

**MARUBENI EUROPE PLC**

**EU Competition Law Compliance Policy**

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## **Section 1. Policy Statement of Managing Director**

It is the policy of Marubeni Europe plc (“Marubeni”) to comply with the competition laws of the European Union and of any country in Europe in which Marubeni does business. Infringements (i.e. breaches) of EU and national competition laws may cause serious harm to both Marubeni and its employees. Consider the following:

- The European Commission and the Office of Fair Trading in the UK may impose fines of up to 10% of Marubeni’s global *group* turnover for infringements of competition laws.
- Where any infringement involves a Marubeni existing commercial agreement, the agreement may be unenforceable, and those harmed by the agreement may succeed in a lawsuit for damages against Marubeni.
- Whether Marubeni is investigated by the EU or national competition authorities, the mere *fact* of investigation would be a drain on Marubeni’s human and financial resources, generate adverse publicity and cause potential damage to Marubeni’s reputation and the share price of Marubeni Corporation.
- In certain Member States, such as France, Germany, Ireland and UK, Marubeni employees could face criminal liability, i.e. fines or imprisonment or both, when they are directly involved in anti-competitive behaviour.
- Where an illegal scheme operates in more than one jurisdiction, for example in both the US and Europe, Marubeni may incur liability under each jurisdiction’s competition laws. In this event, Marubeni (and the employees involved) could face criminal liability both in certain EU Member States and in the US, resulting potentially in stiff fines and damages awards against Marubeni and prison terms for its executives. Marubeni’s employees may even face extradition to the US.

For the above reasons, Marubeni intends to conduct its European business and affairs in ways that do not infringe competition laws. It has therefore adopted a “zero tolerance” policy with regard to infringements of competition laws: it is a condition of your employment with Marubeni that you comply with its competition law policy. Any action in breach of this policy will be treated as a disciplinary offence under your contract of employment and, depending on its seriousness, may be treated as serious or gross misconduct.

The purpose of this Policy is to inform you of those acts which may constitute an infringement of competition laws in order to enable you to avoid engaging in such conduct, and to provide guidance to you as to when you should contact EURLGAL for assistance.

To be more specific, EU competition law is currently in force throughout the European Economic Area (“EEA”)<sup>1</sup>. EU competition law is considered the “federal” competition law of the EEA, meaning that it overrides national competition law and may even supersede other national laws in conflict with it. The standards or benchmarks of EU competition law are also found in the competition laws of numerous EU Member States.

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<sup>1</sup> As from January 2007, the EEA is comprised of the following Member States: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom.

We insist, as part of our European competition law compliance programme, that you read this Policy carefully. In addition, you may be requested to attend competition training programmes to ensure that you fully understand the competition rules and are updated on a regular basis.



Naoya Iwashita  
Managing Director

## **Section 2. Introduction**

Competition law (or “antitrust” law, as it is termed in the United States) is intended to provide a framework to promote fair play in commercial dealings so that competition in the market is protected, for the benefit of consumers. Competition laws can be seen as a form of regulation that seeks to promote innovation, sources of supply, consumer choice and lower prices.

EU competition law has all of the above objectives. But in addition, it seeks to ensure that goods may flow throughout the EEA without artificial barriers.

Behaviour that discourages innovation, restricts sources of supply or consumer choice, imposes barriers on “parallel imports” (i.e. imports of products from one EEA Member State to another, as well as from one defined territory within the EEA to another – please see Section 4 below) or has the effect of raising prices, depending on the circumstances, may be deemed “anti-competitive” and could be the target of competition law enforcement.

The basic provisions of EU competition law are contained in Articles 101 and 102 of the EU Treaty.

Article 101 prohibits anti-competitive “agreements and concerted practices” among independent undertakings. A “concerted practice” could be described as being an implicit agreement between two independent entities. In this regard, this Policy examines the potential anti-competitive behaviour that we need to guard against in our business relations with the following categories of counterparty:

- Relations with Competitors (Section 3);
- Relations with Customers and Suppliers (Section 4); and
- Relations with Agents (Section 5).

Article 102 prohibits the abuse of a dominant position and does not require any agreement whatsoever – in fact, the abuse is unilateral in character and is carried out by the dominant entity. In Section 6 we look at the position of entities that are in a dominant position and what would constitute “abusive” behaviour by such entities.

In Section 7 we look at various issues relating to documentation and the relevance of competition law.

Additionally, in Annex 1 we provide a practical list of DO’s and DON’Ts in relation to issues which may arise in daily business and in Annexes 2 to 6 we detail the important national competition aspects for France, Germany, Italy, Spain and the United Kingdom, to the extent that they differ from EU law.

## **Section 3. Relations with Competitors**

The European Commission (and the national competition authorities) reserve their highest fines for cartels. Commission fines can be particularly severe, often involving hundreds of millions of Euros. The current and past Commissioners in charge of EU competition policy have made cartel enforcement their top priority. Accordingly, it is Marubeni’s top priority to avoid participation in any cartel.

You have undoubtedly heard of the term “cartel”. A “cartel” conjures up a meeting of competitors, sitting in a dark, smoke-filled room, fixing prices. This stereotype is accurate in only one respect: a cartel always involves a meeting or communications between competitors. However, cartels are almost never formed in dark, smoke-filled rooms, and the *subject matter* of a cartel may involve other things besides fixing prices. For example, on 30 June 2010, the Commission imposed fines totalling €269 million against steel producers for having not only fixed prices, but also for having fixed quotas, allocated customers, exchanged commercially important and confidential information, and monitored those arrangements.

*To clarify any uncertainties, a cartel is established when two or more competitors are in agreement to engage in one or more courses of action which are considered anti-competitive. Although implementation of the common plan certainly adds to its seriousness, the plan to do something anti-competitive is all that is necessary to implicate Marubeni (and possibly the individuals concerned) in a potentially costly investigation which may result in burdensome penalties.*

### **3.1 What is an unlawful “agreement”?**

When a competition authority investigates a cartel, it usually finds an “agreement” circumstantially by weaving together various emails, telephone records, agenda notes, internal memos and the like. Unlawful agreements may often be the result of tacit understandings (such as where X tells Y that X will raise prices by 10% next week, and hopefully that “Y will do the same” - and Y indeed raises its prices by 10% at the same time).

The place/venue in which the agreement is concluded is of no consequence. The agreement may be concluded, for example, in a restaurant or country club. The means of communicating the agreement are also of no consequence. An agreement may be formed by the giving of a “wink or nod” or it may be concluded over the telephone or by email - and it may still breach competition laws.

It is worth repeating that Marubeni may be penalised for having entered into such an agreement even where the agreement is in fact never implemented. Depending on the severity of the anti-competitive restriction in the agreement, its anti-competitive *intent* may be sufficient to trigger liability even when it has no effect in the market.

In addition to agreements, employees need to be very careful in their *communications with competitors*. The mere exchange of information that might give the receiving party a competitive advantage can be penalised severely under competition laws. We will return to this point later.

### **3.2 Types of agreements among competitors to be avoided**

*What then, are the types of agreements among competitors that are always considered illegal and which you must avoid?*

- **Agreements on prices and other sales terms**

EU competition law imposes the highest fines for price fixing agreements. This prohibition extends to fixing actual or future prices, profit margins, minimum or maximum prices, price ranges, as well as to fixing discounts, rebates, and terms and conditions and to setting up monitoring mechanisms to facilitate fixing any of the above.

As regards the fixing of terms and conditions, it would be illegal for competitors, for example, to agree to a common policy on product warranty coverage, consumer financing terms or standard terms of business.

Of the above, price agreements are the most common. For these purposes, an “agreement” may be inferred from parallel price movements by competitors, assuming that there is no other reasonable explanation for the parallel movements. If the parallel price movements are coupled with proof of contacts between the companies concerned, this is usually enough to result in liability, even in the absence of a formal “agreement” as such.

- **Market sharing**

Market sharing, another form of serious infringement, may involve the allocation of separate *geographic territories* by competitors, so that for example, cement manufacturers from Belgium and Hungary agree to stay out of each other’s home market or to avoid certain third country markets.

Market sharing may also involve the allocation of *particular customers*. For instance, it would be illegal for the Belgian and Hungarian cement makers of the previous example to agree not to sell to certain customers of the other producer.

- **Restrictions on output, capacity or quality**

When competitors agree to reduce their output or to shut down certain capacity, it is usually with the intention of supporting price levels. Such agreements are almost always illegal because they are, in effect, agreements to raise prices. Such agreements may be permitted in rare instances in order to save an industry in crisis, but such action requires close regulatory supervision and approval. All such arrangements, or invitations to adopt such arrangements, must be reported to EURLGAL.

An agreement by competitors on quality levels is also a means of reducing competition. An example would be where all the European producers of a certain chemical product agree to use a lower quality raw material (for example, as a means of reducing costs). The producers would also be acting illegally by agreeing to use only a higher quality component in order to justify an increased price.

- **Bid rigging/tendering**

When bids are invited by any public authority within the EEA, competitors are prohibited from agreeing on price or other elements of the bid, coordinating their bids on different projects to avoid competing with each other (e.g. that A will refrain from bidding on Project X if B refrains from bidding on Project Y), or reaching any other understanding that would limit their competition on any particular bid.

- **Joint boycotts**

It is illegal for competitors to take a joint decision not to supply to, or not to purchase from, a particular third party.

- **Joint standards**

It is not uncommon for competitors to jointly adopt (de facto) standards that apply in their industry. However, it is important that standard setters avoid falling into certain well-known traps that may give rise to liability:

- First, the patent holders controlling the standard cannot refuse third party competitors access to the standard, and they must provide access to it on fair, reasonable and non-discriminatory terms.
- Second, standard setting cannot become a pretext for jointly setting the prices (or other terms and conditions) for the products incorporating the standard.
- Third, the patent owners cannot limit competition from competing technologies by including non-essential, complementary patents in the standard because this forecloses competition from competing technologies.

### 3.3 Information exchanges

One of the more subtle forms of cartels, which is an increasing concern to the EU and Member State authorities, is the so-called “information exchange” between competitors. Serious fines are being imposed by the EU and Member State competition authorities simply on the basis of information exchanged directly or indirectly by competitors, even without any agreements or understandings being reached.

This form of infringement does not require an agreement of any kind. It only requires certain types of information to be transmitted, either directly or indirectly, from a company to one or more of its

competitors. In other words, you could expose Marubeni to risk by either providing such information to competitors or by receiving such information from them.

The rules governing information exchanges are complex, but the following is what you need to know in order to avoid creating risk for Marubeni and yourself. If you have any doubts when such circumstances arise, you should report the incident to EURLGAL.

- **The risk applies only to certain types of information specific to a particular company or companies**

There is potential competition law risk only if the company-specific information is deemed “strategic” information. This means that competition law risk arises only when the information is of a kind that its exchange may lessen the incentive to compete. The types of information considered strategic include: actual, future or proposed prices, discounts and rebates; dealings/negotiations with customers; customer lists; production costs; turnover; sales volume; profit margin; production capacity; marketing plans; investments; and R&D programs. Even discussions among competitors about the so-called “need”, for example, to reduce dealer commissions or rebates, or to limit production in order to reduce an “oversupply” of the product (thereby raising prices) could be considered an illegal information exchange.

Accordingly, due to the ambiguity of the new EU rules and to avoid arousing any unwarranted suspicion with EU regulators, Marubeni has taken the position that you must not transmit to competitors any information whatsoever that is specific to any of Marubeni’s businesses, unless it has been previously authorised by EURLGAL. This rule also applies to the transmission of strategic information in the course of any acquisition or joint venture involving a competitor. If you receive any company-specific information or data directly from a competitor or via a trade association or other third party, you should report it immediately to EURLGAL. Remember that the communication of strategic information to a competitor often begins with a casual, seemingly harmless exchange of gossip about “life” in the company.

This prohibition on the communication of such Marubeni-specific information to competitors also applies to information that has appeared on Marubeni’s websites, in press releases or as reported in the mass media (e.g. television, newspapers and magazines).

The concern of the authorities is that the giving of strategic information facilitates co-operation between competitors rather than competition and the behaviour in the market place of the parties involved is likely to be affected and lead to a lessening of competition.

- **Dealings with independent third parties who are non-competitors**

Under new Commission rules, it is an infringement of Article 101 for independent third parties, such as trade associations, market consultants and analysts, to collect and disseminate company-specific strategic data to companies that compete with each other. In these instances, the third parties as well as the competitors involved are also deemed liable for the infringement.

- **The exchange of historical data is not safe**

It used to be that Marubeni and its competitors could, for example, through their trade associations, share their non-public competitive data when the information was purely historical and therefore could be said to be no longer capable of influencing the competitive behaviour of those to whom the information is disclosed. “Purely historical” information was regarded as being any information that was at least one year old.

However, under rules adopted in January 2011, the EU Commission has clarified that there is no predetermined date/age at which information becomes historic, i.e. at which it is old enough not to pose risks to competition. Accordingly, you must not make any assumptions as to whether any



particular information is capable of being shared with competitors but should consult with EURLGAL.

Under the current rules, the risk of infringement exists even when the company-specific information is - say six months or one year old. Therefore, all direct and indirect communications between yourself and Marubeni's competitors involving company-specific information should be avoided even when you think that the age of the data may render it useless to competitors.

- **The exchange of aggregated data is problematic if it can be reverse-engineered**

The exchange of aggregated data/statistics, which is normally prepared by trade associations and market analysts/consultations, should be viewed as non-problematic even when it aggregates (and makes anonymous) a company's strategic data, provided that the aggregated information is accessible (in terms of cost) to all competitors and customers alike. However, it is important that the data cannot be disaggregated (i.e. reverse engineered) - otherwise, the exchange is deemed to be an exchange of company-specific strategic data.

- **Discussions with customers, suppliers and distributors intended to illicit information on competitors may be illegal**

You must not seek to obtain from any of our customers, suppliers or distributors, nor from those of our competitors, any information concerning prices, rebates/discounts, terms and conditions of one or more of our competitors or any other aspect of the competitor's commercial policy or dealings.

- **Information/data reported by so-called independent industry experts and specialized media sources may constitute a form of illegal information exchange**

Almost every company, including Marubeni, looks for market intelligence to help it ascertain the direction of the market and the likely success of our products and services. By "market intelligence," we are referring here to potentially valuable information/data that is made available specifically from so-called experts, such as industry consultants and analysts, or from specialized media sources, such as financial/business news channels, industry newsletters and studies. These sources provide a veneer of legitimacy, but their provision of information to us is not always compatible with EU competition law, particularly when it includes company-specific information relating to any of our competitors.

Marubeni does not wish to prohibit your access to all such market intelligence but rather provide helpful guidance as to when the collection/receipt of such intelligence may in fact be considered anti-competitive and therefore, an illegal information exchange. All employees must therefore abide by the following guidelines with regard to market intelligence.

These guidelines apply only to "market intelligence" concerning Marubeni's individual competitors (rather than market trends or aggregated data):

- If the market intelligence is transmitted to you, or made available to you, by a so-called expert such as an industry consultant, market analyst or industry reporter, it must be reported immediately to EURLGAL.
- If the market intelligence is made available to you from a specialized media/news source, as described above, and your access to the information requires payment of any kind, such as a fee for the download or a subscription, it must be reported immediately to EURLGAL before the purchase takes place. But if this is no longer possible, then it must be reported immediately after you obtain access to the intelligence.
- You should be suspicious of any market intelligence, as described above, which is made available to you as part of a "select" group, or to you exclusively. All such incidents must be reported immediately to EURLGAL.

### 3.4 Trade association meetings

You must be particularly careful to avoid illicit information exchanges if you or your division participates in any trade association activities on behalf of Marubeni. After all, trade associations are organisations comprised of competitors. This is not to say that trade associations are “bad”. They are in fact an important “positive” means for competitors to discuss common industry problems, such as, how best to tackle toxic emissions, manage waste disposal or how to educate consumers on a particular product. In trade association meetings, competitors may legitimately discuss how the industry is performing and the obstacles it must overcome, and such discussions may become the subject of legitimate industry studies and reports.

However, trade association meetings become illegal when the subject matter discussed or shared with members involves non-public corporate data and information which, in the hands of a competitor, may affect its competitive behaviour in the market. To guide you as to the types of information which must not be discussed or exchanged at trade association meetings, please refer to Section 3.3 on what constitutes an illegal information exchange - those rules apply with equal force to your participation in trade associations, as well as to “side” discussions that you may have with competitors before, after or during breaks at the meeting.

Marubeni’s mere attendance of a trade association meeting at which illegal discussions are taking place may give rise to costly competition investigations and liability. The repercussions could be severe: *Under EU competition law, it is not only the association which may be fined severely for infringements, but also its members (i.e. Marubeni).*

Legitimate trade association activity may easily drift into illegal subject matter. The following hypothetical examples will illustrate this point:

*The Sugar Association of London is meeting in London. No lawyers are present. The attendees are discussing the need to improve waste management. One attendee from Producer X complains, “You know, we have limited funds available for this sort of thing. Prices have come down too far. We need money to make plant improvements”. The other attendees nod their heads in common empathy. Producer Y says, “Then we ought to be talking about supporting price levels, don’t you think?” The attendees then agree to a scheme for “stabilising” prices.*

*The European Plastics Federation, in which Marubeni participates, is meeting in Paris. No lawyers are present. The attendees are discussing the CTF’s annual report on the “state of the industry”. On page 5 of the draft in circulation, there is a graph indicating that European demand for a certain plastic has fallen off in the last year. Producers X and Y, who account for 60% of the EU market, blurt out that they plan to shut down certain key plants in about six months, even though this is confidential, non-public information. In six months, all producers in attendance of the EPF meeting simultaneously raise their prices.*

There is only one circumstance in which non-public “competitive” data concerning a company may possibly be permitted to be shared with competitor members of a trade association (but not at the trade association meeting itself) and that is where the data in question is provided directly to the trade association itself for the sole purpose of preparing industry reports or compilations of industry statistics that will be published only in an aggregate form (meaning that it is impossible to attribute any statistics to a particular competitor).

Given the difficulty of this area we would suggest that any Marubeni-specific information be provided by the business department concerned to EURLGAL before it is tendered to the trade association. If EURLGAL approves the disclosure of the information, the business department should then liaise with the trade association’s Chair or other association employee (who is not affiliated with a competitor), but not directly with all the trade association members themselves.

To avoid even the appearance of impropriety, Marubeni requires that you follow these simple rules:

- ✓ Every trade association in which Marubeni participates must retain independent counsel who attends every association meeting or function. The sole purpose of the lawyer's attendance is to ensure that attendees adhere to a meeting agenda and to report instances of suspect activity to the Chairman of the association.
- ✓ Marubeni's representatives in trade associations must obtain in advance of every meeting a copy of the agenda for the meeting, which must be vetted, in advance, by EURLGAL.
- ✓ Marubeni attendees of association meetings must ensure that the agenda is strictly adhered to and that minutes of the meeting are taken. These minutes must be circulated in draft form to all attendees of the meeting. Marubeni's representative at such meeting must provide a copy of the draft minutes to EURLGAL for clearance.
- ✓ If the discussion at the meeting departs from the agenda, and in particular, involves a discussion of company-specific information, Marubeni's representatives must (1) object vocally, (2) request that their opposition be reflected in the minutes of the meeting, (3) leave the meeting immediately, and (4) request that their departure also be reflected in the minutes. They must then notify EURLGAL of these events.
- ✓ Marubeni's representatives at such meetings must rigorously avoid all disclosure or discussion of non-public information about Marubeni.
- ✓ If attendees of the meeting gather informally before, during or after the meeting, Marubeni's attendees must be vigilant as to any illicit discussion and avoid it clearly and totally. Any such discussion must then be reported immediately to EURLGAL.
- ✓ Any non-public information about Marubeni may only be disclosed by Marubeni after having been approved by EURLGAL (see the earlier discussion of this issue).

### 3.5 Other competition law "sensitive" dealings with competitors

There are some dealings among competitors whose legitimacy depends on a variety of economic and factual circumstances. In other words, these dealings are not necessarily illegal, but they must be approached with the greatest caution and care - meaning that they must be vetted in advance by EURLGAL. These potentially problematic dealings include the following:

- **"Strategic alliances" and "joint ventures"**. The terms "strategic alliance" and "joint venture" are often applied to cooperation of one kind or another between competitors. Such cooperation is common in various industries, and it is usually publicised as a means of promoting the companies involved, their share price, or both. Strategic alliances and joint ventures, if properly tailored, may result in certain efficiencies that benefit consumers. However, alliances may be used as a pretext for illicit information exchanges, dividing markets or customers, or facilitating joint pricing.
- **R&D agreements**. Collaboration among competitors on research and development is often viewed positively as enhancing technology and making its benefits available to consumers. However, joint R&D amounts to a disguised cartel when the parties fix prices or output, or allocate markets for the products to be exploited pursuant to the R&D programme. Joint R&D may also be prohibited when it places anti-competitive restrictions on the parent companies, such as by: precluding independent research; restricting access to the results of the research; or by precluding manufacture of products incorporating the results of the research.
- **Specialisation agreements**. These are agreements between parties who are actual or potential competitors only to manufacture certain products (often requiring as a consequence that one or the other party cease production of certain products), and often, with an additional commitment to obtain supplies of the product that a party no longer manufactures from the other party. Such

agreements may be permitted due to the efficiencies they generate, but they are competition law sensitive.

- **Joint selling.** In these situations, competitors may form a joint venture or joint selling agency which takes over the distribution of certain products of the parent companies. These situations are problematic because collaborative selling may facilitate price fixing, output limitations or the allocation of markets and customers.
- **Joint purchasing.** In these situations, competitors agree to purchase their inputs or raw materials from a single source. Although such arrangements may be helpful, particularly to smaller companies for the purpose of reducing the price of raw materials, there is usually no commercial justification for larger companies with market power to engage in such collaboration, and such arrangements may be viewed as disguised cartels.
- **Joint marketing.** Within the umbrella of this heading, suspect arrangements include joint brand advertising, joint promotion (e.g. through jointly funded rebates or discounts) and the use of joint quality marks (in this last instance, certain competitors adopt a common quality mark for products satisfying particular specifications, but they refuse to allow the use of the mark by other competitors whose products comply with these specifications).
- **Technology licences.** Technology licences are common in the chemicals, petrochemicals and plastics businesses. Although technology licences are generally viewed by the Commission as benefiting innovation, it is possible that such licences provide a pretext for cartel activity. Also, the presence of certain clauses in the licence may have the effect of rendering the licence unenforceable. For these reasons, all such licences must be approached with great caution, and you are urged to bring all planned licences to the attention of EURLGAL.

### 3.6 To summarise...

- ✓ Communications with Marubeni's competitors should be kept to a minimum, and limited strictly to what is plainly permitted under the competition laws. All contacts with or by competitors should be documented in writing and brought to the attention of EURLGAL.
- ✓ All events at which you will come in contact with Marubeni's competitors, such as at trade shows, industry sporting events, trade association meetings, or formal dinners, must be cleared in advance with EURLGAL. All observed instances of suspect behaviour prior, during or following such events must be reported to EURLGAL.
- ✓ When company-specific information concerning a competitor is communicated to you by that particular competitor, you must NOT:
  - reciprocate by providing Marubeni information of any kind to the competitor;
  - discuss the competitor's information with your commercial colleagues at Marubeni; or
  - take any measures in the market in reaction to the information obtained (especially by raising or lowering prices!);

#### BUT INSTEAD...

- forward any company-specific information concerning our competitor that you have received by email or in physical form to EURLGAL immediately (i.e. time is of the essence);
- telephone EURLGAL immediately to report any such company-specific information that you have received orally (i.e. time is of the essence).

- ✓ Keep in mind that unless Marubeni rejects the transmission to you of company-specific strategic information very soon after your receipt of it, Marubeni is presumed to have acted upon it to its own advantage, thereby unnecessarily generating competition law risk.
- ✓ Whenever you are involved in planning a commercial arrangement or agreement with a competitor, you must clear it in advance with EURLGAL and proceed under its direct supervision.

#### **Section 4. Relations with Customers and Suppliers**

Competition law enforcement is focussed not only on cartels (agreements and concerted practices between competitors), but also on various kinds of agreements that a company maintains with its customers and suppliers. These so-called “vertical” agreements may be anti-competitive when they unduly restrict Marubeni’s distributors and other resellers or when they unduly restrict Marubeni as a purchaser of raw materials or finished goods. When such conditions exist, the agreement may result in significant fines and/or unenforceability of the agreement. This section of the Policy will provide you with guidelines on how to deal with situations which may give rise to liability.

##### **4.1 Influencing resale prices**

In Marubeni’s dealings with customers, whether they are distributors, wholesalers or retailers, it is essential that customers have complete freedom to set their own prices. This means that Marubeni employees cannot fix resale prices, fix profit margins, impose rebate or discount schemes, impose on the customer a binding price range, or penalise customers who “undercharge”.

However, it is permissible to: (1) impose a maximum price, provided that it does not operate as a fixed price; or (2) provide “suggested prices”, provided that there is no attempt to influence the reseller’s actual prices.

Influencing resale prices is a highly sensitive concern of the Commission, which has imposed heavy fines for such behaviour. Marubeni employees must contact EURLGAL before suggesting or imposing any pricing related scheme on customers.

Note: The issue of influencing resale prices may also arise when Marubeni is the customer and our non-group company supplier is seeking to influence Marubeni’s prices. Here as well, when you become aware that a supplier is seeking to influence Marubeni’s resale prices, you should immediately contact EURLGAL.

It should also be noted that it is perfectly permissible for a distributor to refuse to provide the supplier data relating to the distributor’s sales price and profit margins and the supplier would not be permitted to coerce the distributor into providing such information. However, unless the supplier is dominant (see Section 6 below), it could lawfully refuse to extend the existing contract with the distributor as a result.

##### **4.2 Restrictions on parallel imports**

It is a very serious infringement of EU competition law for a company to restrict parallel imports, i.e. imports of products from one EEA Member State to another (see the list of EEA Member States in footnote 1, above), as well as from one defined territory within the EEA to another. Such restrictions are normally placed on distributors in order to maintain price equilibrium in certain territories, that is, to prevent products which are priced lower in certain parts of the EEA from being marketed in other parts of the EEA in which prices are generally higher.

The rule against restrictions on parallel imports applies not only to direct import bans, but also to other indirect measures designed to discourage such imports, such as:

- the refusal or reduction of bonuses or discounts;
- the refusal to supply to a distributor or the threatened termination of the distributorship agreement;
- the implementation of a system for “tracking” parallel imports (for example, by placing a label on the product to indicate where it was first marketed); or
- the refusal to honour a consumer warranty outside the country in which the product is first marketed.

Due to the high sensitivity of such restrictions, it is particularly important that you contact EURLGAL before placing any direct or indirect restrictions on trans-shipments within or between EEA Member States.

Note: The rule against restrictions on parallel imports applies also to situations in which Marubeni is the distributor of products that are subject to the restriction. Whenever a supplier seeks to influence Marubeni’s trading behaviour in this way, you must contact EURLGAL immediately.

#### **4.3 Restrictions on customers**

It is prohibited for Marubeni employees, without previous EURLGAL approval, to require or encourage Marubeni’s distributors to refuse to supply to certain customers or certain types of customers. This prohibition applies to allocations of customers between Marubeni’s distributors as well as between Marubeni itself and its distributors.

Note: This rule applies also to situations in which Marubeni is the distributor of products that are subject to the restriction. Whenever a supplier seeks to influence Marubeni’s trading behaviour in this way, EURLGAL must be contacted immediately.

#### **4.4 Exclusive supply agreements**

Exclusive supply agreements specify that there is only one buyer inside the EEA territory (see the list of EEA Member States in footnote 1, above) to which the supplier may sell a particular final product for resale. The main competition risk of such agreements is that they cut off the availability of supply of such product to other potential buyers. Thus, the larger the individual market shares of each of the supplier and the buyer, the more likely it is that alternative buyers will not be able to obtain supplies. The “foreclosure effect” is exacerbated when the exclusive dealing is for a long duration (say five years).

Therefore, whenever Marubeni employees are contemplating entering into exclusive supply arrangements, they must notify, in advance, EURLGAL.

#### **4.5 Exclusive purchasing agreements**

An exclusive purchasing obligation is just what it implies: the buyer agrees to purchase all, or nearly all, of its requirements of a particular product (often a raw material or component) from a single supplier. The main competition risk posed by such agreements is that they may foreclose market access of other suppliers to the buyer(s) affected. Thus, the larger the individual market shares of each of the supplier and the buyer, the more likely it is that alternative suppliers will be cut off. Such risks are particularly likely when the exclusive purchasing obligation is for a long duration (say five years).

Exclusive purchasing arrangements (whether Marubeni is the purchaser or the supplier) are considered sensitive by Marubeni. Therefore, whenever Marubeni employees are contemplating such arrangements, they must notify, in advance, EURLGAL.

#### **4.6 Tying restrictions**

A “tie” occurs when the seller is willing to sell a particular product to the purchaser only on the condition that the latter also purchases a separate “distinct” product – for example, where Marubeni agrees to sell PVC to a buyer, provided that the latter also agrees to purchase VCM from Marubeni. Another form of tying occurs when two products are sold to a customer subject to a discount or rebate that applies only when both products are sold together.

As a common form of tying, the supplier may seek to persuade the buyer to purchase a “full range” of the supplier’s products. In competition law language, this is known as “full line forcing”.

Marubeni considers the tying of products and/or services to be a sensitive activity, especially when the supplier is dominant (as to dominance, see Section 6). You should communicate all proposed instances of tying, in advance, to EURLGAL.

### **Section 5. Relations with Agents**

Marubeni maintains a number of relationships with so-called “agents”. Whether these purported agents are true agents may be important to Marubeni strategically. This is because agreements between Marubeni and its true agents are not considered agreements by two separate entities - they are considered part of the same entity, Marubeni. Why is this important to Marubeni? If Marubeni has an agreement with a true agent, Marubeni may act with much greater commercial freedom in its dealings with the agent. Among other things, Marubeni may determine the agent’s prices without fear of falling foul of competition laws.

However, under EU competition law (and the national laws of EEA Member States), whether or not someone is a true agent is more than a mere question of labels. The factors considered by the Commission in determining whether an agent is independent are extensive and complex, and best left to EURLGAL to evaluate in any given case.

Additionally, you should keep this in mind when deciding whether to refer to such a party as an agent, when perhaps they would more accurately be described as a distributor or service provider – that under EU law and the laws of the Member States “true” agents are entitled to compensation on the expiry or termination (without cause) of agency agreements or arrangements. For the purposes of both EU competition law and contract law, Marubeni employees act at Marubeni’s risk by assuming that a so-called agent is indeed a “true” agent - to call them an agent may build up some expectation on their part of an entitlement to compensation. It is therefore important to try to understand the exact nature of your relationship with your counterparties.

For the above reasons, we require that all proposed agency and distribution arrangements be brought to the attention of EURLGAL.

### **Section 6. Dominance issues**

Competition law creates a special regime for companies that are dominant in particular “product markets” or for our purposes, product lines. These rules are designed to protect customers and even competitors from “abusive” behaviour carried out by dominant firms, *whether they are manufacturers or traders*. Put another way, dominant firms, due to their market power, are already dealing in a market in which competition has been weakened; they might even be capable of eliminating their competitors. They therefore have a special responsibility not to engage in conduct that might further weaken competition. This means that non-dominant firms are *not* subject to these rules, and therefore enjoy greater commercial freedom, because they need effective tools to compete with the market leaders.

Although Marubeni is active in highly competitive markets – and while we do not consider ourselves dominant in any market – we cannot ignore the possibility that Marubeni might, rightly or wrongly, be

considered dominant by competition authorities with regard to one or more of our products. For our internal purposes, we have established as a benchmark that if Marubeni, at its level of trade (as a trader or distributor), has a market share of 40% or higher for any product, we must avoid all conduct that might be perceived as “abusive”. Attainment of this benchmark market share would be of concern to us whether it exists EEA-wide or in a particular EEA Member State.

There may also be some markets in which Marubeni is one of a handful of competing traders/distributors. If such markets are transparent due, for example, to them involving a commodity product such as a metal or a chemical, then the Commission might find that the entire group of competitors is “*collectively dominant*”. This might be the case, for example, with a group of 7-10 competitors, none of which has a market share greater than 20%. In such cases, each member of the group, including Marubeni, may owe a duty not to engage in abusive conduct. All such markets which may fall within this category must be reported to EURLGAL.

Consequently, if your work activities relate to a product line or market segment where Marubeni has a market share of 40% or more, or to a market on which Marubeni (and its competitors) might be collectively dominant (which should be verified with EURLGAL), you must:

- notify EURLGAL of these circumstances; and
- adhere to the guidelines below.

*What is considered “abusive” behaviour?*

### **6.1 Loyalty rebates and discounts**

The only rebates and discounts allowed under EU competition law are those linked to the volume (i.e. quantity) purchased, and such incentives must be based on cost savings. For example, a dominant supplier could legally offer a discount of 5% for each metric tonne of a particular metal that is purchased on the basis that such a quantity results in certain cost efficiencies.

However, dominant firms cannot offer rebates or discounts that are based on achievement of a particular market share, volume or revenue targets, or on progressive quantity schemes (as explained below). Competition authorities consider that such schemes can only serve one objective: to persuade the purchaser to obtain all, or nearly all, of its business from the supplier. The problem is: if the supplier is dominant, these are considered abusive sales tactics.

An example of a progressive quantity scheme would be where a seller gives a buyer a 5% discount for the first metric tonne purchased, 10% discount for each metric tonne when the purchase exceeds 5 metric tonnes; 20% discount for over 10 metric tonnes. However, this arrangement may be permissible if the discount rate was, for instance, 5% for the first metric tonne purchased, 10% for each metric tonne over 5 metric tonnes; 15% for each metric tonne over 10 metric tonnes because the rate increases by a flat rate of 5% and the volume similarly increases at a flat rate.

### **6.2 Predatory pricing**

It may be considered abusive for a dominant supplier to sell products below its own costs. If you suspect that your sales price falls into this situation, you must contact EURLGAL immediately.

### **6.3 Discrimination**

You cannot discriminate by treating equivalent transactions differently, that is by treating customers differently when there is no objective reason for doing so. This means, for example, that you cannot discriminate among customers on grounds of nationality. Likewise, prices, rebates and discounts, and other terms and conditions must be applied equally to all buyers at the same level of trade. Obviously, wholesalers and retailers may be treated differently because they are at different levels of trade.



Equally, you cannot discriminate against certain customers in times of product shortage - for example, because they are not your “primary” customers for a given product. When facing such market conditions, you must contact EURLGAL to establish internal guidelines to meet such shortages.

#### **6.4 Refusal to supply**

You cannot refuse to supply any existing or prospective customer unless there is valid justification for the refusal. For example, it may be an abuse of dominant position to discontinue supplies to a customer who has acquired one of your competitors in a different market, particularly when the customer has no commercially reasonable alternative source of supply. However, it would not be considered abusive to refuse to supply a customer whose payment is overdue, or who has a record of credit unworthiness.

### **Section 7. Documentation issues**

Marubeni is not immune from so-called “dawn raids”. These are surprise on-site investigations conducted by the Commission, usually at the start of the business day, for the purpose of obtaining evidence in support of a breach of EU competition law. The Commission may also order Marubeni to respond to written requests for information. The documentation that Marubeni must produce to European competition authorities during an on-site investigation or in response to a “Request for Information” could be critical in determining whether Marubeni is held liable for an infringement of competition laws, and in this event, how much its fine shall be. How we manage documentation of this nature could therefore be critical for the mitigation of risk.

There are a number of actions that Marubeni employees should take:

- **Be aware that everything you write down or input into your computer may be used against Marubeni (and possibly even against you).** Proof of cartel activity is usually based upon circumstantial evidence, and the search for such evidence is not limited to Marubeni premises - competition regulators may search employees’ homes, other private premises and even vehicles. During a search, competition regulators may seize computers and search hard drives for emails and files that seek to link us to competitors engaged in cartel activity. There is no such thing as a “complete deletion” from your computer. Notes found in e.g. drawers, diaries and Blackberries may be critical for establishing illicit contacts. It is therefore important for you to be careful about what you say in an email or memorandum, as well as in comments that you make in diaries and informal notes because what you say may be interpreted incorrectly by regulators and create a false impression that Marubeni has engaged in illegal conduct. The following are by way of example:
  - You are reading a newspaper article about how demand for one of our plastics products has increased lately. You write an email to your supervisor suggesting that “the industry needs a price increase” while in fact, without your knowledge, several of our competitors are discussing a price increase. Such an email could be erroneously interpreted by regulators as meaning, “Marubeni has agreed a price increase with competitors”.
  - You are at home one evening watching TV. One of your competitors, Acme, has put its CEO on a TV news programme, and he is claiming that thanks to new process technology that it owns, Acme has “revolutionised” a certain product that we sell (i.e. threatening all those making the “old” product). This development therefore threatens Acme’s competitors, including Marubeni, even though Acme has a relatively small market share. Wanting to protect Marubeni, you write in your diary, “Reminder: Eliminate Acme”. You bring your diary to work, but you forget all about the note that you made in it the night before and take no action on it. A few months later, the industry leaders implement a “price initiative”: They drop their prices simultaneously at a fixed percentage in order to eliminate Acme as a competitor. If your note were retrieved in an on-site investigation, it could be interpreted as meaning, “Marubeni participated in the fixing of prices”.

- **Do not destroy competition “sensitive” documents without prior EURLGAL authorisation.** If you believe that a document in your possession, whether a memo, agreement, letter or email could pose a risk, it must not be destroyed or discarded. Rather, the document must be handed over to EURLGAL immediately.
- **Documenting prohibited conduct.** If you suspect that any Marubeni employee has engaged in, or is contemplating, anti-competitive conduct, you should report it to EURLGAL immediately. This applies to all colleagues, regardless of position. If disciplinary action is taken promptly this could have the effect of reducing Marubeni’s liability.
- **Document Retention Policy.** This policy contains easily understood guidelines for the systematic retention (and disposal) of documents. As with this Policy, there are country-specific appendices. Such policies are good administrative practice because they save Marubeni valuable storage and IT costs and force us to organise our documentation so that the things that matter to Marubeni can be found easily and efficiently.

Document retention schemes are ***not*** for the purpose of destroying evidence that may be used against Marubeni in an investigation (or in any on-going or contemplated litigation or other dispute resolution procedure). Particular attention should be given to paragraph 9 of the Document Retention Policy because the destruction of documents in any such circumstance can result in serious fines. *Therefore, to repeat what we have said earlier, if you are aware of any documents that may give rise to liability, you should provide copies of such documents to EURLGAL.*

## Annex 1 - Do's and Don'ts

### Introduction

Competition laws apply to Marubeni and to all of its business activities. The most relevant sets of competition laws for Marubeni are those of the European Union and of each European country in which Marubeni operates. It is Marubeni's policy to ensure that its business practices comply at all times with the competition laws.

Set out below are practical lists of DO'S and DON'TS in relation to issues that might arise in the normal course of business. These include relations with competitors, customers and suppliers, information exchanges, documentation issues and issues relevant to markets in which Marubeni has a significant market share and/or relatively few competitors.

If you have any questions regarding competition law in general or the Do's and Don'ts, please contact EURLGAL.

### Relations with Competitors

Each provider of goods and services should act independently and competitively on the market and not coordinate its behaviour with that of its competitors. When dealing with competitors, the guidelines below should be followed:

**DON'T** Discuss, recommend or agree with competitors, whether at trade association meetings or in any other context, the following matters:

- Costs.
- Restrictions on output, capacity or quality.
- Purchasing or sales prices, rebates or discounts, profit margins, or intended prices.
- Division or allocation of geographic territories.
- Division or allocation of customers.
- Standard terms of business, or other terms.
- Any plan to refuse to deal with customers or suppliers.
- Any plan to coordinate bid tendering.
- Marketing or promotional plans.
- Any other Marubeni-specific information.

**DON'T** Attend trade association meetings unless all of the following conditions are fulfilled:

- An agenda for the meeting has been prepared in advance.
- You have given a copy of the agenda to EURLGAL.
- EURLGAL has authorised the meeting, approved the agenda, and you have ensured that an independent lawyer will be present at the meeting.

- Minutes of the meeting are taken, and such minutes, in draft form, are submitted to EURLGAL for approval.
- The members at the meeting strictly adhere to the prepared agenda, which should be limited to industry-wide concerns, such as finding environmental solutions, improving health and safety standards, or improving consumer knowledge of the product.
- In the event that any illicit subject matter is discussed, you must leave the room and insist that the minutes reflect that you did not participate in this discussion and that you left the meeting immediately.

- DON'T** Provide or agree to receive any company-specific data (such as prices, output levels and sales) unless approved by EURLGAL.
- DON'T** Assume that because company-specific data is no longer current that its exchange would be legal.
- DON'T** Assume that because Marubeni or any of its competitors have published company-specific information on their website or in other public media that you can circulate such information to your competitors.
- DON'T** Assume that all so-called “market intelligence” is legal, especially when it concerns specific Marubeni competitors.
- DON'T** Seek market intelligence regarding our competitors from our or their customers.
- DON'T** Assume that because you are concluding a commercial agreement with competitors which appears legal, such as a joint venture or a strategic alliance, that it poses no competition risks. Even joint ventures that appear legal could involve illegal objectives or terms that need to be checked, in advance, with EURLGAL.
- DO** Report to EURLGAL any contacts that you have had with competitors and the nature of the discussion, if any.
- DO** Immediately report to EURLGAL all instances in which a competitor, supplier or customer has orally transmitted to you company-specific information regarding one of our competitors.
- DO** Immediately forward to EURLGAL all written or electronic communications that you receive from a competitor, supplier or customer containing company-specific information regarding one of our competitors.
- DO** Report to EURLGAL all suspected instances in which a colleague of yours, or even a supervisor, may have had an unauthorised contact with a competitor.
- DO** Report to EURLGAL all instances in which an analyst, consultant or other independent third party seeks to provide you with market intelligence regarding any of our competitors.
- DO** Report to EURLGAL all instances in which market intelligence is made accessible to you for payment of a price or when the intelligence is made available only to a select group.
- DO** Contact EURLGAL if you have any doubts or questions as to the legality of dealings with competitors.

**Relations with Customers and Suppliers**

- DON'T** As a supplier, do anything to discourage your distributors or retailers from selling products or services to “parallel importers” or to customers who plan to use the products in another Member State.
- DON'T** Seek to influence the resale prices of your customers. However, you may suggest a resale price, but with no threat or compulsion, and you may set a maximum price, provided that it does not operate as a fixed price.
- DON'T** As a customer, accept fixed resale prices or sales margins from your non-group company suppliers. However, you may accept a maximum resale price from such suppliers, provided that it does not operate as a fixed price.
- DON'T** “Tie” the sale of one product or service to the obligation to purchase a separate product or service. This is a sensitive area for Marubeni, particularly with regard to those products in which Marubeni has a high market share. You must inform EURLGAL of all instances in which Marubeni is considering imposing or accepting a tying arrangement.
- DON'T** Enter into agreements with suppliers by which that supplier agrees to sell a given product exclusively to Marubeni, without the prior authorisation of EURLGAL. This same obligation applies when Marubeni is the supplier imposing an exclusive supply arrangement.
- DON'T** Enter into agreements with suppliers by which Marubeni agrees to purchase all, or nearly all, of its requirements of a given product exclusively from a single supplier, without the prior authorisation of EURLGAL. This same obligation applies when Marubeni is the supplier imposing an exclusive purchasing arrangement.
- DON'T** Impose on your distributors and retailers an obligation not to sell to particular customers, or to certain types of customers, without the prior authorisation of EURLGAL. This same obligation applies when Marubeni is being restricted from selling to particular customers or types of customers.

**Dominance issues**

Marubeni has an obligation to avoid engaging in so-called “abusive” market conduct if it is dominant in any product market. For our purposes, we undertake the duty of dominant firms with regard to any product line for which we have a market share of 40% or more, or where we are one of a number of small companies selling a commodity product, such as a metal or coffee, where the market is transparent. The following are the do’s and don’ts applicable to conduct relating to these product lines:

- DON'T** Provide any rebates and discounts except quantity related ones which are linked to cost savings for Marubeni. All promotional schemes of this nature should be cleared in advance with EURLGAL.
- DON'T** Sell a product at below our costs without the express prior authorisation of EURLGAL.
- DON'T** Discriminate against certain customers on grounds of nationality, offer any customer better prices or other terms and conditions than are offered to other purchasers at the same level of trade, or discriminate in favour of any customer when you are experiencing a product shortage.
- DON'T** Refuse to supply any actual or potential customer without obtaining prior clearance

from EURLGAL.

- DO** Consult EURLGAL to determine whether we are dominant in any particular product market, and if we are, whether the measures you are contemplating might be considered abusive.

**Documentation issues**

- DON'T** Destroy or discard any document which may be considered evidence of liability for anti-competitive activity. Rather, bring the document immediately to the attention of EURLGAL.
- DON'T** Write memos, notes or emails which may create the false impression that Marubeni is engaged in anti-competitive activity. Examples of such careless notes are “destroy after reading” or “the industry should raise its prices” or “we need price stability”.
- DON'T** Destroy business records unless permitted under the Document Retention Policy.
- DO** Be aware that everything you write down and leave on company premises or at home, whether it is documents, memoranda, notes, your diary, emails or Blackberry, can be discovered by regulators in an investigation. You should be careful because the evidence obtained can be used against Marubeni or even against you.
- DO** Seek to address instances of anti-competitive conduct immediately and effectively with the assistance of EURLGAL, rather than to hide such activity or destroy evidence of it.

## **Annex 2 - Competition Law in France**

### **1. Background**

The French government has both acknowledged and responded to the modernisation of EU competition law, with the result that the French competition authorities, *e.g.* the French Competition Authority and the French courts, may apply both EU and French competition law (the French Ministry of economy also has residual powers for minor breaches of competition law and specific consumer law infringements). Book IV of the French Commercial Code sets out the various competition provisions of French law.

### **2. Jurisdiction**

Whereas the EU competition rules may be enforced in respect of agreements or practices aimed at, or having a potential effect on, the territory of any one or more EEA Member States, the French Competition Authority and French Courts may apply French competition law to such agreements or practices only to the extent that they are aimed at, or have a potential effect on, the French domestic territory.

### **3. The Substantive Similarities and Differences**

Over the last few years, French competition law has increasingly converged with the principles and application of EU competition law. The main specific feature of French competition law is that, in addition to the abuse of a dominant position, French law also prohibits the abuse of a situation of so-called "economic dependency", a concept which does not exist under EU law.

A state of economic dependency is deemed to exist where a buyer has no alternative to dealing with its supplier. Specifically, the determination of the existence of a state of economic dependency of a distributor with regard to a supplier is based on an evaluation of several criteria including:

- (1) the extent of the supplier's share in the distributor's turnover;
- (2) the reputation of the supplier's trademark;
- (3) the supplier's share of the relevant market; and
- (4) the distributor's ability to obtain equivalent products from other suppliers.

Therefore, for example, a state of economic dependency may exist where a distributor relies heavily on supplies from the supplier as a proportion of all of the distributor's purchases of the product concerned; the supplier's trademark is highly valued; the supplier's market share is substantial; and the distributor cannot obtain equivalent goods from other suppliers. In these situations, the abuse of economic dependency may consist in particular in a refusal to supply the distributor or in the imposition of unfair or discriminatory terms and conditions.

Also, unlike the provisions governing the abuse of a dominant position under EU competition law (Article 102 TFEU), the French Commercial Code (Article L 420-4) provides for a specific exemption from the prohibition of abuses of dominance or economic dependency where the practice concerned (1) results from the application of a legislative text or regulations promulgated in application thereof, or (2) will result in economic progress, provided that consumers will receive an equitable share of the claimed benefits, without giving the undertaking concerned the opportunity to eliminate competition for a substantial portion of the products in question.

To benefit from the Article L. 420-4 exemption, the practice concerned must be indispensable to achieve the efficiencies claimed. However, Article L. 420-4 defences are rarely successful.

It should be noted however that according to settled European case law, a potentially abusive practice may nevertheless be exempted from the prohibition of Article 102 TFEU if it is objectively justified (although this defence is successful only in limited circumstances). There is therefore no divergence

between French and EU competition laws on the substance, as they both provide for the possibility to objectively justify a potentially abusive conduct, but only on the legal basis for this exemption (which relies on a specific legal provision under French law but not under EU law).

#### **4. Comparison of Penalties**

Like under EU competition law, infringements of French competition law are subject to maximum fines of 10% of global turnover if the offender is an undertaking. Unlike under EU law, the maximum fine is capped at €3 million if the offender is an individual.

Unlike EU law, French law also provides for criminal penalties against companies and individuals if they have fraudulently played a personal and leading role in the conception, organisation or implementation of anti-competitive practices.

If convicted, companies are subject to a fine of up to €375,000, and individuals are subject to sanctions of up to four years of imprisonment and/or of a fine of up to €75,000. Pursuant to Article L 462-6 of the Commercial Code, the Competition Authority may defer the case to the public prosecutor, where the facts of a case seem to justify criminal proceedings (the public prosecutor will then decide whether or not to initiate such proceedings). Criminal proceedings may also be initiated by the victim of an anti-competitive practice, by filing a complaint with the public prosecutor's office (which will decide whether or not to initiate criminal proceedings).



### Annex 3 - Competition Law in Germany

#### **1. Background**

Current German competition law is laid down in detailed statutory rules in the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) (the “GWB” or the “Act”). The seventh amendment to the GWB, effective as of July 1, 2005, and the eighth amendment to the GWB, largely effective as of 30 June 2013, had the main purpose of aligning the Act with the European Commission's modernisation reforms.

As a result of the amendments to the GWB: (1) agreements among competitors, as well as agreements between parties at different levels of trade (e.g. supplier/retailer) and vertical agreements (see page 10 above) under German competition law are now mostly dealt with in the same way as they would be under EU competition law and (2) the German Federal Cartel Office (*Bundeskartellamt*) and the courts are fully empowered to apply Articles 101 and 102 of the EC Treaty (see page 3 above), either alone or in combination with German competition law (which, as will be seen below, operates for the most part like Articles 101 and 102, but with application in Germany).

#### **2. Jurisdiction**

Whereas the EU competition rules may be enforced in respect of agreements or practices aimed at, or having a potential effect on, the territory of any one or more EEA Member States, the German competition authority and the courts may apply German competition law to such agreements or practices only to the extent that they are aimed at, or have a potential effect on, the German domestic territory.

#### **3. The substantive similarities and differences**

German competition law now virtually mirrors EU competition law in most respects. This is to say, there are no longer any significant differences in the way cartels, or agreements with suppliers and customers, are dealt with in either legal system.

Moreover, the German Federal Cartel Office is in line with the European Commission in defining which forms of anti-competitive conduct are considered the most serious. Cartels of all kinds are viewed as the most serious form of infringement. The German competition authorities are also strongly opposed to resale price maintenance.

However, there are a few important differences between EU and German competition law. For example, in the event that a supplier and its Frankfurt distributor agree that the latter will not sell to merchants who plan to resell the products in Berlin, German competition law would not oppose this. It could only be prohibited under EU competition law if there were an actual or potential effect on trade between Member States, which is not likely in this example. On the other hand, a ban on exports from Germany to another Member State would be caught by EU competition law, which is enforced by the Federal Cartel Office.

There is another important difference between EU and German competition law with regard to dominance. Under German competition law, there is a concept called “relative market dominance” (otherwise known as abuse of a position of economic dependency) which is designed to protect the availability of supplies for small and medium-sized buyers without sufficient alternatives to dominant firms. Thus, for example, a supplier with a market share of only 10% has been held liable for abuse of dominant position for cutting off supplies to a retailer who had grown dependent on its supplier, where there is no acceptable alternative due to the prestige of the supplier’s brand. *In Germany, therefore, at least with regard to refusals to supply existing customers, Marubeni employees should contact EURLGAL before engaging in such conduct.*

#### **4. Comparison of penalties**

The GWB provides that the Federal Cartel Office may impose fines on companies and individuals of up to €1 million, or in excess of this amount up to 10% of their worldwide group turnover. These fines are applicable both to infringements of EU competition law and of the GWB, although fines imposed on companies are likely to be much higher than those imposed on individuals.

Bid-rigging, in principle, is the only form of anti-competitive behaviour which may be penalised in German by imprisonment. Prison terms are for a maximum of five years.

## Annex 4 - Competition Law in Italy

### **1. Background**

From its inception in 1990, the Italian Competition Law (Law no. 287/1990) has borrowed heavily from EU competition rules. Indeed, the Law embodies two provisions, Articles 2 and 3, prohibiting respectively anti-competitive agreements and abuses of dominant position, which virtually mirror Articles 101 and 102 of the TFEU.

As a result of the modernization of EU competition law in 2004, it is now the case that the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato* - AGCM), as well as the Italian courts, are fully empowered to apply both EU and Italian competition laws.

### **2. Jurisdiction**

Whereas the EU competition rules may be enforced in respect of agreements or practices aimed at, or having a potential effect on, the territory of any one or more EEA Member States, the Italian Competition Authority and courts may apply Italian competition law to such agreements or practices only to the extent that they are aimed at, or have a potential effect on, the Italian domestic territory.

### **3. The Substantive Similarities and Differences**

According to its art. 1, Law no. 287/1990 must be interpreted in accordance with the principles of EU competition law.

The concepts of abuse of dominant position and abuse of economic dependency both exist under Italian competition law, but the latter concept does not exist under EU competition law. The abuse of economic dependency has been part of the Italian competition legislation since 1998, within the framework of Law no. 192/1998, on subcontracting in manufacturing activities.

The proof of abuse of economic dependency, as it implies, takes as a starting point a position of economic dependency between two parties - normally a supplier and a distributor. It is not necessary for the supplier to be dominant. However, the supplier's products must figure prominently in the distributor's outlets, usually due to the importance of the supplier's brand name and the inability of distributor to obtain those goods from another legal source. Another issue often discussed in case-law is whether the abuse of economic dependency, because of its position within the framework of Law no. 192/1998, can be generally applied, irrespective of the existing relationship between the economic operators concerned. In principle the economic dependency can be assessed only in particular economic relationships, namely when an undertaking is able to create disproportions in its economic relationship with another economic operator, as regards their respective rights and obligations. This is especially true when different enterprises coordinate with each other as to create a vertical integration between their activities.

Article 9 of Law no. 192/1998 on the abuse of economic dependency has been amended in 2001, thus empowering the Italian Competition Authority to grant compliance with this provision and the courts to impose injunction and/or compensation orders. However, this theory has never been applied by the Italian Competition Authority, which suggests that it is not an enforcement priority, rather being a courts' concern.

### **4. Comparison of Penalties**

The Italian Competition Authority is empowered to impose fines of up to 10% of global turnover of the undertaking concerned. The Italian Competition Authority does not distinguish between product lines; hence, even if the infringement involves only one product, the Italian Competition Authority will take into account the sales of all of the undertaking's products and services in assessing the maximum cap of the fine to be imposed (i.e. following the approach of the European Commission).

The Italian Competition Authority has used its discretion to impose particularly severe fines. For example in an abuse of dominant position case in 2006 involving ENI Trans-Tunisian Pipeline Company, the Italian Competition Authority imposed a fine of €290 million.

In Italy, criminal penalties are not specifically provided for infringements of competition law. Nevertheless, serious infringements, such as bid-rigging, may be sanctioned under the general criminal law.

## Annex 5 - Competition Law in Spain

### **1. Background**

The main competition legislation under Spanish law was adopted in 1989. From its inception, Spanish competition law has closely followed the approach of EU competition law. There are presently two main competition “institutions” in Spain: an agency which conducts investigations, *Servicio de Defensa de la Competencia* (the “SDC”), and a tribunal which takes decisions, *Tribunal de Defensa de la Competencia* (the “TDC”). However, it is anticipated that this two-body scheme will be changed to a one-body scheme by which a single institution would both conduct investigations and take decisions.

Spain has faithfully adhered to the Community’s “modernisation” programme, by which both the Spanish competition institutions and its national courts are fully empowered to apply both EC and Spanish competition laws.

### **2. Jurisdiction**

Whereas the EU competition rules may be enforced in respect of agreements or practices aimed at, or having a potential effect on, the territory of any one or more EEA Member States, the SDC and TDC and the Spanish courts may apply Spanish competition law to such agreements or practices only to the extent that they are aimed at, or have a potential effect on, the Spanish domestic territory.

### **3. The Substantive Similarities and Differences**

Spain is one of a number of EEA Member States which have not only incorporated “abuse of dominant position” into their domestic law, but have also adopted the concept of “abuse of position of economic dependence” as a separate infringement. The latter prohibition implies a situation where an operator uses the economic dependence of particular customers or suppliers to obtain commercial advantages from them. A doctrine of abuse of a position of economic dependence does not require the supplier to have a dominant position. The Spanish Competition Act links the existence of such condition to a situation in which clients or suppliers are dependent upon a company because they do not have real and equivalent alternatives to that company to conduct their business.

In order to establish a case of abuse of economic dependence, three requisites must be met: (1) the existence of a situation of economic dependence; (2) an abuse of such situation; and (3) an anti-competitive effect in the market. In cases in which a distributor is economically dependent upon its supplier, an abuse of economic dependence may be deemed to exist, for example, when the supplier cuts off supplies to the distributor.

Conversely, where the supplier is dependent on a particular purchaser, the abuse of economic dependence will be presumed, for example, where a dependent supplier is compelled on a regular basis to grant the purchaser not only ordinary discounts, but also additional advantages which are not granted to similarly situated purchasers (i.e. a form of price discrimination).

The abuse of dominant position under Spanish competition law includes the practice of predatory pricing. However, unlike EU competition law, predatory behaviour is only possible when the predatory company is able to recover in the medium or long-term the losses it has sustained to harm a competitor.

### **4. Comparison of Penalties**

Under Spanish competition law, companies may be fined a maximum of 10% of their total turnover. Additionally, company executives are subject to personal fines of up to €30,000 for a single infringement.

The Spanish competition system does not provide for the imprisonment of offenders for breaches of competition law. However, the Spanish Criminal Code establishes the possibility of prison sentences where a supplier manipulates its offer of raw materials and essential goods in order to cause scarcity and a subsequent increase in prices.

## **Annex 6 - Competition Law in the United Kingdom**

### **1. Background**

The competition legislation of the United Kingdom is found in the Competition Act 1998 and the Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013.

The Competition Act 1998 amounted to a complete overhaul of the previous competition rules governing the UK. The adoption of the Competition Act 1998 was intended to bring UK competition law in line with EU competition law. In fact, under Section 60 of the Act, the UK competition authority, the Competition and Markets Authority ("CMA") and national courts are required to ensure that their determinations are fully consistent with the case law of the EU Courts, and that due regard is taken of the decisions of the European Commission.

The Enterprise Act 2002, for the purposes of this Policy, had the main effect of imposing penalties on individuals for their anti-competitive conduct. These criminal penalties were amended by the Enterprise and Regulatory Reform Act 2013 and are now much more likely to be used (see section 4 below).

As a consequence of EU Council Regulation 1/2003, the CMA is fully empowered to apply Articles 101 and 102 of the EC Treaty, either alone or in combination with parallel provisions of the Competition Act 1998.

### **2. Jurisdiction**

Whereas the EU competition rules may be enforced in respect of agreements or practices aimed at, or having a potential effect on, the territory of any one or more EEA Member States, the CMA and UK courts may apply UK competition law to such agreements or practices only to the extent that they are aimed at, or have a potential effect on, the UK domestic territory.

### **3. The substantive similarities**

UK competition law now virtually mirrors EU competition law. This is to say, there are no longer any significant differences in the way cartels, or agreements with suppliers and customers, are dealt with in either legal system. This means, in effect, that Marubeni employees based in the UK must interpret this Policy as governing agreements whose effects (within the EEA) are limited to the UK.

Moreover, the CMA is in line with the European Commission in defining which forms of anti-competitive conduct are considered the most serious. Cartels of all kinds are viewed as the most serious form of infringement. However, the CMA is also strongly opposed to resale price maintenance.

Private competition law actions brought in the courts are also a feature of UK competition law. These are likely to become more prevalent following legislation to be implemented under the Consumer Rights Bill, which will also introduce the possibility of class actions for follow on competition law damage actions.

### **4. Comparison of penalties**

For infringements of both EU and UK competition laws, the CMA is empowered to fine companies up to 10% of their worldwide group turnover.

Additionally, under the Enterprise Act 2002, the UK criminal courts may impose up to six months' imprisonment and/or a fine on individuals found guilty of having engaged in cartel offences. If the individual is indicted and convicted by the Crown Court, he/she may be imprisoned for up to five years (as well as a fine). Following amendments to the criminal cartel offence introduced by the

Enterprise and Regulatory Reform Act 2013, it is no longer necessary to prove that an individual acted dishonestly in order to secure a criminal conviction. This is intended to make it easier to prosecute individuals for involvement in cartels, and the CMA has publicly stated that it intends to bring more prosecutions in the future.

Moreover, for serious infringements, the Enterprise Act 2002 provides that directors of UK companies may be disqualified from acting as a director for a maximum period of 15 years or from holding any management position in a UK company. It should be noted that such disqualification does not require that the director in question shall have participated in or authorised the prohibited activity - disqualification may arise where for example, the director knew that the company was involved in the breach and failed to take appropriate action to cease the infringement.