12th ICN ANNUAL CONFERENCE

SPECIAL PROJECT

Working with Courts and Judges

Warsaw, April 2013

Introduction

The role of the judiciary in developing, enforcing and interpreting competition law around the globe is significant. Judges have a tremendous influence on the shape of competition policy as they are entitled to review and change decisions issued by competition authorities (hereinafter "authorities").

For that reason in 2011 the ICN Steering Group decided to initiate a project the aim of which would be to analyse the state of relations between judges and national competition authorities and identify the areas of tension. The Polish Competition Authority (the Office of Competition and Consumer Protection, UOKiK) volunteered to lead the "*Working with courts and judges*" project and to present it at the 12th ICN Annual Conference as the host's special project. The initial phase of the project, which was concluded by the approval of the *High Level Issue Paper* by the ICN membership at the 11th ICN Annual Conference, was co-led with the Chilean Competition Tribunal.

As the second step, an extensive questionnaire was prepared and circulated to the ICN members. The submitted responses provided information about procedures used when a competition decision is being appealed. The input provided valuable information about courts and judges dealing with competition cases as well as about legal systems in different jurisdictions. Participants of the survey also described how they draft decisions and how they defend cases in courtrooms. Special attention was paid to the use of economic evidence. Moreover, authorities were asked to indicate the problematic areas when communicating with judges.

The purpose of the document is to provide an overview of the judicial review process and the range of tools and methods that are used by the ICN Members to improve their standing with the judiciary and promote competition rules. This document was drafted in order to share worldwide approaches to dialogue with the judiciary. The paper does not recommend one approach over another. Rather it is meant to serve as a reference for competition authorities looking to advance their current approaches.

The document is comprised of two parts. The purpose of the first one, the Executive Summary, is to present in a nutshell three main issues, i.e. decision drafting techniques; economic evidence; and dialogue with courts and judges - as well as to put forward some questions to be addressed during the 12th ICN Annual Conference in Warsaw this year. The second one, the Collective Summary, contains collected and processed responses from the 45 National Competition Authorities taking part in the survey.

UOKiK would like to express its gratitude to all ICN Members that provided responses or input to the project. We would like to address special thanks to the drafting team for their excellent work and great effort.

The “Working with Courts and Judges Project” will be discussed during the first day of the 12th ICN Conference in Warsaw. Hopefully the results of the discussions will determine how we may further address this important issue and find effective ways in which competition authorities can apply such knowledge to their daily cooperation with the judiciary.

Thank you and we look forward to welcoming you to Warsaw!

Working with Courts and Judges
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EXECUTIVE SUMMARY

I. Drafting and presenting authority's decision

Who drafts the decisions

In nearly all of the jurisdictions participating in the survey, decisions are drafted in teams comprised of lawyers and economists. In some jurisdictions, the composition of teams is fixed, whereas in others they are formed on a case-by-case basis. Teams are also often supported by other employees of the competition authority, for example sector or field specific employees who either were, or were not involved with the initial investigation and drafting of the statement of objections.

In some jurisdictions a number of alternative methods are used for drafting decisions, for example rather than all drafting the decision together, one member may take the lead with input from other members, or each member may be responsible for a certain field, such as legal argumentation, economics or financial decisions. In one authority, although initially the case handlers/competition experts drafted the decision, decisions are now principally drafted by a specialized drafting team. The reason for establishing this drafting team was the need to simplify the process and create decisions which were more understandable for the general public.

In some jurisdictions, decisions are drafted by the ultimate decision makers. For example, at one authority, the decision is drafted by one of the commissioners, with significant consultation with and input from other commissioners. The commissioner assigned to draft the opinion often relies on assistance from one or more attorneys in the Office of General Counsel and/or from the commissioner's own office.

There are generally two forms of surveillance within most competition authorities. The first is carried out by the management team, starting with the project manager, with the director being finally

responsible for the decision, and ending with the board. The second is generally some form of internal or external review and devil's advocate process carries out by colleagues and/or external consultants.

In other jurisdictions, the case team takes the lead in decision drafting. One authority details a drafting process which many other responding authorities also institute. This process may be loosely explained as follows: decisions (and other internal/external documents) are drafted by case teams, comprised of one or several case handlers (generally a mix of economists and lawyers) these are then reviewed by case managers/team leaders/rapporteurs and (where possible) supported by a case secretary. The case team is responsible for the comprehensive research of the facts and their accurate rendition in the decision/work product. The case team is also responsible for the timely implementation of all procedural steps.

The work of the case team is often then coordinated by a case manager who provides advice and guidance when needed especially by assisting with identifying the key issues and setting the line of the case. The case manager also ensures liaison with the upper echelons of the authority - with participation from the case team when necessary. Where these documents originate in the competition department, the case teams are often also supported by the authority's Legal Service and Chief Economist's team.

The departmental head generally provides support by: contributing know-how during the initial assessment phase; ensuring soundness and consistency during the case assessment phase; and supporting the case team in its presentation of the case to the board/chairperson/commissioner and assisting with communication (and where necessary communicating with) external stakeholders.

During the drafting of a decision, management generally checks to ensure that the key issues have been properly outlined and analyzed, that the decision is coherent and consistent with past decisions and the authority's own goals and precedents have been correctly followed.

The second form of scrutiny, as outlined above, generally involves some form of internal debate and may also include external advice. Decisions are, for example, often analysed by specialized lawyers and economists from outside the case team in order to review the relevant facts and key underlying evidence. Such analysis also serves to highlight to the case team and the relevant decision maker(s) the legal and/or economic risks associated with the proposed course of action. It may also serve to

increase the readability of the decisions. In some instances, authorities may seek advice from external counsel for these matters.

Nearly all participants of the survey confirmed that the employees responsible for drafting the decisions are provided with trainings on the legal and economic developments. The trainings may take very different forms, for example some authorities have regular internal trainings, either run by their own staff, or by external specialists; while others also provide external trainings, either through professional institutions, or by sending their staff on exchange to better established authorities.

In one jurisdiction, officials even have to pass an exam which tests whether they have continued to educate themselves and kept abreast of developments in the field. This test must be taken every six years in order to retain their job.

Who are decisions drafted for

Decisions are drafted in order to remedy the challenged anticompetitive conduct consistent with the authorities' goals, in most cases this is to ensure healthy competition and resultant benefits for consumers. To achieve this goal, decisions need to be coherent, transparent and precise, clearly stating legal and economic arguments that serve as the basis for the decision.

In all responding jurisdictions, the authority decision is subject to challenge. Naturally, in order to be of use, such decisions must stand up in court. Competition authorities generally consider how a judge is likely to respond to a decision when drafting their pieces. In order to stand up in court, authorities consider language, legal requirements, precedents and previous experience. Competition authorities generally explain in some detail the facts considered, the evidence relied on and the legal and economic analysis the conclusions are based on, always keeping in mind that each decision adds to the already existing legal precedent and serves as a deterrent to prevent others from violating the antitrust laws.

While all authorities consider precedents relevant to the case, one jurisdiction commented that it is also useful to pay particularly close attention to the previous rulings of the specific judge likely to hear the decision. In this way, one can improve on the areas where the judge had ruled against the authority in the past. These approaches require a careful analysis of previous decisions.

In order to learn from past experience, the Legal Department of at least one authority writes a synopsis of the judgment and an accompanying legal opinion on every judgment issued by the

national courts. This is also done for important judgments of the regional courts. These legal opinions focus on the lessons to be learned from each judgment, which are then distributed among the officials of the authority. Moreover, every year some authorities analyse all case law of the foregoing year to compare and contrast the verdicts and to signal any new or emerging trends or topics. These efforts have resulted in a clear insight into the level of judicial review with a focus on what judges find important. This makes it easier to decide on a case by case strategy in order to moist effectively influence and convince judges.

Another authority mentions that greater coordination both internally (between different units of the organization) and externally (with the State Bar) has improved decision-making and its defense at trial. However, an even greater coordination with the State Bar can improve the current situation.

Although probably not possible in all jurisdictions, one authority sometimes organizes informal meetings with judges who have scrutinized its past decisions and discuss these decisions in detail. These meetings provide both parties with a great opportunity to exchange views and experiences. This authority also invites judges to participate in its conferences, which enables judges to improve both their knowledge of competition law and economic-based knowledge.

Language used

The vast majority of the competition authorities taking part in the survey answered that their decisions are drafted in a language that can be understood by non-specialists. Most authorities are conscious of their position vis-à-vis the general public and their decisions are therefore guided by clarity and are thus more readily accessible to non-specialists. In this way, authorities are fulfilling their goals of utilizing the economic or judicial analysis and potential advocacy contained in its decisions to further the spread of healthy competition.

Within some authorities cooperation between either the case team and the legal service, or the drafters and other specialists within the authority, provides an extra level of scrutiny in order to guarantee that the economic and legal analysis are drafted in a way that is comprehensible for non-specialists.

An interesting solution when technical language seems practically unavoidable is to describe the economic or judicial reasoning in accessible language, with the more technical aspects reserved for an appendix, such as already occurs in at least one jurisdiction.

It is interesting to note that only one authority actually has a “Best practices for expert opinions”, which also includes guidance on how to present the facts and analysis, including the tip that expert opinions must be comprehensible to a non economist audience. While another jurisdiction maintains an internal glossary of specialized terms which non-economists may find difficult or inaccessible and suggests that these be explained or a plainer alternative used in the final decisions.

At the same time, as one authority notes, naturally precision and accuracy should never be sacrificed in favor of accessibility to non-experts.

Electronic templates and Checklists

More than two thirds of respondents to the survey indicated that they either use electronic templates and/or have internal guidelines on drafting decisions. In most cases, it depends on the type of case and therefore the type of decision. However, in many cases guidance on economic elements is not included. Many countries naturally use previous decisions and the improvements on them as templates for new decisions.

For reasons of legal certainty, clarity, precision, protocol or uniformity, in most jurisdictions, decisions must comply with formal rules. To that end some of the larger authorities utilize manuals of procedures which provide guidance on the different steps of competition procedures as well as Modules, Checklists and Templates to be used during the drafting phase. Some authorities complement this with substantive guidelines on specific economic issues, such as horizontal merger guidelines.

In quite a few countries templates contain the different titles and subtitles of the different parts of the decisions. This is a helpful way to structure the decisions. In one jurisdiction, the authority provides templates for economic models which might be useful once the market has been defined.

Guidance for the setting of fines

In most jurisdictions participating in the survey regulations on the setting of fines exist. Some authorities noted that formal guidance (i.e. ministerial guidelines) may be supplemented by internal guidelines on the specific methods of calculation. Ministerial guidance may include general criteria, on which to base the fine, such as the seriousness of the infringement; importance of the harm done to the economy; the duration of the offence; the economic situation of the relevant market and/or firms involved; recidivism and other aggravating – or mitigating circumstances; and role in the

offence. Quite a few jurisdictions mentioned their fining guidelines as an excellent tool which helps them to draft decisions. One authority noted that its notice on the method of setting fines is so transparent that it allows for a step by step tracking of the fining process. While not all authorities possess such guidelines, many newer authorities are in the process of drafting these.

The authorities that do possess such guidelines generally noted that while the method of calculation is often stipulated, there is no guidance on presenting those methods in the decisions. In fact, only one authority stated that it does have a manual (Best practices for expert economic opinions) which includes guidance on how to present facts and analysis.

One responding authority withdrew its policy statement on fines finding the practical effect was to create an overly restrictive view of the authority's options for equitable remedies. The authority relies instead on existing case law to guide its use of disgorgement and restitution remedies, and evaluates the unique circumstances of each case through that framework.

Economic evidence

All authorities report that they rely, to some extent, on economic evidence. Its use is driven by pragmatic rather than legal factors: in most jurisdictions there is no legal obligation to rely on economic evidence in all cases. Economic models and empirical analyses are used to properly substantiate competition authorities' positions. The usefulness of economic evidence varies, depending on the context. It is likely to be most relevant for merger and abuse of dominance cases, or – in general – for restrictions whose effect (as opposed to object) is to restrict competition. It is especially useful where analysis of market conditions and likely effects of undertakings' behavior is decisive for the final judgment and a lack of proper economic evidence could undermine authorities' conclusions. The decisions which are ultimately drafted using economic evidence to describe the actual effects on the market as a result of anticompetitive conduct naturally lend themselves better for use in civil actions. *Per se* infringements (e.g. cartels), on the other hand, may be less demanding in terms of economic evidence.

Most authorities indicate that economic evidence is admissible on general grounds. Just as in the case of other types of evidence, some restrictions may apply to the type of permissible evidence due to the need to ensure its reliability. In particular, admissibility of expert economic evidence in court proceedings may be subject to various tests, aiming to exclude irrelevant or unreliable expert testimony. The most comprehensive test used by the judiciary incorporates the so called *Daubert* criteria, which take into consideration whether: i) the expert's knowledge will be helpful for the court

to decide the case; ii) the expert's testimony is based on sufficient facts or data and is the product of reliable principles and methods; and iii) whether these have reliably been applied to the facts of the case. Similar criteria may also be used by authorities in their administrative proceedings. However, to date only a few authorities have issued guidelines outlining best practices in presenting economic evidence, aimed at ensuring that evidence presented by the parties to the proceedings maintains appropriate methodological standards and is presented in a way that allows it to be easily understood and verified by courts. A small number of authorities is in the process of preparing such guidelines. Other arrangements used to ensure that economic evidence is properly explained include i)internal review of draft documents; ii) integrating internal economic experts with case teams; and iii) ensuring that a manageable number of cases where advanced economic evidence is used exists. These factors, especially when taken together, help to make sure that the economic reasoning is properly explained to the courts. In one jurisdiction, specialized competition inspectors check for the admissibility of economic evidence contained by any report, these specialists are distinct from those assigned to the investigation team.

The internal economic experts of most authorities may also participate in the judicial review process. They may appear before courts (for example, if the parties to the proceedings submit economic evidence to support their positions, the economic experts will often be called upon to help refute this evidence), however a majority of cases do not require their presence. It is much more common for internal economists to participate in the preparations for the hearings, helping prepare the case or defense and coaching lawyers on pertinent economic issues. There are, however, authorities, whose economic experts neither participate in the judicial review process, nor assist with the drafting of the litigious side of the case, as they are prohibited from doing so.

Most authorities do not rely on external economic experts, though many of them retain the possibility of calling on them. The reasons for not appointing external experts, as indicated by some authorities, may be budget constraints on the one hand and/or sufficient in-house expertise on the other. External economic experts may be called on if they possess specific expertise in the industry under investigation or if particular empirical research is required for the investigation. Interestingly, one of the authorities does routinely hire such experts to testify at trial.

The courts seem to take a similar approach – even though in most jurisdictions they may appoint economic experts, they use this possibility sparingly. Although a substantial number of jurisdictions exists where courts do not appoint economic experts at all.

Improving the quality of decisions

As it was mentioned above, generally there are two forms of scrutiny, the first one is carried out by the management team and the second is generally some form of internal or external review. Following completion of the first draft of a decision, internal peer reviews are regularly used in order to play devil's advocate, as the drafters may otherwise not have enough distance from their own piece. One authority stated that this is done in a very structured way, and experience has shown that the quality of decisions has improved in the process.

Another way in which (at least) one authority increases the quality of its decisions is to take case handlers responsible for the investigation of anticompetitive conduct and for drafting the decisions to court hearings. The intention is that this will give them a better idea of the kinds of questions a judge will ask, allowing them to better anticipate those questions during their investigations and when drafting their decisions.

One authority retains a senior research officer specialized in legal arguments and procedural law issues who reviews all of the authorities' proposed fining decisions in order to check for consistency. The authority notes that this has improved consistency considerably.

One authority mentions that it has taken to including more graphs, charts and figures in the decision, for example to show the relationship among market participants. In another jurisdiction, greater coordination both internally (between different units) and externally (with the judiciary) has improved not only decision making and drafting, but also defense at trial.

Many authorities monitor all competition related decisions which affect their jurisdiction, in particular by analyzing the decision with an eye to the wider implication for the decisional practice of the authority. Anything of note is then included either in lunch time debates, at regular team meetings and/ or, where appropriate, in guidance material.

II. Dialogue with courts and judges

Types of interaction

Interaction between authorities and courts and judges may be either formal or informal. Informal interaction takes place in the context of conferences, seminars and trainings, as well as on a bilateral

basis. Institutional interaction takes place in the context of the review/amendment of competition law or in the context of a civil trial.

In the majority of jurisdictions, judges partake both in public and private conferences/ trainings/seminars devoted to competition. These events may be held at various levels: national, regional or international. The judges may participate either as speakers or as attendees. Sometimes they prefer the status of observers in order to preserve their independence. One authority indicated that only judges belonging to a specialized competition court are invited to take part in such events.

Some authorities indicated that judges in their countries attend conferences infrequently or do not attend at all. The main reasons for such abstinence are lack of time, lack of resources, no specific budget for training, relatively low number of competition cases to justify attendance, insufficient command of the English language, a lack of interest in broadening knowledge of competition issues, and/ or a perceived need to preserve independence.

In some jurisdictions, interaction between authorities and courts may also occur in the process of a judge's education. For example, one competition authority has arranged for the addition of a competition law course for federal judges in their National Magistracy School.

In some other jurisdictions there is no direct interaction in the context of bilateral or roundtable discussions between courts and authorities regarding either the enforcement of the law or its review. This may again be caused by the desire to safeguard the independence of the judiciary. In the countries where the direct dialogue does occur, it generally takes the form of informal meetings organized to discuss past decisions and exchange experience, or to discuss common managerial aspects regarding procedure, such as the inflow of new cases and current matters in upcoming cases. For example, the president of one of the authorities visits the presidents of the courts involved in order to raise awareness of the specific issues related to competition cases.

With regard to discussions concerning law enforcement and review, institutional interaction between authorities and courts is foreseen in less than half of the jurisdictions. In the instances where it does occur, the discussions may take place on a bilateral basis (direct discussions, joint seminars) or in the framework of public consultations addressed specifically to the judiciary or to a broader range of recipients (and even the public at large).

In a few jurisdictions, there are no provisions providing for specific cooperation between courts and competition authorities. When such cooperation is foreseen, it often relates to consultation by the courts with the authorities in cases where the authority is not a party to the proceedings.

In some jurisdictions, the courts are obliged to provide authorities with adopted judgments. Furthermore, they may address requests for information, documents, factual or legal clarifications or even conduct an investigation and file a report with the authorities. Interestingly, while in one jurisdiction a court must give the authority the opportunity of being heard, in another, the court has the duty to refer the case to the authority for an expert report.

Amicus Curiae

The majority of respondents indicated that the authorities have the right to submit their opinion/an *amicus curiae* brief to the courts either on the authority's own initiative or at the court's request. The responses received indicated that *amicus curiae* briefs help the courts to better understand both generic competition issues and matters affecting competition in specific industries. One of the specific circumstances that has led competition authorities to submit *amicus curiae* briefs is the risk of incoherence in the application of the competition provisions. One authority indicated that, subject to the court's permission, it may present an oral opinion.

III. Sources of tension identified in the relationships between authorities and courts

Many respondents indicated that authorities and courts do interact in various forms and on multiple occasions and that this interaction does not raise any specific issues. In some jurisdictions, the relationship is benefited by the fact that the courts are specialized to deal with competition cases.

Appeal Procedures

However, some authorities did state that the above mentioned reluctance of judges to participate in trainings negatively affects the cooperation between authorities and courts and judges. Another form of tension stems from the appeal procedure. For example: courts reviewing the authority's decisions have the tendency to review the case anew without giving sufficient consideration to what the authority has decided, moreover, they sometimes lack sufficient understanding of the economic context in complex cases. Authorities may therefore feel that the courts are more focused on the formal rather than the substantial aspects of the case. In these cases, it may occur that the courts reduce fines without providing a clear reasoning for doing so.

Leniency Issues

Another cause for tension identified by some authorities, was the requirement to transmit information on request of civil and criminal courts. This obligation is sometimes problematic as it may have a chilling effect on leniency applications, especially when disclosure of information from on-going cases is related to criminal proceedings.

IV. Conclusion

The outcome of the survey conducted within the project proves that the scale of problematic tensions between authorities and the judiciary is not as significant as might have been initially expected. However, it should be kept in mind that the findings only reflect the situation in the countries that responded to the questionnaire (one third of the ICN members).

In general, it should be underlined that there is a high awareness of the need to maintain good relations with courts. At the same time in many jurisdictions judges do not deny the necessity to talk about competition law with the authorities responsible for its enforcement. Results of the survey provide an interesting catalogue of possible interactions between authorities and the judiciary. Moreover, they provide insight into authorities' experience with respect to the usage of economic evidence, decision drafting processes and presenting an authority's views in the courtroom.

According to the original concept of *"Working with courts and judges"* the project will be continued after the 2013 ICN Annual Conference by the Advocacy Working Group. The material gathered so far indicates possible directions in which this exercise may develop in the future. We hope that the plenary and break-out conference sessions will provide even more food for thought.

The Polish Competition Authority, as organizer of this Special Project, counts on fruitful discussions during the Conference. We encourage you to get acquainted with the Collective Summary of responses in order to obtain a better view of the specifics of cooperation between courts, judges and authorities. The summary is roughly divided into the topics specific to the break-out sessions to be held on 24th April 2013.

For the purpose of preparation to the *"Working with courts and judges"* sessions we are presenting a number of questions which may serve as food for thought and good starting points for the debates:

- *How far should cooperation between authorities and courts go? How close is too close – are there methods of cooperation that should be perceived as inappropriate?*
- *Taking into consideration the perceived need for separation of powers, should there be a limit to the cooperation between authorities and courts?*
- *Are some kinds of dialogue between authorities and courts that are more efficient than others?*
- *What methods and techniques should be used to effectively explain complex competition issues to judges – how do parties get the message across?*
- *What actions can your competition authority take to promote the knowledge of competition law and economics among the judiciary? How to help judges understand economic issues? How to help economists understand legal issues?*
- *What types of economic evidence have been persuasive in court? What types of evidence was rejected by the courts?*
- *Keeping in mind the increasing "economization" of competition law should courts already think to create special economic divisions?*
- *What should be the limits on judicial review and how free should the judges be to disagree with the competition agencies and set aside their determinations?*

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