

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Cancels & replaces the same document of 3 June 2019**

**Working Party No. 3 on Co-operation and Enforcement****The standard of review by courts in competition cases – Summaries of contributions**

**4 June 2019**

This document reproduces summaries of contributions submitted for Item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019.

More documents related to this discussion can be found at

[www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm](http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm)

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*The standard of review by courts in competition cases -  
Summaries of Contributions*

This document contains summaries of the various written contributions received for the discussion on the standard of review by courts in competition cases (129th Meeting of the Working Party No 3 on Co-operation and Enforcement on 4 June 2019). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an \*.

### *Austria\**

The Austrian enforcement system is judicial. Binding decisions on anti-trust are exclusively adopted by specialised Cartel Courts (CC). Competition issues can be brought to the court by the Federal Competition Authority (FCA), an independent investigative authority; the Federal Cartel Prosecutor, a body bound by the instructions of the Federal Minister of Justice; and, in some cases, certain public chambers, as well as undertakings and business associations.

The CC decisions can be appealed before the Supreme Cartel Court (SCC). Possible grounds for appeal are (i) certain procedural errors; (ii) inadmissibility; (iii) an incorrect legal assessment of the case; and (iv) a change in the legal situation. Until recently the SCC could only carry out legality review, but now it can also assess the facts of the case. The re-assessment of the facts is limited to manifest errors.

Both the CC and the SCC are specialised bodies. Judges in the CC are generally experienced and knowledgeable in the field of competition law. If the court does not have sufficient expertise in a certain field, it may ask an expert for its (written) opinion. If that is the case, the parties of the proceedings are granted the opportunity to comment the expert evidence assessed by the court.

## *Belgium\**

The Belgian enforcement system is administrative. The powers of the Belgian Competition Authority (BCA) are very similar to those of the European Commission, but the powers of investigation and prosecution, and of decision making are held by different bodies: the Investigation and Prosecution Service, and the Competition College, respectively. As an exception, settlement and simplified merger control decisions are adopted by the Investigation and Prosecution Service.

The Market Court, a specialised section within the Brussels Court of Appeals, has exclusive jurisdiction to review the decisions of the BCA. The Market Court has the power to carry out a full review on the merits, including re-assessing the evidence and the proportionality of fines. With a few exceptions, the court can not only annul the BCA decision, but also adopt a new one. Although there is no clear case law on merger control, it is likely that the standard of review of the court is less strict and the court only examines whether the BCA erred in law or made a manifest error when assessing the facts.

BCA's substantive decisions in infringement and merger control cases are subject to review, with a few exceptions such as settlement decisions, which cannot be appealed. Appeals may be brought before the Market Court, with the exception of appeals against decisions of the Investigation and Prosecution Service to close a case that may be appealed before the Competition College.

The Market Court is composed of judges who joined from other sections of the Court of Appeals or from other courts, and of judges selected on the basis of expertise acquired in the field of economic, financial, and market law.

## BIAC

*Business at OECD* supports the efforts of the OECD Competition Committee to get a deeper understanding and appreciation of judicial oversight of competition enforcement decisions. This topic runs to the core of the functioning and the legitimacy of competition enforcement regimes. It is an issue of growing importance given the extension of competition law into newer areas of economic activity and the increasingly significant sanctions that are being imposed across OECD competition enforcement jurisdictions.

*Business at OECD* has reviewed how the European Courts have approached judicial oversight of competition proceedings, given the maturity of the system, the influence that European law has on European member countries, as well as the influence European competition law has more broadly. *Business at OECD* observes that the European Courts have evolved their understanding of what standard of review to apply. This evolution is not entirely surprising given that judicial oversight must be sufficiently intensive in order to give effect to fundamental fair hearing rights and to address the increasing complexity of applying legal rules to economic theory and commercial realities. In addition, it would be expected that cases raising novel theories will be scrutinized by the courts, which will result in greater stability in the law and establish precedent that can be followed.

As competition sanctions increase in significance, competition regulation intervenes in new areas of law, and complex assessment of new economic or legal theories require authorities to make choices, it is entirely reasonable for courts to ensure effective scrutiny in order to enhance the viability of the system. *Business at OECD* therefore believes that courts match their standard of review to the impact and influence of competition authorities' decisions. The limits of a court's jurisdiction and the standard of review that the court should apply stands outside the control of competition authorities. However, in *Business at OECD's* view, authorities that rigorously apply due process and procedural fairness norms, will help to immunize themselves against criticism by the courts. Indeed, sound judicial review should provide the legal certainty and guidance to authorities to undertake their functions with more confidence and issue decisions that are increasingly strong and more appeal-proof.

## *Brazil*

In Brazil, competition enforcement relies on an administrative system implemented by the competition law enforcement authority – the Administrative Council for Economic Defense (CADE in its Portuguese acronym). Although CADE has administrative jurisdiction that cannot be modified within the executive branch of government, any decision issued by CADE can be challenged in the judiciary branch.

The judicial review of administrative decisions is based on the constitutional principle of separation of powers and the principle stated in article 5(XXXV) of the Brazilian Constitution, according to which “the law shall not exclude any injury or threat to a right from the consideration of the judiciary branch”.

CADE is responsible for the investigation and for the first-instance decision making on competition matters over the whole national territory. The judiciary branch can review any decision issued by CADE, irrespective whether it is a final decision, a charging document or a procedural act.

The judicial review of competition cases in Brazil entails a review of legality as well as a full review of the merits of the decision. Therefore, the judiciary branch can either confirm CADE’s decision or annul it, in full or in part. When it comes to annulment, the judiciary can either order CADE to make a new decision or replace CADE’s decision with one of its own.

CADE acknowledges the benefits of an efficient judicial review of competition decisions. However, due to the current structure of the Brazilian judiciary system, some of the benefits of the judicial review may be hard to achieve in practice. The effectiveness of judicial review and the usefulness of this control to improve CADE’s decisions would improve with the establishment of simple and faster court procedures, the consolidation of the specialized courts in competition law with limited judicial power to review the merit of decisions issued by CADE, and the effective training of judges in competition law.

## Chile

The Chilean competition enforcement system is mostly an adversarial system, whereby the National Economic Prosecutor's Office (FNE) is in charge of investigating competition law violations and initiating legal proceedings to challenge conducts that harm competition. Hence, the FNE does not have adjudicatory power generally. The only exception to this rule is the FNE's recent mandate to clear -with or without remedies- or reject certain mergers with effects in Chile (Law No. 20.945 enacted in August 2016).

The FNE has broad powers to investigate competition law infringements and reach settlements with economic agents. However, some investigative powers are subject to judicial approval and others can be challenged by the affected parties. Additionally, extrajudicial settlements agreed between the FNE and economic agents subject to an investigation and judicial settlements also require approval by the Competition Tribunal (TDLC).

The adjudication power resides within the TDLC, a specialised and independent court, which receives the cases submitted by the FNE or private parties or public institutions acting as plaintiffs. It is common for parties in these proceedings to voluntarily present legal and/or economic submissions to support their case. Even though the TDLC has broad powers to order evidentiary measures and could request external expert advice *ex officio* on a specific matter, it is not usual for the TDLC to request a report from experts in law or economics, given that it is a specialised tribunal.

Judgments issued by the TDLC in contentious proceedings and decisions issued by the TDLC in non-contentious proceedings can be challenged before the Supreme Court, that has a variety of jurisdictional competences, as the court of last appeal in Chile. The Supreme Court has consistently conducted a full review of the merits of the case. This full review is applied to questions of fact and law. Where the TDLC's decision addresses policy matters or entails complex economic assessments, the Supreme Court has also engaged in a full review. In general, parties do not present legal or economic submissions and the Supreme Court does not adopt evidentiary measures related to legal or economic issues.

The decisions whereby the FNE rejects a merger transaction can be challenged before the TDLC. The TDLC has ruled that it has the power to review in depth the merits and the validity of these decisions, using the background information contained in the FNE investigation file and information that it directly collects.



## *Chinese Taipei*

The Fair Trade Commission (FTC) enforces the Fair Trade Act (FTA), which belongs to the administrative competition enforcement system. Enterprises finding the administrative dispositions unacceptable can act according to the Administrative Litigation Act and file a lawsuit with administrative courts for revocation. In subsequence, administrative courts will review the legality of the dispositions.

The advantage of the administrative court review system is that the legality of an administrative disposition can be inspected again and gives enterprises the right to seek remediation. However, the disadvantage is that certain cases are sent back and forth between administrative courts as a result of the remand court procedure. Sometimes no final judgments are made in such cases even after more than ten years have gone by, while the industrial environment and market structure have gone through significant changes during such a period. As a consequence, the rights of concerned parties are not safeguarded.

To enhance interaction between law and economics and between theory and practice, the FTC often organizes seminars and academic workshops and invites judges from courts of various levels to participate by presenting reports or giving opinions. The FTC also publishes the Fair Trade Quarterly and the FTC Newsletter on a regular basis and sends copies to courts of various levels for judges to be aware of related issues.

## *Costa Rica*

The Commission to Promote Competition (COPROCOM), which is the national authority, and the Telecommunications Regulatory Authority (SUTEL), as the sectorial authority, are administrative entities that are responsible for the application of competition regulations in the country. The procedure followed through the administrative channel to investigate, and if appropriate, sanction anticompetitive conduct, is established by a general law. It is a procedure that incorporates the elements of due process. In Costa Rica, only the authorities or the courts of justice can review and, if appropriate, annul all or part of the acts issued by the competition authorities. The country does not have a specialized court in Competition Law.

The review of the initial data reveals that the first sanctioning rulings imposed by COPROCOM, with one exception, were of a symbolic or educational nature before a recently enacted law. Sanctions included corrective measures and the obligation to annul anti-competitive agreements, as well as the payment of relatively low fines. None of these administrative rulings was challenged in court.

Later, a defiant ruling arrived, this judgement represents a transition, not only because of the greater severity of the sanction imposed by the authority; but also, for being the first decision that was questioned before the court, which confirmed the ruling issued by COPROCOM. From this point on, the challenge of rulings issued by the competition authority became a constant situation. By 2018, 63% of sanctions imposed by the competition authorities had been challenged before the courts of law. Regarding the non-appealed judgments in court, cases in which the fines imposed were relatively low stand out, which possibly led to the generation of valuations regarding the cost of a legal process and the payment of monetary penalties

Particularly, of the 20 cases that have been taken to the Courts of Justice, 85% have already been resolved, and most of the resolutions issued by the competition authorities have been confirmed in full. As for the cases already concluded in the courts, the standard being that a final judgment required several years to be resolved, and the two instances therein needed to be exhausted.

In the case of Costa Rica, judicial reviews of the decisions of competition authorities, mainly the most recent cases, have established a series of relevant parameters to be taken into account in the processing of the different types of procedures, being the main elements aspects of form that emphasize on the justification of the fine to be imposed, the imputation of charges, and the evaluation of evidence.

The courts have recognized the special nature of the law of competition, a specialty that leads to the need to have a procedure that reflects the particularities of this matter and that in turn allows the authorities to guarantee the principle of the right of defense in the best possible way. Due to the foregoing, the Costa Rican competition authorities, COPROCOM and SUTEL, took on the task of including in draft Law 21.303, “Strengthening of the Competition Authorities of Costa Rica”, the different elements indicated by the courts to have a favourable procedure for investigating infringements to the competition law. The bill also contemplates the creation of a specialized court in the field of competition law, which in turn would also favour a judicial review of the decisions of the authorities by judges with a greater knowledge of competition matters.

## Croatia

In its contribution, the Croatian Competition Agency (CCA) wishes to present its system of judicial review of competition cases. In the last ten years the system has undergone one major reform – the competence has shifted from minor offence courts (and competition infringements being considered minor offences) to the High Administrative court which now reviews both the legality and the merits of the decision of the CCA. Infringements of competition rules are now treated as *sui generis* infringements, and the imposition of fine, previously hardly ever practiced by the competent minor offence courts, is under the exclusive competence of the CCA.

An example presented here, refers to arbitration proceedings initiated by investors before the International Centre for Settlement of Investment Disputes (ICSID).

## *Denmark\**

Enforcement of competition law in Denmark is carried out: for administrative proceedings, by the Danish Competition and Consumer Authority (the DCCA) and the Competition Council (CC); for criminal proceedings, by the public prosecutor (The State Prosecutor for Serious Economic and International Crime – SEIC).

DCCA is in charge of initiating administrative proceedings and preparing a proposed decision. This proposed decision is submitted to the CC, which then decides on the case. The CC can issue an injunction (cease and desist order) or adopt a commitment decision.

As a general rule, decisions by the CC may be appealed before the Competition Appeals Tribunal (CAT), an administrative body with expertise on competition cases. The CAT consists of a chairman (a Supreme Court judge) and four other members (two members with judicial expertise and two members with economic expertise). Certain acts, such as commitments adopted by the companies, cannot be appealed to the CAT, and have to be appealed directly before the ordinary courts.

The scope of the CAT's review is not specified in the Danish Competition Act. In principle, the CAT can review the facts and the application of the law. The CAT can confirm, repeal (in full or partially), remit or change the CC's decision.

The CAT's decision can be appealed before the ordinary courts. Since 2007, the Danish Maritime and Commercial High Court, a court specialised in cases concerning commerce, has been assigned jurisdictional responsibility over cases where the application of the Danish Competition Act is of significant importance. Experts, primarily nominated by business organisations, may participate in trial proceedings. It is possible to bring new evidence before these courts. Danish courts consider that competition authorities have a certain degree of discretion as regards competition aspects.

The decisions of the Danish Maritime and Commercial High Court's can be appealed before the High Court or, under certain circumstances, directly before the Supreme Court. Decisions of the High Court may be appealed before the Supreme Court.

If a criminal sanction is to be imposed, the case must be referred to the SEIC (either directly or after an administrative decision). The infringement must be proved beyond reasonable doubt (the criminal standard).

The decision to refer a case to the SEIC is made by the CC. Referral takes place after the CC has adopted its decision. If the decision is appealed to the CAT, the referral normally awaits the result of the appeal. If the CAT's decision is appealed, referral will not await the civil court's decision.

Criminal cases are handled by one of the District Courts. The decisions of District Courts can be appealed before the High Court where new evidence can be submitted. Judgments by these courts may be appealed before the Supreme Court.

Note that the current enforcement system can change following the European Union's directive on strengthening the national competition authorities' enforcement of the competition rules.

## EU

The European Union competition enforcement system is an administrative system, entrusted principally to the European Commission, under the judicial control of the Court of Justice of the European Union.

The principle of effective judicial protection is a general principle of EU law. In line with this principle, the enforcement activity of the Commission is subject to a wide and thorough scrutiny by the Court of Justice.

An action for annulment may be brought against a Commission decision in antitrust/cartel and merger cases, at first instance, before the General Court, which has the power of full judicial review. Appeals against judgments and orders of the General Court may be brought before the Court of Justice on points of law only.

The Court of Justice has the power to review the legality of acts of the Commission intended to produce legal effects vis-à-vis third parties. An action for annulment may be brought, for example, against the Commission infringement decisions under Article 101 and 102 TFEU (including settlement decisions), commitment decisions under Article 9 of Regulation (EC) No 1/2003, decisions to terminate an investigation or decisions to reject a complaint in antitrust cases. In merger cases, challengeable acts include in particular the Commission prohibition decisions, unconditional and conditional clearance decisions, and decisions to refer a case to a Member State competition authority. Intermediate measures intended to pave the way for a final decision are in principle not challengeable.

The legal standing of the applicants before the Court is broad, and is not limited, for example, to the notifying parties in merger cases or the parties on which a fine has been imposed in antitrust cases.

The Court may annul a Commission decision, in full or in part, on grounds of lack of competence, infringement of an essential procedural requirement, lack of reasoning, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The General Court may review all elements of Commission decisions relating to proceedings applying Articles 101 TFEU and 102 TFEU and the EU Merger Regulation. It may review all points of fact and law and thus may verify evidence, factual findings and the legal qualifications derived therefrom.

The Court has recognised that in the case of complex assessments, in particular of economic nature, the Commission enjoys a certain margin of discretion. Nevertheless, the Court's judgments in antitrust and merger cases demonstrate that the Court exercises a full and comprehensive review and subjects the Commission's complex (economic) analyses to rigorous scrutiny.

In decisions whereby the Commission has fixed a fine or periodic penalty payment, the Court in addition has unlimited jurisdiction. This entails that the Court may, but is not required to, cancel, reduce or increase the fine or periodic penalty payment involved.

The Court has wide access to competition expertise in competition cases. Hence, the parties may use economic studies or reports during the Court proceedings or bring an expert in order to make an oral presentation during the Court hearing in support of their arguments. Also, the Court may itself appoint an economic expert to submit neutral expert evidence.

## *France*

Litigation concerning the decisions of the Autorité de la concurrence is divided between the administrative and judicial branches and, within the latter, between civil and criminal courts. The review of conduct falls within the jurisdiction of the judicial judge, while the administrative law judge has jurisdiction for the review of market structure.

When it comes to the judicial judge, the civil law judge is competent for decisions on anticompetitive practices, while the review of investigative measures is the responsibility of the criminal law judge. The Paris Court of Appeal has jurisdiction in matters relating to the litigation of anticompetitive practices. The authorisation and review of the conduct of dawn raids are the jurisdiction of the criminal law judge, i.e. the liberty and custody judge and, in the event of an appeal, the first president of the appeal court of the liberty and custody judge (at first instance) and then the criminal chamber of the French Supreme Court (Cour de cassation) in the event of an appeal.

Judicial oversight of merger decisions, which carries out *ex ante* review of market structure and not, as in the case of anticompetitive practices, *ex post* review of conduct, remains the jurisdiction of the French Administrative Supreme Court (Conseil d'État) ruling in first and last instance.

The judicial judge exercises full jurisdiction. The administrative law judge exercises a review over the legality of the Autorité de la concurrence's decisions clearing mergers in the context of an action for abuse of power, as well as full jurisdiction of decisions rendered for example on the grounds of the premature completion of a transaction.

In addition, as an administrative authority operating according to a specific institutional design, the Autorité de la concurrence must comply with certain requirements under the review of the French supreme courts, the European court and the French constitutional court.

Appeals against decisions of the Autorité de la concurrence are non-suspensive and its decisions may be the subject of requests for suspension. The administrative law court may also decide to limit the effects of the decision under appeal.

Last but not least, depending on the nature of the review exercised, access to expertise by the judicial judge and the administrative law judge play an important role.

## *Germany*

Germany has a strong tradition of legal control of power in administrative law. As a result, the standard of review by courts has a huge impact on the exercise of power by the Bundeskartellamt and the parties' right to defence. The Düsseldorf Higher Regional Court re-examines all factual and legal aspects of the case, providing the companies with a full review of the Bundeskartellamt's decision. The applicable standard of proof is also higher than the standard used by other jurisdictions. Therefore, the judicial review complements the internal procedures that the Bundeskartellamt has put in place to grant due process.

## *Hungary*

The law enforcement proceedings of the Hungarian Competition Authority (GVH) are administrative procedures and – adjusted to the organisational structure of the agency – consist of two phases: first the phase of the case handler and then the phase of the Competition Council. As for the review of competition cases, an administrative system of judicial review exists in Hungary. As of 1 January 2018 there are two instances of court review for competition cases, the first instance court is the Regional Court of Budapest, which possesses exclusive competence in competition law matters, while the second instance court is the Hungarian Supreme Court (also known as *Curia*), which is the presiding appellate court. Before the entry into force of the Code of Administrative Litigation<sup>1</sup>, the Curia acted as an extraordinary review court in competition cases. However, in accordance with the legislation that is currently in force, the Curia is the appellate court for the review of the GVH's decision on the merits of the cases.

Hungarian administrative review courts carry out a full review in competition cases. This review takes the form of a comprehensive assessment of both the findings of fact and conclusions of law. The same standard of review is applied to both of the abovementioned elements.

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<sup>1</sup> Act I of 2017 on the Code of Administrative Litigation



## *Israel*

The Israeli Competition Tribunal, established under the Economic Competition Law-1988 (hereafter – the "Competition Law"), is a significant part of the competition regime in Israel. It is a specialized tribunal, which has, over the years, acquired broad reaching, significant knowledge and expertise in antitrust and competition law, which takes a major role in the creation of case law and the development thereof.

The Israeli contribution will provide an overview of the standard of review implemented by the Competition Tribunal, on decisions granted by the General Director of the Israel Competition Authority (hereafter also – the "General Director" and the "ICA", respectively), and certain developments thereof in case law. We will mainly focus on the Tribunal's standard of review, as reflected in decisions concerning merger transactions.

Indeed, according to the Competition Law, the Tribunal may approve the General Director's Decision, revoke, or change it. We will elaborate on case law development in this regard, whereas, the *de-novo* standard of review set forth by the Israel Supreme Court, was over the year, refined: clarifying that the Tribunal's broad standard of review of the General Director's decisions, should also take into consideration the decision as a *starting point* for the discussion, while recognizing the importance of the knowledge, acquired expertise, and the cumulative experience of the authorized authority.

## *Italy*

Italy's competition law enforcement system is an administrative one with the Italian Competition Authority (ICA) being the sole responsible body for public enforcement and its decisions are fully effective; the parties involved have the right to challenge ICA's decisions before the administrative Courts.

The contribution provides an overview of the scope of the ICA's acts which are challengeable by the parties involved, both in terms of final decisions and procedural decisions; it discusses the scope of the review of the administrative Courts in competition cases and their access to competition expertise.

The review of ICA decisions is full and effective and extends to all factual and legal issues raised by the decision under scrutiny, including technical criteria employed by the ICA in its economic assessment.

In particular, with regards to complex economic assessment, against the background that administrative Courts cannot substitute their own assessment for that of the ICA, Courts have gradually set out tighter criteria for their scrutiny and have also considered, in order to verify the reliability of the ICA's decision in comparison with the alternative technical assessment proposed by the parties.

The ICA welcomes this type of scrutiny, as it may positively affect the antitrust enforcement activity, at least in two different ways. Indeed, on the one side, an ex post effective judicial review ensures compliance with procedural rules and full observance of due process rights, which also implies a transparent dialogue with the parties concerned and thus full accountability of competition enforcement decisions. On the other side, it directly impacts on the standard of proof that an antitrust authority must satisfy to establish competition infringements; in this respect, the ICA believes that the gradual expansion of the scope of review may also help to improve, over time, the quality of agencies output.

## *Korea*

The Korean enforcement system is administrative. Competition law is enforced by the Korea Fair Trade Commission (KFTC), an administrative body. Seoul's High Court reviews the appeals against KFTC's decisions, allowing for the specialisation of this court, the streamlining of proceedings, and the prompt resolution of cases. Although this court also hears cases not related to competition law, three of its chambers exclusively deal with competition law at the moment. When reviewing KFTC's decisions, Seoul's High Court examines both questions of fact and of law. The judgments of this court can be appealed before the Supreme Court. The Supreme only reviews questions of law.

As regards KFTC's administrative proceedings, the standard of proof for competition matters is similar to the one required for civil law proceedings: the arguments of the defence and the evidence are considered as a whole. As regards criminal proceedings, the standard is stricter: the infringement must be proven beyond reasonable doubt. It is possible that the same conduct is considered as an infringement for administrative purposes, but not for criminal purposes.

Courts in Korea have the possibility to appoint an external expert to assist the court, but they rarely do so. In contrast, the KFTC and private parties frequently retain experts and provide their opinions to the court. Sometimes public officials with expertise in a particular subject matter also participate as witnesses in court proceedings.

## Latvia

Latvia is a jurisdiction of an administrative competition enforcement system with supervising governmental institution the Competition Council of Latvia (CC), consisting of an investigative – Executive body and a decision-making body – the Council. The CC is functionally independent in decision making from Ministry of Economics to whom the CC is subordinated.

According to the Competition Law<sup>2</sup> (CL) undertakings have rights to protect their business secret as well as other sensitive information and all relevant rights of defense (to be informed about subject matter of investigation and about relevant facts gathered during investigation in statement of objections, to be heard etc.) before final decision is taken. However, the CC is not obliged to allow an access to the file before the statement of objections is sent due to confidentiality of the investigation. Procedural deadline for investigation is two years.

The CC has discretion to consider priorities, the impact of the potential infringement on competition and its significance to public interests when initiating or closing the proceedings. In addition, the CC has different tools in its discretion when closing an investigation – to terminate an investigation, to adopt infringement and settlement decision or commitments decision, to enter into administrative contract<sup>3</sup>. Upon choosing settlement procedure maximum reduction of 10 % of the fine can be achieved, whereas even more can be applied when concluding an administrative contract. However, in both situations the CC will consider settling the dispute if an undertaking admits its liability in the infringement.

All procedural decisions (open or prolong investigation) and decisions on the substance (in antitrust investigations, merger review and other) are taken by the Council. Usually only final decisions are subject to court's review. Procedural decisions or the CC's actions (e.g. during dawn raids) are subject to court's review on specific grounds. The court warrant authorizing dawn raids can also be challenged in specialized court. For third parties to challenge the CC's decision they must prove infringement of their rights and legal interests, however when appealing the CC's decision clearing the merger infringement of third person's rights must be substantial. Commitment decisions and administrative contracts usually are not subject to the court's review, but settlement decisions may be reviewed partially regarding the amount of the fine.

The CC's decisions can be appealed in administrative courts in two instances (the Administrative regional court and the Supreme court).<sup>4</sup> Private damage claims are reviewed by courts of general jurisdiction that also review private disputes. In both instances administrative courts perform review of legality of the decision on substantive matters, on possible procedural violations during investigation and legality of the fines applied. The Supreme court does not examine the evidence but evaluate correct application of legal norms and procedural principles. The scope of the court's review primarily is determined

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<sup>2</sup> Competition Law. Available here in English: <https://likumi.lv/ta/en/en/id/54890-competition-law>

<sup>3</sup> By its nature it's a private law contract with public law elements.

<sup>4</sup> Rights to appeal in 2 instances are granted in cases of those independent government agencies that have collective decision taking bodies (*quasi-court bodies*).

by the complaint but the court itself (*ex officio*) may evaluate all findings of the case, even by establishing new facts, and provide an assessment of the legality of the decision.

The administrative court has jurisdiction to annul or deem invalid the decision of the CC (as whole or in part). However, if warranted by the facts of the case, the court may instruct the CC to adopt a new decision. When deciding to adopt a new decision, the CC shall take into account the facts and legal considerations established in the court's judgment. This standard of court's review (regarding the amount of fines) was challenged by the administrative court before the Constitutional Court<sup>5</sup>. However, the Constitutional court rejected administrative court's complaint by stating that the right to a fair trial does not require that the court, in reviewing the legality of an administrative act unfavorable to a person, should always make considerations of expediency itself and, on the basis of these, determine a new content for the fining decision.

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<sup>5</sup> According to Article 104 (2) of the Administrative Procedure Law if the court acknowledges that a norm of law does not conform to the Constitution (*Satversme*) or norms (acts) of international law, it shall suspend court proceedings in the matter and send a substantiated application to the Constitutional Court. After the coming into force of the decision or judgment of the Constitutional Court, the court proceedings in the matter shall be renewed the following court proceedings shall be based upon the view of the Constitutional Court.

## *Lithuania*

In Lithuania, competition law is enforced on the basis of the administrative competition enforcement system. The Competition Council of the Republic of Lithuania is responsible for the public enforcement of competition law. The decisions of the latter can be judicially reviewed by Vilnius Regional Administrative Court (the court of first instance), whereas the judgements of the latter can further be appealed to the Supreme Administrative Court of Lithuania (the appellate instance). The judgements of the latter are final and cannot be further reviewed in the cassation instance. Various decisions of the Competition Council can be judicially reviewed, such as, for example, decisions on the infringements of competition law, decisions on the notifications of concentrations, decisions terminating the investigation on the basis of accepting commitments. Complaints lodged with the Competition Council on the acts or decisions of the empowered officials of the Competition Council may also be judicially reviewed.

## *Mexico*

In 2013 and 2014, Mexico undertook an extensive reform to its constitutional and legal frameworks with the purpose of strengthening competition law, policy and institutions with more than 25 years of existence. Regulatory and institutional reform committed to the specialization of administrative and judiciary authorities in competition, telecommunications and broadcasting matters.

Mexican competition authorities –IFT and COFECE– meet a constitutional mandate that establishes two separated bodies to substantiate competition cases regarding collusion, abuse of dominance, unlawful mergers, and the existence of substantial market power, barriers to entry or effective competition conditions. In addition, two specialized trial courts and two specialized appellate courts were created to review cases in competition, telecommunications and broadcasting.

The legal system for competition, telecommunications and broadcasting –including the stage for judiciary review– is based on specialization. This contribution describes relevant changes in the institutional design, the enforcement system, the types of evidence and the general and specific criteria for judicial review in competition cases.

## Peru<sup>6</sup>

In Peru, the Competition Authority is an administrative entity (*Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual - Indecopi*) that has two instances: Competition Commission (Commission) and, in appeal, the Competition Division of the Tribunal of Indecopi (Tribunal).

Both instances have autonomy for their investigations and sanctions, so they have impartial decisions. The Commission is composed by four members (lawyers and economists) who decide if the investigations carried out by their Technical Secretariat can lead to an infringement to competition and, in that case, impose the corresponding sanctions to the enterprises or persons investigated. The Commission also resolves requests of commitments and settlements.

The second instance, the Tribunal, is composed by five members (lawyers and economists) who review all the Commission decisions that can be appealed. According to Peruvian legal system, these are: (i) rulings that impede the parties to continue the proceeding; (ii) decisions that can put the investigated in a state of defenselessness; and, (iii) the final decision of the Commission. In the merger control system (Peru only has implemented merger control in the electricity market) the Tribunal also reviews the Commission rulings that order remedies or deny the operation.

The Tribunal reviews the legality of the decisions issued by the Commission. The resolution issued by the Tribunal cannot be appealed in other administrative proceeding, since it is the last instance. However, the parties can request a judicial review that puts Indecopi as the sued part. In such cases, the judge reviews the legality of the administrative decision, and does not participate as another instance of the competition agency.

In 2012, the Judicial Power created 4 unipersonal courts of first instance and a collegiate tribunal of second instance, both exclusively for reviewing the disputes related to the cases known by Indecopi. These jurisdictional bodies are partially specialized in competition law, as they are also competent to review the decisions of Indecopi in other matters (such as consumer protection, intellectual property, etc.) and regulatory issues.

The Supreme Court of Justice intervenes in reviewing competition cases as a court of cassation through the Chamber of Constitutional and Social Law, which is a court of general jurisdiction that can review a greater extent of disputes related to the branch of administrative and constitutional law.

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<sup>6</sup> This document was prepared by Carlos Mamani Moya, senior legal analyst of the Technical Secretariat of the Competition Division of the Tribunal of Indecopi; and, Pedro Chirinos Terrones, legal analyst of the Technical Secretariat of the Competition Division of the Tribunal of Indecopi.



## *Poland*

The **Court of Competition and Consumer Protection** (hereinafter referred to as: “SOKiK”), which is a branch of the Regional Court in Warsaw, has exclusive jurisdiction to hear competition cases at first instance, and in particular appeals against decisions of the President of the Office of Competition and Consumer Protection – UOKiK (hereinafter referred to as: “the President of UOKiK” and “competition authority”), as it specializes in competition and consumer protection cases, while the **Court of Appeal in Warsaw** serves as the appellate court. Judgments of the court of second instance are final. Both SOKiK and Court of Appeal have full jurisdiction in competition cases. Judgments of the court of second instance are subject to cassation appeal to the Supreme Court. The Supreme Court is a court of law and doesn’t adjudicate on the facts of case.

When discussing the issue of judicial review in competition cases in Poland, it is impossible to disregard the observable trend towards increasing guarantees of procedural justice, including the right of defence. In the last two years, there have been several cases which ended with non-standard court rulings affecting either the way the competition authority proceeds or the legal situation of undertakings.

The SOKiK’s resolution of 7 March 2017 issued as a result of an undertaking filing a complaint against the inspection activities, necessitated a change of the UOKiK’s previous practice and introduction of far-reaching modifications into the organization of searches. As a result of the ruling, the President of UOKiK now selects the collected (electronic) evidence only at the entrepreneur’s premises and in his presence.

On 16 February 2019, the Constitutional Tribunal ruled that Art. 105n par. 4, second sentence of the antimonopoly act reading that the resolution of SOKiK on giving consent to carry out an inspection is not appealable is incompatible with Art. 78 in connection with Art. 45 par. 1 of the Constitution of the Republic of Poland. Therefore the provision expired and legislative changes in this respect are to be introduced.

## *Romania*

The Romanian competition enforcement system is one where the Romanian Competition Council (RCC) acts as an integrated public authority - it investigates and decides on cases by administrative decision of the decision-making body (e.g. Plenum), subject to full judicial review by the Bucharest Court of Appeal.

As regards the enforcement of art. 5 (corresponding to art. 101 of the TFEU) and art. 6 (corresponding to art. 102 of the TFEU) of the Romanian Competition Law and of art. 101 and art. 102 of the TFEU, the RCC investigates potential infringements of competition rules and adopts binding decisions, including the imposition of fines.

The competition directorates represent the area within the RCC that investigate under the supervision of the General Director, while decisions are taken by the decision-making body, independent of political and business interests.

With respect to merger control, the Romanian Competition Law also provides for a regime of integrated public enforcement, whereby the RCC is vested with exclusive jurisdiction to decide upon concentrations under its authority, subject to the control of the Courts.

These decisions are subject to judicial review before the Bucharest Court of Appeal - a generalist court - on all points of fact and law, including review of evidence, factual findings derived therefrom, legal qualification of the evidence and procedural accuracy carried out by the RCC. Economic evidence is also to be assessed by the Court. With regard to the fines imposed by the RCC, the Court may annul them or reduce their amount.

In order to help judges interpret and assess different technical aspects, courts may appoint, ex officio or at the request of the undertakings, external independent experts.

The enforcement acts issued by the RCC (such as orders initiating/closing the investigation, decisions on merger control, including merger remedies, decisions making commitments binding, etc.) are subject to the same standard of review by courts, with a slightly different approach on decisions imposing fines, in that the courts also evaluate the proportionality of the sanctions.

Charging documents, such as statements of objections, and procedural acts, like request for interviews, etc., cannot individually be challenged before court.

The average duration of a competition case before the Bucharest Court of Appeal is, in the recent period, of 1.5 years.

Judgments of the Bucharest Court of Appeal may be appealed on points of law only before the High Court of Cassation and Justice – a generalist court as well. If the appeal is admissible and well founded, the High Court of Cassation and Justice may set aside the judgment of the Bucharest Court of Appeal. Where the state of the proceedings so permits, the High Court may itself decide the case. Otherwise, it refers the case back to the Bucharest Court of Appeal, which is bound by the judgment adopted by the High Court of Cassation and Justice.

The average duration of a competition case before the High Court of Cassation and Justice is, in the recent period, of 2.5 years.

## *Russian Federation*

In accordance with the Russian competition legislation every person has the right to appeal the decision of the Federal Antimonopoly Service of Russia (FAS) in the courts. According to the general rule of jurisdiction, an application to appeal the decisions and rulings of the antimonopoly body is submitted to the arbitration court at the location of the antimonopoly body that issued these documents. The decision or ruling of the antimonopoly authority may be appealed within three months from the date of the decision or issuance of the ruling.

Cases of bringing to administrative responsibility of business entities and individual entrepreneurs in connection with the implementation of entrepreneurial and other economic activities, referred by the federal law to the jurisdiction of arbitration courts, are considered according to the general rules of action proceedings.

All decisions adopted by the court on appealed cases are published on the official website of the FAS. In accordance with the Arbitration Procedure Code, the Supreme Court has the power to review decisions taken by courts of lower instances.

The Constitutional Court is responsible for considering issues regarding the conformity of standards of the legislation of the Russian Federation to the Constitution. For the entire existence of the FAS, there have been five cases referred to the Constitutional Court.

In January 2016, the Federal Law of 5 October 2015 No. 275-FZ came into force, which amended and supplemented the Law on Protection of Competition and certain legislative acts of the Russian Federation, i.e. the so-called “fourth antimonopoly package”. One of the most important changes of these amendments was the procedure for appealing decisions and rulings of the FAS Regional Offices to the FAS collegial body - an internal appeal.

Depending on the specifics of the cases under consideration, 14 Appeal Boards were formed by areas of activity: cartels, unfair competition, etc. In addition, the right to review the decisions and rulings of the FAS Regional Offices is vested in the FAS Presidium. The decision and (or) ruling of the FAS Regional Offices may be appealed within one month from the date of their issuance.

## Singapore

Singapore has an administrative competition enforcement system, where the Competition and Consumer Commission of Singapore (“CCCS”) is vested with the powers to investigate infringements, as well as the power to enforce the Competition Act (Cap. 50B) (“**Competition Act**”) by issuing a decision of infringement and directing the infringing parties to bring the infringement to an end.

The first instance of appeal against a decision by CCCS is to the Competition Appeal Board (“**CAB**”). A further appeal against a decision of the CAB is to the High Court, with final right of appeal to the Court of Appeal. The CAB has held that a party’s right to appeal is a statutory right as prescribed under the Competition Act. Under the Competition Act, a third party whom CCCS has not made a decision against has no statutory right of appeal.

The CAB is an independent body established under the Competition Act, where members are appointed on the basis of their ability and experience in industry, commerce or administration or their professional qualifications. The CAB is vested with the right to review on all points of fact and law *de novo*, including an unlimited review of the evidence. On an appeal before the CAB, CCCS bears the burden of proving that an infringement of the prohibitions has been committed and the standard of proof is the civil standard (i.e. balance of probabilities). The varied background of its members enables the CAB to have economic expertise in understanding the competition assessment undertaken in an investigation or merger assessment. In addition, the appeal hearing process before the CAB is adversarial in nature and each party is entitled to call economic experts. The CAB has been free to interpret the economic assessment tendered by the parties and their expert witnesses.

An appeal against the CAB’s decision lies to the High Court and it is limited to points of law and any decision of the CAB as to the amount of a financial penalty. The High Court and the Court of Appeal are general courts, with no specialised competition expertise. While there has yet to be an appeal to the High Court, given that the standard of review of CCCS’s decisions is the civil standard of proof (i.e. balance of probabilities), it is highly likely that the High Court in the exercise of its appellate civil jurisdiction will adopt the same standard of review (i.e. on a balance of probabilities) when hearing an appeal from a decision of the CAB.

CCCS as an administrative body is subject to judicial review before the High Court, with a further right of appeal to the Court of Appeal. Thus far, there has been no application for judicial review of CCCS’s decision. However, based on reported decisions of judicial review of other administrative bodies, it is likely that complaints against procedural decisions made by CCCS in the course of the investigation are subject to judicial review. It is likely that the undertakings under investigation or who are subject of the infringement decisions will have sufficient interest to apply for judicial review. It remains untested whether the right to apply for judicial review extends to third parties.

## *Slovak Republic*

The Slovak enforcement system is administrative. The Antimonopoly Office of the Slovak Republic (the Office) is the independent central body entrusted with the enforcement of the competition rules in the Slovak Republic. It has the power to investigate competition law infringements, as well as the power to issue decisions and impose fines.

The Slovak competition enforcement procedure has two stages. First, the relevant division of the Office adopts a decision. Then, this decision can be challenged before the Council of the Office. The Council consists of seven members, the Chairman of the Office, and six external experts (lawyers and economists). The Council of the Office may amend, uphold or annul the first-instance decision or close the proceedings for procedural reasons.

Parties may challenge the decisions of the Council before the Regional Court of Bratislava. Other acts, such as dawn raids, can be challenged as well. The Regional Court may uphold the decision, annul it and refer the case back, or modify the sanction that was imposed. Decisions with commitments and settlement decisions are in principle subject to review. The judgments of the Regional Court can be appealed before the Supreme Court of the Slovak Republic.

The judicial review of the Office's decisions is largely based on a review of the legality of the already established factual context. In this regard, courts should rely on the facts established by the public authority. However, the Regional Court can allow new evidence to be submitted in the review proceedings if needed for the review. Although courts have the power to hear experts, the Office has no experience with the court bringing an expert on its own initiative.

Both the Regional Court of Bratislava and the Supreme Court are general courts. The Office's decisions are reviewed by judges specialised in administrative matters. Although it is theoretically possible that courts decide that some of its judges specialise in competition law matters, this is unlikely, given the relatively low number of competition cases there are, for instance, compared to social security cases.

Exceptionally, competition infringements can constitute a criminal offence; for instance, when the infringement results in a considerable harm to a competitor. Only natural persons can be imposed a criminal sanction. Criminal cases are investigated by the police or the prosecutor and charges are brought before court in criminal proceedings. The Office is not aware of any criminal investigation and, hence, does not address this perspective in its submission.

## *Spain*

This paper examines the judicial review of competition cases in the Spanish jurisdiction. Particularly, it focuses on the acts and decisions which are subject to review, the standard of review applied by the courts in those cases and the interaction between the competition authority and the courts in order to ensure the effectiveness of competition law.

## *Switzerland*

Switzerland uses an administrative system in the public competition law enforcement. The Swiss Competition Commission (COMCO) adopts an administrative decision in response to a motion proposed by its Secretariat, which investigates all the cases. The first independent court is the Federal Administrative Court (FAC). The FAC performs a full review of factual and legal questions and thus meets the requirements of Articles 6 and 7 ECHR. The second judicial instance is the Federal Supreme Court (FSC). In contrast to the FAC, the FSC usually reviews only the application of the law.

The FAC and the FSC have to decide on a broad variety of different legal issues. As the courts are not specialized in competition law and economic matters, dealing with competition cases is rather demanding. In general, the courts' decisions are of high quality. However, some of the court proceedings take rather long. The Swiss parliament has charged the Federal Council to simplify the cartel proceedings before the courts and to speed them up by introducing deadlines in the relevant legislation to deal with this issue.

## *Ukraine*

Based on the results of investigation and the available evidence, the Antimonopoly Committee of Ukraine (AMCU) prepares a statement of objections (SoO), which contains description of circumstances, analysis of evidence and preliminary findings in the case and is notified to the case participants who are invited to submit their comments and objections. Following consideration of the parties' comments/objections, the AMCU findings may vary from reaffirmation of legal qualification of the respondent's actions as a competition law infringement to closure of the case due to the lack of evidence. Should the respondent or other case participant disagree with the AMCU final decision, it may seek to annul the decision fully or in part in the economic court within 2 months from the date of the receipt of the full text of the decision.

**Grounds for annulment of AMCU decisions.** AMCU decisions are presumed to be valid unless annulled by the court on exhaustive grounds (e.g. incomplete investigation of material circumstances of the case, failure to prove material circumstances of the case, which were deemed proven in the decision etc.).

**Annulable AMCU acts and court jurisdiction.** While the law expressly mentions decisions and resolutions of the AMCU as annulable in economic courts, recommendations and other AMCU actions are also in practice challenged in the courts and sought to be annulled, often in administrative courts, due to unclear rules on court jurisdiction over competition claims (expected to be cured by the Supreme Court).

**Involvement of expert examination in annulment proceedings.** Under the 2017 procedural codes the parties have a right to provide the court with expert opinions on issues which require special expertise in a non-legal sphere. A court on its own initiative or at the request of one of the case participants may decide to appoint a forensic expert, which now occurs increasingly more often.

**Judicial review of the amount of the AMCU fines.** Ukrainian laws do not expressly bar courts from revising the amount of fines imposed by the AMCU. However, in a well-established case law the cassation court has ruled that the courts have no competence to revise and reduce the amount of the AMCU fines and if the fine imposed by the AMCU is within the legal limits there are no ground to call the validity of the fine or its amount into question.

**Judicial review of obligations imposed by the AMCU.** Following the results of investigation, the AMCU may impose obligations on a respondent with the purpose of termination of the infringement. In doing so, AMCU has tended to specify the exact actions to be undertaken by the respondent in order to terminate the infringement. However, the Cassation court recently ruled that AMCU has no competence to order undertakings how to pursue their business activities, so they shall have a right to independently determine how they would terminate the infringement. At the same time, business entities often complain that the lack of specific instructions on termination of infringements causes difficulties in understanding which specific actions shall be taken which sometimes results in disputes.

**Time limits of judicial review and procedural delays.** Usually, the annulment proceedings regarding AMCU decisions last in courts for at least a year. However, the process is often considerably delayed due to a significant caseload of the courts and other



intervening circumstances and also may occur due to offender's deliberate delaying techniques (e.g. filing numerous complaints and requesting suspension of the proceedings). Although such abusive practices are capable of considerably delaying court proceedings and execution of AMCU and court decisions, Ukrainian courts have been mainly hesitant to effectively tackle them.

**Case law summary.** As of today, the AMCU is guided by the resolution of the Plenum of the Higher Economic Court of Ukraine (HECU) "On some issues of application of competition laws" which appears to be out-of-date, also due to the 2017 judicial reform which liquidated HECU. As a matter of practice, AMCU and courts are currently guided by interpretation given by the Supreme Court in individual competition related disputes, to be followed in cases with similar circumstances.

## *United Kingdom*

The CMA's submission is divided in two parts: The first aims to give an overview of the legal framework and the standard of review applied by courts in competition cases in the UK. The second focuses on the recent proposals suggested by the CMA Chairman to the Secretary of State for Business, Energy and Industrial Strategy, which relate to the court review of CMA decisions.

The first part explains the appeal process which is followed in competition cases and provides the main features of the courts that have jurisdiction to review the CMA's decisions. Appeals are most often taken to the Competition Appeal Tribunal (CAT), which is a specialist tribunal comprised of members with appropriate experience and expertise in the field. It is also noted that the standard of review depends on the nature of the CMA decision under review. Decisions on mergers, and on remedies following market investigations, are subject to ordinary judicial review. Decisions on antitrust and cartels cases are subject to a "full merits" standard of review.

The second part focuses on two main issues set out in the CMA Chairman's letter to the Secretary of State in February 2019. These are: a) the need for a faster review process, which could be achieved through greater restrictions on the admissibility of new evidence and less reliance on oral testimony; and b) the need to move away from the current "full merits" standard in Competition Act cases, either to a judicial review standard, or to a new standard of review, setting out specified grounds of permissible appeal. It is noted that at the time of the submission, the UK Government has not adopted any formal position, provisional or otherwise, on these proposals.

## *The United States\**

In the United States, the competition laws are enforced by two dedicated federal government agencies: the Antitrust Division of the U.S. Department of Justice (“DOJ”) and the U.S. Federal Trade Commission (“FTC”). But competition enforcement authority in the United States is not vested exclusively in the federal enforcement agencies. State governments can also enforce their own competition laws and some federal statutes, and sometimes they work together to bring cases. Most U.S. competition cases are brought by private citizens, seeking redress from the courts for the antitrust injuries they have suffered.

The U.S. federal courts play a central role in reviewing antitrust enforcement actions. Although the decision about whether or not to take enforcement action is committed to agency discretion, the DOJ is a law enforcement agency that has no adjudicative power on its own. Thus, in order to enforce the federal antitrust statutes under its purview (the Sherman Act and the Clayton Act), the DOJ, like a state or private enforcer, must file an action in a federal district (trial) court. The court is the arbiter of whether the law has been violated and, if so, orders appropriate remedies. The court is also responsible for resolving disputes over DOJ’s investigatory powers (*e.g.*, enforcement of subpoenas and other requests for information; authorization of search warrants, etc.). In addition, courts review cases that the FTC decides through its internal adjudicative process.

Regardless of whether a case is initiated by one of the federal enforcers, a state enforcer or a private citizen, the process is adversarial: the parties submit their evidence and arguments regarding the relevant facts to a judge (or potentially a jury in criminal cases). Based on the parties’ submissions, the judge (or jury) determines the ultimate facts and the court decides the case in accordance with the controlling law and precedent.

The U.S. judicial system provides significant due process protections to the defendant before liability can be imposed. For example, both the plaintiff and defendant may seek subpoenas for documents and sworn testimony, seek expedited dismissal of unfounded claims, cross-examine each other’s witnesses and argue the merits of their positions before a neutral decision-maker. The burden of proof for a violation of law lies with the enforcer or civil plaintiff. The defendant never needs to affirmatively prove their innocence in the United States.

In civil matters, the plaintiffs and defendants also enjoy the right to appeal an adverse ruling on the ultimate merits to an appellate judicial body, composed of neutral decision-makers. A corporate or individual defendant convicted in a criminal case also has the right to appeal.