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The standard of review by courts in competition cases - Background Note

By the Secretariat

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More documentation related to this discussion can be found at

www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm

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Standard of review by courts in competition cases

By the Secretariat*

Abstract

The effectiveness and credibility of enforcement requires that there is access to ex post review of competition cases by an independent court or tribunal. Judges assess both procedural due process as well as compliance with the substantive provisions of competition law and can confirm enforcement decisions, or identify mistakes and seek to correct them.

Some jurisdictions allow a full merits review of competition decisions without limitation of the legal grounds that can be invoked or the aspects of the decision that can be appealed. Other jurisdictions provide for a legality review of competition decisions based on limited grounds of review, which typically cover the legality, reasonableness and procedural compliance of the contested act.

Understanding the standard of review of competition enforcement that courts follow is important, first, for decision-makers, as their investigations and decisions all need to be able to withstand judicial scrutiny, and, second, for affected parties, who will consider the available grounds of appeal and their chances of success at trial in deciding whether or not to challenge a decision.

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1. Introduction

1. Review by the courts of the enforcement of competition law helps to ensure that enforcement process and decisions follow the applicable rules, parties' rights are respected and the exercise of competition authorities' discretion is pursued within legally set bounds. Judges assess both whether procedural due process was observed, as well as whether the substantive provisions of competition law were applied in a correct and consistent manner. Courts can also identify mistakes of fact and law and impose corrective measures or, alternatively, confirm enforcement decisions. In doing so, they ensure that competition law is applied in an impartial, coherent and transparent manner, and ultimately improve the legitimacy and credibility of competition law enforcement.

2. In 1996, the Competition Committee held a seminar on the *Judicial Enforcement of Competition Law*, which provided an overview of standards of proof and standards of review followed by courts in competition cases, and included a discussion of different standards that are applicable to findings of law versus findings of fact (OECD, 1996). In 2011, the Competition Committee's Working Party 3 on Co-operation and Enforcement (WP3) held a roundtable on the *Institutional and Procedural Aspects of the Relationship between Competition Authorities and Courts, and Update on Developments in Procedural Fairness and Transparency* (OECD, 2011). That roundtable briefly looked at the scope of courts' review in OECD Members and compared the different institutional and legal frameworks in which such review occurred. The discussion concluded that an effective review by courts is a necessary complement to the internal checks and balances that competition authorities put in place to ensure due process. The Competition Committee and WP3 have not examined the topic otherwise.

3. Understanding the standard of review of competition enforcement that courts follow is important, first, for decision-makers; their investigations, collection of evidence and decisions all need to be able to withstand judicial scrutiny. The applicable standard of review is also important for affected parties, who will consider that standard in deciding whether or not to challenge a decision, based on available grounds of appeal and their chances of success at trial.

4. This paper is structured as follows. Section 2 provides an overview of the enforcement context, in particular whether a jurisdiction has a judicial or an administrative competition enforcement system, and whether competition cases are heard by general courts or specialised tribunals. Section 3 examines the intensity of review by courts, whether the grounds of review are defined or are unlimited, and whether courts review parts or every aspect of a competition decision, and to which extent. The section refers also to the margin of appreciation of the decision-maker, and its implications for the intensity of courts' review. Section 4 concludes.

5. The roundtable on the standard of courts' review is part of the Competition Committee's long-term theme on transparency and procedural fairness, which is expected to conclude with the adoption of an OECD recommendation on transparency and procedural fairness in 2020. The roundtable and this paper deal with the review by courts of public enforcement decisions only.

2. The enforcement context

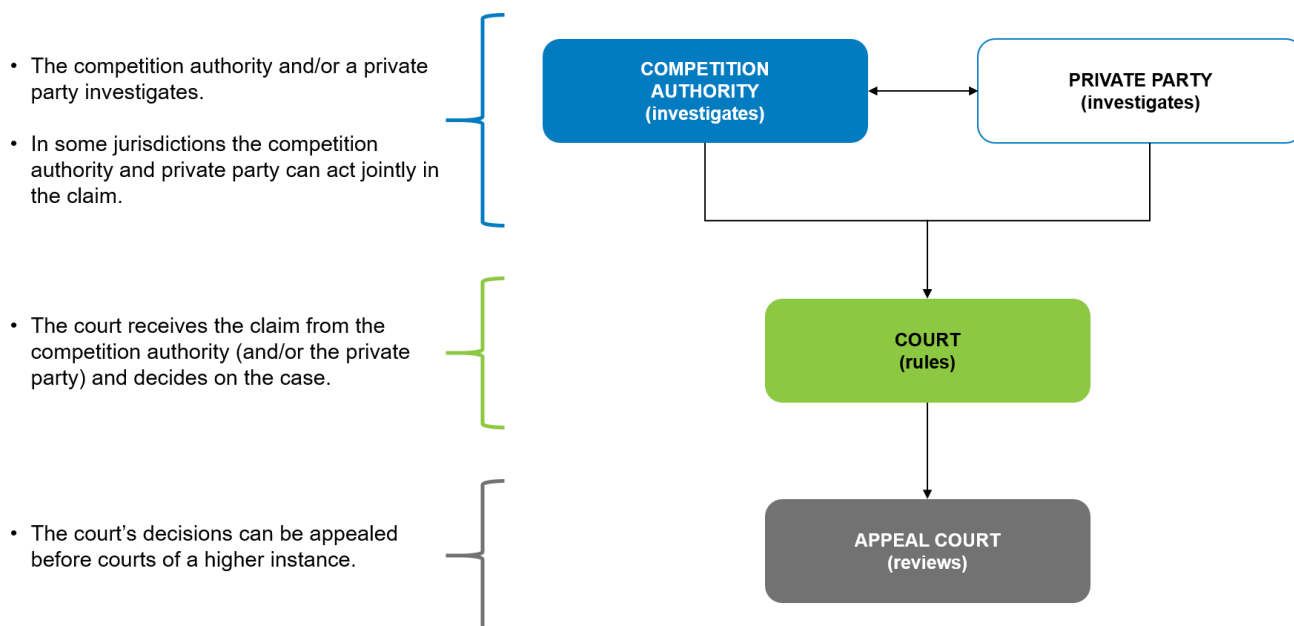
6. This section provides an overview of the context for competition enforcement and related court review. Competition enforcement takes place in either judicial systems (where the competition authority investigates cases, and can challenge conduct and mergers that are deemed to harm competition, but the first-instance decision is taken by a court) or administrative systems (where the competition authority is the investigator as well as the decision-maker at first instance) (OECD, 2016). A different distinction concerns the level of competition specialisation of review courts, considered below in this section.

7. In this paper, the terms “judicial” and “administrative” system refer to the nature of the competition enforcement system and the role of the courts in relation to how the tasks of investigator, prosecutor and decision-maker are divided between the competition authority and the judiciary. There is another distinction, which will not be dealt with in this paper, between adversarial and inquisitorial court proceedings. This distinction refers to the role of the judge during court proceedings and the rules of adjudication. Namely, in adversarial proceedings “*the trial is thought of as a kind of contest between two equally-situated contestants, each of which is striving to prevail*”; conversely, an inquisitorial trial is “*a neutral inquiry conducted and controlled by a state official aimed at investigating and establishing the facts of a contested occurrence*” (Ainsworth, 2015). The distinction between adversarial and inquisitorial proceedings reflects on the way the court process is carried out, and the manner in which evidence is presented and assessed at trial, and is not necessarily related to whether the competition enforcement system is judicial or administrative.

2.1. The judicial and administrative enforcement systems

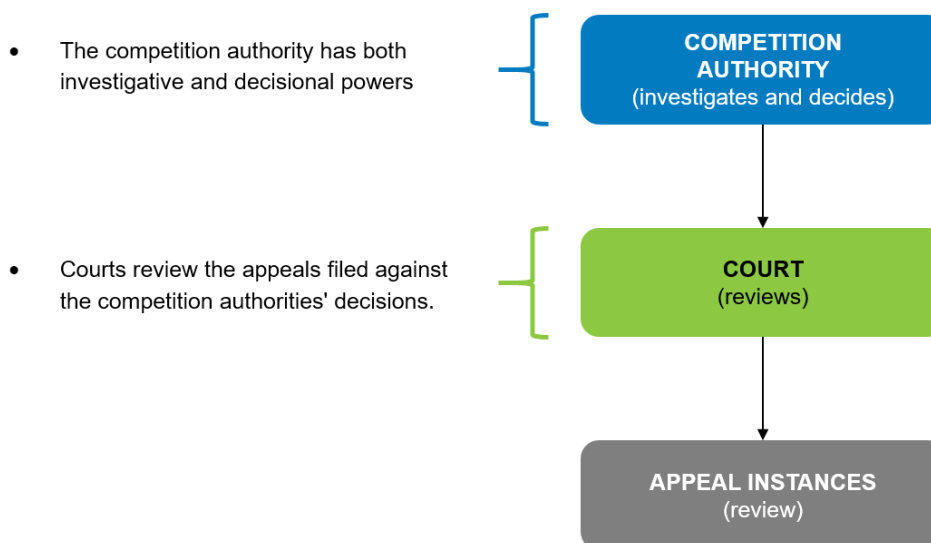
8. In judicial (sometimes referred to as prosecutorial or bifurcated) enforcement systems, the competition authority investigates cases and, if it identifies a competition concern, brings the case before a court, which will be the decision-maker at first instance. The court decision is appealable before another court at second instance; there is sometimes a third instance review.

9. Judicial enforcement is usual in common law countries but is not limited to them. According to the Secretariat’s research, the eight OECD Members that have a judicial enforcement system are Australia, Austria, Canada, Chile, Ireland, Israel, New Zealand and the United States as regards primarily enforcement by the Antitrust Division of the Department of Justice (“DoJ”).

Figure 1. Judicial Enforcement System

Source: Adapted from OECD (2016b), The resolution of competition cases by specialised and generalist courts: Stocktaking of international experiences, p. 33.

10. In administrative (sometimes referred to as integrated) enforcement systems, the competition authority investigates cases and makes decisions, which are subject to review by the courts, at usually two instances. The lower court often reviews findings of law and fact. The second court typically conducts only a legality review on specific grounds. In administrative systems, criminal prosecutors prosecute criminal infringements and the decisions at first instance are made by courts, and are subject to appeal.

Figure 2. Administrative Enforcement System

Source: Adapted from OECD (2016b), The resolution of competition cases by specialised and generalist courts: Stocktaking of international experiences, p. 33.

11. Most OECD Members have an administrative enforcement system. Some systems have both judicial and administrative elements. In New Zealand, some decisions are made by the Commerce Commission, while others need to be brought to New Zealand's High Court. The Australian Competition and Consumer Commission ("ACCC") conducts investigations concerning infringements of the Australian Competition and Consumer Act and makes final determinations on restrictive trade practices and merger clearances (appealable before the Australian Competition Tribunal), while other cases must be brought before the Federal Court of Australia at first instance (OECD, 2018b).

12. In the United States, the DoJ and the Federal Trade Commission ("FTC") follow different processes. The DoJ investigates cases and brings challenges before the competent court, and therefore follows the judicial system. The FTC is, in some cases, the first-instance decision-maker; these decisions are subject to appellate review in federal courts of appeal. In other cases, the FTC may issue an administrative complaint to start proceedings before an Administrative Law Judge (ALJ), who is employed by, and sits within, the FTC, but is independent from it. The ALJ decides on the complaint, and this decision can be challenged before the collegial body of the FTC Commissioners. The decision of the Commissioners can then be appealed before the competent court. Finally, in yet other cases the FTC brings the challenge directly before the competent courts without using the administrative process¹.

2.2. Specialised competition tribunals and general courts

13. Competition cases can be heard by either a specialised competition tribunal, generalist civil or administrative courts, or specialised chambers of the generalist courts.

14. Several jurisdictions have specialised competition tribunals. According to the Secretariat's research, the 13 OECD Members with specialised tribunals are Australia, Austria, Canada, Chile, Finland, Ireland, Israel, Mexico, Norway, Poland, Portugal, Sweden and the United Kingdom. The decisions of these tribunals are appealable before a higher generalist court.

15. In other jurisdictions, competition cases are heard by generalist courts, which review any civil and/or administrative and/or criminal matters. For example, the U.S. (generalist) federal courts of appeal review the decisions of the FTC. The (also generalist) federal district courts decide, at first instance, on cases brought by the Antitrust Division of the Department of Justice ("DoJ") and the losing party can appeal the trial court's decision before the courts of appeal. The Court of Justice of the European Union hears all appeals against the Commission's decisions, including those on competition.

16. In yet other jurisdictions, competition cases are heard by partially specialised courts, which deal with a limited range of issues. For instance, in France, competition appeals are brought before the Paris Court of Appeals, which has a chamber specialising in competition. In Germany, competition cases are brought before one single court of general jurisdiction, the Düsseldorf Higher Regional Court, which has three specialised competition chambers. In Italy, the review court of first instance is the Regional Tribunal of Lazio. In Belgium, the Market Court, a specialised section within the Brussels Court of Appeals, has exclusive jurisdiction to review the decisions of the Belgian competition authority (OECD, 2008).

17. Experience across OECD Members shows that competition law can be enforced effectively by either generalist or specialist judges (OECD, 1996). The specialisation of courts may lead to greater efficiency, enhanced uniformity and better quality decisions.

Greater efficiency is due to the repetition and standardisation of tasks, and the judges' larger experience in hearing and understanding economic evidence and arguments that underpin competition cases. Uniformity of decisions is increased through the concentration of all competition cases in a single court. The improvement in decision quality results from the greater expertise and experience in competition law and practice. Still, specialised courts can be affected by risks that the concentration of cases in one single body can bring about, such as the less broad experience due to the judges' focus on a specific legal area, and the detachment from the overall judicial system. Courts of general jurisdiction may also build a deep knowledge of substantive competition questions, as well as skills and experience in competition matters, while benefitting from their greater experience in applying legal principles across areas of law.

Figure 3. Examples of specialised and general courts in judicial and administrative competition enforcement systems

BIFURCATED MODEL (Courts as decision-makers)	INTEGRATED MODEL (Courts as review bodies)
Chile Competition Tribunal (TDLC) Specialised <i>All competition cases</i>	Mexico Specialised District Courts Specialised Collegiate Circuit Courts Specialised <i>All competition, telecommunications and broadcasting cases</i>
United States Federal District Courts Generalist <i>All competition cases</i>	United States Federal Court of Appeals Generalist <i>All competition cases</i>
Australia Federal Courts Generalist <i>Cases of breaches to the competition law</i>	Australia Australian Competition Tribunal (ACT) Specialised <i>Restrictive trade practices, mergers and regulatory determinations</i>
Canada Competition Tribunal Specialised <i>Civil reviewable matters</i> Federal Courts Generalist <i>Cartel criminal cases</i>	European Union General court Generalist <i>All competition and merger cases</i>

Source: Adapted from OECD (2016b), The resolution of competition cases by specialised and generalist courts: Stocktaking of international experiences, p. 41.

18. The decision of entrusting the review of competition cases to generalist or specialised courts is not related to the judicial or administrative nature of competition law enforcement. It is linked to jurisdictions' cultural background, legal framework and institutional choices that determine which institutional architecture will best achieve the goals of reviewing judicially competition enforcement.

3. Standards of review

3.1. Standards of proof and standards of review

19. Before discussing the different standards of review that courts follow in competition cases, it is relevant to distinguish standard of proof from standard of review. The “*standard of proof is the threshold that must be met before an adjudicator decides that a point is proven in law. ... Standard of review is the standard that a reviewing tribunal or appellate court applies when reviewing the legality of a decision of an administrative body or lower tribunal*” (Vesterdorf, 2005).²

20. In relation to issuing a competition enforcement decision, the standard of proof is the point at which the first-instance decision-maker concludes that the applicable substantive legal test has been satisfied and there is a breach, or not, of competition law. The standard of proof is usually defined in terms of the probability or certainty required to establish that competition law has been violated³. Discharging the standard of proof depends on the quality of investigation, and the strength, comprehensiveness and conclusiveness of evidence and arguments, counter arguments and defences raised by the investigating authority and the parties in accordance with the applicable legal rules and presumptions and evidentiary rules.

21. The standard of review is the level of intensity with which the first-instance competition enforcement decision will be reviewed (and the second-instance decision may be reviewed by a higher court, on further appeal). The standard of review is also concerned with the assessment of whether the decision-maker has met the standard of proof that is incumbent upon it, and is therefore related to the standard of proof. “*It can be said that the more rigorous the standard of review, the more likely it is that the standard of proof will be high as well*”, since an exacting, intensive court review would require that the first-instance decision meets high standards of accuracy to pass judicial scrutiny (Reeves and Dodoo, 2005).

22. Standards of review can be defined in law (in either specific competition statutes or general civil or administrative procedure rules) or case law, and usually vary depending on whether the reviewed matter is a finding of law, a finding of fact or a mix of the two.

3.2. Which acts are reviewable?

23. Final first-instance decisions imposing a prohibition, a corrective measure or a penalty are always challengeable by their addressees. In the context of judicial enforcement systems, the reviewable act will be a court decision, while in administrative systems the reviewable act will have been adopted by an administrative competition authority.

24. Investigation steps, such as, for example, mandatory requests for information and interviews, dawn raids orders or decisions on parties’ confidentiality protection claims can also be reviewed, in both judicial and administrative enforcement systems. The appealability, standing to appeal, review grounds, and standard of review of procedural steps vary among OECD Members. For example, in Belgium, requests for information and requests for interviews cannot be appealed⁴, whereas, in the United States, subpoenas or civil investigative demands requesting testimony, documents, written reports, and written answers are appealable. In the European Union, the Commission’s binding acts, like mandatory requests for information or decisions ordering a dawn raid, are reviewable by the General Court.

Box 1. Review of procedural enforcement acts: the European Commission’s decisions requesting information and ordering inspections

During a cartel investigation in the electric cable sector, the Commission ordered **Nexans** and all companies controlled by it to submit to an inspection. On appeal, Nexans alleged that the Commission did not sufficiently delimit the scope and purpose of the inspection in the inspection decision.

The General Court held that “*when the Commission carries out an inspection at the premises of an undertaking under Article 20(4) of Regulation No 1/2003, it is required to restrict its searches to the activities of that undertaking relating to the sectors indicated in the decision ordering the inspection*” and partially annulled the Commission's dawn raid decision.

Source: Case T-135/09, Nexans v European Commission

In the context of another cartel investigation, in the cement sector this time, the Commission issued a mandatory request for information addressed to the company **Heidelberg Cement**. The company brought an action before the General Court seeking the annulment of the request, alleging infringement of the applicable rules, breach of proportionality and the rights of defence, and inadequate statement of reasons for the questionnaire. The General Court held that Heidelberg Cement’s pleas were unfounded and dismissed the application. Heidelberg Cement appealed.

The Court of Justice found that an “*excessively succinct, vague and generic — and in some respects, ambiguous — statement of reasons does not fulfil the requirements of the obligation to state reasons*” and set aside the General Court’s appealed judgment. The vagueness consisted in: referring to the alleged infringement “*in a particularly succinct, vague and generic manner*” as “*restrictions of trade flows in the European Economic Area (EEA)*”; a generic reference to the products to which the investigation relates as “*the cement market and related products market*”; and a too broad geographical scope of the alleged infringement encompassing “*the territory of the EU or of the EEA.*”

Source: Case C 247/14 P, Heidelberg Cement v Commission. See also Case C-248/14 P, Schwenk Zement v Commission; Case C-267/14 P, Buzzi Unicem v Commission, Case C-268/14 P, Italmobiliare v Commission.

25. Commitment decisions, i.e. remedies agreed with the parties to an antitrust proceeding to resolve concerns and typically used in non-cartel cases, are appealable in several jurisdictions. Still, parties to the commitment decision may have waived the right to appeal. In some jurisdictions, commitment decisions may not be appealable; nevertheless, they may have been subject to prior judicial control. In the United States, the equivalent to commitment decisions are DoJ consent decrees (which are court orders proposed by the DoJ, in settlement of litigation) and FTC consent orders (which are binding administrative settlements between the FTC and the parties); neither is appealable. Consent decrees are reviewed by a court before being entered into, and consent orders are open to public scrutiny before they become binding (Fetzer, Huang and Yoo, forthcoming).

26. Even in jurisdictions where commitment decisions are appealable, legal standing rules make it difficult for plaintiffs to succeed in court. Appeals of commitment decisions are more commonly filed by complainants, i.e. persons who have initiated the antitrust proceedings by lodging a complaint with the competition authority, or affected third parties, like competitors or business partners of the party that agreed to the commitments (OECD,

2016d). Legal standing obstacles may explain the low litigation numbers before the courts of the European Union in relation to the Commission's commitment decisions despite the high number of such decisions (OECD, 2016d).

Box 2. Review of commitment decisions by the courts of the European Union

There are cases involving challenges to the European Commission commitment decisions for manifest error.

De Beers SA ('De Beers') is the world's largest rough diamond producer. **Alrosa Company** Ltd ('Alrosa') is the second. Following an investigation by the Commission, De Beers offered commitments to end its purchases of rough diamonds from Alrosa, and thereby address the Commission's concerns that these purchases may have allowed De Beers to control the rough diamonds market in the absence of a viable competitor and abuse its dominant market position.

On appeal by Alrosa, the General Court annulled the Commission's decision of February 2006. On appeal by the Commission against the General Court's decision, the Court ruled that "*the General Court expressed its own differing assessment of the capability of the joint commitments to eliminate the competition problems identified by the Commission, before concluding [in paragraph 154] that alternative solutions that were less onerous for the undertakings than a complete ban on dealings existed in the present case. By so doing, the General Court put forward its own assessment of complex economic circumstances and thus substituted its own assessment for that of the Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment*" (paragraphs 66 and 67, underline added). The Court therefore set aside the General Court's judgment, and upheld the Commission's original decision.

Source: Case C-441/07 P, Commission v Alrosa

In 2009, the Commission opened proceedings for alleged abuse of a dominant position in the worldwide market for consolidated real-time data feeds against Thomson Reuters Corporation and companies under its control, including Reuters Limited ('TR'). The Commission accepted commitments by TR and stopped the investigation.

Morningstar, a Thomson Reuters competitor, challenged the commitment decision. The General Court judged the appeal admissible, since Morningstar was directly affected by the contested decision and had been involved in the administrative procedure that led to its adoption. The General Court reminded that "*the review by the EU Courts is limited to establishing whether the Commission's assessment is manifestly wrong*", found that the Commission did not commit any manifest error in its assessment concerning the adequacy of the commitments, and dismissed the action in its entirety.

Source: Case T-76/14 Morningstar, Inc. v European Commission

27. Settlements or plea agreements in cartel cases (where the competition authorities and the investigated parties agree on substantive findings and procedure, in exchange for speedy resolution of the case and reductions in fines) may also be reviewable, under more or less the same constraints as commitments decisions regarding the waiver of the right to appeal, and possible lack of standing to challenge.

28. In general, different legal systems adopt different positions as regards the appealability of infringement decisions or procedural administrative decisions, particularly by persons other than the investigated parties. Appealability depends on factors such as the regime applicable to the specific competition proceedings (criminal, civil, administrative), the rules on standing to file an appeal, judicial procedures and special procedural rules that address the specificities of the review of competition cases in the context of generally applicable national rules.

3.3. Different standards of review of final competition decisions

29. First-instance competition decisions, whether judicial or administrative, are always subject to review by a court. Different standards of review can be applied to those decisions depending on the jurisdiction and the nature of the decision. The two most common standards are full merits review and legality review.

30. To enable review, first-instance decisions should provide clear detailed description of the case facts and legal assessments, as well as explain the reasons for the conclusions. Failure to provide reasons would, generally, be deemed a procedural impropriety and caught under any standard of review. One of the aims of reviews is to assess precisely the authority's reasoning and ensure that it is cogent and methodologically sound; without detailed reasons, the reviewing court would be unable to exercise this control. Most competition regimes provide that competition decisions should be reasoned.

Box 3. Competition enforcement decisions should provide detailed reasons: UK and Canada

In a case regarding the carriage price for the treatment and transportation of water charged by the owner of treatment works, **Dwr Cymru**, to a water provider, **Albion Water**, the UK Water Services Regulatory Authority found no abuse of dominance. On appeal by the water provider, the CAT set aside the regulator's decision for lack of reasoning and failure to provide details for, among others, the calculation of costs and methodologies used in the contested decision. According to the CAT, these omissions made it impossible for the CAT to identify and verify the costs and, in general, assess the way and reasons on which the decision was reached. It therefore set aside parts of the regulator's decision on this ground.

Source: [2006] CAT 23, Case: 1046/2/4/04

Procedural decisions should have reasons, too. In **Bell Canada**, the Federal Court of Canada published reasons for the orders previously issued following ex parte applications by Canada's Commissioner of Competition for the delivery of written responses by persons likely to have information relevant to an inquiry of Canada's Competition Bureau. The reasons were issued "*so that the public could be aware of the Court's evolving approach to applications brought by the Commissioner under section 11 of the Act. In the interests of fostering greater transparency, certainty and predictability in respect of this area of the law, the Court will continue to give reasons for orders issued pursuant to section 11 as and when appropriate.*"

Source: Bell Canada, 2015 FC 990

3.3.1. Merits review

31. Some jurisdictions allow a merits review of competition decisions. This is a full review on any available legal ground. It can involve a reassessment of the correctness of the decision; the courts are entitled, in these cases, to decide whether the appealed decision was the right one to take (Bailey, 2004). A merits reviewer may confirm the decision, or entirely or partially set it aside. If a decision is set aside, the merits reviewer may send it back to the primary decision-maker for reconsideration or make a new decision on its own, depending on whether the applicable review rules and/or the facts of the case allow it.

Box 4. Review on the merits in Belgium

In **Belgium**, the Market Court has the power of a full review on the merits. The Court can not only annul the authority's decision, but also replace it by its own decision. The Court reconsiders infringement decisions *ab novo*: it examines and assesses all the evidence, independently from the interpretation and assessment made by the authority.

There are exceptions: the Court has only the power to annul (and must refer back to the authority) cases regarding the clearance of mergers, the imposition of merger commitments and where the Court finds an infringement of Articles 101 and 102 of the Treaty on the Functioning of the European Union, contrary to the authority's decision. In the event of referral, the Competition College will decide in a different composition than that for the first (annulled) decision.

Source: Belgium's contribution for the roundtable on the standard of review by courts in competition cases, www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm

32. In the UK, the Competition Appeal Tribunal ("CAT") in some cases decides on the merits and in others performs a judicial legality review. The CAT conducts a full merits review of the decisions of the Competition and Markets Authority ("CMA") in cartels and abuse of dominance cases, as well as of CMA decisions imposing penalties for breach of procedural requirements. This means that the CAT reviews the CMA's findings of fact, its economic assessment and its application of the law, and can replace decisions with its own findings⁵.

33. The Court of Justice of the European Union has unlimited jurisdiction to review fines or periodic penalty payments by the Commission, under article 31 of Regulation 1/2003⁶, which empowers the Court to cancel, reduce or increase the fine or periodic penalty payment. Unlimited jurisdiction in essence allows the Court to examine fines imposed by the Commission *de novo*, and substitute the Commission's judgment on the fine with its own.

34. Review on the merits, when conducted by an expert impartial judge, can guarantee that decisions are effectively checked (as a merits review leaves a wide margin for the judge to assess, find and correct errors) and helps make competition enforcement more accurate, consistent and predictable.

35. The challenge for systems that allow a full review on the merits of competition decisions, and in particular for administrative competition enforcement systems, is to respect the separation of mandates and powers between the administrative competition authorities and the courts, and check the exercise of the authorities' powers without reducing the discretion that the applicable law affords to them. Competition authorities are

set up to allow society to benefit from their knowledge and expertise in enforcing competition law. Administrative systems implicitly place some trust in allowing authorities to enforce competition law in light of this expertise. Given this, some deference to the competition authority's findings might be in order (Bernatt, 2017).

3.3.2. *Legality (judicial) review*

36. Legality (sometimes called judicial) review consists in examining the lawfulness of the action of the decision-maker based on limited grounds of review. These grounds typically include the legality (no misuse of powers), reasonableness (no manifest error of assessment) and procedural compliance (adherence with the relevant procedural rules and observance of the parties' rights of defence) in the adoption of the contested act⁷.

37. Legality or judicial review is typically considered less intrusive than a full merits review. Courts do not rehear the case; they assess certain aspects of the decision-making (OECD, 2011; OECD, 2016b). This, in effect, means that a decision that may have been found wrong on a review on the merits, might be allowed to stand under judicial review if it is found to have been made according to the law, is not unreasonable or manifestly wrong, and has observed procedural rules.

38. In the EU, article 263 of the Treaty on the Functioning of the European Union ("TFEU") spells out a legality review, and specifies the grounds on which the legality of a decision by the European Commission ("Commission") may be challenged. The first-instance General Court may review the legality of a decision by the Commission "*on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.*" The Court of Justice of the European Union may, sitting on appeal, review decisions by the General Court on points of law (not fact) (article 256 TFEU). Still, review of legality at the EU level involves a close examination of facts and evidence (see also section 3.4.2).

39. The European Court of Human Rights requires a comprehensive review of competition decisions, for the purposes of ensuring that they comply with article 6 of the European Convention of Human Rights on the right to a fair trial.

Box 5. Article 6 of the European Convention of Human Rights on right to fair trial: courts' review should be comprehensive and cover both facts and law

In 2003, Italy's competition authority imposed a fine on Menarini Diagnostics for breach of competition law. The company's domestic appeals against the decision imposing the fine were rejected, and the company brought the case before the European Court of Human Rights (ECHR), alleging violation of article 6 of the European Convention of Human Rights on right to fair trial.

The ECHR found that the competent Italian administrative courts, and Italy's Council of State, met the standards of independence and impartiality required for the purposes of complying with article 6. The ECHR also found that the lower administrative courts had examined the company's allegations in fact and in law, and reviewed the evidence on which the competition authority had relied on. The courts were able to verify whether the administration had made proper use of its powers, and even check its technical findings; their review was not limited to a legality check only. Both the administrative courts and the Council of State had full jurisdiction and would have been able to modify the fine if necessary. In particular, the Council of State had gone beyond a formal review of the logical coherency of the reasoning of the decision and had made a detailed analysis of the appropriateness of the penalty.

The ECHR ruled that such impartial review by adjudicators with full jurisdiction on law and facts satisfied the requirements of article 6, and found no violation.

Source : Menarini Diagnostics v. Italy, application 43509/08, judgment 27.9.2011 ; www.echr.coe.int/Documents/CLIN_2011_09_144_ENG_894208.pdf

40. The standard of review may vary not only across jurisdictions, but even within the same jurisdiction depending on the nature of the act. In the UK, on the one hand, competition infringement decisions are subject to the CAT's full review on the merits, as mentioned in section 3.3.1. On the other hand, the CMA's merger decisions and remedies following market investigation, as well as the CMA's decisions accepting or releasing binding commitments are only subject to judicial review by the CAT, on three grounds: unlawfulness, unreasonableness and procedural defect⁸. Some CMA decisions, like the decision to close a competition investigation on the grounds of administrative priorities, or other administrative decisions taken as part of an investigation which are not specified in statute as appealable to or judicially reviewable by the CAT, can be appealed before the High Court, which will follow the judicial review standard.⁹

41. As noted above, merits and legality reviews are thought to impose different levels of scrutiny. However, ultimately the level of scrutiny depends also on the intensity with which the review (merits or legality) is pursued. In a high intensity review on the merits, the court may choose to reconsider the question *de novo* and substitute the authority's judgement with its own. This is an option not open under a legality review, which may, at most, quash the decision¹⁰. Still, a high intensity legality review may leave the decision-making authority with a very limited margin of discretion in the choice of the options available to it (David et al, 2014).

42. The intensity of review may have to do not only with whether the reviewing court may review the merits of a decision or, conversely, can review specific grounds only, but also with which body would be better placed to make the decision. If the primary decision-

maker has been given a wide margin of discretion in reaching decisions by statute or as a result of the separation of powers between administrative bodies and courts (which is particularly relevant in administrative enforcement systems), its decisions would be granted some deference; the courts would not substitute the decision-maker's discretion with their own (Frische, 2013). It is therefore possible to adopt a relaxed merits review that defers to the perceived expertise of a competition agency.

3.4. Different standards of review for different decision elements

43. Standards of review may not only vary across jurisdictions or types of decisions. There may be different standards applicable to different elements of a competition decision. On first appeal against the first-instance competition decision, most courts review both issues of fact and law. Within the assessment of the facts, courts may also be required to review complex economic assessments. Each of these constituent elements of competition decisions – facts, law and economic assessments – may be subject to a different standard of review.

3.4.1. Review of legal assessments

44. Courts do not usually defer to the legal conclusions reached by first-instance decision makers, whether competition authorities or lower courts, since the review of the right application of the law is precisely their task.

45. The courts of the European Union do not defer to the Commission's assessment of points of law, or the application of law to the facts. Likewise, in the United States, the trial court's determinations on matters of law are reviewed fully on appeal. If the appellate court finds that the trial court erred, it will reverse and remand the matter, typically with instructions, so that the lower court may apply the correct standard. (OECD, 1996; UNCTAD, 2015). In Australia, appeals lie, from trial judges to appellate courts, on questions of law, and all errors of law are reviewable. These include errors in relation to the assessment of facts. Typical trial judge errors in establishing findings of fact include: error of principle; irrelevant considerations taken into account; relevant considerations not taken into account; findings of fact that no reasonable fact finder could have made; misapplication of established authority or failure to apply established authority (OECD, 1996).

46. It follows that whether a question is one of law is important in the review of competition decisions. Many issues in competition cases are not easily categorised as questions of either fact or law, as legal concepts find their meaning through being applied to a case-specific set of facts. This may raise some challenges regarding the intensity of review of specific aspects of competition decisions, depending on whether they are characterised as factual or legal.

47. For example, market definition is such an issue: on the one hand, it is fact-intensive; on the other, facts are assessed according to a method of analysis circumscribed by law. Some courts and scholars consider market definition (and, therefore, other issues such as ease of entry, existence of market power and assessment of competitive effects) as having two elements, one relating to fact and the other to law. The selection of the analytical framework for deciding the issue would be a question of law, while the application of that framework to the facts of the case would be a question of fact, or a mixed question of fact and law (OECD, 1996).

3.4.2. Review of findings of fact

48. Findings of fact may be reviewed less intensively than legal assessments in competition cases, often reflecting the relevant jurisdiction's reliance on the competition agency's or the trial court's expertise in the selection of the relevant facts, the collection of evidence and the evaluation of its appropriateness to substantiate the case¹¹. Such reliance does not extend to legal assessments, which fall roundly within the expertise of courts. In administrative enforcement systems, the fact that the same agency investigates and adjudicates may justify some level of court scrutiny of facts to ensure that due process in decision-making is observed, though procedural safeguards followed in investigations and in the process of reaching the first-instance decision also help.

49. In the United States, where decisions are adopted at first instance by a trial court, this court's factual findings will generally be upheld if supported by substantial evidence on the record. Also, the U.S. circuit courts of appeals, which have competence to review, on matters of law and fact, FTC's cease-and-desist orders issued under section 5 of the FTC Act, may amend or set them aside. The FTC's factual findings, however, shall be conclusive if supported by evidence.¹² Findings of fact may be set aside only if unsupported by relevant evidence. If two alternative factual findings are possible, and the ones reached by the FTC are found to be supported by substantial evidence, the agency's decision will be upheld (Bernatt, 2017).

50. The review of the factual conclusions underpinning an administrative or judicial first-instance decision involves a review of the sufficiency, conclusiveness and suitability of the evidence substantiating that decision. A finding of insufficiency or lack of relevance of the evidence to the conclusions reached would mean that the appealed decision can be annulled.

Box 6. Evidence must be relevant to the decision

The Spanish competition authority (Comisión Nacional de los Mercados y la Competencia, CNMC) had imposed €120 million in fines on **Orange, Vodafone** and **Telefónica** for abusing their dominant positions in the market for text and media messages.

On appeal by the mobile operators, the first-instance Spanish court (the National Court) overturned the decision, on the ground that the CNMC had relied on a previous market assessment, when it should have conducted its own case-specific assessment. The CNMC appealed the decision of the National Court, on the ground that the court exceeded its jurisdiction by analysing not only the evidence on which the decision was based, but whether that evidence was relevant to the decision.

The Supreme Court found against the CNMC. It ruled that the National Court was entitled to analyse the relevance and suitability of the evidence for reaching the decision: *“in short, judicial review can cover not only the “material accuracy of the evidence invoked, its reliability and consistency” but also to the relevance of the data relied on and their suitability to substantiate the conclusions reached. So, when the [National Court] finds that conclusions do not have a sufficient and reliable basis or there is no logical connection between the decision and the data on which it is based, it can annul the decision of the [authority].”*

The Supreme Court concluded that the National Court was entitled to overturn the enforcer's decision.

Source: Tribunal Supremo, Sala de lo Contencioso, decision 1867/2018, 21/12/2018; <https://globalcompetitionreview.com/article/1179258/spanish-enforcer-suffers-another-loss>

51. Decision-makers may be granted deference as regards their economic assessments or use of economic models, as long as these are supported by sufficient evidence and appropriate analysis (and, depending on the case, discussion with the parties).

Box 7. The Commission has a margin of discretion in assessing economic matters, which will be reviewed

When the Commission takes decisions assessing technical economic issues, the courts of the European Union recognise the Commission's margin of discretion and will not second-guess conclusions if based on sufficient evidence, unless the Commission made a manifest error.

The Courts will still review the manner in which the Commission exercises its discretion and may set aside a decision that either does not fulfil certain conditions of evidence sufficiency or failed to follow the right process. Reliance on economic analysis, in particular, requires not only adducing sufficient evidence and discussing the analysis with the parties, but also a strict observance of the parties' rights of defence.

The Court of First Instance overturned a decision by the Commission to prohibit a proposed merger between the Swedish packing company Tetra Laval and a French company, Sidel. On appeal by the Commission, the Court of Justice ruled that "*whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it*" (paragraph 39). The Court confirmed the lower court's decision, and dismissed the Commission's appeal.

Sources: Case C-12/03 P, Commission vs Tetra Laval BV

In 2012, United Parcel Service, Inc. ('UPS') notified the Commission of its proposed acquisition of its competitor TNT Express NV ('TNT') (both companies operate in the markets for the international express delivery of small parcels). The Commission blocked the merger in 2013. On appeal, UPS alleged an infringement of its rights of defence in that the Commission had adopted its decision by relying on a different econometric model from that which had been the subject of submissions during the merger clearance procedure. The General Court agreed and annulled the Commission's decision.

The Commission appealed against the General Court's decision. The Court confirmed the lower court's decision, and dismissed the Commission's appeal in its entirety. The Court ruled that failure to disclose the methodological choices underpinning the econometric model used for the analysis of the effects of the proposed merger resulted in an infringement of the rights of the defence. The Court stated that "*the General Court did not err in law when it held, in paragraph 210 of the judgment under appeal that 'the applicant's rights of defence were infringed, with the result that the [decision at issue]*

should be annulled, provided that it has been sufficiently demonstrated by the applicant not that, in the absence of that procedural irregularity, the [decision at issue] would have been different in content, but that there was even a slight chance that it would have been better able to defend itself” (paragraph 56).

Case C-265/17 P United Parcel Service, Inc. v Commission

4. Conclusions

52. In any competition enforcement system, whether judicial or administrative, and independently of that system’s characteristics, the effectiveness and credibility of enforcement requires that there is, in addition to the ex ante internal checks and balances and procedural guarantees for parties that competition authorities put in place, access to ex post review of competition cases by an independent generalist or specialised court or tribunal. That review should cover enforcement decisions and procedural acts, like mandatory requests for information and inspection decisions.

53. Some jurisdictions allow a full merits review of competition decisions without limitation of the legal grounds that can be invoked, or the aspects of the decision that can be appealed. A merits review can involve a reconsideration of the appropriateness of the decision and allow the judge to identify and, depending on the applicable rules and the facts of the case, correct errors. The challenge for systems that allow a full review on the merits of competition decisions, and in particular for administrative competition enforcement systems, is to respect the right balance between the powers of the administrative competition authorities (that are typically given some decisional discretion) and those of the reviewing courts.

54. Other jurisdictions provide for a legality review of competition decisions, on the basis of limited grounds of review, which typically cover the legality, reasonableness and procedural compliance of the contested act. This is considered a less intrusive review, as courts do not fully rehear the case but assess certain aspects of the decision-making. Still, legality review may be intense. Law and case law may specify the requirements for legality review, and may allow a fairly comprehensive control of different aspects of competition decisions.

55. Findings of fact may be reviewed less intensively than legal assessments in competition cases, often reflecting a jurisdiction’s reliance on the competition agency’s or the trial court’s expertise in the selection and appreciation of the relevant facts. Many issues in competition cases are not easily categorised as questions of fact or law, since legal concepts acquire their meaning through their application to a case-specific set of facts. In all cases, even in systems where factual findings are reviewed more lightly than conclusions of law, insufficient or irrelevant factual evidence, or use of economic models without explanation of their methodology or assumptions, would mean that the decision is unlawful and can be annulled.

56. To enable review, first-instance decisions should provide clear detailed description of the case facts, the applicable rules and the reasons for the legal and factual findings.

Endnotes

¹ “In some cases, the [FTC] decides cases administratively; the decisions are then subject to appellate review in federal court. In other cases, the FTC uses a hybrid procedure, whereby FTC staff litigating the case act as prosecutors in federal courts to seek preliminary injunctive relief before litigating within the FTC’s administrative system, where the Commission makes the final decision on the merits. In still other cases, particularly where the legal standards are well-settled and only a court has the power to issue the appropriate remedy, the FTC may seek an ultimate decision from the court without using the administrative process.” (UNCTAD, 2015)

² “Another term which can be used to denote “standard of review” is “judicial control” (*contrôle juridictionnel*). A standard of review, as the term literally indicates, is therefore a standard used to review another person’s decision.” (Vesterdorf, 2005).

³ In common law systems, the civil competition enforcement standard is, typically, the preponderance of evidence that a rule has “more likely than not” been breached; the degree of likelihood and the requirements to establish it vary among enforcement systems and among cases. The (stricter) criminal enforcement standard is legal certainty, i.e. proof of breach beyond reasonable doubt, or similar standard (OECD, 2016c).

⁴ Belgium’s contribution to the roundtable, www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm

⁵ In [2008] CAT 319 November 2008, the CAT found an abuse of dominant position overturning the regulator’s decision that there had been none.

⁶ Article 263 of the Treaty on the Functioning of the European Union (“TFEU”) provides that regulations may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations, and Regulation 1/2003 is one such regulation.

⁷ “Judicial review of the legality of a competition decision involves scrutiny of the process of competition law decision-making, to determine whether a decision is based on accurate and reliable evidence, does not exceed the limits of the authority’s discretion and no error of law has been made.” (OECD, 2011) Executive summary of the 2011 OECD roundtable on the Institutional and Procedural Aspects of the Relationship between Competition Authorities and Courts, and Update on Developments in Procedural Fairness and Transparency.

⁸ “One can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality,” the second “irrationality” and the third “procedural impropriety”: Lord Diplock in Council of Civil Service Unions and Others (Appellants) and Minister for the Civil Service (Respondent), [1985] AC 374 [House Of Lords] www.bailii.org/uk/cases/UKHL/1984/9.html

⁹

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf

¹⁰ “... the Court’s determination of the reasonableness of the Commissioner’s interpretation of his jurisdiction in respect of foreign arrangements would not represent the Court’s view of the

correctness of that interpretation”, Rakuten Kobo Inc v. Canada (Commissioner of Competition), 2017 FC 382

¹¹ “*In some jurisdictions the judicial body may accord a certain degree of deference towards the competition agency’s decision, to reflect the ‘expert skills’ required for the complex legal and economic analysis involved in competition cases. However, in other countries the scope and focus of the judicial review may be wider and therefore encompass a careful review of the economic and legal assessment carried out by the competition authority*” (OECD, 2011).

¹² 15 U.S.C. § 45(c) *Review of order; rehearing.*

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