealed by the Competition Act 1998 and the Enterprise Act 2002.
The Competition Act 1980 ¹⁶³⁹	Repealed by the Competition Act 1998 and the Enterprise Act 2002.

2.1 General legislation

The Competition Act 1998 and the Enterprise Act 2002 are the United Kingdom's main competition law provisions. These Acts replaced previous competition provisions in the *Fair Trading Act 1973*, the *Restrictive Trade Practices Act 1976*, the *Resale Prices Act 1976* and the *Competition Act 1980*. Regulation 1/2003 was implemented in the United Kingdom by the *Competition Act 1998 and Other Enactments (Amendment) Regulation 2004*.¹⁶⁴⁰ The *Enterprise and Regulatory Reform Act 2013* received its royal assent on 25 April 2013 and shall govern the merger between the two national competition authorities in the United Kingdom, the Office of Fair Trading (hereinafter 'OFT') and the Competition Commission (hereinafter 'CC') in order to form one entity: the Competition and Market Authority (hereinafter 'CMA').

The 1998 *Competition Act's* main provisions entered into force on 1 March 2000. The Act is subdivided into two main provisions: *Chapter 1 prohibition* and *Chapter 2 prohibition*. Section 2(1) of the *Competition Act* contains the *Chapter 1 prohibition*.¹⁶⁴¹ The *Chapter 1 prohibition* in the *Competition Act* is the equivalent of Article 101 of the Treaty on the Functioning of the European Union (hereinafter 'TFEU'). Exemptions to the application of Chapter 1 include cases which are excluded as a result of mergers and acquisitions, competition scrutiny under other enactments, planning obligations and other general exclusions and professional rules).¹⁶⁴² Section 18 of the *Competition Act* contains the *Chapter 2 prohibition*.¹⁶⁴³ The

¹⁶³³ <http://services.parliament.uk/bills/2012-13/enterpriseandregulatoryreform/documents.html>

¹⁶³⁴ <http://www.legislation.gov.uk/ukpga/2002/40/contents>.

¹⁶³⁵ <http://www.legislation.gov.uk/ukpga/1998/41/contents>.

¹⁶³⁶ <http://www.legislation.gov.uk/ukpga/1973/41>

¹⁶³⁷ <http://www.legislation.gov.uk/ukpga/1976/34/contents>

¹⁶³⁸ <http://www.legislation.gov.uk/ukpga/1976/53/contents>

¹⁶³⁹ <http://www.legislation.gov.uk/ukpga/1980/21/contents>

¹⁶⁴⁰ See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and *SI 2004/1261*.

¹⁶⁴¹ "Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which - (a) may affect trade within the UK, and (b) have as their object or effect the prevention, restriction or distortion of competition within the UK, are prohibited unless they are exempt in accordance with the provisions of this Part".

¹⁶⁴² Schedules 1 to 4 of the Competition Act 1998.

Chapter 2 prohibition in the Competition Act is the equivalent of Article 102 TFEU. Exemptions to the application of Chapter 2 include cases which are excluded as a result of mergers and acquisitions and other general exclusions.¹⁶⁴⁴ However, please note that Chapter 1 and Chapter 2 prohibitions are not full-text literal transpositions of Article 101 and 102 TFEU. An undertaking is defined as a natural or legal person engaged in an economic activity.¹⁶⁴⁵

The *Enterprise Act 2002* introduced new provisions into the United Kingdom's competition regime. These new provisions include criminal sanctions of up to 5 years imprisonment for individuals involved in hard-core cartels.¹⁶⁴⁶ Additionally, the Act introduced the disqualification of company directors in the event of a breach of competition law.¹⁶⁴⁷ Provisions facilitating private competition law actions have also been introduced by the *Enterprise Act 2002*.¹⁶⁴⁸

Importantly, the *Enterprise Act* introduced structural changes by abolishing the Director General of Fair Trading and creating the OFT.¹⁶⁴⁹ Last but certainly not least, the *Enterprise Act* established the *Competition Appeal Tribunal* (hereinafter the CAT).¹⁶⁵⁰

In addition to the *Competition Act 1998* and the *Enterprise Act 2002*, there is a rising number of delegated legislation including but not limited to: the *Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations*,¹⁶⁵¹ the *Competition Act 1998 (Determination of Turnover for Penalties) Order*,¹⁶⁵² the *Competition Act 1998 (Concurrency) Regulations 2004*,¹⁶⁵³ the *Competition Act 1998 (Appealable Decisions and Revocation of Notification of Excluded Agreements) Regulations 2004*,¹⁶⁵⁴ the *Competition Act 1998 (Land Agreements Exclusions and Revocation) Order 2004*,¹⁶⁵⁵ the *Competition Act 1998 (Office of Fair Trading's Rules) Order 2004*¹⁶⁵⁶ and the *Competition Act 1998 (Land Agreements Exclusion Revocation) Order 2010*.¹⁶⁵⁷ Delegated legislation or secondary legislation implements detailed changes to the law made under powers from an existing Act of Parliament.

¹⁶⁴³ "(1) Subject to section 29, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the UK.

(2) Conduct may, in particular, constitute such an abuse if it consists in -

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

(3) In this section - 'dominant position' means a dominant position within the UK; and 'the 'UK' means the UK or any part of it.

(4) The prohibition imposed in subsection (1) is referred to in this Act as 'The Chapter II prohibition'."

¹⁶⁴⁴ Schedules 1 and 3 of the Competition Act 1998.

¹⁶⁴⁵ See paragraph 21 of case C-41/90 *Höfner & Elser v Macrotron* [1991] ECR I-1979 and http://www.offt.gov.uk/shared_offt/ca-and-cartels/OFT1389.pdf.

¹⁶⁴⁶ Section 188 of the *Enterprise Act 2002*.

¹⁶⁴⁷ Section 204 of the *Enterprise Act 2002* introducing new sections into the *Company Directors Disqualification Act 1986*.

¹⁶⁴⁸ Section 16 of the *Enterprises Act 2002*.

¹⁶⁴⁹ Section 1 of the *Enterprise Act 2002*.

¹⁶⁵⁰ Section 12.1 of the *Enterprise Act 2002*.

¹⁶⁵¹ *SI 2000/262*.

¹⁶⁵² *SI 2000/309*, amended by *SI 2004/1259*.

¹⁶⁵³ *SI 2004/1077*.

¹⁶⁵⁴ *SI 2004/1078*.

¹⁶⁵⁵ *SI 2004/1260*.

¹⁶⁵⁶ *SI 2004/2751*.

¹⁶⁵⁷ *SI 2010/1709*.

Within UK legislation, the extra-territoriality of UK competition law is mentioned in section 2(3) of the *Competition Act 1998* which, referring to *Chapter 1 prohibitions*, states that "Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the UK". The OFT will consult the European Commission's guidelines on "The Effect on Trade Concept contained in Article 81 and 82 of the Treaty" in order to determine whether an allegedly anti-competitive conduct has an effect on trade between Member State.¹⁶⁵⁸

It may be worth noting that the Consumer Rights Bill 2013 contains several proposed changes to competition law enforcement in the United Kingdom. Namely, the government proposes to introduce a limited opt-out collection actions regime for competition law, to promote Alternative Dispute Resolution and to enhance the Competition Appeal Tribunal's powers.¹⁶⁵⁹ Crucially, the enhancement of the Competition Appeal Tribunal's power includes the possibility of hearing stand-alone cases.¹⁶⁶⁰

2.2 Industry-specific legislation

The *Competition Act 1998* instills powers of investigation and enforcement of competition law on the OFT and on regulators in the following sectors:

- communications (the Office of Communications, hereinafter OFCOM)¹⁶⁶¹;
- energy (the Gas and Electricity Markets Authority hereinafter GEMA supported by the Office of Gas and Electricity Markets, hereinafter OFGEM)¹⁶⁶²;
- water (the Water Services Regulation Authority, hereinafter OFWAT)¹⁶⁶³;
- aviation (the Civil Aviation Authority, hereinafter CAA)¹⁶⁶⁴;
- energy in Northern Ireland (the Office for the Regulation of Gas and Electricity Northern Ireland, hereinafter NIAER)¹⁶⁶⁵;
- railways (the Office of Rail Regulation, hereinafter ORR);¹⁶⁶⁶
- healthcare (the Co-operation and Competition Directorate of the National Health Service, hereinafter the NHS).¹⁶⁶⁷

Sector specific legislation exists for different sectors but the Competition Act 1998 and the Enterprise Act 2002 remain applicable. As a result, the OFT and the sectoral regulators have concurrent powers of investigation.¹⁶⁶⁸ The Government seeks to encourage greater information sharing about antitrust cases between sectoral regulators and will give the CMA, through the *Enterprise and Regulatory Reform Act 2013*, the power to take antitrust cases from sector regulators in certain circumstances.¹⁶⁶⁹ Moreover, the CMA will be required to

¹⁶⁵⁸ See http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft401.pdf

¹⁶⁵⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274787/bis-13-916-draft-consumer-rights-bill-governemnt-response-to-consultations-on-consumer-rights.pdf

¹⁶⁶⁰ Annex 7 - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274787/bis-13-916-draft-consumer-rights-bill-governemnt-response-to-consultations-on-consumer-rights.pdf

¹⁶⁶¹ *Office of Communications Act 2002*, section 1.

¹⁶⁶² *Utilities Act 2000*, section 1.

¹⁶⁶³ *Water Act 2003*, section 34.

¹⁶⁶⁴ The *Civil Aviation Act 2012* (for airport operation services), *Part 4 of the Enterprise Act 2002* (for market investigations of airport operation services), the *Transport Act 2000* (for air traffic services).

¹⁶⁶⁵ The *Energy Order 2003* and Article 3 of *SI 2003/419*.

¹⁶⁶⁶ The *Railway and Transport Safety Act 2003*, section 15.

¹⁶⁶⁷ The *NHS provider license* and the *National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013*.

¹⁶⁶⁸ The *Competition Act 1998 (Concurrency) Regulations 2000*.

¹⁶⁶⁹ *Growth, Competition and the Competition Regime: a Government Response to Consultation of March 2012 by the Department for Business, Innovation and Skills*, page 11.

report annually on the use of concurrent competition powers across the landscape of competition authorities.¹⁶⁷⁰

3 The National Competition Authority

This Section describes the National Competition Authority (hereinafter 'NCA') in the United Kingdom, detailing its competences and structure, as well as the procedures in place.

3.1 The establishment of the OFT and the CC

The OFT and the CC are the national competition authorities in the United Kingdom which are in charge of competition law enforcement. As mentioned in Section 2, the OFT and the CC will be replaced by the CMA. A shadow version of the CMA has been established on October 1st 2013 and the CMA will be fully operational and will replace the OFT and the CC on April 1st 2014.¹⁶⁷¹ According to governmental sources, the shadow version of the CMA is "empowered to make the necessary preparations to allow the new authority to assume its responsibilities next year".¹⁶⁷²

The Office of the Director of Fair Trading, which later became the OFT, was established by *Part II* of the *Fair Trading Act 1973*. The CC, replacing the Monopolies and Mergers Commission, was established by the *Competition Act 1998*.¹⁶⁷³ However, schedule 7 of the *Competition Act 1998* as amended by Schedule 11 of the *Enterprise Act 2002* sets out provisions regarding the CC. The CC superseded the Monopolies and Mergers Commission. The OFT carries out consultations, investigations into alleged competition law violations and prosecutions whereas the CC carries out in-depth inquiries into markets, mergers and regulation following a reference made by another relevant authority such as the OFT or a sectoral regulator. The OFT is entitled to make a reference to the CC if it has "reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition".¹⁶⁷⁴

3.2 The reform of the OFT and the CC - creation of the CMA

The United Kingdom's Department for Business, Innovation and Skills (hereinafter the 'BIS') issued proposals in order to improve the enforcement of competition law in the United Kingdom.¹⁶⁷⁵ The most notable proposal was the merger of the two competition authorities (the OFT and the CC) to form a new entity: the CMA. The merger was introduced by the *Enterprise and Regulatory Reform Act 2013*.¹⁶⁷⁶ According to government sources, the creation of the CMA will lead to a "faster, clearer and more effective approach to help make markets work well for consumers".¹⁶⁷⁷ The CMA will take on the functions currently exercised by both the OFT and the CC.

The public consultation carried out by the BIS revealed concerns regarding the duration of the cases and the "quality and robustness of administrative decision-making" in the current system.¹⁶⁷⁸ According to the public consultation, a majority of stakeholders voiced a

¹⁶⁷⁰ *Growth, Competition and the Competition Regime: a Government Response to Consultation of March 2012 by the Department for Business, Innovation and Skills*, page 12.

¹⁶⁷¹ See <https://www.gov.uk/government/news/new-competition-authority-comes-into-existence>.

¹⁶⁷² <https://www.gov.uk/government/news/new-competition-authority-comes-into-existence>

¹⁶⁷³ Section 45 of the *Competition Act 1998*.

¹⁶⁷⁴ Section 131 (1) of the *Enterprise Act 2002*.

¹⁶⁷⁵ *Growth, Competition and the Competition Regime: a Government Response to Consultation of March 2012 by the Department for Business, Innovation and Skills*.

¹⁶⁷⁶ The Bill was introduced to the House of Common on 23 May 2012, and completed its passage on 24 April 2013.

¹⁶⁷⁷ Press release by the Department for Business, Innovation & Skills of April 25 2013. The Press release can be found on <https://www.gov.uk/government/news/enterprise-and-regulatory-reform-bill-receives-royal-assent> (last checked 04/11/13).

¹⁶⁷⁸ *Growth, Competition and the Competition Regime: a Government Response to Consultation of March 2012 by the Department for Business, Innovation and Skills*, page 9.

preference for a prosecutorial system of competition enforcement at NCA level.¹⁶⁷⁹ The government chose however to retain the administrative system in existence under the OFT and the CC regime.¹⁶⁸⁰ In order to safeguard its independence, the CMA has been set up as a Non Ministerial Department (NMD) governmental entity.

3.3 Composition and decision-making

The Board of the OFT is made up of a non-executive Chairman and at least four other members (as appointed by the Secretary of State). It is responsible for strategy, prioritisation, planning and performance at the OFT.¹⁶⁸¹ A Chief Executive of the OFT is also appointed by the Secretary of State.¹⁶⁸² The purpose of the OFT is to make markets work well for consumers by enforcing competition and consumer protection rules. The OFT enforces *Chapter I* and *Chapter II* prohibitions in the UK and enjoys powers to obtain information, carry out dawn raids, make interim and final decisions and impose fines.

The CC cannot initiate investigations. Investigations are referred to the CC by the OFT, by sectoral regulators or by the Secretary of State.¹⁶⁸³ Moreover, the CC has regulatory functions stemming from various legislative instruments.¹⁶⁸⁴ The CC has a full-time Chairman, Deputy Chairmen (number not specified) and part-time members appointed by the Secretary of State, following an open competition, for a single period of eight years. When a case is referred to the CC, a group (two to six members) is formed and appointed to investigate.¹⁶⁸⁵

Regarding the newly formed CMA, Lord Currie has been appointed as Chairman designate of the CMA and Alex Chisholm has been appointed as Chief Executive designate.¹⁶⁸⁶ The role of the Chairman designate and Chief Executive designate is to ensure the smooth transition and creation of the CMA following the announcement of the merger between the OFT and the CC. The government has decided to establish a CMA board which will be responsible for overall strategy, performance, rules and guidance.¹⁶⁸⁷ Decisions on market cases will be the responsibility of the Board of the CMA whereas decisions in regulatory appeals will be taken by panels of experts.¹⁶⁸⁸ On November 14th 2013, the CMA announced more appointments in senior management positions.¹⁶⁸⁹

¹⁶⁷⁹ *Growth, Competition and the Competition Regime: a Government Response to Consultation of March 2012 by the Department for Business, Innovation and Skills*, page 9.

¹⁶⁸⁰ *Growth, Competition and the Competition Regime: a Government Response to Consultation of March 2012 by the Department for Business, Innovation and Skills*, page 11.

¹⁶⁸¹ Schedule 1(1) of the *Enterprise Act 2002*.

¹⁶⁸² Schedule 1(5)(1) of the *Enterprise Act 2002*.

¹⁶⁸³ *The Enterprise Act 2002*.

¹⁶⁸⁴ *The Airports Act 1986, the Airports (Northern Ireland) Order 1994, the Gas Act 1986 and the Gas (Northern Ireland) Order 1996, the Electricity Act 1989, the Electricity (Northern Ireland) Order 1992, the Water Industry Act 1991, the Water Services (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005, the Water and Sewerage Services (Northern Ireland) Order 2006, the Railways Act 1993, the Postal Services Act 2000, the Transport Act 2000, the Financial Services and Markets Act 2000, the Legal Services Act 2007, the Communications Act 2003 and the Energy Act 2004*.

¹⁶⁸⁵ Schedule 7, Part II of the *Competition Act 1998* as amended by schedule 11 of the *Enterprise Act 2002*.

¹⁶⁸⁶ Lord Currie was appointed as Chair Designate to the CMA by the Business Secretary, Vince Cable, in July 2012.

¹⁶⁸⁷ *Growth, Competition and the Competition Regime: a Government Response to Consultation of March 2012 by the Department for Business, Innovation and Skills* page 15.

¹⁶⁸⁸ *Growth, Competition and the Competition Regime: a Government Response to Consultation of March 2012 by the Department for Business, Innovation and Skills* page 15.

¹⁶⁸⁹ See <https://www.gov.uk/government/news/competition-and-markets-authority-announces-next-wave-of-senior-appointments>.

3.4 Cooperation with other entities

Part II of the *Competition Act 1998* includes provisions which set out the cooperation between the OFT and the National Competition Authorities of other Member States as stipulated in Article 22 of Regulation 1/2003.¹⁶⁹⁰ The OFT also cooperates with the Financial Conduct Authority on competition issues related to the financial sector.

3.5 Investigations

Part II of the *Competition Act* sets out the procedure to follow in the event of an investigation of an alleged breach of *Chapter 1* and/or *Chapter 2 prohibitions*. Specifically, Section 25 of the *Competition Act* stipulates that the OFT may conduct an investigation if it has reasonable grounds for suspecting an infringement of competition law. According to section 25 of the *Competition Act*, the OFT is not under a duty to conduct an investigation and has the discretion to decide whether to commence an investigation. The OFT's powers of investigation are set out in the *Powers of investigation* guidelines and *A guide to the OFT's investigation procedures in competition cases*.¹⁶⁹¹

3.6 Decision-making

If the OFT decides to conduct an investigation, it will issue a written inquiry by notice as specified under section 26 of the *Competition Act*. When a formal investigation commences, a case team is formed with a designated Team Leader, a Project Director and a Senior Responsible Officer who has the responsibility for authorising the opening of a formal investigation and authorising the issue of a Statement of Objections.¹⁶⁹² A Procedural Adjudicator may review decisions made by a particular case team during an investigation by the OFT.¹⁶⁹³ When the OFT seeks to issue an infringement finding, it will provide the interested parties with a "statement of objections" and will give them the opportunity to rebut the allegations made.¹⁶⁹⁴ Rule 5 of the OFT's rules sets out how the "statement of objections" (hereinafter 'SO') is to be drafted and deals with issues such as access to file and the possibility to make oral submissions.¹⁶⁹⁵ Once an SO is issued, a Case Decision Group consisting of three persons is formed by the OFT's policy committee.¹⁶⁹⁶ The Case Decision Group is responsible for issuing an infringement decision and determining the amount of the penalty.¹⁶⁹⁷ Following the issuing of an SO and the written representations submitted by the addressees of the SO, parties can attend an oral hearing. If new information is provided during the written representations, the OFT may issue a Supplementary SO. After all the written and oral submissions of the parties are considered, the Case Decision Group issues a Draft Penalty Statement which is communicated to the addressees of the SO. An oral hearing may be organised in order for the addressees to provide comments regarding the Draft Penalty Statement.¹⁶⁹⁸ Regarding the final decision, the Case Decision Group will consult the Policy Committee on legal, economic and policy matters before issuing an infringement decision.¹⁶⁹⁹ The non-confidential version of the infringement decision is published on the OFT's website and register.

¹⁶⁹⁰ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

¹⁶⁹¹ Available on www.of.gov.uk.

¹⁶⁹² http://www.of.gov.uk/shared_of/policy/OFT1263rev

¹⁶⁹³ See *A guide to the OFT's investigation procedures in competition cases*.

¹⁶⁹⁴ Section 31(1)(b) of the *Competition Act 1998*.

¹⁶⁹⁵ *SI 2004/2751*.

¹⁶⁹⁶ http://www.of.gov.uk/shared_of/policy/OFT1263rev

¹⁶⁹⁷ http://www.of.gov.uk/shared_of/policy/OFT1263rev

¹⁶⁹⁸ http://www.of.gov.uk/shared_of/policy/OFT1263rev

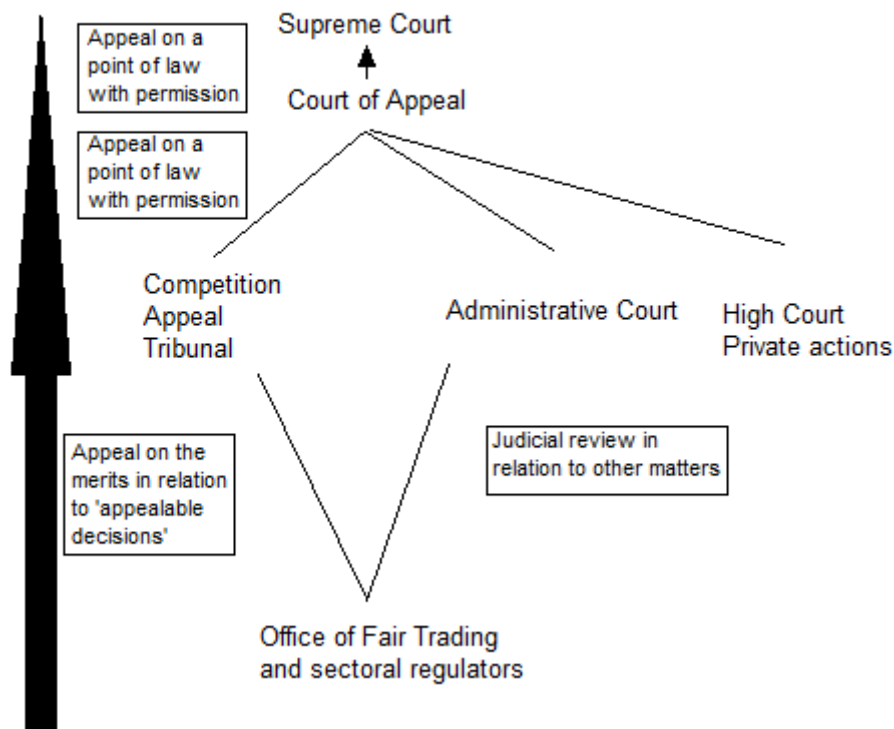
¹⁶⁹⁹ http://www.of.gov.uk/shared_of/policy/OFT1263rev

4 Competent courts

This Section presents the competent courts in the United Kingdom for competition law matters.

Litigation regarding judicial review and follow-on cases in the United Kingdom begins at the Competition Appeal Tribunal or the High Court level and it can be appealed on a point of law to the Court of Appeal and ultimately to the Supreme Court. Figure 4.1 provides an overview of the court system in the United Kingdom.

Figure 4.1 Court system in the United Kingdom ¹⁷⁰⁰



4.1 The Competition Appeal Tribunal

The Competition Appeal Tribunal (hereinafter 'CAT') is entitled to hear judicial review and follow-on cases at first instance. The CAT is formed by a President,¹⁷⁰¹ a panel of Chairmen appointed by the Lord Chancellor following recommendations from the Judicial Appointments Commission,¹⁷⁰² and a panel of ordinary members appointed by the Secretary of State.¹⁷⁰³ The tribunal consists of three persons, chaired by the President or a member of the panel of Chairmen. The Secretary of State also appoints a registrar for the CAT.¹⁷⁰⁴ The Competition Service funds and provides support services to the Tribunal.¹⁷⁰⁵ As of November 2013, the CAT was made up of 17 Chairmen, 14 Members and 8 registrars and staff.¹⁷⁰⁶

¹⁷⁰⁰ Drafted by the national expert on the basis of information contained in Richard Whish and David Bailey, *Competition Law*, 7th edition.

¹⁷⁰¹ Section 12(2)(a) of the *Enterprise Act 2002*.

¹⁷⁰² Section 12(2)(b) of the *Enterprise Act 2002*.

¹⁷⁰³ Section 12(2)(c) of the *Enterprise Act 2002*.

¹⁷⁰⁴ Section 12(3) of the *Enterprise Act 2002*.

¹⁷⁰⁵ Section 13(2) of the *Enterprise Act 2002*.

¹⁷⁰⁶ See <http://www.catribunal.org.uk/246/Personnel.html>.

Additionally, the CAT is entitled to hear monetary claims arising from decisions made by competition authorities in the UK or by the European Commission.¹⁷⁰⁷ Moreover, the CAT is entitled to review decisions of the OFT, the Secretary of State and other entities in relation to market investigations.¹⁷⁰⁸ Lastly, the CAT has the competence to hear appeals against penalties imposed by the CC regarding the attendance of witnesses or the discovery of documents during market investigations.¹⁷⁰⁹ The CAT also has the competence to hear residual sector appeals.¹⁷¹⁰

The rules to be followed by the CAT are set out in Section 15 of the *Enterprise Act 2002*, the *Competition Appeal Tribunal Rules 2003*,¹⁷¹¹ as amended by the *Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004*.¹⁷¹² In the event that a claimant appeals a penalty imposed by the OFT, the CAT is entitled to impose, revoke or vary the penalty imposed.¹⁷¹³ The CAT is also entitled to hear appeals against non-infringement and file closures by the OFT.¹⁷¹⁴ The procedure for cases brought before the CAT is written except for the oral hearing where the CAT may probe evidence and cross-examine witnesses. Recently, the government decided to legislate for applications for a warrant authorising entry to premises by force to be made to the CAT.¹⁷¹⁵

4.1.1 Judicial Review

Regarding judicial review cases, the CAT is entitled to hear cases on the merits made on 'appealable decisions' of the OFT and sectoral regulators under the *Competition Act 1998*.¹⁷¹⁶ Appealable decisions are set out in Sections 46(3) and 47(1) of the *Competition Act*. A decision must be 'appealable' in order to be brought before the CAT.¹⁷¹⁷ Appealable decisions include, *inter alia*, infringement decisions,¹⁷¹⁸ interim measure decisions and penalty decisions.¹⁷¹⁹

4.1.2 Follow-on

The CAT is also entitled to hear follow-on cases stemming from decisions made by the OFT, sectoral regulators and other relevant authorities.¹⁷²⁰

4.2 The High Court

The High Court is also entitled to hear judicial review and follow-on cases at first instance.

4.2.1 Judicial Review

Judicial review cases may be brought to the High Court. An advantage of bringing a judicial review at the High Court level as opposed to the CAT level (specialised court) is the fact that the claim need not be "appealable" in order to be brought before the High Court.

¹⁷⁰⁷ Section 47A of the *Competition Act 1998*.

¹⁷⁰⁸ Section 177 of the *Enterprise Act 2002*.

¹⁷⁰⁹ Section 114 of the *Enterprise Act 2002*.

¹⁷¹⁰ For instance, see section 193 of the *Communications Act 2003*.

¹⁷¹¹ SI 2003/1372.

¹⁷¹² SI 2004/2068.

¹⁷¹³ The *Competition Act 1998*, Schedule 8, paragraph 3(2)(b).

¹⁷¹⁴ See for instance Case Nos 1002-1004/2/1/01 *Institute of Independent Insurance Brokers v Director General of Fair Trading* [2001] and Case No 1008/2/1/02 [2003] CAT 3 [2004] Comp AR1 *Claymore Dairies Ltd and Express Dairies plc v Director General of Fair Trading*.

¹⁷¹⁵ *Growth, Competition and the Competition Regime: a Government Response to Consultation of March 2012 by the Department for Business, Innovation and Skills*, page 9.

¹⁷¹⁶ Sections 46 and 47 of the *Competition Act 1998*.

¹⁷¹⁷ Section 46 of the *Competition Act 1998*.

¹⁷¹⁸ Section 46(3) (a) and (b) of the *Competition Act 1998*.

¹⁷¹⁹ Section 46(3)(i) of the *Competition Act 1998*.

¹⁷²⁰ The *Competition Act 1998*.

4.2.2 Follow-on

Private actions may be brought in the High Court and such actions are usually brought in the Chancery Division but may be brought to the Commercial Court.¹⁷²¹ When private actions are brought and the OFT or the CAT have already established infringements, these decisions are binding vis-à-vis ordinary courts.¹⁷²² Please note that the Lord Chancellor can adopt regulations for the transfer of cases to and from the CAT.¹⁷²³ Regarding the disqualification of directors according to section 204 of the *Enterprise Act 2002*, it is for the High Court (or the *Court of Session of Scotland*) to make a competition disqualification order ('CDO').

4.3 Court of Appeal

A further appeal at 2nd instance from judgments of the Tribunal and the High Court either on a point of law or in penalty cases as to the amount of a penalty may be brought to the *Court of Appeal* in relation to proceedings in England and Wales; in relation to proceedings in Scotland, to the *Court of Session*; and in relation to proceedings in Northern Ireland to the *Court of Appeal in Northern Ireland*.¹⁷²⁴ However, it has been stated that permission to appeal to the *Court of Appeal* should be granted sparingly.¹⁷²⁵ Permission from the Court of Appeal must be sought for such an appeal.

4.4 The Supreme Court

The *Supreme Court of the United Kingdom* is the highest court in the land and the highest appellate court for all cases in England and Wales, Northern Ireland and Scotland except for Criminal cases in Scotland.¹⁷²⁶ The court of last resort for criminal cases in Scotland is the *High Court of Justiciary*. The CAT may also make an Article 267 preliminary reference to the European Court of Justice.¹⁷²⁷ Further appeals to the Supreme Court of the United Kingdom may be taken with permission from the Supreme Court.

4.5 The Crown Court or Magistrates' Court

The cartel criminal offence can be tried in the Crown Court by jury trial or in a Magistrates' Court.¹⁷²⁸ The most serious offences are trialled at the Crown Court level because it is the higher court of first instance in criminal cases

5 Proceedings related to breaches of Competition Law rules

This Section presents proceedings related to breaches of competition law rules in the United Kingdom.

5.1 Legal standing in judicial review and follow-on proceedings

The legal standing in cases of judicial review and follow-on cases in the United Kingdom is described in Table 5.1 below.

¹⁷²¹ See Rule 58.1(2) of the *Civil Procedure Rules*.

¹⁷²² Section 58(A) of the *Competition Act 1998*.

¹⁷²³ Claims under Sections 47A and 47B of the *Competition Act 1998*.

¹⁷²⁴ Section 49 of the *Competition Act 1998*.

¹⁷²⁵ Case No 1151/3/3/10 *British Telecommunications Plc v OFCOM* [2010] CATC 22.

¹⁷²⁶ The Supreme Court of the United Kingdom was established on 1st October 2009 by Part 3 of the *Constitutional Reform Act 2005*. It replaced the *Appellate Committee of the House of Lords* as the highest court of the land.

¹⁷²⁷ See rule 60 of the *Competition Appeal Tribunal Rules 2003* - SI 2003/1372.

¹⁷²⁸ *Powers of Criminal Courts (Sentencing) Act 2000*, section 79 and section 190(1)(b) of the *Enterprise Act 2002*.

Table 5.1 Legal Standing

	Judicial Review	Follow on
Who can file an action?	Affected Parties, interested third parties, group litigation orders or representative actions.	Affected parties, group litigation orders or representative actions.
How can an action be filed?	By appeal.	By appeal.
With which authorities can the action be filed?	To the CAT or to the High Court.	To the CAT or to the High Court.
Burden of proof	Burden of proof is on the claimant and he must prove the allegations on the balance of probabilities.	Burden of proof is on the claimant and he must prove the allegations on the balance of probabilities.

5.2 Judicial Review Proceedings

When a case is brought before the CAT, it is a judicial proceeding as opposed to an administrative procedure.¹⁷²⁹ Appeals against 'appealable decisions' of the OFT and sectoral regulators under the *Competition Act* should be brought before the CAT. *Super-complaints* are complaints submitted by a designated consumer body regarding the fact that 'any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers'.¹⁷³⁰ *Super-complaints* may be made against actions of the sectoral regulators under the provisions set out in Section 22 of the *Enterprise Act 2002*.¹⁷³¹ The newly formed CMA will perform the functions currently held by the CC regarding regulatory references and appeals.¹⁷³²

5.2.1 Rules applicable to the judicial review of NCA decisions¹⁷³³

Sections 46 and 47 of the *Competition Act* set out which decisions may be appealed to the CAT. Sections 46(3) and 47(1) of the *Competition Act* set out the type of decisions taken by the OFT (or sectoral regulators) which may be subject to an appeal by the CAT. A detailed guide to proceedings is available from the Competition Appeal Tribunal's website.¹⁷³⁴

5.2.2 Competent Court

The CAT is the competent court for 'appealable decisions' against decisions by the OFT although parties may choose to bring a case before the High Court. When an appeal is sought before the CAT, the appeal can only be withdrawn either with the CAT's permission at the request of a party or when the OFT has withdrawn its own decision subject to the litigation.¹⁷³⁵ Judicial review may also be brought before the High Court in the case of improper exercise of administrative discretion or procedural irregularities.

¹⁷²⁹ See Paragraph 117 in Case No 1000/1/1/01 *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2001] CompAR 13.

¹⁷³⁰ Section 11(9)(a) of the *Enterprise Act 2002*.

¹⁷³¹ *The Enterprise Act 2002 (Super-complaints to Regulators) Order 2003, SI 2003/1368*.

¹⁷³² *Growth, Competition and the Competition Regime: a Government Response to Consultation of March 2012 by the Department for Business, Innovation and Skills*, page 12.

¹⁷³³ See Sections 46(3) and 47(1) of the *Competition Act 1998*.

¹⁷³⁴ <http://www.catribunal.org.uk/240/Rules-and-Guidance.html>

¹⁷³⁵ Rule 11, *Competition Appeal Tribunal Rules 2003, SI 2003/1372*.

5.2.3 Timeframe

For actions before the CAT, the timeframe for bringing the action is within two months of the date upon which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier.¹⁷³⁶

The table below provides an overview of the timeframes for judicial review.

Table 5.2 Timeframe for judicial review cases

1 st instance	2 nd / 3 rd instance
Judicial Review	Judicial Review
2 months of the date upon which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier (Section 8 of the Competition Appeal Tribunal Rules 2003, SI 2003/1372).	21 days after the date of the decision of the lower court that the appellant wishes to appeal. The lower court may direct a different time limit (which may be longer or shorter than the period referred to above) (section 52.4 of the Civil Procedure Rules).
3 months after the grounds to make the claim first arose (Section 54.5 of the Civil Procedure Rules).	A party may lodge proceedings before the Supreme Court 28 days from the date of the order appealed from. The Supreme Court may extend this time limit (section 1.2.9 of the Supreme Court's practice directions).

5.2.4 Admissibility of Evidence

The *Competition Act* stipulates that findings of fact made by the OFT or other competent sectoral regulators are binding on parties in proceedings before the High Court and the CAT when the time of appeal against the findings has elapsed or when the OFT's findings have been acknowledged on appeal, unless the Court decides differently.¹⁷³⁷ This lightens the evidentiary burden of parties as they can rely on the evidence provided by the OFT or other sectoral regulators. In cases brought before the CAT, when an expert produces a report, he has a duty to assist the CAT regardless of who has requested the report.¹⁷³⁸ Appellants provide evidence to the CAT that has not been submitted to the OFT at their own risk. The OFT is also entitled to bring new evidence during a CAT appeal.

In criminal cases, the *Criminal Procedure and Investigations Act 1996* mandates the OFT and the Serious Fraud Office to disclose to the defendant prosecution material undermining the case for the prosecution. Furthermore, certain evidence gathered by the OFT may not be admissible in a criminal case, for instance if it has been gathered in breach of *PACE procedures*.¹⁷³⁹ PACE procedures are procedures set out in the Police and Criminal Evidence Act which is the legislative framework governing search and entry warrants, the handling of exhibits seized during those searches and the treatment of suspects during criminal investigations.

5.2.5 Interim Measures

Interim measures are available and they usually come in the form of an injunction. Injunctions can be granted by ordinary courts (they are not available in the CAT). Injunctions are an "order requiring the defendant to take steps to bring certain actions or omissions to an end".¹⁷⁴⁰ Injunctions are appropriate where the claimant cannot be compensated adequately by damages.¹⁷⁴¹ In order to grant an injunction, the court weighs the damage caused by an

¹⁷³⁶ Section 8 of the *Competition Appeal Tribunal Rules 2003*, SI 2003/1372.

¹⁷³⁷ Section 58(1) of the *Competition Act 1998*.

¹⁷³⁸ See paragraph 12.9 of the *Guide to Proceedings* available at www.catribunal.org.uk

¹⁷³⁹ See the *Police and Criminal Evidence Act 1984*.

¹⁷⁴⁰ http://www.of.gov.uk/shared_of/business_leaflets/private-litigation.pdf.

¹⁷⁴¹ http://www.of.gov.uk/shared_of/business_leaflets/private-litigation.pdf.

injunction to the defendant against the damage caused by the claimant if the injunction is refused.¹⁷⁴²

The CAT is entitled to confirm or set aside all or part of a decision made by the OFT (or a sectoral regulator). The making of an appeal to the CAT does not suspend the effect of the said decision except for appeals regarding the amount of a penalty.¹⁷⁴³

5.2.6 Rulings of the court

The *Competition Act* stipulates that the findings of infringement by the OFT or the CAT are binding on Courts for damages claims after the appeal period against the findings has expired.¹⁷⁴⁴ In the past, The CAT has also made a finding on infringement separate of that of the OFT or a sectoral regulator.¹⁷⁴⁵

5.3 Follow-on Proceedings (private enforcement)

This Section presents follow-on proceedings for competition law cases in the United Kingdom.

5.3.1 Rules applicable to follow-on procedures

The United Kingdom is a pioneer in follow-on procedures in competition cases and has established in the mid-1980's that damages may be sought in the event of harm following an infringement of Articles 101 or 102 TFEU.¹⁷⁴⁶ The legal basis for follow-on procedures in the United Kingdom are sections 47A and 58A of the *Competition Act* providing for follow-on actions pursuant to findings of infringement of competition law and section 60(2) of the act which requires infringement findings to be in conformity with EU jurisprudence and in particular the *Crehan* and *Manfredi* judgments.¹⁷⁴⁷

Section 47A of the *Competition Act 1998* enables follow-on procedures for damages before the CAT in the event of a finding of infringement of UK or EU competition law. Section 47 B of the *Competition Act* and rule 33 of the *Competition Appeal Tribunal Rules* enables consumer bodies to bring collective actions before CAT.¹⁷⁴⁸ The Secretary of State must specify which consumer bodies are entitled to bring claims (current names are set out in the *Specified Body (Consumer Claims) Order 2005*) and the consumer bodies must bring the claim on behalf of at least 2 claimants.¹⁷⁴⁹

Claimants must demonstrate a causal link between the presumably anti-competitive behaviour and the loss suffered by the claimant.¹⁷⁵⁰ Courts in the United Kingdom have been reticent to award "exemplary" or "punitive" damages because it may breach of the principle of *ne bis in idem*.¹⁷⁵¹

The passing-on defence, that is where a defendant in a competition case can claim that an intermediary purchaser which has passed-on the price inflation to the final consumer and is thus not entitled to claim damages because it has not incurred any harm, has not been formally acknowledged by Courts in the United Kingdom.

¹⁷⁴² See *AAH Pharmaceuticals Ltd v Pfizer Ltd* [2007] EWHC 565.

¹⁷⁴³ The *Competition Act 1998* and www.catribunal.org.uk.

¹⁷⁴⁴ Section 58A of the *Competition Law Act 1998*.

¹⁷⁴⁵ See *JJ Burgess & Sons v OFT* Case No 1044/2/1/05 [2005] CompAR 1151 and *Albion Water Ltd v Water Services Regulation Authority* Case No 1046/2/4/04 [2006] CAT 36, [2007] CompAR 328.

¹⁷⁴⁶ See, for instance, *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130.

¹⁷⁴⁷ C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297 and C-295/04 *Vicenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619 respectively.

¹⁷⁴⁸ SI 2003/1372.

¹⁷⁴⁹ Rule 33 SI 2003/1372 and SI 2005/2365.

¹⁷⁵⁰ See *Arkin v Bochard Lines Ltd* [2003] EWHC 687, judgment of the Queen's Bench Division of the High Court.

¹⁷⁵¹ See *Devenish Nutrition Ltd. v Sanofi-Aventis SA* [2007] EWHC 2394.

5.3.2 Competent Court

When an infringement has been found by either the OFT, a sectoral regulator or the European Commission, the claimant is entitled to bring a "follow-on" claim to the CAT or to the High Court. Follow-on actions can be brought with permission from the CAT within the prescribed timeframe. The right to bring a follow-on case before the CAT does not exclude the right to bring a follow-on case to the High Court.¹⁷⁵² Section 47A of the *Competition Act* is substantiated by part IV of the *Competition Appeal Tribunal Rules 2003*.¹⁷⁵³ For instance, the CAT rules include provisions enabling the transfer of claims for damages from the CAT to the High Court, and transfers of follow-on claims from the High Court to the CAT.¹⁷⁵⁴ Appeals on a point of law are allowed to the Court of Appeal, and if permitted to the Supreme Court.¹⁷⁵⁵

Some claimants choose nevertheless to bring follow-on claims in front of the High Court. Some reasons for choosing to bring follow-on claims before the High Court instead of the CAT include the different time limits for bringing a claim and the fact that a permission is required for bringing a follow-on case before the CAT (as opposed to the High Court) which may delay proceedings and may even deny the case of any UK jurisdiction if the action is brought in another Member State in the meantime.

5.3.3 Timeframe

For actions before the CAT, the timeframe for bringing the action is within 2 years from either "the date on which the period of appealing against the European Commission or OFT infringement decision relied on expires when any such appeal has been determined; or, if the claimant does not suffer loss until after this date, two years from the loss".¹⁷⁵⁶ According to the *Limitation Act*, the timeframe for bringing an action in the High Court is 6 years.¹⁷⁵⁷ The clock starts running from the date in which the loss has been incurred. In the case of concealment of key facts by the defendant, the timeframe is frozen.¹⁷⁵⁸ In the event of a hidden competition law infringement, the clock starts running from the date in which the claimant knew, or ought to have known, about the loss.

The table below provides an overview of the timeframe for follow-on actions.

Table 5.3 Timeframe for follow-on actions

1 st instance	2 nd / 3 rd instance
Follow On	Follow On
6 years from the date in which the loss has been incurred. If the loss is concealed, the clock starts running from the date in which the claimant knew, or ought to have known, about the loss (Section 2 of the <i>Limitation Act 1980</i>).	21 days after the date of the decision of the lower court that the appellant wishes to appeal. The lower court may direct a different time limit (which may be longer or shorter than the period referred to above) (section 52.4 of the <i>Civil Procedure Rules</i>).
2 years after the date of expiration of the appeal period following a decision by the competent competition authority (CAT) (Section 31 of the <i>Competition Appeal Tribunal Rules 2003</i> , SI 2003/1372).	A party may lodge proceedings before the Supreme Court 28 days from the date of the order appealed from. The Supreme Court may extend this time limit (section 1.2.9 of the Supreme Court's practice directions).

¹⁷⁵² Section 47A(10) of the *Competition Act 1998*.

¹⁷⁵³ *SI 2003/1372*.

¹⁷⁵⁴ See rule 48 and 49 *SI 2003/1372* respectively.

¹⁷⁵⁵ Section 49 of the *Competition Act 1998*.

¹⁷⁵⁶ http://www.ofc.gov.uk/shared_ofc/business_leaflets/private-litigation.pdf and Section 31 of the *Competition Appeal Tribunal Rules 2003*, SI 2003/1372.

¹⁷⁵⁷ Section 2 of the *Limitation Act 1980*.

¹⁷⁵⁸ Section 32(1)(b) of the *Limitation Act 1980*.

5.3.4 Admissibility of evidence

The *Competition Act* stipulates that findings of fact made by the OFT or other competent sectoral regulators are binding on parties in proceedings before the High Court and the CAT when the time of appeal against the findings has elapsed or when the OFT's findings have been acknowledged on appeal, unless the Court decides differently.¹⁷⁵⁹ This lightens the evidentiary burden of parties as they rely on the evidence provided by the OFT or other sectoral regulators. The burden of proof is on the claimant and he must prove the allegations on the balance of probabilities.¹⁷⁶⁰

5.3.5 Interim Measures

Interim measures are available and they usually come in the form of an injunction. In order to grant an injunction, the court weighs the damage caused by an injunction to the defendant against the damage caused by the claimant if the injunction is refused.¹⁷⁶¹ Interim measures are awarded where the litigation in question raises serious concerns and that awarding an interim measure is the least prejudicial course of action. For instance, in the standalone case of *Dahabshiil v Barclays Bank Plc*, the High Court granted an injunction which required Barclays to continue providing banking services to Dahabshiil pending the Court's ruling.¹⁷⁶²

5.3.6 Rulings of the court

The *Competition Act* stipulates that the findings of infringement made by the OFT or the CAT are binding on Courts for damages claims after the appeal period against the findings has expired.¹⁷⁶³ The calculation of the damages to be recovered in competition cases in the United Kingdom is carried out by subtracting the price the claimant ought to have paid in the absence of an infringement with the price the claimant actually paid.¹⁷⁶⁴ Regarding interest accrued, both the CAT and the High Court are entitled to award pre-judgment interest on damages.¹⁷⁶⁵

5.3.7 Rules applicable to the enforcement of court judgments

The Rules applicable to the enforcement of court judgments are set out in Part 70, *general rules about enforcement of judgments and orders*, of the *Civil Procedures Rules*. Namely, a judgment creditor may enforce a judgment or order for the payment of money by: a writ of *fiery facias*, a warrant of execution, a third party debt order, a charging order, a stop order, a stop notice, or the appointment of a receiver.¹⁷⁶⁶ The Court in question may make the following orders against a judgment debtor: an order of committal (if permitted by a rule of the Debtors Acts 1869 and 1878) or a writ of sequestration (if permitted by RSC Order 45 rule 5).¹⁷⁶⁷

5.4 Alternative dispute resolution mechanisms

On an *ad hoc* basis, the High Court or the CAT may suggest alternative resolution mechanisms, such as mediation.¹⁷⁶⁸ In its publication of January 2013 entitled "*Private Actions in Competition Law: A consultation on options for reform – government response*",

¹⁷⁵⁹ Section 58(1) of the *Competition Act 1998*.

¹⁷⁶⁰ See *Chester City Council v Arriva plc* [2007] EWHC 1373 and in front of the CAT Case No 1021/1/1/03 *JJB Sports Plc v OFT* [2004] CAT 17.

¹⁷⁶¹ See *AAH Pharmaceuticals Ltd v Pfizer Ltd* [2007] EWHC 565.

¹⁷⁶² *Dahabshiil Transfer Services Ltd v Barclays Bank Plc* [2013] EWHC 3379 (Ch)

¹⁷⁶³ Section 58A of the *Competition Law Act 1998*.

¹⁷⁶⁴ See *Devenish Nutrition Ltd. v Sanofi-Aventis SA* [2007] EWHC 2394.

¹⁷⁶⁵ See *Senior Courts Act 1981* section 35A and *Competition Appeal Tribunal Rules 2003*, SI 2003/1372, r 56(2) respectively.

¹⁷⁶⁶ Rule 70.2 of the *Civil Procedures Rules*;

¹⁷⁶⁷ Rule 70.2 of the *Civil Procedures Rules*;

¹⁷⁶⁸ See for instance CAT Case No 1088/3/7/07 *ME Burgess v W Austin & Sons Ltd*.

the BIS has expressed its will to promote Alternative Dispute Resolution.¹⁷⁶⁹ In addition to this encouragement, the BIS has noted that the government is seeking to introduce a new opt-out collective settlement in the CAT similar to the *Dutch Mass Settlement Act of 2005* and give the CMA a limited role in certifying redress schemes.¹⁷⁷⁰ These proposals are included in the Consumer Rights Bill 2013.

6 Contextual Information

This Section provides contextual information on the judicial system in the United Kingdom.

6.1 Duration and cost of competition law cases

Costs can be significant in competition law cases. In the High Court, costs follow the event, which means that the successful party can seek an order that the unsuccessful party pay the former's costs.¹⁷⁷¹ The CAT has more discretion in the way costs are allocated but the unsuccessful parties generally bear the brunt of the legal costs.¹⁷⁷² In valuating and allocating costs, the CAT takes into consideration "the success or failure overall or on particular issues, the parties' conduct in relation to the proceedings and the nature, purpose and subject-matter of the proceedings".¹⁷⁷³

In its public consultation, the Government acknowledged that stakeholders were generally opposed to the recovery of the CAT's costs and had valid concerns regarding access to justice. In consideration of the views portrayed by stakeholders and in an attempt the cost to the taxpayer, the Government decide to introduce a "policy of optimal cost recovery in which costs are recovered from the majority of parties but where the CAT has discretion to waive these in the interests of access to justice".¹⁷⁷⁴

6.2 Influencing Factors

The United Kingdom, and in particular, London attracts a high proportion of international businesses active in the United Kingdom, Europe and throughout the world. Moreover, claimants may choose the United Kingdom as their filing jurisdiction in a "forum shopping" situation due to their rules of disclosure of evidence and considerable experience in dealing with international parties.¹⁷⁷⁵ For instance, in the High Court damages claims stemming from the Commission decision in the Gas Insulated Switchgear case, Mr Justice Roth granted the disclosure of a number of redacted passages of the Commission decision and limited passages from other relevant documents.¹⁷⁷⁶ This type of disclosure may be beneficial to parties because it may enable them to have recourse to more evidence than in other jurisdictions where there is a blanket objection to the disclosure of sensitive documents.

It is important to keep in mind that the *Human Rights Act 1998* and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 are applicable to the judicial review of UK legislation regarding the enforcement of competition rules.

¹⁷⁶⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf.

¹⁷⁷⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf.

¹⁷⁷¹ *Senior Courts Act 1981* section 51 and *Civil Procedures Rules* r44.3.

¹⁷⁷² *Competition Appeal Tribunal Rules 2003*, SI 2003/1372, r 55(2).

¹⁷⁷³ Paragraph 21 case No 1107/4/10/08 *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] Comp AR 269.

¹⁷⁷⁴ *Growth, Competition and the Competition Regime: a Government Response to Consultation of March 2012 by the Department for Business, Innovation and Skills*, page 16.

¹⁷⁷⁵ See, for instance, *Roche Products Ltd v Provimi Ltd* [2003] EWHC 96.

¹⁷⁷⁶ *National Grid Electricity Transmission Plc v ABB Ltd & Ors* [2012] EWHC 869.

6.3 Obstacles/Barriers

As stated above, the BIS public consultation has shown that certain stakeholders are concerned about access to justice due to the costs in participating in a competition litigation in the United Kingdom.

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