



THE RESOLUTION OF COMPETITION CASES BY SPECIALISED AND GENERALIST COURTS

Stocktaking of international experiences



The resolution of competition cases by specialised and generalist courts: Stocktaking of international experiences

**Ministry of Economy of Mexico-OECD Co-operation
to Strengthen Competitiveness in Mexico**

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Foreword

In December 2014 the OECD signed an Agreement with the Ministry of Economy of Mexico to strengthen Mexico's competitiveness through economic competition. The support provided by the OECD through this agreement aims to help the Ministry in its contribution to the efficiency of markets in Mexico, particularly in those in which performance could be negatively affected by structural, conduct and regulatory features.

The Constitutional reform in telecommunications, broadcasting and economic competition of June 2013 modified Mexico's institutional landscape in these three public policy areas. First, the reform created two competition authorities – the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT);¹ second, established specialised courts in these areas;² and third, mandated the enactment of a new Federal Economic Competition Law (FECL) which was published in the Federal Official Gazette in May 2014.

The new FECL endows the Federal Executive Branch, by itself or through the Ministry of Economy, to make requests to the competition authorities to start investigations and special procedures, to perform studies and to issue non-binding opinions.³ The Ministry, on the basis of this new attributions granted by the new FECL and its mandate to formulate and conduct general industrial, foreign trade, internal trade and supply policies in Mexico, is the authority responsible for promoting productivity and competitiveness of the country's economy in the benefit of consumers, to create a better business environment, to strengthen Mexico's internal market, and to attract national and international investment.⁴

The work carried out by the Mexican competition authorities and the Ministry of Economy to improve competition and market efficiency, as well as to boost Mexico's productivity and competitiveness also requires stronger judicial institutions that ensure the correct and effective implementation of the new FECL, and therefore compliance with the aforementioned constitutional reform.

The Ministry is very conscious of the essential role that the new courts specialised in economic competition have in the creation of a specialised legal system that generates certainty for firms' decision making in the field of investment, favouring a better business environment, while at the same time creating favourable conditions for consumers. Therefore, the aforementioned agreement sets forth the following two means for providing an overview of international experiences and best practices to these courts:

- *Elaboration by the OECD of the present report*, which provides an overview of international experiences on the different institutional designs of competition law systems⁵ – with an emphasis on the role of courts within the systems and in the implementation of competition policy; on issues related to court specialisation (such as its motives and benefits); on factors that may contribute to the strengthening of courts; and on the relationship amongst courts, competition agencies, regulators and other government bodies.

- *Promotion of open and fluid communication among the Ministry, the specialised courts, the competition agencies and the private sector* through the organisation of three workshops (held in October, November and December 2015)⁶ – with the participation of judges from the United States and Puerto Rico and the Chairman of the OECD Competition Committee.

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Acronyms and abbreviations

ABA	American Bar Association
ACCC	Australian Competition and Consumer Commission
ACT	Australian Competition Tribunal
AEC	Adverse effect on competition
AECLJ	Association of European Competition Law Judges
AIJDR	Ibero-American Association of Judges in Regulatory Law <i>Asociación Iberoamericana de Juzgadores en Derecho Regulatorio</i>
ALJ	Administrative Law Judge of the FTC
CAA	Civil Aviation Authority of the United Kingdom
CAT	Competition Appeal Tribunal of the United Kingdom
CC	Competition Commission of the United Kingdom
CCI	Competition Commission of India
CDPP	Commonwealth Director of Public Prosecutions of Australia
CFC	Comisión Federal de Competencia de México <i>Federal Competition Commission of Mexico</i>
CIDAC	Centro de Investigación y Desarrollo A.C. de México <i>Centre for Research and Development in Mexico</i>
CIDE	Centro de Investigación y Docencia Económicas A.C. de México <i>Centre for Research and Teaching of Economics in Mexico</i>
CJF	Consejo de la Judicatura Federal de México <i>Federal Judicature Council of Mexico</i>
CMA	Competition and Markets Authority of the United Kingdom
COFECE	Comisión Federal de Competencia Económica de México <i>Federal Economic Competition Commission of Mexico</i>
COMPAT	Competition Appellate Tribunal of India
DOJ	Department of Justice, Antitrust Division, of the United States
FECL	Federal Economic Competition Law

FCA	French Competition Authority <i>Autorité de la Concurrence</i>
FNE	Fiscalía Nacional Económica de Chile <i>National Economic Prosecutor's Office of Chile</i>
FTC	Federal Trade Commission of the United States
IADB	Inter-American Development Bank
ICN	International Competition Network
IFT	Instituto Federal de Telecomunicaciones de México <i>Federal Telecommunications Institute of Mexico</i>
IJF	<i>Instituto de la Judicatura Federal de México</i> Federal Judicature Institute of Mexico
IMSS	<i>Instituto Mexicano de Seguridad Social</i> Mexican Institute of Social Security
IMCO	<i>Instituto Mexicano para la Competitividad</i> Mexican Institute for Competitiveness
LRAIC	Long run average incremental costs
OFCOM	Office of Communications of the United Kingdom
OFGEM	Office of Gas and Electricity Markets of the United Kingdom
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading of the United Kingdom

Executive summary

Competition law vests competition authorities with direct powers to apply the law. However, courts also play a central role by guaranteeing due process and by applying substantive and economic principles in the review of decisions issued by the authorities; these bodies can even provide a certain degree of flexibility in the implementation of legislation by setting judicial precedents. The correct functioning of these bodies is crucial for ensuring that competition authorities act appropriately and for creating an environment of certainty and predictability in market economies.

There are two competition system models: the bifurcated and the integrated. Bifurcated models are those in which courts have the faculty to decide the cases that are brought to them by competition authorities, which act as prosecutors, or by private parties that have carried out their own investigation. Integrated models are those in which courts review the decisions issued by the Plenum or Administrative Council of the competition authority. Under this model, the authority has both investigative and decisional powers. Moreover, there are jurisdictions, such as the United States or Australia, that combine both models.

Courts in both models can be of general jurisdiction or specialised in competition, and they can assess some or all competition law cases. Courts of general jurisdiction can review civil, administrative or criminal matters, which include a wide range of issues. Specialised courts are those which gather cases that are handled differently and whose judges have expertise and specific experience in that particular area of law. In the field of economic competition, the reason for this concentration of cases lies in the procedural and substantive complexity of competition law, as well as in the need to increase certainty and predictability in the markets through the expedited adjudication of cases on this matter.

The specialisation of courts is a matter of degree, and can range between partial and full specialisation in competition matters, which could even also cover regulatory issues. The specialisation of these bodies can entail at least three advantages:

- *Greater efficiency* brought about by the repetition and standardisation of tasks, the skills and experience of the judges reviewing and understanding economic evidence, as well as the arguments that support competition cases. Efficiency can be measured through the review duration indicator. Shorter review times will generate greater certainty in the markets, and it is a good practice to set up deadlines to finish the review.
- *Uniformity of decisions* is promoted through the concentration of all cases of a specific type in a single court. Greater subject matter specialisation and a reduction in the number of judges will further promote uniformity. The greater the uniformity in legal interpretation in the field of economic competition, the greater the certainty and predictability in the market.
- *Improvement in decision quality* is a result of the increase in skill and experience in the correct application of competition law to a case's evidence. Moreover, when courts fulfil their tasks correctly, i.e. making authorities accountable and reversing their decisions when they are erroneous, they can have an effect in the quality of the decisions issued by the competition authority itself.

Regardless of the above, international experience shows that courts of general jurisdiction are also capable of having a broad knowledge of substantive questions of competition legislation, as well as skills and experience in competition and economic matters. Additionally, specialised courts can be affected by the risks that the concentration of cases in one single body can bring about – such as capture by a specific group of court users, the potential bias in the judge selection process, the less broad experience due to the judges’ focus on a specific legal area, and the detachment from the judiciary system. Measures such as the development of procedures or performance guidelines or indicators can help specialised courts, their users and the general public to assess the courts’ performance, besides contributing to the identification of risks that may affect it.

The present report highlights other factors that also influence the performance of courts, both of general or specialised jurisdictions, involved in competition law and policy enforcement. They are:

- *Selection process of judges* reviewing competition cases, which often takes place in a two-stage process, typically carried out by two different instances, which contributes to guarantee its independence. The selection process may or may not include a public competition, and it may be open to any person holding a law degree or to so-called specialists who do not hold a law degree but who have some form of specialisation or practical experience (e.g. who are economists, accountants, finance experts, etc.).
- *Prior experience* required to become a judge varies between jurisdictions – for instance it can be left open or vary between five and twenty years of experience as a judge or practitioner.
- *Appointment duration* also varies. International experience shows that judges from general jurisdiction courts have long appointment periods, until retirement, or even life tenure, in contrast with shorter appointments (for instance, of six, seven or eight years) for judges of specialised courts. When judges have shorter appointments they may often have the possibility to renew them with the goal of giving continuity to their work and in order to accumulate more experience in competition matters. Moreover, these appointment periods can be staggered in order to guarantee that there are always experienced judges serving in the court.
- *Understanding of substantive concepts* by judges is essential. Some basic concepts that judges must be well informed about are market definition, market features, market characteristics and theories of harm. These concepts typically frame competition cases and guide the interpretation of detailed evidence.
- *External economic experts* can help judges interpret economic evidence and assess its probative value. Ideally, economic experts must be defenders of their own economic position, and this position must be firmly grounded on economics. This can be achieved when the selection of experts is carried out in a transparent, impartial way on the basis of their qualifications, when these experts have good communication skills, their results and testimonies are presented, assessed and contested by parties, and their methodologies and theories have been sufficiently proven.
- *Technical skills of the court’s staff* are essential for the development of a specialisation on economic competition matters. These skills can be developed through access training for the staff working with judges, supported by a robust system of continuous judicial training in competition matters. International training is also essential to obtain better practices and experiences from other jurisdictions and can be more effective if this knowledge is brought to the court and shared through local training.

- *Robust management systems* must be adopted for a reliable and transparent management of judicial processes, as well as for the systematic production of databases and statistics on the body's results.
- *Court transparency* is fundamental in order to create public trust toward the court. Robust management systems will allow for the organisation and structuring of case information that might become public. Another transparency tool is the broadcasting of sessions through the internet or television.
- *Court expense structure* is an effective means of increasing clearance rates and reducing the duration of litigation. International experience proves that investment in infrastructure and information technology contributes to the above.

The effective application of competition legislation calls for courts to apply due process and become familiar with competition and economic matters. The interaction between courts, competition authorities and regulators can contribute to achieving this. This interaction may be formal or informal. Formal interaction generally takes place in the context of a judicial review. Informal interaction generally takes place in the context of conferences, seminars or workshops. When these activities are organised by competition authorities, regulators and Ministries for the promotion of competition culture they are known as advocacy initiatives.

Competition authorities, government bodies with competition powers, the legal community, the academic world and non-governmental organisations generally develop advocacy initiatives under the form of tailor-made training for judges on competition and economics matters. Another practice aimed at increasing the knowledge and understanding of competition legislation by courts is the creation or adhesion to regional judge networks. Two international networks are highlighted in this report, namely the Association of European Competition Law Judges and the newly created Ibero-American Association of Judges in Regulatory Law (Asociación Iberoamericana de Juzgadores en Derecho Regulatorio). Additionally, the report highlights the role of international organisations, such as the OECD, the ICN and UNCTAD, which constitute neutral forums where competition authorities, regulators, Ministries, courts and experts discuss matters related to the effective application of competition law and policy.

Finally, it is concluded that, regardless of the legal system where courts operate, the type of review they carry out or the powers they have to apply competition legislation, they have a great impact in the correct and effective implementation of the competition law. The aim of this report is to contribute to the strengthening of these bodies, providing them with a general overview of international experiences and best practices. Taking this goal into account, it is essential for the Ministry of Economy, the new courts specialised in telecommunications, broadcasting and competition matters, and the Mexican competition authorities to create, reinforce and maintain open and clear communication channels, and to promote through them the exchange of experiences and best practices, in particular as regards the substantive and procedural soundness of the decisions issued by the competition authorities, as well as with regard to the results of court reviews.

In particular, this report is expected to become a reference document for the members of courts specialised in telecommunications, broadcasting and economic competition, and where relevant, for the Mexican Judiciary; it is further expected to be considered in the fulfilment of these bodies' duties, as well as in the planning of modifications to their operations with the purpose of making them more independent, transparent, effective, uniform and predictable – for the benefit of consumers, market participants and the Mexican economy as the whole.

Introduction

This report provides an overview of international experiences and best practices related to the role of courts in the implementation of competition policy. It aims to become a reference document for the Judiciary and court members, particularly for judges of Mexico's courts specialised in telecommunications, broadcasting and economic competition, in the exercise of their duties, as well as when planning modifications to their operation with the purpose of improving it. In addition, this report provides an insight of the role of courts in competition law systems which can be useful for improving its understanding by competition agencies, other public entities, the private sector and the academia.

The report is divided in the following seven sections:

- *Section 1 – Introduction* provides a general definition of competition and competition policy and a general description of the evolution of competition policy in Mexico.
- *Section 2 – Competition policy and the role of courts* describes the crucial role of courts in the effective implementation of competition policy.
- *Section 3 – Judicial enforcement of competition law* provides a description of the institutional settings in which courts are enforcement decision-makers and have adjudicative competition powers. Examples provided of these types of courts are from Chile, the United States, Canada and Australia. This section also provides a description of the institutional settings in which courts function as reviewers of cases adjudicated by competition authorities or regulators. Examples from Australia, Mexico, the European Union and the United States are provided to illustrate the latter setting.
- *Section 4 – Court specialisation* describes the characteristics of general jurisdiction and specialised courts. This section also describes the different degrees of specialisation that courts may have. It presents examples from the United States, France, Finland, India, and the United Kingdom.
- *Section 5 – Benefits of court specialisation* describes three possible advantages of court specialisation (greater efficiency, enhanced uniformity, and quality of decisions). It presents examples from the United Kingdom and Mexico.
- *Section 6 – Determining factors of courts' outcomes* describes factors that may contribute to the strengthening of judicial institutions and that may enhance their role in the implementation of competition policy and law. It presents examples from Chile, Mexico, Canada, Australia, the United Kingdom, the European Union and the United States.
- *Section 7 – Relationship with courts* describes forms of interaction between competition authorities, sectoral regulators and courts. This section emphasises the importance of competition advocacy as a means for facilitating technical capacity building in economic and competition issues to judges. It also describes the key role of international organisations and networks in facilitating an effective relationship with courts that review competition cases.

1. Evolution of competition law and policy in Mexico

Competition is the process of business rivalry between firms in the marketplace. This process provides an incentive for firms to improve their products and reduce costs, which leads to increased or improved choice for consumers, allowing them to choose between products or services with the price and quality characteristics that most closely match their needs.

Competition plays a key role in how markets operate –

“Competition has two main benefits: first, it protects consumers from companies that may, at times, seek or use market power⁷ to raise prices or reduce outputs. Second, it promotes productivity growth, largely by imposing stronger rivalry among companies to succeed in gaining the business of customers, which in turn leads to faster economic growth (OECD, 2014a).”⁸

When firms cannot freely enter and exit the market at a given time, or when they face other structural, regulatory or conduct restrictions, competition policy and law enforcement are needed to achieve greater economic efficiency in the marketplace (OECD, 2015a) (OECD, 2006).⁹

Competition policy is “*the set of policies and laws which ensure that competition in the marketplace is not restricted in a way that is detrimental to economic welfare* (Motta, 2004) (OECD, 2011c).”¹⁰ Even though the objectives of competition policy may differ across jurisdictions, most of them converge in a basic one, which is to maintain and encourage the process of competition in order to promote efficient use of resources while protecting the freedom of economic action of various market participants (OECD, 2003) (OECD, 2011c).¹¹ In consequence, competition policy aims to attain greater market economic efficiency in order to increase the economic welfare of society¹² through competition law enforcement and advocacy to make markets freer and more open (OECD, 2015a).

Mexican competition policy emanates from Article 28 of the Mexican Constitution. The Federal Economic Competition Law (FECL) is designed to give operative force to the provisions set out in this Constitutional Article (OECD, 2004a).¹³

Competition policy has evolved rapidly in Mexico since the entry into force of the first FECL in 1993.¹⁴ Since then, the FECL and Article 28 of the Constitution have been modified to strengthen the process of free market access and competition in the Mexican markets.

The 2006 FECL reform¹⁵ included specific economic concepts for a firm to argue that there are efficiency gains that offset a practice’s anti-competitive effects in the cases of relative monopolistic practices; merger notification thresholds increased by 50 per cent, in order to allow the extinct Federal Competition Commission (CFC) to focus on the transactions that were most likely to raise competitive issues in the Mexican markets; it also contemplated a merger review process for issuing a decision within 15 days after receiving the reception agreement (only for cases that clearly raise no competitive concerns) ; five additional conducts that may constitute relative monopolistic practices were added (OECD, 2006) (OECD, 2004a);¹⁶ the CFC acquired powers to conduct on-site searches (prior

authorisation of the judiciary) that allowed for the gathering of information within its investigations; it granted the power to give immunity to the economic agent that requested it following its participation in an absolute monopoly practice, as long as it provided information proving the practice and given it co-operated during the investigation and the trial-type procedure; it provided higher economic sanctions; and it included sanctions such as asset divestiture. The reform also eliminated the authority's powers to initiate investigations that could give rise to liability and the imposition of sanctions later than five years after the prohibited conduct by the law has been committed.¹⁷

Even though this reform strengthened competition policy and enforcement in Mexico, it did not solve certain significant problems, which are explained below.

The reform of 2006 did not address important aspects of the judicial system that created significant obstacles to the effective implementation of competition law in Mexico. These obstacles included the ample opportunities for economic agents, in the context of a competition case, to start time-consuming litigation known as *amparo* (OECD, 2011a) (OECD, 2007),¹⁸ before administrative courts of general jurisdiction, against the decisions of the competition authority. In addition, parties could seek judicial relief before the Federal Court of Fiscal and Administrative Justice (TFJFA), in order for this court to review any action by the CFC involving solely the imposition of a monetary payment obligation. Therefore, the CFC's investigation and resolution proceedings were routinely subject to multiple *amparos*, leading to court orders suspending the competition authority's proceedings, and where court judges reviewing these cases were usually unfamiliar with competition issues.

The 2011 FECL reform¹⁹ introduced several important changes. It applied OECD recommended best practices in order to increase the chance of the competition authority to detect firms abusing market power, while increasing the cost of these abuses by increasing the amount of economic sanctions; it also allowed unannounced on-site searches; expanded the scope for criminal prosecution with 3 to 10 years of imprisonment against individuals engaged in cartel activity; and maximum fines were increased as high as 10 per cent of company revenue (OECD, 2011a).²⁰

This reform foresaw that judicial reviews to the competition authority's resolutions should be referred to courts specialised in competition law and eliminated the possibility of challenging the authority's decisions before the TFJFA. In particular, the reform referred to an ordinary administrative judicial procedure. Unlike the 15 days available to request *amparo*, the claim in this procedure could be filed within 30 days after the decision.

Considering that the courts would be specialised, the FECL was reformed again by decree of 30 August 2011 in order to provide for persons that had suffered damages as a result of a monopoly practice or unlawful concentration to be able to file claims in defence of their rights or interests in a manner independent from the procedures provided for by the FECL itself.

The elimination of the possibility of challenging decisions before the TFJFA was of particular importance because the reform partly addressed the way that reviews by courts were handled, since the authority's proceedings could still be routinely subjected to multiple *amparos* leading to court orders to suspend them (OECD, 2011a). The aim of the creation of courts specialised in competition was to reduce the duration of the lengthy review proceedings and to increase the quality of the courts' decisions.²¹ Despite this reform, the length of time that courts took to review cases remained a problem since the specialised courts with expert judges that were envisioned by the reform were not set up and the ordinary administrative judicial procedure before these courts was never implemented.²²

In 2014 a new FECL²³ was enacted in accordance with the Constitutional reform in economic competition, telecommunications and broadcasting of June 2013. The Constitutional reform created the Federal Economic Competition Commission (COFECE) as an autonomous entity with competition enforcement and advocacy powers in all sectors of the economy, with exception of telecommunications and broadcasting, where the Federal Telecommunications Institute (IFT), also created as an autonomous entity by the aforementioned reform, is the competent authority. To restore dynamism in the markets, these new agencies were strengthened with the power to regulate access to essential facilities and remove barriers to competition.

In order to reduce abuse in the use of *amparos*, the Constitutional reform of 2013 brought an important modification in the way *amparos* were processed in economic competition cases. The reform established that acts and resolutions issued by the competition authorities can only be challenged once the final resolution is issued, through an indirect *amparo*²⁴ ruling, and that the effects of the competition authorities' resolutions cannot be suspended during the period in which an *amparo* ruling is being processed by a specialised court (OECD, 2015).²⁵

In addition, in 2013 progress was made in setting-up specialised courts. That year, two new District Courts specialised in competition, telecommunications and broadcasting cases, as well as two Collegiate Circuit Courts, specialised in these same matters, were established. These are situated in Mexico City but have nation-wide jurisdiction. The current judges of these courts were selected by the Federal Judicature Council (CJF) on the basis of their expertise and experience in such matters (OECD, 2015).²⁶

1.1 Conclusions

An effective implementation of competition policy and law is crucial for increasing competition in the marketplace. This has the object of preserving the integrity of free markets, undistorted by anti-competitive conduct – which translates into more competitive markets, what leads to greater improvements in the productive efficiency of firms, increases innovation, benefits consumers, and ultimately results in higher productivity and faster economic growth (OECD, 2015a).

The evolution of Mexico's competition policy is aimed at boosting the productivity and economic growth of the country.

Giving effect to the full range of competition reforms that have taken place over the last twenty years in Mexico requires strong judicial institutions capable of reducing the length of judicial review and of producing quality decisions that instil certainty into markets, that create a climate of trust which encourages firms to invest, innovate, compete and deliver more choice for consumers of products and services with better prices and quality and that, at the same time, has the judicial strength necessary to discourage anti-competitive practices (OECD, 2013).

With the creation of specialised courts, the judiciary becomes an even more crucial element in the implementation of economic competition policy, since its decisions will set up to a considerable extent the future precedents in this matter.

The aim of this report is to contribute to the strengthening of these institutions by providing them with an overview of international experiences and best practices carried out by courts in the implementation of competition policy and law.

2. Competition policy and the role of courts

Effective implementation of competition policy is a necessary condition for the *efficient operation of markets* (OECD, 2015b).²⁷

For this policy to be implemented, competition law should constitute the substantive law that regulates the relationship of market participants, and its objective shall be precisely to maintain effective competition in the marketplace.

Competition authorities are the main implementers of this policy, and in the law, they are expressly granted powers to that end (OECD, 1996).²⁸ Nevertheless, courts also have a central role in the implementation of competition policy (OECD, 1996) (OECD, 2011).²⁹

2.1. Courts and the market economy

Well-functioning courts when carrying out the judicial control function are an indirect determinant of economic performance (OECD, 2013)³⁰ – by promoting efficient production and distribution of goods and services, and by securing two essential prerequisites of market economies: security of property rights and enforcement of contracts (OECD, 2013) (Williamson, 1996).³¹

Property rights provide incentives to individuals and market participants to save and invest by protecting returns from the activities carried out in the markets. This enhances the development and deepening of financial and credit markets, promotes innovation efforts and increases the ability of countries to attract investments (OECD, 2013).

Enforcement of contracts simulates individuals and market participants to enter into economic transactions, by dissuading opportunistic behaviour and reducing transaction costs. This promotes competition by:

- encouraging buyers to enter into transactions with sellers without established reputation;
- facilitating firms' growth by fostering investments and innovation; and
- increasing efficiency through the promotion of market transactions.

2.2 Singularity of competition law

In the sphere of competition policy, courts decide upon the decisions of the authority considering the arguments of the parties involved (often market participants) and the authority, and they solve disputes between a market participant and the competition authority (OECD, 1996) on the basis of competition law.³²

Competition law encompasses a complex system of rules and procedures (OECD, 1996), and is fundamentally subjective – in the sense it is based upon a public policy – and can therefore include non-economic goals and purposes, such as the guarantee of procedural fairness, through the protection of the

rights of parties, to ensure accountability of administrative processes or to ensure consistency, from a legal perspective, in the actions of the authority reviewed by the courts (David, et al., 2014).³³

There is also a close and fundamental relationship between economics and competition law, where economics provides the substantive basis for this law.

“Few areas of laws draw more heavily, or more directly, on economics learning than competition or antitrust law. The reason for this is simple: in order to condemn only practices that are anti-competitive and to leave markets free otherwise, competition law needs a screening device that will single out for enforcement only practices that undermine the market. Of the many such devices available, economics is prima inter pares: whether a country purports to rely solely on economic criteria, or it prefers to use economic criteria along with other factors, it is a virtual certainty that economic criteria will play a central role in competition policy and enforcement (OECD, 1996).”³⁴

Thus, economics contribution to competition law, as well as to competition analysis, is important.

In this context, the courts’ three most important functions in the implementation of competition law are (OECD, 1996):

- ensuring procedural due process,
- applying substantive or economic principles, and
- bringing a certain degree of flexibility.

Hereunder each of these functions is generally described.

Ensuring procedural due process – is carried out through the protection of fundamental procedural rights, such as the right of privacy, to a fair and impartial hearing, and confidentiality of information. Procedural due process ensures that competition law is implemented in an objective fashion and that the competition agency is accountable, allowing for impartiality and consistency in the interpretation of the law. In this, courts have to strike a balance between fundamental rights and those essential investigatory powers that are allocated to the competition authority.

Box 2.1 provides an example of the courts’ responsibility to ensure that competition law is enforced in accordance with the rights of confidentiality and defence.

Box 2.1. Mexico’s example on the right of confidentiality of information

In September 2015 the Supreme Court of Justice (SCJN)¹ assessed several cases related to confidential information. It stated that confidential information could be disclosed to the parties of a judicial review.

In making this decision, the SCJN analysed the following arguments:

- Some courts held that it was not the role of the district judge to declassify the information classified by the authorities – since the judge has no attributions for this declassification.
- Other courts argued the opposite – in order not to leave the parties unprotected.

The SCJN established that judges, under their sole responsibility may grant access (full or partial) to the parties, provided there are reasonable grounds for this access.

Thus, judges shall guarantee that the information is essential for the defence of the parties; they must secure the safety of the information, weigh the right of the parties to access the information, and impose necessary measures in order to guarantee the information is by no means photocopied, photographed, scanned, or transmitted to a third party.

If a judge declassifies information, sufficient guarantees shall be provided to its owner that will ensure him or her that it will not be used in their prejudice. For this, the judge must carry out a procedure which starts with a request to the owner of the information in order that he or she pronounces on this request; then, the judge will weigh the need for declassification with the arguments supplied by the owner of the information. Lastly, if the decision is to declassify, the judge must specify to whom and why it will be shown.

The judge may also request the creation of a public version of the information.

A decision of a judge to declassify information, in competition cases, may be subject to a reconsideration resource.²

1. Information classified as reserved or confidential exhibited with justified report. The constitutional judge, on his or her own and strictest responsibility, may grant the parties access to the information he or she considers essential for their defence. Décima Época. Registry: 2009916. Authority: Plenum, *Source*: Gazette of the Federal Judicial Weekly, Book 22, September 2015, Volume I. Matter(s): Common. Thesis: P./J. 26/2015 (10a.), page: 28, arising from ruling contradiction 121/2014.
2. Article 81 of the Political Constitution of the United Mexican States.

Source: Presentation made by Judge Silvia Cerón, about the Supreme Court of Justice (SCJN) on the treatment of confidential information, in the workshop of November 4, 2015.

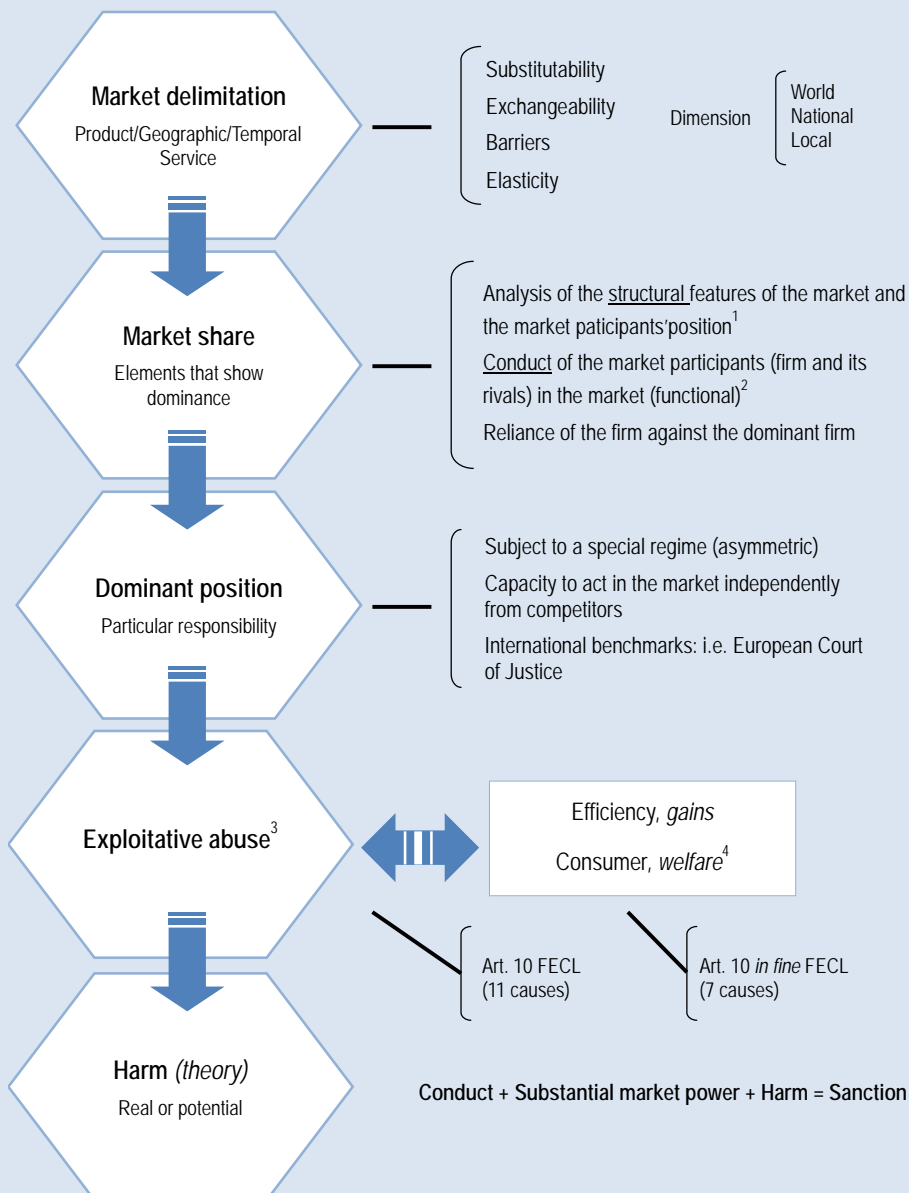
The application of economic or substantive principles – of the competition legislation in a correct and consistent manner. Through this application, courts may make allowance for the imperatives of economic principles in implementing competition laws, *bringing economic facts and concepts into legal reasoning*³⁵ when making determinations.

With regards to economic facts, judges have to weigh the economic implications in terms of obligations and penalties, and they must be able to grasp economic concepts if they are to take account of these implications in reaching a decision.³⁶

Therefore, judicial reasoning may act as the link between the economic authority's expertise and the market participants' rights.

Box 2.2 provides an example of the process of bringing economic facts and concepts into the legal reasoning. This process was developed and used by a Mexican Collegiate Circuit Court to analyse abuse of dominance cases.

Bringing a certain degree of flexibility – as a consequence of the work of courts, allows for the adaptation and evolution of the legal framework through the adjudication of cases and the setting of precedents. That degree of flexibility in the implementation of competition policy and law is a function that promotes their development by allowing for the application of current economic thinking into them. This may be particularly the case for systems where competition law is set mainly through judicial precedent.³⁷

Box 2.2. Mexico's example of the analysis of economic factors into the legal reasoning**Elements to analyse abuse of dominance**

Notes: 1. a) Market share b) Temporality c) Barriers to entry d) Vertical integration e) Financial power f) Technology and intellectual property rights g) Size and global strength. 2. Required information and meet industrial organisation. 3. Abusive exploitation is an objective concept referring to the behaviour of an undertaking in a dominant position which may affect the structure, exist in a market where, precisely because of the presence of the company in question, the intensity of competition that is already weakened and which has the effect of impeding, by means other than those of governing normal competition in products or services on the performance of economic agents, maintaining the level of competition still existing in the market on the growth of that competition. TJUE 85/76 Hoffman-La Roche p. 91. FECL, Art. 54, Subsection III. Have or may have as their object or effect, in the relevant market or in any related market, unduly displaced other economic agents, substantially hindered their access or established exclusive advantages in favour of one or more economic agents. 4. Efficiency gains and a favourable impact on the process of economic competition and free surpassing its possible anti-competitive effects, and result in improved consumer welfare.

Source: Presentation made by Magistrate Jean Claude Tron Petit, about the Big Cola case, in the workshop of October 23, 2015.

2.3 Balancing of competition law principles

Judges are uniquely qualified to perform a balancing of procedural and substantive principles in competition enforcement due to at least three main reasons (OECD, 1996):

- *Independence* – from other branches of government; this allows for impartiality and consistency in the interpretation of the competition law.
- *Experience* – in the process of discerning the underlying purpose(s) of the law and reconciling those fundamental goals of the law with the need for fair and transparent application of the law.
- *Expertise* – in the interpretation of the law.

Box 2.3 provides an example of a formal proceeding for the analysis of competition cases where a court balances procedural and substantive principles in a transparent application of the competition law.

Box 2.3. Chile's TDLC's role in a formal proceeding

The Competition Tribunal (TDLC) is the decisional judiciary body having exclusive jurisdiction on competition law and ruling in both adversarial procedures (such as cartels or dominance abuses) and non-adversarial ones (such as mergers).¹

Adversarial proceedings² can be initiated both by a complaint by the National Economic Prosecutor's Office (FNE) or by a private plaintiff's complaint (or by other public body acting as a plaintiff). The procedural form of an adversarial proceeding is a trial where the FNE or a private plaintiff submits the grounds for an accusation and the defendant has a deadline for submitting a response or defence to the accusation.

If there are facts that must be proven, a stage for submitting evidence takes place. Evidence submitted can be commented on by the parties. Then, a public hearing where all the parties can present their arguments orally before the TDLC's five judge members is carried out to conclude the opportunities for parties' participation in the proceeding until the issuing of the TDLC's ruling. After this final hearing the TDLC may still order the parties to further clarify those facts that still appear to be obscure and doubtful and to carry out probative activities considered indispensable for the decision.

Even though the proceeding is public, the TDLC must avoid the risk of disseminating the parties' sensitive commercial information and thus it should decree on petitions about the confidentiality of records, balancing protection of sensitive commercial information and due process and the parties' rights of defence.

1. See Box 3.1 for a general description of the institutional arrangement for competition law in Chile.

2. See subsection 2.4.1.

Source: Based on information from (OECD, 2011b).

2.4 Legal factors influencing the role of courts

There is a significant difference among jurisdictions in relation to how they deal with the role of courts in the implementation of competition law. The difference may be a function of a jurisdiction's history, legal and political culture (North, 1993).³⁸

This report only describes in general terms the legal factors that may have an influence in the role of courts that implement competition law. These factors are the type of legal system, the type of standard of review and the court's powers.

2.4.1 Legal system

Courts perform in a judicial system, which may be adversarial or inquisitorial.³⁹

Adversarial systems aim to get the truth through the open competition between the prosecution and the party's defence to make the most compelling argument for their case. Therefore the responsibility for gathering evidence rests with the parties of the trial. This system is also known as accusatorial and is typical in common law justice systems.⁴⁰

Inquisitorial systems aim to get to the truth of the matter through extensive investigation and examination of all evidence by the court. Typically there is an investigation phase for collecting evidence and generally an examining phase, where the judges' analysis is based on written narrative documents. This system is more common in Roman law countries or in those having roman-canonical legal traditions.⁴¹

2.4.2 Nature of the standard of review

Another important consideration in respect to the role of courts in the implementation of competition policy and law relates to the standard of the review of the competition authority's decisions – that is the form of judicial scrutiny. In general terms the form may be classified in two different reviews: judicial and on the merits (or on substantive issues) (David, et al., 2014).⁴²

Judicial review – focuses on the lawfulness of the action of the authority that is subject to review, based on specific grounds challenged before the court (David, et al., 2014).

There are three traditional grounds for this type of review – these are not exhaustive nor mutually exclusive (David, et al., 2014):

- *Illegality* – when the competition authority acted in a manner which is inconsistent with that established in the law, the decision was taken for improper purposes; and when the authority used its discretion unlawfully (David, et al., 2014),⁴³ taking into account unlawful considerations in its decision.
- *Unreasonableness* – is referred to as a subjective concept in that it has to do with the irrationality of the authority in the exercise of any discretion.
- *Procedural inaccuracy* – when the authority has not complied or followed the right procedure.

Although a judicial review places an emphasis in the legality of the authority's action – apparently indicating that the court will not engage thoroughly with questions of fact but will instead focus on issues of law – the boundaries of this review are often difficult to establish and that is why a material error of law or wrong assessment of facts may constitute a ground for a judicial review, without the court being expected to conduct a full factual assessment (David, et al., 2014).⁴⁴

Review on the merits – is often referred to as an appeal process in which all possible grounds of review are examined, including a full factual assessment of the rationality and opportunity of the authority's actions. The court will attempt to go beyond the usual grounds of the review in order to determine whether the decision of the authority was correct, in view of its faculties. Therefore, in this type of review a decision of an authority may be found incorrect, after a careful examination of the facts, even though it was made according to the law, it was reasonable and carried out with procedural

accuracy.⁴⁵ See Box 2.4, which provides an example of the standard of review conducted by the Competition Appeal Tribunal of the United Kingdom.⁴⁶

Box 2.4. Standard of review: an example of the United Kingdom

The intensity of review of a regulator's decision by the Competition Appeal Tribunal (CAT)¹ may comprise a judicial review, on the merits or in accordance with the statutory defined standard, which sets out particular grounds for an appeal.²

A judicial review may be available in circumstances where a regulator makes a decision and the legislation is silent on any right of appeal. In contrast, an appeal on the merits may involve a consideration of whether a decision was right.

Allowing for a more detailed scrutiny of facts and legal arguments underpinning a decision through a full merits review should make it less likely that errors will occur in decision-making, contributing to greater certainty. A merits review could also avoid some of the unintended consequences of judicial review, for example that regulators focus on procedural aspects.

Equally, a merits review could allow a decision to stand, even if there were procedural deficiencies, whereas a judicial review would require the decision to be remitted to the authority.

Appeals play a vital regulatory accountability role in the United Kingdom by allowing the regulators' decisions to be challenged. Several recent appeals have demonstrated that regulators have made clear factual errors, allowing appellants to successfully demonstrate flaws in the regulator's decision.

More generally, appeals allow for a regulator's reasoning to be explored in more detail, even where the decision is ultimately upheld. In this way, appeals can provide an important discipline upon regulators and are an element of regulatory accountability and transparency.

1. See Boxes 4.7, 4.8 and 4.13, and Appendix 1.

2. See Box 4.7.

Source: Based on information from (HM Government, 2013).

2.4.3 Court powers

Courts are an integral element of competition law systems in all OECD member countries.

In some systems, the court is the decision-maker at first instance for both public and private enforcement of competition law, determining whether competition provisions have been breached by the defendant on the facts. In other systems, the competition authority adopts decisions regarding competition cases, which are then subject to a higher level review by the courts.

Courts may be of general jurisdiction⁴⁷ – hearing many types of cases⁴⁸ – or specialised⁴⁹ – concentrating on the analysis of competition cases. These types of courts may have general jurisdiction judges or specialised judges, or may even have non-judicial members (known as *lay members*) (OECD, 1996).⁵⁰

The next section present country examples of these systems, which are usually divided in the following three:

- When courts are decision-makers in competition cases.
- When *courts are review bodies* of competition cases.
- When *courts are specialised* in the review of competition cases.

2.5 Conclusions

The role of courts is crucial for creating an environment of certainty and predictability in market economies. Well-functioning courts guarantee the security of property rights and enforcement of contracts. Security of property rights strengthens incentives to save and invest, by protecting the returns from these activities. A proper enforcement of contracts induces market participants to enter into economic relationships, by discouraging opportunistic behaviour and decreasing transaction costs. This has a positive impact on markets and economic growth: it promotes competition, fosters innovation, contributes to the development of financial and credit markets and facilitates firm growth.

Furthermore, the independent review carried out by courts of the competition authorities' decisions is necessary for the efficient operation of markets. Through this review, courts are uniquely positioned to assure for parties, the authorities and the public at large that the competition law is being implemented appropriately and in accordance with the legal framework (OECD, 1996).

Given the complex nature of competition law – due to the close relationship between legal and economic principles – judges need to have experience and expertise in the interpretation of the law in order to balance two of their main functions, namely ensuring procedural due process and applying, when appropriate, substantive economic principles into their reasoning. Therefore, understanding economic facts and concepts in the interpretation of competition law is an important part of effective competition law implementation at the court level.

When implementing competition law courts may carry out another important function – to bring flexibility to the application of the law, playing a fundamental role in the evolution of competition law systems.

Notwithstanding the legal system in which courts operate (*adversarial or inquisitorial*), the type of review they perform (*judicial or on the merits*), or the powers they have to enforce competition law (*decision-makers or reviewers*), courts exert an important influence on the functioning of the competition system.

Independent, expert and experienced judges are uniquely qualified to balance procedural and substantive principles in the review of competition cases. In carrying out this function judges need to:

- Avoid the risk of disseminating parties' sensitive commercial information and balance the right of confidentiality and defence in order to safeguard procedural due process. See Mexico (Box 2.1) and Chile (Box 2.3).
- Bring economic facts and concepts into legal reasoning when making determinations. See Mexico (Box 2.2).

The implementation of the principle of transparency in the application of the competition law by the courts builds trust and promotes predictability in the marketplace. The means to make court proceedings more transparent may be varied and are a function of the legal framework. In the case of Chile (Box 2.3) this may take place through public hearings in which interested parties are given the opportunity to plead their arguments before the courts and those parties involved or interested in the case.

A detailed scrutiny by courts of the facts and legal arguments underpinning a decision through a judicial review, as well as through a review on the merits, should make it less likely that errors will occur in decision-making, contributing to greater certainty. A merits review could also avoid some of the unintended consequences of judicial review, for example that competition authority or regulators focus on procedural aspects. See United Kingdom (Box 2.4).

3. Adjudication of competition cases by courts

Institutional designs of competition law systems are determined by the different jurisdictions' history, legal system and political culture.

There are two basic models of competition law systems: the bifurcated, also known as adversarial competition law regime, and the integrated model, or administrative enforcement regime.

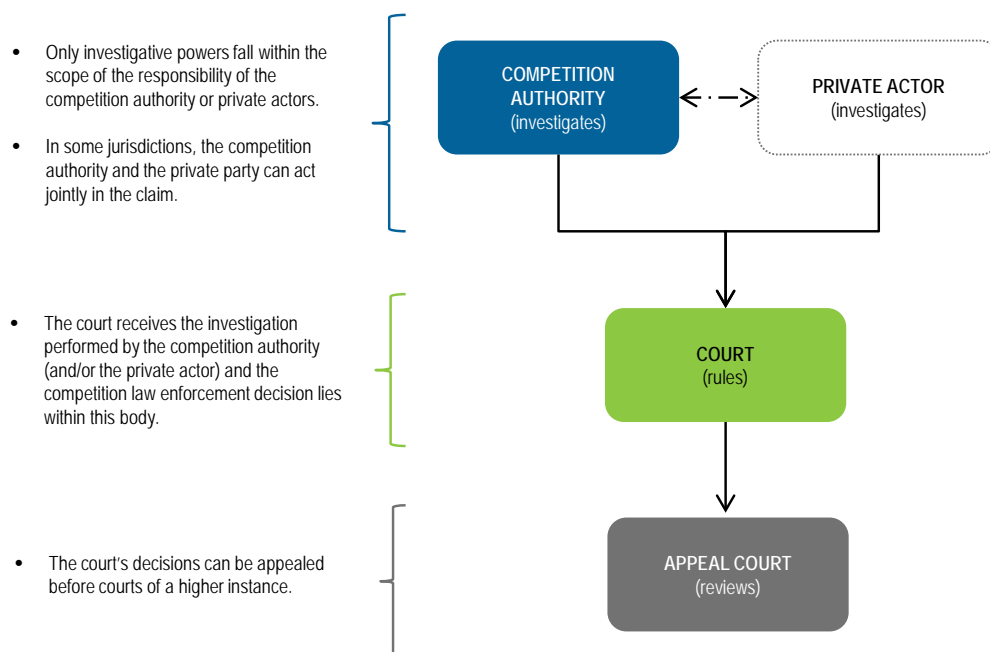
In each system the role of courts is different. In bifurcated models, courts adjudicate cases and act as enforcement decision-makers, whereas in integrated models courts function as review bodies of competition cases decided by competition authorities or regulators.

3.1 Courts as decision-makers (*bifurcated model*)

There are institutional designs of competition law systems in which the following two powers are separated in two distinct entities:

- *investigate* possible violations of the competition law; and
- *adjudicate or decide* to enforce the law in cases where these violations are demonstrated.

Figure 3.1. General schematic diagram of the bifurcated model



In these designs, the investigative power is vested in a competition authority, or a private party, and the adjudicative power falls within the scope of the judicial system, in courts of general jurisdiction or specialised in competition matters.⁵¹ Figure 3.1 shows a general schematic diagram illustrating the above.

These designs are also known as *adversarial competition law regimes*⁵² or *bifurcated models*,⁵³ and comprise two general settings where the first adjudication in courts will comprise either a review of:

- *all* competition cases; or
- *only some* competition cases.

Box 3.1 provides the country example of Chile, whose competition system provides that a competition authority is in charge of investigating all alleged violations to the competition law, while the first level adjudication of these cases resides within a court that is specialised in competition matters.⁵⁴

Box 3.1. Example of Chile: the Competition Tribunal (TDLC)

In Chile, the National Economic Prosecutor's Office (FNE) is the competition authority with broad powers to investigate competition law infringements. The FNE is an independent agency¹ with its own legal personality and patrimony, independent in its decisions and operation, subject to the oversight of the Executive Branch, through the Ministry of Economy.

The adjudication power resides within the Competition Tribunal (TDLC), an independent court, which receives the cases presented by the FNE or private parties that may conduct their own investigation on an alleged violation of the competition law. The FNE may join a private party's claim and vice versa.

The TDLC has the function of preventing, remedying and sanctioning offenses against competition.² It has competence to: (i) assess situations referred to it by the FNE or a private party with a legitimate interest that may presume an infringement of the competition legislation; (ii) set general guidelines related to competition in the areas specified by the competition rules; (iii) suggest changes to existing laws and regulations.³ The TDLC may also issue an injunction⁴ when requested by the FNE or a private party (Fox & Trebilcock, 2015).

The decisions of the TDLC are subject to the oversight powers of the Supreme Court in appellate proceedings.⁵ The Supreme Court has a variety of jurisdictional competences, as the court of last appeal in Chile.⁶ The Supreme Court is usually deferential to the TDLC's fact-finding (Fox & Trebilcock, 2015) (OECD, 2011b).

Successful cases brought by the FNE and private parties may be subject to compensatory damages in civil courts (Fox & Trebilcock, 2015).

1. See (OECD, 2014b), p.291. In this report competition agencies will be understood as independent when they "[...] can make decisions free from the influence of elected officials (e.g. heads of state or legislators) or appointees subject to their control. In principle, the condition of independence improves policy outcomes by enabling the enforcement agency to exercise its authority according to widely accepted competition policy principles and to resist demands that serve special interests at the expense of the larger public welfare. At a very general level, there seems to be a rough consensus about what political independence ought to mean in practice. A competition agency should not exercise its power to prosecute – to open files, to issue complaints, to impose sanctions – to satisfy the preferences of legislators, presidents or departmental ministries."

2. See Article 5 of Chile's Competition Act, Decree Law 211 of 1973.

3. See Article 18 of Chile's Competition Act, Decree Law 211 of 1973.

4. An injunction is a court order requiring a market participant to do or cease doing a specific action. See definition in the Legal Information Institute of Cornell University Law School, www.law.cornell.edu/wex/injunction.

5. See Article 27 of Chile's Competition Act, Decree Law 211 of 1973.

6. See Article 52-53 and 96-98 of Chile's Organic Code on Judicial Organisation.

Source: Based on information of (Fox & Trebilcock, 2015) and of the Competition Tribunal (TDLC), www.tdlc.cl/tdlc/.

Box 3.2 presents the example of the United States, a country that has both types of models (bifurcated and integrated). In the case of its bifurcated model, one of its two national competition

authorities is in charge of investigating *some types of violation to the law* (e.g. cartels and/or concentrations) and bringing these cases for enforcement action before a court of general jurisdiction (Fox & Trebilcock, 2015).

Box 3.2. Example of the United States: the Federal District Courts¹

At the federal level, the Department of Justice Antitrust Division (DOJ) is one of the two federal agencies that can enforce the antitrust law of the United States. The DOJ is a division of the Executive Branch that investigates cases and brings them before Federal District Courts, of general jurisdiction, for their adjudication.²

In criminal matters (such as cartel offenses) the defendants have a constitutional right to a trial by jury,³ but in civil suits or in the presence of injunctive relief (such as in merger cases), decisions are made solely by a judge.⁴ In addition, District Court judges may issue judicial or consent decrees, which are settlements entered into by the government and an offender before the filing of a lawsuit. These decrees can be enforced through civil or criminal contempt proceedings if violated.⁵

Competition decisions of Federal District Courts in government cases may be appealed before a Circuit Court of Appeals and are subject to discretionary review by the Supreme Court.⁶

At the state level, antitrust enforcement is handled by each state's attorney general or a private party and enforcement takes place exclusively through court litigation in state courts of general jurisdiction.

1. See (Fox & Trebilcock, 2015), p. 21. "The United States is a common law jurisdiction. The US enforcement system is complex. There are two major federal enforcement agencies and fifty state enforcement agencies, plus five federal districts or territories, and enforcement through private litigation [...]. The two US federal agencies are the Department of Justice Antitrust Division and the Federal Trade Commission." See also Boxes 3.8 and 4.1.
2. See Role and Structure of US Courts, www.uscourts.gov/about-federal-courts/court-role-and-structure. The United States have 94 District Federal Courts. There is at least one district court in each state. See also Fox and Trebilcock (2015), pp. 337-338. There are other five federal jurisdictions (the District of Columbia, the Commonwealth of Puerto Rico, and the three US territories of Guam, Northern Mariana Islands and the Virgin Islands), which hear competition cases through suits under federal competition law or under state competition laws.
3. See (Fox & Trebilcock, 2015), p. 348 "US Criminal procedure provides heightened protections for defendants. These include Fourth Amendment protections against unreasonable searches and seizures, and the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to a speedy trial by jury, and the due process right to have guilt proved beyond a reasonable doubt."
4. See *Idem*, p. 335.
5. See *Ibid*.
6. See *Ibid*.

Source: Based on the information of (Fox & Trebilcock, 2015).

Box 3.3 presents the example of Australia, a country whose institutional design also presents elements of both bifurcated and integrated models. In the case of the bifurcated model, the federal courts adjudicate in the first instance the *investigations of breaches of competition law* previously carried out by the competition agency.

Box 3.3. Example of Australia: the Federal Courts

Enforcement proceedings by the Australian Competition and Consumer Commission (ACCC) for breaches of the competition provisions of the Competition and Consumer Act are reviewed by federal courts – in the first instance by a single federal court judge sitting alone, and then on appeal by the full federal court, comprising three judges. Unlike the Australian Competition Tribunal (ACT) the federal courts cannot have members who are not lawyers or "lay members". Hence a disadvantage of enforcement proceedings before the federal courts is the lack of specialisation and competition economics expertise in the bench.

The ACCC's position is that serious cartel conduct should be prosecuted criminally whenever possible. For this reason, the ACCC will distinguish serious cartel conduct from that which is less serious in nature. If the ACCC forms a view that serious cartel conduct has occurred, it forwards a brief of evidence to the Office of the Commonwealth Director of Public Prosecutions (CDPP). The CDPP is independent of the ACCC and considers

whether to institute criminal proceedings with reference to the Prosecution Policy of the Commonwealth.¹ The CDPP will only commence proceedings if it considers that there is sufficient evidence to do so; and if it is evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest.² Ordinarily there are committal proceedings where the evidence against the accused is tested by the court before trial. If the court determines that there is not sufficient evidence to proceed, the matter is unlikely to progress to trial.³ However, following the committal, if the CDPP elects to institute proceedings, it conducts them in accordance with Australia's criminal court procedures, which include trial by jury.

1. See (OECD, 2011), p. 24.

2. See Ibid.

3. See Ibid.

Source: Based on the information of (Fox & Trebilcock, 2015).

Box 3.4 presents the example of Canada where the first level of adjudication of *some competition complaints* takes place in a court specialised in competition, while criminal cases are investigated by another government agency and adjudicated by a generalist court.

Box 3.4. Example of Canada: the Competition Tribunal

Canada is a common law jurisdiction and has an adversarial system. Its competition agency is the Competition Bureau of Canada, an independent agency responsible for enforcing the Competition Act. This Act contains criminal offenses (like cartels) and also includes civil reviewable matters, such as mergers or abuse of dominance, which are reviewed by the Competition Tribunal. In this sense, the adjudication of competition law matters in Canada is pursued through a two-track system (civil and criminal).

On the one hand, the Competition Tribunal is a quasi-judicial body¹ that acts as first adjudicator in civil reviewable matters. Decisions by the Tribunal may be appealed to the Federal Court of Appeal both on questions of law or mixed law and fact, there existing also the possibility of appeal of this review before the Supreme Court of Canada.

The Competition Tribunal has the power to examine witnesses, enforce orders, make rules, award costs, and issue a variety of prohibitions and remedial orders.² The Competition Bureau may negotiate settlements, often in the form of consent agreements that assume the force of a court order by their mere registration with the Competition Tribunal.³

On the other hand, criminal offenses must be referred by the Bureau to the Director of Public Prosecution who acts on behalf of the Crown before a Federal Court. In these cases, the Crown must establish each of the elements of the offence beyond a reasonable doubt. Appeals against these decisions can be carried out before a Provincial Court of Appeals, or at the Federal Court of Appeal, with the possibility of review by the Supreme Court.

As regards competition law, the Federal Court has jurisdiction over prosecution or other proceedings that the Director of Public Prosecution may: (i) institute and conduct, (ii) prohibit the continuation of behaviours, or (iii) claim damages in relation to indictable offenses in relation to competition. In particular, an appeal lies from the Federal Court to the Federal Court of Appeal and from the Federal Court of Appeal to the Supreme Court of Canada in the context of any judicial action under the Criminal Code.⁴

The Supreme Court is an appellate court, with civil and criminal jurisdiction within and throughout Canada.⁵ The Court will grant leave to appeal when it is of the opinion that any question involved is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it.⁶

1. See (Fox & Trebilcock, 2015), p. 113. Because the Tribunal is a hybrid body, comprised of judges and lay members. Judges may determine matters of law, while both, judges and lay members, determine matters of mixed law and fact or only fact.

2. See Ibid.

3. See Idem, p. 14-15.

4. See Canada's Competition Tribunal Act R.S.C., 1985, c. 19 (2nd Supp.), s. 77.

5. See Canada's Supreme Court Act R.S.C., 1985, c. S-26, s. 35-42.

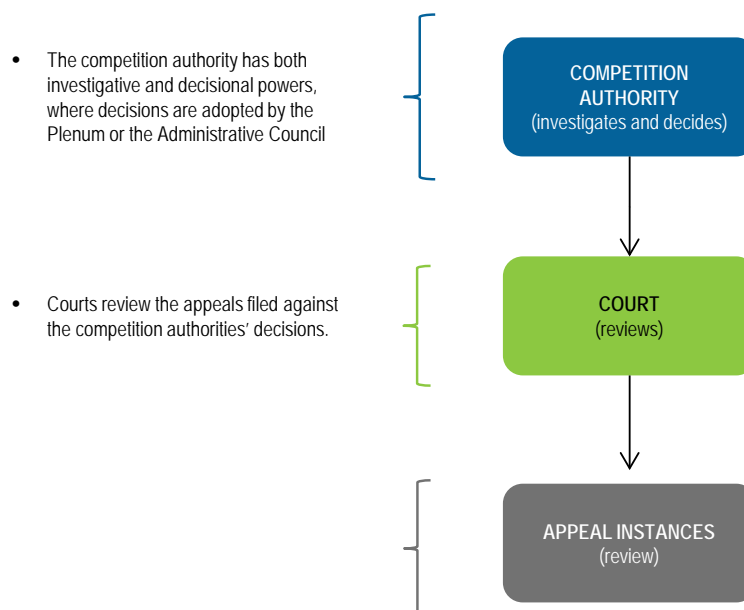
6. See Canada's Supreme Court Act R.S.C., 1985, c. S-26, s. 40.

Source: Based on information of (OECD, 2008) and the Canadian Competition Tribunal, www.ct-tc.gc.ca/Home.asp.

3.2 Courts as review bodies (*integrated model*)

Institutional designs of competition systems in which a competition authority has both investigative and adjudicative powers, and where decisions by the authority's Plenum or Administrative Council are subject to review before the courts, are known as *administrative competition law enforcement regimes*⁵⁵ or *integrated models*.⁵⁶

Figure 3.2. General schematic diagram of the integrated model



The integrated model merges investigation powers against possible violations of the competition law and/or merger review and a first-level adjudication of these cases in a single agency through the decision issued by its Plenum or Administrative Council – which is responsible for competition law enforcement. Figure 3.2 shows a general schematic diagram illustrating the above.

Australia (Box 3.5), Mexico (Box 3.6), the European Union (Box 3.7) and the United States (Box 3.8) are some examples of this model.⁵⁷

Box 3.5. Example of Australia: the Australian Competition Tribunal (ACT)

The Australian Competition Tribunal (ACT) reviews appeals against the Australia's Competition and Consumer Commission (ACCC)¹ first-instance determinations in relation to authorisations of restrictive trade practices and clearing (or prohibiting) concentrations. The ACT also reviews applications related to the authorisations of concentrations that would otherwise fail the competition test, but which the parties argue would result in public benefits justifying their authorisations. The ACT is responsible for the review of certain decisions of the ACCC in relation to regulatory determinations. The ACT is entitled to exercise all the powers of the ACCC, and may affirm, set aside or vary the ACCC's determinations as it sees fit.

1. The ACCC determinations are made by the Commission members. These members are the Chairman, two Deputy Chairs, four member Commissioners, and four Associate Members. See ACCC, www.accc.gov.au/about-us/australian-competition-consumer-commission/organisation-structure#commission-members.

Source: Based on the information of (Fox & Trebilcock, 2015).

Box 3.6. Example of Mexico: the new specialised courts

Before the Constitutional reform of 2013 the decisions issued by the Plenum of the Mexican competition authority, the Federal Competition Commission (CFC), could be reviewed in a first instance by:¹

- the Plenum of the CFC itself following a reconsideration resource filed by the parties. Article 39 of the 1992 FECL stated that the filing of such a resource would suspend the implementation of the challenged decision until a ruling on the resource was issued (OECD, 2011).²

In addition, the parties to cases subject to the CFC's Plenum could request judicial relief should they not be satisfied with the Commission's acts by means of two options:

- before the Federal Court of Fiscal and Administrative Justice (TFJFA) only with regard to decisions imposing only economic sanctions; or
- before an Administrative District Court, which had the power to review the legality of the CFC's administrative enforcement decisions. Administrative District Courts could also receive cases that had been dismissed by the TFJFA. The resolutions of these courts could be reviewed by Administrative Collegiate Circuit Courts, which are hierarchically superior to District Courts. In constitutionality cases, these could be sent or attracted by the Supreme Court of Justice (SCJN) for review.³

The District and Circuit Courts were courts of general jurisdiction in administrative matters and only a few judges conducted an in-depth review of competition cases. For this reason, there was only a meagre revision of the evidence that underpinned a case and the assessment of the anti-competitive conducts was shallow. Thus, in most cases, the judicial review of competition issues was reduced to the analysis of procedural matters (OECD, 2011).

After the Constitutional reform of 2013, and following the entry into force of the 2014 FECL, the reconsideration resource is eliminated and the decisions adopted by the newly created competition authorities, COFECE and IFT, can be reviewed by Specialised District Courts, through indirect amparos against resolutions that put an end to proceedings,⁴ with regard to decisions issued by the authority's Plenum on fines imposed as enforcement measures and for acts issued during the investigation. A decision from the Specialised District Court may be reviewed by the Specialised Collegiate Circuit Courts, each comprised of a three-member panel (made up of judges known as Magistrates), who are competent to hear what could be compared, for descriptive purposes, to federal appeals, included in the Amparo Law as complaint resources and review resources. The decision of the Collegiate Circuit Court could be the end of the proceedings unless there are issues of unconstitutionality of the FECL, or any other federal rule applied by COFECE which the Supreme Court is competent to hear, or that the Supreme Court decides to hear due to its importance or significance.

The specialisation of the Mexico's courts now allows for a more nuanced review of competition decisions.

It is important to point out that District Courts and Collegiate Courts specialising in economic competition, broadcasting and telecommunications are based in Mexico City, but have subject-matter jurisdiction across the country's territory.

1. See section 1.

2. See 170034. 2ª/J. 30/2008. Second Chamber. Nueva Época. Gazette of the Federal Judicial Weekly. Volume XXVII, March 2008, p.171, <http://sjf.scjn.gob.mx/SJFSist/Documentos/Tesis/170/170034.pdf>.

3. The Supreme Court may also hear cases provided that they are of relevance and importance to the country. See articles 4, 83 and 84 of the *Amparo Law*.

4. See also endnote 18. Indirect amparos are also known as two-instance amparos because they have two instances; the first is processed before district judges and the second, before collegiate courts or before the SCJN. They are initiated before a district judge, with a lawsuit disputing the constitutionality of the act concerned. See also Gaceta del Semanario Judicial de la Federación, Libro 29, Tomo III, Abril de 2016, Tribunales Colegiados de Circuito y Normativa y Acuerdos Relevantes, jurisprudencia I.1º.A.E.24 A (10ª.) "Established the aforementioned, it must be said that article 28, twentieth paragraph, section VII of the constitution established that the amparo is inadmissible against intra-procedural acts or competition authorities' proceedings, issued within a procedure, which do not constitute the terminal or final decision, except when the acts are impossible of reparation, because of a physical impairment – real and present – of substantive rights. It is also argued that the scope of an "intra-procedural act," used by the Legislative, is general, and hence, refers to any occurred within the progressive sequence of acts aimed towards the legal resolution of the matter – not only to those occurred during the trial-type procedure –". See also Gaceta del Semanario Judicial de la Federación, Libro 29, Tomo III, Abril de 2016, Tribunales Colegiados de Circuito

y Normativa y Acuerdos Relevantes, jurisprudencia I.1º.A.E. J/4 (10ª.) *"In the case of intra-procedural acts or violations, what is decisive to claim an immediate challenge through an indirect amparo is the impossible repair of a material affectation – real and present – of substantive rights, unlike formal grievance or injury to adjectival provisions or proceedings. Therefore, rather than the form or type (intra-procedural or final), what matters are the effects and injuries that can occur in specific situations or circumstances; that is, they can be claimed immediately when it is in the presence of what is referred to as an impossible repair, or along the final act, an provided they have generated indefensibility."*

Source: Based on information of (OECD, 2006) and (OECD, 2007).

Box 3.7. Example of the European Union: the European Union Courts

The European Union (EU) competition enforcement system is one where the European Commission acts as an integrated public authority: it investigates and decides on cases by administrative decision of the College of Commissioners, subject to full judicial review by the General Court.¹

As regards the enforcement of Articles 101 and 102 of the Treaty of the Functioning of the European Union (TFEU)², the European Commission investigates potential infringements of the competition rules and adopts binding decisions, including the imposition of fines. The Directorate General of Competition is the area within the European Commission that investigates under the leadership of the Commissioner responsible for competition – while decisions are taken by the College of Commissioners, who are independent of national and business interests. These decisions are subject to judicial review, on all points of fact and law, including unlimited review of the evidence, of the factual findings derived there from and of the legal qualification of the evidence. With regard to the fines imposed by the Commission, the General Court may annul them or increase or reduce their amount. This system is not unique. In Europe, the majority of EU Member States have opted for similar integrated enforcement systems.

Judgements and orders of the General Court on points of law may be appealed only before the Court of Justice. If the appeal is admissible and well founded, the Court of Justice may set aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself decide the case. Otherwise, it refers the case back to the General Court, which is bound by the decision adopted by the Court of Justice on the appeal.³

With regards to merger control, the EU Merger Regulation also provides for a regime of integrated public enforcement, whereby the Commission is vested with exclusive jurisdiction to decide upon concentrations of an EU dimension, subject to the control of the Courts of the European Union.

The Courts of the European Union fully review the findings of facts (e.g. their accuracy) and the Commission's application of the law (e.g. the absence of an error in law enforcement) with a certain margin of appreciation being accorded to the Commission with regard to complex economic assessments.

1. See Curia – Court of Justice of the European Union, http://curia.europa.eu/jcms/jcms/Jo2_7033/. The General Court has jurisdiction to hear: actions brought by natural or legal persons against acts of the institutions, bodies, offices or agencies of the European Union (which are addressed to them or are of direct and individual concern to them) and against regulatory acts (which concern them directly and which do not entail implementing measures) or against a failure to act on the part of those institutions, bodies, offices or agencies; for example, a case brought by a company against a Commission decision imposing a fine on that company; actions brought by the Member States against the Commission; actions brought by the Member States against the Council relating to acts adopted in the field of State aid, trade protection measures (dumping) and acts by which it exercises implementing powers; actions seeking compensation for damage caused by the institutions or the bodies, offices or agencies of the European Union or their staff; or actions based on contracts made by the European Union which expressly give jurisdiction to the General Court. The decisions of the General Court may, within two months, be subject to an appeal before the Court of Justice, limited to points of law.
2. See Implementing EU competition rules: application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l26092>. Article 101 sets out conducts contrary to competition related to concerted practices that restrict competition, such as cartels. Article 102 prohibits abuses of a dominant position. The TFEU sets forth that the rules on competition provided in these two articles are to be enforced by the European Commission (when there are cross-border effects) and in a decentralised manner by the national competition authorities and judicial bodies (when the effects are purely national) of the EU member states.
3. See Curia – Court of Justice of the European Union, http://curia.europa.eu/jcms/jcms/Jo2_7024/.

Source: Based on information of Court of Justice of the European Union, http://curia.europa.eu/jcms/jcms/Jo2_7024/.

Box 3.8. Example of the United States: the Federal Appellate Courts

The Federal Trade Commission (FTC) is one of the two federal agencies that can enforce the federal antitrust law in the United States. The Commission follows the integrated agency model, with the power to investigate and adjudicate cases internally, notwithstanding the subsequent review by the Federal Court of Appeals. Cases are internally adjudicated and ruled on by the Administrative Council, formed by four Commissioners, one of which acts as President. The first level of review of internally adjudicated cases takes place before an Administrative Law Judge (ALJ).¹ This judge follows the procedural rules similar to those used in Federal Court litigation, and its decisions are subject to subsequent Federal Appellate Court review (there are thirteen Federal Courts of Appeals in the United States).²

Federal Courts of Appeals have full power to decide on questions of law, including issues of statutory interpretation. They may give deference to fact or mixed fact-and-law conclusions and they may be guided by interpretations of the law by the specialised agency in charge of applying it. Normally the Federal Appellate Courts give deference to fact finding by the FTC.

Appeals from the Federal Appellate Courts may be taken to the Supreme Court but this court has wide discretion to deny review.

At any stage in the process the Commission can decide to settle a case with a consent order, analogous to the consent decree, except that it is not entered in the court.³

It is worth noting that the FTC may also seek injunctions from Federal District Courts, as for example in merger cases.

1. See (Fox & Trebilcock, 2015), p. 367. *“The ALJ selection process is dictated by government-wide requirements, not by FTC rules or policy, [...] Commentators have expressed concern that familiarity with antitrust or consumer protection law is not a factor in the choice [...]. Thus the ALJ tends to resemble more a district court judge of general jurisdiction than an expert decision-maker, except where a Commissioner acts as ALJ, raising the impartiality concerns [...]”*
2. See Role and Structure of US Courts, www.uscourts.gov/about-federal-courts/court-role-and-structure.
3. See Fox and Trebilcock (2015), p. 336.

Source: Based on the information of (Fox & Trebilcock, 2015).

3.3 Conclusions

There are two basic models of competition law systems: the bifurcated (Figure 3.1), also known as adversarial competition law regime, and the integrated model (Figure 3.2), or administrative enforcement regime.

On the one hand, bifurcated models are those in which the courts have the power to adjudicate cases brought to them by a competition authority, which acts as prosecutor, or by a private party that has conducted its own investigation.

On the other hand, integrated models are those in which a court, generalist or specialist, will review decisions by a competition authority's Plenum or Administrative Council. In contrast with the bifurcated model, in this model the competition authority has both powers, namely investigative and adjudicative.

The courts in these models may of general jurisdiction or specialised in competition, and may analyse all or some competition law cases.

Table 3.1 presents a summary of the international examples provided in this section. These are organised according to the corresponding arrangement of their competition law system, and to the model

or models prevalent in their jurisdiction. The table specifies the name of the court responsible for making first instance enforcement decisions (in the bifurcated model) or the name of the court that functions as a first reviewer of decisions already adjudicated by the competition agencies or regulators (in the integrated model). It also indicates whether the court is specialised or generalist.

Lastly, the table also presents the types of cases that these courts hear.

As can be seen in Table 3.1, the institutional designs of Australia (Boxes 3.3 and 3.5) and the United States (Boxes 3.2 and 3.8) present features of the bifurcated and integrated models.

Mexico's example (Box 3.6) is particular because it presents a two level specialised review system, starting with a Specialised District Court, which may be followed by an appeal review a Specialised Collegiate Circuit Court. In particular, *amparo* proceedings permit the challenge of general rules' constitutionality. In the case of *amparo* against laws, the review against the ruling is conducted by the Supreme Court of Justice of the Nation, except if case-law exists. The review of the ruling with regard to other issues is the competence of Specialised Collegiate Court.

Lastly, it can be observed in all country examples presented in this section that law enforcement decisions issued by a court in the first instance may be appealed in higher instance courts (e.g. Appeal Courts or the Supreme Court).

Table 3.1. Judicial enforcement of competition law: International examples

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 Of general jurisdiction <i>Some competition cases</i> <i>(e.g. cartels or mergers)</i>	United States Federal Court of Appeals Of general jurisdiction <i>Some competition cases</i> <i>(e.g. monopolisation or mergers)</i>
Australia Federal Courts Of general jurisdiction <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 Of general jurisdiction <i>Cartel criminal cases</i>	European Union General court Generalist <i>All competition and merger cases</i>

4. Court specialisation

International experience demonstrates that the decisions of a competition authority, be it in the contexts of a bifurcated model or an integrated one, are subject to the review of courts. However, the path followed by this review will be different in each model, and the court carrying out this review may be of general or specialised jurisdiction.

4.1 Courts of general jurisdiction

Courts of general jurisdiction are bodies that for *reasons of public policy* issued by the legislature, depending on the jurisdiction, can review civil and/or administrative and/or criminal matters (Lianos & Sokol, 2012).

However, the fact that these courts are generalist does not mean that they do not retain (Lianos & Sokol, 2012):

- *Extensive knowledge on substantive issues of competition law* necessary to decide on information related to the facts of the cases reviewed. This comprehensive knowledge may belong to the judge, its staff and/or external experts.
- *Experience in economic competition* in the form of accumulation of knowledge and skills in this matter. This knowledge is usually developed as a consequence of reviewing a large number of the competition authority's decisions, particularly if decisions are of the same nature.

Therefore, if a court is classified as having general jurisdiction, it does not mean it does not hold extensive knowledge on substantive issues of competition law, or that it lacks experience in this matter.

This is the case of the United States courts, in particular of the Federal Courts of Appeals, which review the decisions of the Federal Trade Commission (FTC), or of the Federal District Courts, which decide on the cases submitted by the Antitrust Division of the Department of Justice (DOJ) or by private parties.

Box 4.1 presents some of the basic characteristics of the United States courts of general jurisdiction.

Box 4.1. The United States courts of general jurisdiction

Following the information presented in Boxes 3.2 and 3.8, it can be said that the "US competition system is complex, with two federal enforcers with different organisational forms, with state enforcers and private actions. Furthermore, the system is split between civil enforcement and criminal enforcement of which the agencies do not have complete control because it is pursued through litigation in courts of general jurisdiction under the rules applicable to all federal litigation. (Fox & Trebilcock, 2015)"

Nonetheless, and "considering the complexity of this system", there is a certain consensus between the competition, academic and private sector communities that the system performs well (Fox & Trebilcock, 2015).

“American antitrust statutes are for the most part broad pronouncements against agreements in restraint of trade, against monopolies and against anti-competitive mergers, with the details filled in case-by-case by the courts. As a result, the judiciary controls liability standards, evidentiary burdens, and standing rules in competition cases, (OECD, 1996).”¹

“Even though American federal judges are not economic competition specialists, they have managed to craft decisions with fairly accurate results in particular cases. A number of factors contribute to this result.

- First, any single case will [...] not call into play the whole body of American competition precedent.
- Second, the liberal discovery rules applicable in American federal courts permit the full development of the facts upon which a considered decision can be based, [...]. Most competition issues are fact specific and to the extent that the facts are fully accessible, a more accurate result can be achieved.
- Third, competition cases are high-stakes matters for the parties involved, in which high damages, a desired merger, or perhaps their economic viability is at risk.

For these reasons, the parties have an incentive to retain quality counsel, to finance the retention of economic experts, and to finance the discovery necessary to develop the facts.

It is true that expert economists retained by the parties sometimes appear to sacrifice their independent judgment for favourable litigation results, and federal courts are increasingly sceptical of partisan expert testimony. Nevertheless, expert testimony in competition cases is of invaluable assistance in understanding the relevant economic issues.

Further, American courts have the discretion to retain their own economic experts at the parties' expense, if the judge feels it is necessary to do so. [...] In addition to appointing experts who will testify, the court may appoint experts who act merely as technical advisors to assist the court in interpreting complex data or terminology.

[...] The ideal is that cases will not proceed to trial without the court and the parties having worked together before trial to identify the relevant issues to be tried, as well as the law applicable to the facts, and to eliminate issues that have no merit. Although these management powers are not exercised with equal skill throughout the judiciary, the tools are available to help structure the fact-gathering process and to narrow complex issues to facilitate comprehension by judges.

Finally, federal judges are not strangers to complexity, and the reasoning process in competition cases is not fundamentally different from that applied by federal judges in other areas of the law. Nor are economic issues unknown in other legal contexts. [...] For these reasons, the results in competition cases are no worse than those achieved in other complex areas of the law.”²

1. See OECD (1996), p. 113-116. *“This allocation of responsibility to the federal judiciary has drawn criticism on the grounds that relegating important national policy to over 49 generalist trial courts and 13 circuit courts, many or most of whom have had no training in economics, robs the law of desirable coherence.”*

2. See Ibid.

Source: Based on the information of (OECD, 1996).

4.1.1 Examples of cases solved by courts of general jurisdiction

The following boxes provide two examples of competition cases decided by generalist courts in the United States.

Box 4.2. Case – Verizon Communications Inc. v. Trinko (2004)

“The Trinko case deals with key elements related to the nature of monopolisation. The Telecommunications Act of 1996 requires incumbent telephone companies to assist would-be competitors by providing access to the incumbent's facilities. The plaintiff alleged that the incumbent telephone company sought to discourage customers from using a competitor's telephone service by dealing its competitors' orders on a discriminatory basis. The court of appeals upheld the plaintiff's competition claim on the so-called “essential facilities” and “monopoly leveraging” theories. The Department of Justice (DOJ) urged the Supreme Court to hear the case and reverse the decision of the appeals court. It was argued that the 1996 Act neither restricts the antitrust laws nor expands antitrust liability by creating new antitrust duties. In 2004, the Supreme Court reversed the court of appeals decision. It concluded that “just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards.” Considering the policies of the antitrust laws and the risk of chilling the very competition they are intended to protect, the Supreme Court emphasised the need for caution with respect to government intervention against single firm conduct, especially in imposing antitrust obligations on firms to assist competitors and share resources. The Court's opinion strictly circumscribed or eliminated expansive theories under the labels of “essential facilities” or “monopoly leveraging” of antitrust liability.”

Source: Based on the information of the antitrust law in the U.S. Supreme Court, R. Hewitt Pate, Assistant Attorney General, Antitrust Division, US Department of Justice. Presented at the British Institute of International and Comparative Law Conference. London, England, www.justice.gov/atr/speech/antitrust-law-us-supreme-court#N_32.

Box 4.3. Case – Leegin Creative Leather Products v. PSKS, Inc.

“Leegin Creative Leather Products (“Leegin”) is a California-based leather manufacturer that produces and markets women's accessories. In 1990, Leegin introduced the “Brighton” brand of products, which quickly gained popularity. Leegin distributed Brighton products in independently-owned boutiques and through its own branch of retail stores. The company gained market share in the competitive market of leather accessories by equating Brighton products with value and customer service. Consistent with this strategy, in 1997 Leegin adopted the “Brighton Retail Pricing and Promotion Policy.” The policy required that all retailers selling Brighton-brand products sign written agreements to maintain a certain price for such products. Leegin argued that minimum prices provided retailers with a guaranteed margin, which in turn encouraged them to offer customers quality service and a pleasant shopping environment. If retailers broke the agreement, Leegin threatened to stop or suspend shipment of Brighton products. In 1995, PSKS Inc. (“PSKS”), which operated a retail store called “Kaye's Kloset” in Lewisville, Texas, began offering Brighton products, advertising Brighton along with other merchandise at its own expense. In 2002, Leegin learned that Kaye's Kloset was selling Brighton products at a discount below the policy levels and terminated shipments to the store. Alleging that Leegin's pricing policy violated federal antitrust law, PSKS filed action in the U.S. District Court for the Eastern District of Texas. At trial, the district court found that Leegin's policy constituted a per se violation of Section 1 of the Sherman Act (resale price maintenance), and refused to permit Leegin to introduce evidence of the policy's pro-competitive effects. The Fifth Circuit affirmed the lower court's decision, citing the same reasons.” “In 2007, the Supreme Court decided to overrule the per se rule and determined that vertical price restraints were to be judged according to the rule of reason.¹ The rule of reason was the appropriate standard to judge vertical price restraints and vertical minimum resale price maintenance agreements because (1) pro-competitive justifications existed for a manufacturer's use of resale price maintenance, (2) the primary purpose of the antitrust laws was to protect interbrand competition, (3) administrative advantages were not sufficient in themselves to justify the creation of per se rules, and (4) stare decisis did not compel the Court's continued adherence to the per se rule.”

1. See (Fundakowski, 2013). The Sherman Act was passed in 1890 and prohibits agreements that adversely affect consumers. There are two analytical standards applied to determine if agreements are anticompetitive, these are the per se and rule of reason. The per se rule is commonly reserved to conducts that almost always raise prices to consumers and that have little or no procompetitive value (such as collusion). Under this rule, predictability of the pernicious restriction is considered as unlawful without the existence of an evaluation of the justifications or alleged reasonableness. On the other hand, the rule of reason requires an empirical rigorous assessment into whether the agreement unreasonably restrains competition. This assessment requires the identification and balancing of the procompetitive benefits and the anticompetitive effects of the restriction.

Source: Based on the information of the LII Supreme Court Bulletin, www.law.cornell.edu/supct/cert. In the LexisNexis. Supreme Court Briefs, [www.law.berkeley.edu/files/Leegin v. PSKS Inc.pdf](http://www.law.berkeley.edu/files/Leegin_v._PSKS_Inc.pdf). And in the opinion of the court, www.justice.gov/atr/case-document/opinion-court-0

4.2 Specialised courts

Specialisation is a concept with multiple dimensions. Specialisation may take place in a particular geographical area and/or within a category that may be functional.

In this report the concept of specialisation will refer to a function defined in terms of the case type reviewed and the judges who review it (Baum, 2009).

Court specialisation means that there are certain types of cases that are handled differently, and there is a need to analyse them separately from the rest of the cases. Moreover, that the judge reviewing these cases shall retain special knowledge of and expertise in that particular area of the law (Grameckow & Walsh, 2013). Also, specialisation implies that cases in a particular field are concentrated among a limited number of judges (Baum, 2011).

Given its complexity, it is often argued that competition law enforcement requires (ICN, 2007):

- a *sophisticated adjudication* of competition cases for which competition authorities and courts should be well equipped in order to pay more attention to substance of cases than to procedural matters; and
- an *expedite resolution of cases*, in order to avoid the risk of jeopardising certainty and predictability in the marketplace.

Therefore, the introduction of specialist competition law courts may be seen as another way of ensuring that cases related to the subject matter of competition are dealt with by judges who understand competition law and economics (ICN, 2015).⁵⁸

Court specialisation is often considered an important initiative to improve the development and performance of the judicial system. This specialisation may take different forms. The selected form may reflect the underlying problem intended to be addressed, for example a higher demand for specialised review – which can be reflected in the number of cases that require special treatment, and/or a need for technical specialised expertise in competition.

Court specialisation is a matter of degree, depending on the matter or matters that fall under the competence of specialised courts. Specialised courts may be:

- partially specialised in competition;
- fully specialised in competition; or
- fully specialised in competition and economic regulation.

4.2.1 Partially specialised in competition

In France there are partially specialised courts. This jurisdiction has commercial courts specialising in commercial matters, which include acts of trade encompassing economic competition matters. It also has the Paris Court of Appeals, which has a mixed competence, with civil and criminal chambers. In particular, this Court has a chamber specialising in competition. On the other hand, the Court of Cassation is the highest civil and criminal instance in the French judicial order, having also specialised chambers – one of them being the commercial chamber, which reviews economic competition cases. See Box 4.4.

Box 4.4. Example of France: partially specialised courts

The Autorité de la Concurrence, or French Competition Authority (FCA) is the sole administrative authority that may penalise anti-competitive practices by imposing monetary sanctions. In addition, the application of competition law is also carried out by eight specialised commercial courts.¹ These specialised commercial courts have concurrent jurisdiction with the FCA to declare that practices are anti-competitive and order that they cease. Although these courts do not have the authority to impose monetary sanctions, they do have the authority to nullify contract clauses they consider anti-competitive and to award compensation or make provisions for compensation.²

Victims of anti-competitive practices can either engage in follow-on actions, under which they file a complaint with the FCA requesting that it investigates and prohibits an infringement of competition law and then file a claim for compensation with the commercial courts, or stand-alone action, under which they file a complaint directly with a commercial court to seek recognition of and compensation for anti-competitive practices.

The Court of Appeal of Paris is the specialised appellate court for both public and private antitrust enforcement actions. It centralises appeals against the FCA and the specialised commercial courts of France.³ These appeals are handled by a specialised chamber within the Court of Appeal (Chamber 5-7).⁴ This concentration of cases in this chamber in practice has proved to be very helpful. The judges of this chamber have acquired a better understanding of the economic issues, and the relationship between the FCA and the Court of Appeal has improved (Dieter & Atanasiu, 2001).

The Court of Cassation is the highest court and it can hear cases about the decisions issued by the Court of Appeals. The role of the Court of Cassation is not to review the merits of the case, but to decide instead whether the law has been correctly applied, based on the facts reviewed by lower courts. That is, its work is to consider whether previous instances have correctly applied the law in relation to the facts, as well as to respond the questions that have been raised to it.⁵

1. Specialised commercial courts carry out this function under the terms of the Decree of 30 December 2005, which, in application of Article L. 420-7 of the French Commercial Code, lists and defines the scope of these specialised jurisdictions.

2. Urgent proceedings (*référé*) allow the judge to rule on urgent cases of anti-competitive practice and order that they cease.

3. Article R. 420-5 of the French Commercial Code. Which has the right to rule on these practices.

4. Another chamber handles stand-alone disputes or follow-on actions for compensation (Chamber 5-4).

5. See The Court of Cassation, www.courdecassation.fr/documents_traduits_2850/espa_ol_3722/del_tribunal_173.html.

Source: Based on information of (OECD, 2015b).

Finland is another example of a country with a court partially specialised in competition, since its Market Court has mixed competence to review commercial, competition, public procurement and intellectual property law (Ginsburg & Wright, 2012). See Box 4.5.

Box 4.5. Example of Finland: the Market Court

In Finland, the decisions of the Competition and Consumer Authority are reviewed by the Market Court, a specialised court hearing market law, competition law, public procurement and intellectual property cases.¹

This court was created after a major institutional change that replaced the Competition Council by the Market Court. One of the objectives of this change was to integrate unfair competition² and consumer protection into competition policy.

The Market Court issues injunctions against illegal restrictions to competition and order monetary penalties. It has duties also in the supervision of mergers and acquisitions. In addition, the Market Court may overturn public procurement decisions, adjust the procurement process and order compensatory payments. As a peculiarity, the Market Court follows civil procedures in market law cases and administrative procedures in public procurement cases and in most competition cases. Thus, in cases where a civil procedure is followed, appeals on decisions relating to disputes may be submitted to the Supreme Court, whereas cases with administrative procedures are appealed to the Supreme Administrative Court.³

1. See (Wise, 2005), p. 12 and p. 27. In 2002, The Market Court combines judges with market experts. Its judges and chief justice have the usual protections of judicial independence, such as lifetime tenure. Several of the judicial members will serve in this court fulltime. In addition, there are part-time non-judicial experts, appointed by the government for 4 year terms, to assist them.
 2. The type of conduct deemed to be unfair competition may vary across jurisdictions. However, generally this classification includes conduct such as diversion of clients, exploitation of another's reputation, violation of trade secrets, induction to contractual breach or unfair exclusivity agreements.
 3. See Experiences of the new IP Court in Finland. Markku Tuominen, Attorneys Ltd, www.roschier.com/sites/default/files/whos_who_legal_trademarks_2015_finland.pdf.
- Source: Based on information of the Market Court, www.markkinaoikeus.fi/en/index.html.

4.2.2 Fully specialised in competition

India is one of the few countries in the world with a court specialising only in competition law cases; this is the case of the Competition Appellate Tribunal. See Box 4.6.

Box 4.6. Example of India: the Competition Appellate Tribunal (COMPAT)

The Indian competition law regime is still in a nascent state. Its first competition act entered into force in 2009.

The case of India is interesting, because this country has a Competition Appellate Tribunal (COMPAT) that is not part of the judicial system; instead it depends from the central government and is bound by the principles of natural justice and subject to the provisions of the Competition Act and to the rules issued by the central government.

The COMPAT shall also adjudicate on claims for compensation that may arise from the findings of the Competition Commission of India (CCI) and pass orders for the recovery of compensations.

The Tribunal's decisions have the same force as those issued by a civil court; any contravention thereto entails monetary sanctions and/or imprisonment for a term of up to three years.

Appeals against COMPAT decisions will lie with the Supreme Court of India.¹

CCI decisions are upheld by the Appellate Tribunal (COMPAT) in most cases.²

1. See GCR Asia Pacific Antitrust Review 2015. Ashok Chawla, Chairperson of the Competition Commission of India, <http://globalcompetitionreview.com/reviews/69/sections/235/chapters/2747/india-competition-commission-india/>. For example, in a landmark judgment, the Supreme Court of India held that the CCI's adoption of a prima facie and the subsequent issuance of directions to the director general for investigation, would not be appealable to COMPAT under the Competition Act. The Supreme Court observed that orders that have not specifically been made appealable under the Competition Act cannot be treated as appealable by implication. Hence, the adoption of a prima facie view by the CCI and the ensuing issuance of directions to the director general for investigation would not constitute an appealable order and therefore COMPAT does not have the jurisdiction to entertain such an appeal. These observations were made by the Supreme Court pursuant to the CCI challenging the order of COMPAT, whereby COMPAT had directed the director general to stay an investigation.
2. See Ibid.

Source: Based on the information of The Competition Appellate Tribunal, www.compat.nic.in/introduction.html.

4.2.3 Fully specialised in competition and economic regulation

The United Kingdom has a court specialised in competition law and economic regulation, the Competition Appeal Tribunal (CAT), which is a specialised judicial body whose members have

horizontal experience in law, economics, business and accounting matters, and whose function is to hear and decide cases involving competition and regulatory issues.⁵⁹ See Box 4.7.

Box 4.7. Example of the United Kingdom: the Competition Appeal Tribunal

The United Kingdom's competition regime exists to ensure that competition and markets works well for consumers and businesses. Independent regulators and competition authorities are an essential element of this regime. However, where decisions have been delegated to independent experts outside of direct ministerial control, firms need to have a mechanism for challenging regulatory decisions, in order to correct regulatory mistakes and ensure regulators are operating in a reasonable and consistent way. Appeals are thus central to ensuring proper accountability of these bodies and well-functioning markets.

The Competition Appeal Tribunal (CAT) plays a key role in this appeals process. This Tribunal can hear appeals related to the merits of decisions applying the competition rules set out in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), and Chapters I and II of the Competition Act 1998.¹ Regarding these provisions, the CAT has a wide range of powers to decide on the merits of the decisions of the Competition and Markets Authority (CMA) or sectorial regulator.

The Tribunal may confirm or cancel part or all of a decision, returning the case to the CMA or the regulator; it may impose, revoke or vary the amount of any penalty, provide guidelines separate from those given or taken by the CMA or regulator, or determine another part of the decision taken by the CMA or regulator. With regard to conditions established by the CMA or a regulator, the CAT may dismiss the appeal or reverse the decision in full or in part. If the CAT annuls a decision, it may adopt a final decision itself; or refer it to the CMA or sectorial regulator for reconsideration in accordance with the decision adopted by the CAT. On appeal, the CAT may also decide whether a decision should be suspended or not. The CAT is also responsible for reviewing cases involving claims for damages related to the above provisions.²

The CAT can also reviews decisions relating to concentrations or market studies under the Enterprise Act of 2002. Thus, any person who feels aggrieved by a decision of the CMA or the Secretary of State in relation to a concentration or a market study may apply for a review by the CAT (CAT, 2015).

1. See Box 3.7. See the procedures set out in the Competition Act 1998. Chapter I prohibits certain agreements or concerted practices that may affect trade within the UK and that have as their object or effect to prevent, restrict or distort competition within the UK. Chapter II prohibits abuses of a dominant position that may affect trade within the UK.
2. See The Competition Appeal Tribunal, www.catribunal.org.uk/.

Source: Based on the information Competition Appeal Tribunal (CAT), www.catribunal.org.uk/ and the Government Response: Competition Appeal Tribunal (CAT) Rules of Procedure, www.gov.uk/government/uploads/system/uploads/attachment_data/file/460442/BIS-15-357-competition-appeal-tribunal-rules-of-procedure-government-response.pdf

In regulatory aspects, the CAT can review the issues shown in Box 4.8.⁶⁰

Box 4.8. Example of the United Kingdom: the review of regulatory issues by the CAT

Telecommunications – The CAT, under the Communications Act 2003, can review decisions issued by the OFCOM to regulate electronic communications networks and services, as well as decisions on the use of radio spectrum grounded in the aforementioned legislation and the legislation of wireless telegraphy from 1949 and 1998. The CAT can also review decisions taken after the Secretary of State instructs in respect to networks and services functions. The CAT's decisions on this matter should be decided on the merits and should include, where relevant, the appropriate course of action to the appropriate institution for consideration.

Broadcasting – The telecommunications legislation and broadcasting of 2003, 1990 and 1996 provides OFCOM with the authority to impose a variety of conditions on licenses, in order to ensure fair and effective competition. Any person affected by the exercise of these powers can appeal to the CAT.

Roaming in mobile telephony - The CAT can hear appeals from any individual affected by decisions made by OFCOM under the relevant EU Regulation.

Use of frequency for the provision of mobile satellite services - Anyone affected by OFCOM's decisions on the selection and authorisation of operators of systems providing mobile satellite services can appeal before the CAT, and the CAT's decisions can be appealed to the Appeals Court or the Court of Session of Scotland.

Price control – When during an appeal an issue arises concerning price controls, the CAT, before making a decision, must send the matter to the CMA in order for the authority to follow the guidelines of the CAT.

Payment services - Anyone affected by a decision of the CMA in relation to the implementation of the relevant European Union rules in relation to access to payment systems may appeal to the Tribunal.

Financial services - Some regulatory decisions related to sanctions and the enforcement of legislation on financial services can be appealed to the CAT.

Energy - The CAT can hear appeals related to decisions taken by the Office of Gas and Electricity Markets (OGEM) concerning the implementation of a condition to a license granted in the electricity markets, as well as on the imposition and amount of any penalty set up by the aforementioned authority.

Civil aviation - The CAT can hear appeals regarding decisions on the determination of market power and dominant positions adopted by the Civil Aviation Authority (CAA). It is also possible to appeal before the CAT certain CAA decisions dealing with the imposition, modification and reversal of orders.

Social security and health – It is possible to appeal to the CAT decisions made by the regulator of security and social health services, which has powers in competition concurrent with those of the CMA and which can also requests the CMA to perform market investigations.

Source: Based on the information Competition Appeal Tribunal (CAT), www.catribunal.org.uk/.

4.2.4 *Examples of cases solved by specialised courts*

The following boxes provide examples of competition cases decided in France, Finland, India and the United Kingdom, by courts that, as noted in the previous subsections, have different degrees of specialisation in reviewing competition law cases.

Box 4.9. Case – Concurrence SA v. Sony, Paris Court of Appeal (1997)

“Concurrence was a company specialised in the sale of electronic goods, as well as one of Sony’s distributors.

Compared to its other distributors, Sony had allegedly imposed unfair and discriminatory conditions of sale on Concurrence.

Concurrence lodged a complaint before the Competition Council (the FCA). The Competition Council decided that Sony was responsible for several practices contrary to article L. 420-1 Com. Code (the French equivalent of article [101(1)TFEU]). This decision was confirmed by the Court of Appeal. Concurrence then brought an action for damages before a commercial court, to get compensation for the damage it suffered as a result of these anti-competitive practices. The Commercial court held Sony liable for the injury suffered by Concurrence, and damages were awarded on the basis of a lump sum.

Sony appealed this decision. The Court of Appeal held that Sony was liable to pay damages to Concurrence. However, the Court did not consider that Sony was liable to pay damages for all of the anti-competitive practices for which it had been fined by the Competition Council. The Court especially insisted on the importance of a causal link. For some of the anti-competitive practices, the causal link between the practices and the damage alleged could not be proved. Therefore the Court did not grant compensation for the damages caused by all these practices. Furthermore, the Court held that damages could not be awarded on the basis of a lump sum, but that the exact amount of injury suffered had to be assessed. It therefore appointed an expert to evaluate this amount.”¹

1. See also Box 4.4.

Source: Based on the information The European Commission. Actions for Damages. France, http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/france_en.pdf

Box 4.10. Case – Valio, milk processor in Finland

“Valio, the biggest milk processor in Finland, is owned by dairy co-operatives which in turn are owned by dairy farmers. Valio collects over 80 per cent of all raw milk in Finland. It is the market leader in nearly all dairy products and has a market share above 50 per cent in the fresh milk market. Consequently, Valio was found to hold a dominant position in the fresh milk market. Valio’s main competitor in Finland is Arla Ingman, which since 2008 has been a part of the Arla Foods group.

The Court upheld the Competition Authority’s traditional approach to predatory conduct, namely to compare Valio’s wholesale prices with total costs and average variable costs in the fresh milk market. The Court did not follow recent EU case law such as Post Danmark which examined whether reduced prices covered long run average incremental costs (LRAIC) and whether anti-competitive effects of low prices could be established above those costs. The LRAIC method was considered more relevant for natural monopolies. Valio’s arguments on the fixed nature of raw material costs due to Valio’s obligation to process all the raw milk produced by its owner co-operatives were not accepted. The Court stressed that this was not a legal obligation but a historical practice accepted by Valio’s management. Valio argued that variable raw milk cost used in the comparison should be lower since, due to the co-operative nature of the business, the price paid for raw milk included also profits on more lucrative products than fresh milk. This argument was rejected. The Court concluded that after the price cuts in March 2010, Valio’s wholesale prices did not cover the variable costs of production and sale of fresh milk.

As the largest purchaser of raw milk, Valio is able to set the price which its competitors must pay to obtain Finnish raw milk. This price must be taken into account in the application of the equally efficient competitor test used to assess Valio’s pricing behaviour and likelihood of foreclosure. Valio claimed that its price cuts were motivated by its desire to meet competition from Arla Ingman which had obtained significant business with the largest grocery retail chain S Group. The Court rejected this claim. The criteria of efficiency defence were not fulfilled. The Court also pointed out that Valio’s price changes were not initiated by customers but were part of

Valio's own strategy and that Valio offered additional price reductions to the S Group which was an important customer for Arla Ingman. The Market Court found that it is not necessary for the Competition Authority to show intent to foreclose to conclude that pricing behaviour is predatory. Further, it was explicitly stated that intent could be presumed since Valio's prices did not cover variable costs.

Despite this conclusion, the Court examined in detail the evidence submitted for Valio's intent. It found that Valio's top management made a strategic decision in February 2010 to drop the wholesale prices of fresh milk significantly to foreclose competition on the Finnish market. The finding was based on e-mail correspondence and internal documents found during inspections. According to the judgment, the evidence showed that the purpose of the price cuts was to make importing of milk unprofitable for Arla Ingman, to increase Valio's market share and thereafter raise prices back to a higher level. Valio was ordered to end its abusive pricing and to pay a record fine of EUR 70 million. The Court justified the high fine by the serious nature of the infringement. The Court noted that Valio had offered conditional volume rebates to Arla Ingman's important customer and forced Arla Ingman to sell at an even lower price than Valio, thereby increasing Arla Ingman's losses. The Court also took into account recidivism since Valio had been found guilty of an abuse of dominant position in the milk market in 1998. Furthermore, Valio failed to terminate the abusive pricing behaviour even during the investigation. Valio has appealed the judgment in the Supreme Administrative Court.”¹

1. See also Box 4.5.

Source: D&I Quarterly 2014. Q3, www.dittmar.fi/sites/default/files/publications/2014_09_30_D_per_cent26I_Quarterly_Q3_2014.pdf

Box 4.11. Case – Lafarge India Limited Vs. Competition Commission of India & Builders Association of India (2015)

“In a judgment passed in batch petitions of “Lafarge India Limited Vs. Competition Commission of India & Builders Association of India”, the Competition Appellate Tribunal (COMPAT) set aside a circa 60 billion rupee (\$ 945 million) fine imposed on 11 cement firms by Competition Commission of India (CCI) for allegedly forming a price cartel on procedural grounds and directed the CCI to hear the matter afresh. COMPAT also allowed the cement manufacturers to withdraw the 10 per cent penalty amount already deposited with the CCI which has been asked to pass a fresh order within three months. The judgement followed appeals filed by 9 cement manufacturing companies including ACC, Ambuja Cements, Binani Cements, Century Textiles Ltd, India Cements, JK Cements, Lafarge India and their industry body Cement Manufacturers Association (CMA) against the two CCI orders passed in June-July 2012 declaring that the CMA and cement makers had acted in violation of the Competition Act, and imposing a total penalty of approximately INR 60 billion. COMPAT allowed the appeals on a procedural violation and not on merits. The violation related to the signing of the impugned order of CCI by the Chairman, though the Chairman was not present at the time of final hearings of the matter on three dates on which arguments were advanced by the counsels of each party. Therefore, the main procedural issue before COMPAT was whether in exercise of its adjudicatory functions, CCI acts as a quasi-judicial body and as such, it is bound to comply with the principles of natural justice and whether non-compliance of an important facet of natural justice, namely ‘only the one who hears should decide’ has the effect of rendering the impugned order a nullity. After analysing the case, COMPAT rejected the submissions made by CCI on the lack of prejudice caused during the procedural lapse; COMPAT held that if natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal.”¹

1. See also Box 4.6.

Source: Competition Appellate Tribunal sets aside order of Competition Commission of India against Cement Cartel. Ranjan Jha, Partner at Bhasin & Co., Advocates, www.linkedin.com/pulse/competition-appellate-tribunal-sets-aside-order-commission-ranjan-jha.

Box 4.12. Case – Ryanair/Aer Lingus (2015)

“Ryanair Holdings Plc (“Ryanair”) is the holder of 29.82 per cent of the issued share capital of Aer Lingus Group plc (“Aer Lingus”), the Irish national carrier. Most of the minority stake (some 25.2 per cent) was acquired between September and November 2006 when Ryanair launched its first public bid to acquire Aer Lingus.

The European Commission declared that the bid (together with the acquisition of the 25.2 per cent minority stake) would significantly impede effective competition in the common market and that the concentration composed of the bid and the minority stake was incompatible with the common market. Aer Lingus sought from the European Commission a direction requiring Ryanair to divest itself of the 25.2 per cent stake it had built up. This was resisted and the European Commission eventually decided in October 2007 that it had no power to make a direction because Ryanair did not have control over Aer Lingus within the meaning of the European Union Merger Regulation.

There were appeals by both Ryanair and Aer Lingus against the various determinations by the European Commission. The General Court rejected both appeals. It held that, absent control, the Commission had no power to require Ryanair to divest itself of the minority stake it had acquired. Any further action in that respect would be a matter for the national authority applying its own competition law.

Following the judgments in the General Court, the Office of Fair Trading (OFT) of the United Kingdom began its own investigation in relation to Ryanair's retention of its minority stake. Ryanair's minority stake in Aer Lingus was referred for investigation to the Competition Commission (CC) on June 2012. The CC found that the two companies had ceased to be distinct enterprises for the purposes of the Act as a result of Ryanair's ability to exercise material influence over the policy of Aer Lingus and that this therefore amounted to a relevant merger situation. Ryanair could block special resolutions at general meetings of Aer Lingus and could prevent Aer Lingus from merging with another airline. In particular, Ryanair had the ability to block the sale of Heathrow slots. Drawing on the CC's analysis Ryanair's stake would need to be reduced to 5 per cent for a partial divestiture. While a stake at this level, under some circumstances, may still enable Ryanair to block a special resolution, such scenarios were sufficiently unlikely to occur in practice for this risk to be tolerable at this level of shareholding.

In February 2015, Ryanair requested that the Competition and Markets Authority (CMA), which replaced the OFT and the CC, to re-examine its decision to require it to sell its 29.8 per cent stake in Aer Lingus down to 5 per cent. In July 2015, the Competition Appeal Tribunal (CAT) dismissed Ryanair's appeal against the CMA's decision. Ryanair then sought permission from the Court of Appeal to appeal the CAT's decision, but has now withdrawn that application.”

Source: Based on the information of Bailii. England and Wales Court of Appeal (Civil Division) Decisions, www.bailii.org/ew/cases/EWCA/Civ/2015/83.html and the Competition and Markets Authority, www.gov.uk/government/news/cma-welcomes-court-of-appeal-judgment-on-ryanair-aer-lingus and www.gov.uk/government/news/cma-welcomes-ryanairs-withdrawal-of-challenge.

Box 4.13. Case – Local Loop Unbundling: Ofcom price control decision (2009)

“On May 2009, the Office of Communications (OFCOM) set out its decision on what the price controls should be relating to local loop unbundling and wholesale line rental in the telecoms market until March 2011 (local loop unbundling makes British Telecommunications cables which run from a customer's property to the exchange available for others to use). On July 2009, Carphone Warehouse appealed OFCOM's decision. On November 2009 the Competition Appeal Tribunal (CAT) made a judgement on the ‘non price control matters’ and issued an order entitled a Reference of Specified Price Control Matters to the Competition Commission (CC). On August 2010 CC made a judgement stating that OFCOM had materially erred by underestimating the rate of efficiency savings which Openreach¹ could reasonably be expected to achieve over the period of the price controls. The CC also upheld Carphone Warehouse's challenge when in relation to OFCOM's assessment of inflation of wage and energy costs. The CC also determined that OFCOM had made certain errors in relation to specifying the price caps for baskets of ancillary services. On October 2010 CAT made a final judgement which found OFCOM had made certain errors, and remitted the decision back to it. OFCOM adopted the CAT's judgement immediately so it could be implemented for the remainder of the price control period – until March 2011.”

1. See Openreach, a BT Group business, www.openreach.co.uk/orpg/home/products/pricing/loadProductPrices.do?data=%2Bs55xT91%2FPruY0Pxlyi4HVnqs1m6Ockz301sqolk8P2FdiaKKPEfrCsJCb3sZkzj.

Source: Based on the information of (HM Government, 2013).

4.3 Conclusions

The decisions of the competition authority, either in a bifurcated or integrated model, are subject to review by courts. The path of this review will be different in each model and the court(s) carrying it out may be of general or specialised jurisdiction.

The nature of the courts' jurisdiction, either general or specialised, is a function of public policy emanating from the legislature.

Courts of general jurisdiction can review civil, administrative or criminal matters that include a wide range of issues.

Specialised courts are those that concentrate cases that are handled differently and whose judges retain special knowledge of and expertise in that particular area of the law. In the sphere of economic competition, the rationale behind the concentration of cases is sustained in the procedural and substantive complexity of competition law, and in the need to promote certainty and predictability in the marketplace through the expedite resolution of competition cases.

Court specialisation is a matter of degree, depending on the matter or matters that fall within the competence of specialised courts. The international examples presented in this section illustrate these variances in degree, which may range from partial to full specialisation in competition which, may even cover regulatory issues.

Figure 4.1 presents a summary of the international examples provided in this section. These are organised in a Cartesian plane according to the jurisdiction and the degree of specialisation of the court that decides upon competition cases (in the case of the bifurcated model) or reviews competition cases (in the case of the integrated model).

This figure includes and highlights Mexico's case, since it is the jurisdiction that requested the production of the present report, and therefore it may be relevant to it to visually place the position that the new specialised courts take in the specialisation degree axis. It can be observed that the position of District Court and Collegiate Circuit Courts specialised in telecommunications, broadcasting and competition is left of the Competition Appeal Tribunal (CAT), a specialised court specialising in the review of a larger number of regulatory issues.

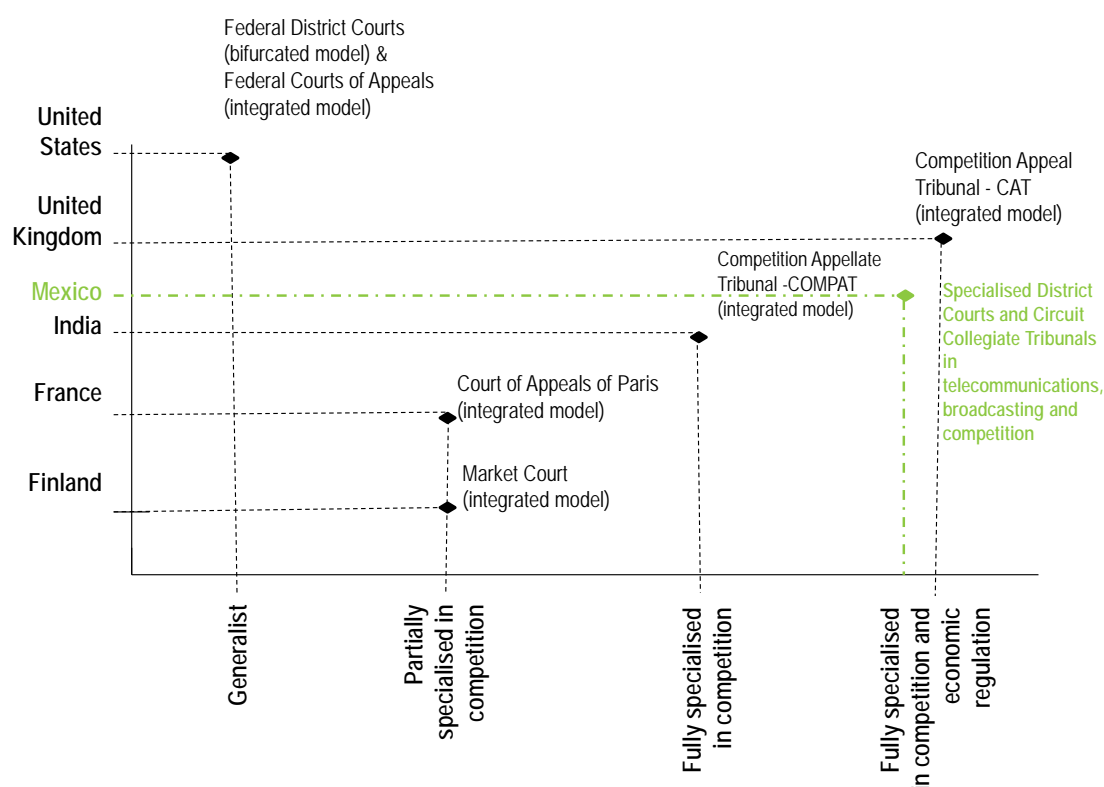
Partial specialisation is exemplified by the cases of France and Finland. The example of France (Box 4.4) presents a best practice where the concentration of competition cases in specialised chamber within the Court of Appeals of Paris has resulted in a better understanding of the economic issues that underpin competition cases, furthermore improving the relationship between the French Competition Authority and the Court of Appeal. In Finland's case (Box 4.5), the partially specialised court was created to integrate different but interrelated policy objectives (commercial law, intellectual property, unfair competition,⁶¹ consumer protection and economic competition). Examples of cases decided by these courts are included in Boxes 4.9 and 4.10.

Full specialisation in competition cases is rare, as demonstrated by the case of India (Box 4.6). This case is particular since the Competition Appellate Tribunal (COMPAT) is a non-judicial body. An example of a case decided by COMPAT is provided in Box 4.11.

Full specialisation in competition and economic regulation is seen in the case of the United Kingdom (Boxes 4.7 and 4.8) where the Competition Appeal Tribunal (CAT) reviews appeals on the merits in respect to decisions made by the Competition and Markets Authority (CMA) and sector

regulators (in telecommunications, electricity, gas, water, railways, air traffic services, payment systems, healthcare services and financial services). This court has the objective of providing a control mechanism for challenging or correcting the decisions of all government bodies responsible for and directly involved in the well-functioning of markets, including the decision of the Secretary of State. Examples of cases decided by the CAT are provided in Boxes 4.12 and 4.13).

Figure 4.1. Level of specialisation of courts: some international examples



The concentration of competition cases in a court may be an adequate strategy for the effective implementation of competition law. However, when case concentration is not possible, such as in the courts of general jurisdiction, judges that hold expertise and experience in complex areas of the law (different to competition), may still produce fairly accurate results with regard to the assessment and decision of economic competition cases. The experience of the United States courts (Box 4.1) demonstrates this. Examples of competition cases decided by United States courts of general jurisdiction are provided in Boxes 4.2 and 4.3.

Where courts are of general jurisdiction and the concentration of cases of the same nature is not possible, judges may need to use other means to complement their expertise and experience – such as serving longer terms,⁶² pre-trial work with the parties and/or the use of court's economic experts appointed by the court⁶³ – the latter two resources will help structure the fact-gathering process and narrow complex issues to facilitate comprehension by judges of general jurisdiction.

5. Benefits of court specialisation

The main reasons for court specialisation in several policy areas are (Grameckow & Walsh, 2013):

- the increasing specialisation of law and the growing complexity of topics; and
- the range of benefits brought about by specialisation, such as greater *procedural efficiency* and understanding of the law and the *impact of the courts' decisions* on the parties and on the overall context (e.g. in the markets, the environment, etc.).

In the sphere of competition, the “conventionally claimed benefits of specialised courts go to their potential efficiency, subject matter expertise, and, if they are given a monopoly over the subject matter, uniformity of decisions. (Ginsburg & Wright, 2012)”

Specialisation of courts, in competition as well as in other policy areas may have at least three advantages (Grameckow & Walsh, 2013) :

- *Greater efficiency*, through specialised procedures, staff and specialised judges who are well versed in the subject matter, which leads to streamlined operations and more efficient processing.
- *Enhanced uniformity*, as a result of dealing with exclusive jurisdiction over particular areas of the law, thereby contributing to greater predictability and confidence in the courts.
- *Quality decisions*, due to greater expertise and experience in applying the law to the facts properly (Ginsburg & Wright, 2012).⁶⁴

5.1 Greater efficiency

Organisations specialise to increase their productivity. Repeating several tasks may allow judges to develop routines, facilitate standardisation and give them greater familiarity with such tasks. Therefore, it seems intuitive to think that judges who only review competition law cases will, at least, process them faster than judges that hear only occasionally competition cases (Baum, 2009).⁶⁵

Efficiency is the result of a process that entails the use of fewer resources to produce more output. In the presence of specialisation, efficiency gains would be expected. However these gains are not directly attributable to specialisation itself but rather to the expertise gained in respect to the procedural and technical aspects of the law, as well as to the experience obtained through the concentration of knowledge in a particular subject matter (Baum, 2009).

That is:

- *Expertise* is an attribute that may produce efficiency. Any gains in efficiency that result from specialisation are partly the product of judges' gaining expertise through concentration on a

particular subject matter. Expert competition specialists need to be able to apply the law to the facts, as well as to carry out an assessment of effects measured by sound economic analysis (OECD, 2008a).⁶⁶

- *Experienced competition specialists* should be more able to recognise a claim that should be dismissed or an argument that can be put to a test because the judge's experience with prior cases will inform their view of future cases. This is an important point for any particular field of the law, but it probably is more relevant to competition cases because these depend by their very nature on economics (Ginsburg & Wright, 2012).

Therefore, efficiency in reviewing the decisions of a competition authority is likely increased by accumulating expertise and experience in hearing and understanding economic evidence and arguments, which are the substance of competition cases.

Courts that review the decisions of an authority that regulates a complex field of economic activity, as competition, or specific sector, become familiar with the regulatory scheme overall and see more quickly how a case fits into the relevant legal framework or body of precedent. Therefore, it is expected that a specialist court would be more efficient in processing competition cases⁶⁷ – that is processing these cases in less time – where the case management can be most expedite by a judge knowledgeable about the subject.

In this sense, efficiency could be assessed through the indicator of the *length of a review*. This indicator is relevant because lengthy reviews could increase the uncertainty level in the market, be it because decisions are delayed or because they are under overall consideration for longer (HM Government, 2013).

However, the length of a review is not only subject to the experience of judges; it will also be affected by other factors such as: the type of review and its intensity;⁶⁸ the type of case reviewed, or the resources available to the courts – such as their financial resources or their management systems.⁶⁹

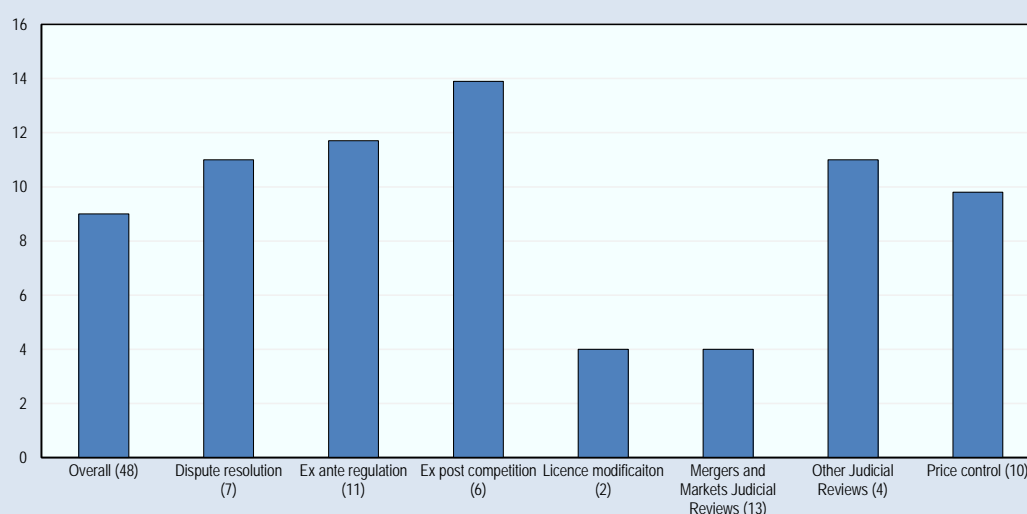
Box 5.1 presents the example of the duration of the case resolution conducted by the Competition Appeal Tribunal (CAT) of the United Kingdom (according to the type of case and the type of review carried out by the Tribunal).

Box 5.1. Length of appeals heard by the UK CAT

Inevitably the process of bringing and hearing appeals takes time. The CAT's Rules and Guide to Proceedings set out how the CAT should use case management processes to ensure that cases are dealt with expeditiously and fairly. For example, the CAT's Guide to Proceedings (2005) states that the Tribunal 'will aim to complete straight forward cases within nine months'.¹

The following bar graph shows the average time taken in different types of appeals over a period of five years. The CAT notes there is significant variation around the types of cases. For example, some cases take as long as twenty four months where others as little of ten days. When there are further appeals to the Court of Appeal and/or the Supreme Court, these add an average of a year to the total time taken.

Figure 5.1. Average time taken by type of appeal (no. of appeals)



Source: Average time taken by type of appeal. From the Streamlining Regulatory and Competition Appeals – Consultation Report on Options for Reform. HM Government, of 19 June 2013, p. 20.

Cases heard on procedural grounds appear to be resolved more quickly than full merits appeals. Between 2008 and 2012, appeals heard by the CAT on procedural grounds lasted around four months, whereas a full merits review lasted around eleven months on average. These case timescales are broadly in line with international comparators although these vary significantly and some comparators outperform the UK.² For example, telecoms and energy appeals in the Cour d'appel de Bruxelles in Belgium average 23.5 months and 14.1 months respectively. All proceedings heard in 2009 at the Verwaltungsgericht Köln in Germany average 9.4 months. Telecoms and energy appeals heard at the Court of Appeals of Paris in France average 7.5 months and 8.8 months respectively. In comparison the UK Government estimates that on average communications and energy appeals last 10.1 months and 12.4 months respectively.

1. See HM Government (2013), p. 69. There is a government belief that appeals should be as quick as possible, while remaining robust, to increase certainty so as to not act as a drag on the system. Therefore the government proposed to work with the CAT to reduce its target timescale for all straightforward cases to 6 months. The Government would also encourage the CAT to introduce a target timescale for all other cases of 12 months.
2. See (OECD, 2013b), p. 7. In the OECD area the average length of civil proceedings is around 240 days in first instance, but in some jurisdictions a trial may require almost twice as many days to be resolved. Final disposition of cases may involve a long process of appeal before higher courts, which in some cases average more than 7 years.

Source: Based on information obtained of (HM Government, 2013)

5.2 Uniformity

In most discussions, specialisation refers to the premise that relates expertise and experience to an improvement in the judges' capacities to reach decisions in which they apply the law to the facts properly (Baum, 2009).

Concentrating all cases of a particular type in a single court eradicates the potential for distinctness and conserves the resources of the court for review of these cases. Moreover, greater subject-matter specialisation for judges is usually accompanied by reductions in the number of judges who hear cases in the field or fields in which a court specialises.

If a specialised court replaced a court of general jurisdiction in a specific field, one effect would be the aforementioned concentration of cases among the specialised court judges rather than their distribution among the different district judges. A likely result of that will be a reduction in the number of decisional units that hear cases in a particular field, which in turn is likely to increase the uniformity of legal interpretation in the field and therefore the predictability of courts' decisions (OECD, 2013a) (Baum, 2010).

Uniformity refers to minimising conflicts in the interpretations of the law. To the extent that specialisation produces uniformity, that effect results from reducing the number of judges or courts who decide cases in a field of law rather than from reducing the range of specific cases heard (Baum, 2009). Moreover, uniformity can be the result of other effective mechanisms to solve discrepancies among courts (specialised or of general jurisdiction), such as the creation of circuit plenums in order to avoid thesis contradictions.⁷⁰

Predictability of court decisions is a function of uniformity. Predictability refers to the possibility to predict ex ante how the law will be applied by the court in an ex post manner. Predictability is extremely important from an economic point of view. It guarantees legal certainty of the law and enables economic agents to anticipate the potential legal consequences of their actions. The latter in turn is crucial for making correct decisions ex ante. The predictability of court decisions is influenced by uniformity in the application of the law (Baum, 2010).

Box 5.2 presents a summary of decisions made by the Supreme Court of Justice of Mexico (SCJN) in competition matters; these decisions represent a reference and a solid foundation that promotes uniformity and predictability in the decisions of the new specialised courts.⁷¹

Box 5.2. Case law in competition issues by the Supreme Court of Justice of Mexico

Even though in Mexico's courts specialised in competition have been in place only since 2013,¹ the case law produced over the last twenty years, as a result of the judicial review of decisions of the competition authority, provides the basis for uniformity and predictability of the intervention of specialised courts in the implementation of competition policy in Mexico.

The case law produced by the SCJN has recognised the nature of the competition authority and considered basic concepts such as: market participant, relevant market, barriers to entry, substantial power, and anti-competitive practices.

This case law has been produced in line with:

- Constitutional principles of: legality, legal security, division of powers, specificity, due process, non-self-incrimination, freedom of labour and commerce, sanctions and reservation of the law.
- Procedures and formalities: of the investigation and decision phases, information requirements, depositions, on-site searches, forfeitures, notifications and extensions of investigation periods.
- Established means for legal defence: reconsideration resources, nullity judgements, amparos² and suspensions.

SCJN case law in competition matters:		
Year	Topic	Market
2000	Initiation of an investigation	On-line sale of oral care products
2002	Confirmation that public brokers and public notaries shall not be considered market participants	Public brokers and public notaries
2003	Initiation of an investigation	Chewing gum
2004	Confirmation of the existence of a collective market participant (an economic group)	Carbonated drinks
2007	Confirmation of the CFC's independence (to carry out on-site searches and to sanction)	Not applicable
2008	Basis for the classification of information in the investigation phase	Not applicable
2013	Confirmation of substantial market power	Local and long distance telephone calls
2015	Confirmation of a sanction imposed on a cartel	Pharmaceuticals
2015	Confirmation of a sanction imposed on a cartel	Chicken
2015	Confirmation of a sanction imposed on a cartel	Anaesthesiologists

1. The appointment of the members of the new specialised courts was published on 27 September 2013. Federal Judicature Council. Communication No. 23 of 27 September 2013.

2. See also endnote 18.

Source: Presentation made by Magistrate Adriana Campuzano, about the Supreme Court of Justice (SCJN) case law in competition, in the workshop of November 3, 2015.

5.3 Decision quality

Expertise may enhance the quality of a court's decisions because more expert judges have a greater knowledge about the field in which they are deciding cases, and are therefore more skilled and likely to reach the right decisions.

A higher quality of decisions, apart from being a function of greater expertise on the part of judges, also depends on their experience in applying the law to the facts properly.

In addition, the concentration of cases may allow for the appreciation of the competition enforcement system as a whole, which enables the specialised court to assess the context of any case before it and to appreciate the effect of its decisions on the complete system. For example, *“if a specialised court always decided to reduce fines imposed by the competition authority, this would virtually guarantee an increase in the number of reviews, with a distorting effect. A specialised court is best placed to assess the advantages and risks of such decisions. (Freeman, 2013)”*

Moreover, specialisation may produce a virtuous circle, since the greater the specialisation of courts, the greater the demands placed on the performance of the competition authority, the lawyers and the independent experts.

In this sense, a specialised court properly fulfilling its role, which is to watch that the authority's actions comply with the legislation in force and to overturn its decisions whenever they feature defective aspects, may have an effect on the quality of the decisions of the competition authorities. That is, the cumulative effect of a number of the court's findings may indeed affect the authority in the fulfilment of its tasks and in this sense it affects the authority's operation and its outcomes. Thus, an authority's learning curve may result in good decisions, based on sound evidence and on the rule of law, which will generally be much less likely to be overturned by a specialised court.

Box 5.3 shows the United Kingdom's example of the CAT upholding the competition authority's decision in the healthcare market. Box 5.4 shows Mexico's example of a bid rigging decision by the competition authority in the public healthcare market that was upheld by the courts. Both cases focus on the healthcare market: in the case of the United Kingdom the authority presented economic evidence that showed no adverse effects on competition; and, in the Mexican case, the authority presented indirect economic evidence supported by direct evidence⁷² of cartel activity. In both cases, robust analysis and evidence lead the decisions to be upheld by the courts of their respective countries.

Box 5.3. CAT upholds a CMA market investigation decision in a healthcare appeal

"In March 2015 the Competition Appeal Tribunal (CAT) confirmed a Competition and Markets Authority's (CMA) decision arising from the private medical healthcare market investigation.

The CAT upheld the CMA's 2014 finding that the formation of anaesthetist (or other medical professionals) groups do not have an adverse effect on competition (AEC) in the UK.

AXA, one of the UK's leading private medical insurers, claimed:

- That AEC could be presumed in relation to certain local markets due to the formation and operation of certain anaesthetist groups, and that the CMA had failed to displace this presumption. AXA in particular highlighted a combination of collective fee setting and high local market shares as giving rise to the presumption.
- That, contrary to the CMA's report, the CMA's investigation tended to show that there was an AEC in some local markets.
- That the CMA had breached its statutory duty by failing to make a finding as to whether or not there was an AEC in any of the relevant markets.

The CAT dismissed AXA's appeal on all three grounds. The CAT agreed with the CMA's stance that a high market share does not in itself give rise to a presumption of an AEC, and concluded that the CMA had adopted a rational approach in weighing up other evidence as to whether or not anaesthetist groups give rise to widespread competitive harm.

Based on the fact that the CMA's investigation had produced "mixed" results regarding how each local market was operating, the CAT further held that the CMA was entitled to choose not to proceed with the investigation. It held that the CMA was justified in believing that the likelihood of finding an AEC in any local market was sufficiently small to render further investigation unjustifiable. The CAT further acknowledged that (under the rules at the time) the CMA was constrained by a fixed timeline of two years from the date of reference to complete its investigation and publish its report.

The CMA's private healthcare report has spawned several other appeals. [...]"¹

1. See King & Wood Mallesons. "Private hospital operator, HCA, is appealing against the CMA's decision that it divests two private London hospitals. Since then, a procedural error has come to light regarding this part of the CMA's case and this aspect has been remitted to the CMA for it to retake the decision following further representations. AXA, is also challenging the remedies imposed by the CMA in central London (including the hospital divestments), which it claims don't go far enough. This part of AXA's appeal is currently stayed pending the outcome of the remittal. In addition, the Federation of Independent Practitioner Organisations has raised a separate appeal. This is against the CMA's decision not to impose a remedy to improve public information in relation to consultants' fees in the private medical sector."

Source: King & Wood Mallesons. CAT upholds CMA decision in AXA private healthcare appeal finding it 'rational' and 'justified', of 10 March 2015, www.kwm.com/en/lu/knowledge/insights/cat-upholds-cma-decision-in-axa-private-healthcare-appeal-finding-it-rational-and-justified-20150320.

Box 5.4. The supreme court decides on bid rigging in Mexico's social public security tender case

"In April 2015, the Supreme Court of Justice (SCJN) confirmed the legality of a resolution issued by the extinct Federal Competition Commission (CFC) in 2010, against pharmaceutical enterprises Baxter, Fresenius, Eli Lilly and Pisa for engaging in cartel practices. The practice involved collusive agreements in public tender processes undertaken by the Mexican Institute of Social Security (IMSS), between 2003 and 2006, for two medicine groups: i) human insulin; and ii) electrolyte and intravenous solutions (which includes injectable water, sodium chloride, sodium chloride and glucose, and injectable glucose and Hartmann solution).

The SCJN decision not only validates the investigation that demonstrates that the anti-competitive practice took place, but also confirms the legitimacy of economic analysis as indirect proof for detecting anti-competitive practices. This constitutes an investigative tool of great value for the Competition Authority.

The bid rigging involved an agreement between the companies in order to establish, concert, and co-ordinate public procurement bid proposals with the aim of allocating contracts. This was detected through economic analysis of the results of tenders carried out between 2003 and 2006. The bid rigging led to an artificial increase in insulin and electrolyte and intravenous solution prices.

Certain market circumstances aided co-ordination between competitors. Some of these include: homogeneity of the tendered goods, the tender calls' frequency, the awarding of multiple contracts, acquisition decentralisation, and the exchange of information between the companies involved.

Furthermore, the SCJN decision states that the fines imposed on the companies that took part in the bid rigging, which amount to USD \$11.3 million, must be modified (or recalculated). The Federal Economic Competition Commission (COFECE) will comply with this decision with full respect to the SCJN.

To estimate the damages that the practice caused the IMSS, COFECE undertook an ex-post evaluation in line with best international practices. Its results suggest that, during the referred period, IMSS paid an average surcharge of 2.9 per cent in its acquisition of intra-venous solutions and 57.6 per cent for human insulin. This is equivalent to approximately USD \$46.8 million."¹

1. See Case Analysis, April 2015, COFECE. Absolute Monopoly Practice Analysis: Bid-rigging in public tenders for the purchase of medicines for the IMSS, www.cofece.mx/cofece/images/Promocion/Historias/HISTORIA_IMSS_080415.pdf.

Source: COFECE Press Release, COFECE-009-2015, www.cofece.mx/ingles/images/ingles/press_release/COFECE-009-2015.pdf.

5.4 Potential risks

There is evidence suggesting that court specialisation may also pose some risks, such as (Grameckow & Walsh, 2013):

- *A specific group of court users* – since judges, lawyers, experts, officials and actors involved in the litigation of cases handled by specialised courts tend to be a small group in each jurisdiction, judges may become familiar with these actors. Knowing these parties too well can lead to potential preferential treatment or bias in the judges' decisions.
- *Less broad experience* – through the compartmentalisation of the judges' activity and knowledge of the law, which may stir them away from the knowledge of different areas beyond their own speciality. Some argue that in the long run this could lead to a narrowing or even loss of perspective – limiting and biasing the understanding of the matters addressed and ultimately impacting the quality of the decisions.

- *Preferential selection process* – may lead to biased selection of judges and their staff. The justification of the need for greater experience or effort to be selected must not lead to preferential selection processes. The same shall be considered in other judicial organisational issues such as evaluation, promotion and payment. Circumventing legal requirements in this process may open the door for interest groups to influence the selection process.
- *Detachment from the judiciary system* – if court specialisation benefits only a small group of court users and positive results and lessons learned are not transferred to other judicial operations. In this case, the special focus and investment in these courts may become questionable. In addition, an important link with the general court system may be lost if their work and education is detached from it.
- *Transformation of a court into another competition authority* – in view of their specific expertise, specialised courts and competition authorities may tend to be treated alike – namely as experts in economic competition (David, et al., 2014). Therefore, particularly in integrated models, the legal framework needs to strike a careful balance between the need to ensure accountability and accuracy of the interventions of the competition authority, and the imposition of actions that even unintentionally hold back the action of the authority and that may also transform courts into other competition authorities. It follows that in issues of fact, courts need to carefully analyse the discretion that should be granted to the competition authority.

The aforementioned paragraphs do not question the value of court specialisation, but rather aim to encourage reflection about the possible costs and potential drawbacks in the course of action of specialised courts. These risks must be kept in mind in order to implement actions that will prevent them, as well as their likely potential negative effects.

Therefore, it is suggested that specialised courts develop the following measures:

- *Transparent procedures or guidance* that allow court users, and the public in general, to understand the objectives for which these courts were set up and the operation and processes they carry out.⁷³
- *Performance indicators* that provide the means for measuring the achievement of their objectives (e.g. length of review, number of cases solved in a given period, number and type of complaints received, number of capacity building events, or consistency in the application of the law.)

The aforementioned measures may help specialised courts, their users and the general public to assess the courts' performance, as well as to identify potential risks that may affect their operation.

5.5 Conclusions

The specialisation of courts, in competition as well as in other policy areas, may have at least three advantages: greater efficiency, enhanced uniformity and quality decisions.

Greater efficiency is driven by repetition and standardisation of tasks, expertise and experience of judges in hearing and understanding economic evidence and arguments that underpin competition cases. Efficiency can be attested through the indicator of the length of a review.

Shorter review lengths will provide greater certainty to the markets. It may be good practice to establish target deadlines to conclude the review of cases. For example, the Competition Appeal Tribunal (Box 5.1) has established in its Guide to Proceedings a target deadline of nine months to complete the review of straightforward cases.

Uniformity of decisions is promoted through the concentration of all cases of a particular type in a single court. Moreover, greater subject-matter specialisation and a reduction in the number of judges who hear cases in the field or fields in which a court specialises will further promote uniformity.

The greater the uniformity of the legal interpretation in the field of competition the greater the certainty and predictability in the market place. Mexico's example (Box 5.2) provides a best practice on the support provided by the SCJN's competition case-law, which can promote uniformity and predictability in the decisions of the new courts specialised in economic competition.

The improvement in decision quality is a function of greater expertise and experience in the correct application of the law to the facts. Courts that properly fulfil their role, i.e. holding the authorities accountable and overturning their decisions when defective, may have an effect on the quality of the decisions of the competition authorities. The international experiences of the United Kingdom (Box 5.3) and Mexico (Box 5.4) prove that robust analysis and evidence lead to decisions that may be ultimately upheld by the courts.

Jurisdictions with specialised courts need to be aware of the potential risks that the concentration of cases in a single court or courts may produce – such as capture by a specific group of court users, biases in the selection process of judges; less broad experience due to judges focusing on a specific area of the law; detachment from the judiciary system; and in integrated models, the possible transformation of a court into another competition authority.

Measures such as the development of transparent procedures or guidance and performance indicators may help specialised courts, its users and the general public to assess its performance, as well as contribute to the identification of potential risks that may affect their operation.

6. Determining factors of courts' outcomes

This section of the report describes some of the fundamental factors that may contribute to the strengthening of judicial institutions and that may enhance their role in the implementation of competition policy and law (OECD, 2015).⁷⁴

In previous sections it has been stated that courts' expertise and experience in procedural and substantive issues of competition law and in economics are needed for an effective implementation of competition policy.

On the one hand, *a court's expertise* is a dimension that may be influenced by several factors, which can include the:

- selection procedure of judges;
- academic background and previous experience in competition law and economics of judges;
- understanding of economic evidence by judges;
- availability of external experts; and
- expertise of the human capital (staff) that supports the review of cases.

On the other hand, the *dimension of a court's experience* may also be related to the factors that influence expertise, but may also include the terms that judges serve in the bench. The premise is that an increase in experience is a directly related to exposure to concentrated cases of the same nature.

Besides judges' expertise and experience, effective implementation of the competition law requires that courts have *robust management systems* that will allow if for a (i) a reliable management and transparent administration of the process; and (ii) the systematic production of statistics of the court's outputs (e.g. number of cases and length of the review, etc.).

Moreover, the quantity of financial resource available to the court inevitably influences its efficiency. However, even more crucial than the quantity of resources available is the *spending structure of the court*, which refers to the amount of financial resources devoted to specific key spending categories, such as those dedicated to develop or maintain the court's infrastructure, its information systems or its technical capabilities.

The following subsections provide a general description of the aforementioned factors, which are exemplified with international examples from Australia, Canada, Chile, Mexico, the United Kingdom and the European Union.

6.1 Selection process, academic background and professional experience

Independence⁷⁵ is a basic principle of the judiciary that shall be safeguarded regardless of the method used for selecting judges (Oberto, 2002).

Table A.1 in Appendix 1 provides international examples that illustrate a variety of different selection methods, academic background and experience requirements for judges serving in courts of general or specialised jurisdiction that review competition cases.

This experience shows that the selection of judges can be carried out in many different ways in the various competition systems around the world. Table A.1 shows that the methods of selection may include a two stage process in which there is a proposal of candidates (which may be submitted by the Executive Branch, a Central Bank or a Ministry, the Judiciary or even a country) that will be selected by another instance different to the first one (that may be the Executive Branch, a Ministry, the Judiciary, the Legislative, or a panel of experts).⁷⁶

Moreover, the selection process may take place following or not a public competition. The country examples of Chile and Mexico illustrate competitive processes for the selection of specialised judges.

Typically, there are boards appointed to carry out the task of selecting candidates, even if the formal nomination instrument of nomination carries the signature of the head of the Judiciary or the Executive. The case of the European Union is an example of this; where the 255 Panel (see Appendix 1) is the board responsible for selecting the judges of the General Court and the Court of Justice. Another example is Mexico, where the Federal Judicature Council (CJF) is the body responsible for determining the selection criteria and for selecting specialised judges. The CJF has an institution responsible for providing initial training on competition matters to selected judges (and applicants), namely the Federal Judicature Institute (IJF).

The selection process may be open, and in most cases, will allow for the participation of any person with a law degree (subject to the conditions established by the various laws), or else to persons who could be termed as specialists, in that they not only have a legal qualification, but also some form of specialisation or practical experience in a particular subject or subjects (Oberto, 2002).

It can be seen in Table A.1 that countries like Chile, Canada, Australia and the United Kingdom have specialised courts whose members may come from different academic backgrounds (e.g. economists). In the cases of Canada, Australia and the United Kingdom, members with backgrounds different to that of the legal profession will be considered lay members of the court. Even though EU courts are of general jurisdiction in nature, their members may also have different academic backgrounds. Mexico and the United States are the only countries of the sample used in this section whose courts, specialised or of general jurisdiction, require all their members to have a law degree, or in the case of the United States that its members have passed a bar exam.

With respect to the years of prior experience required to become a court member, the sample of countries illustrates a broad spectrum of years ranging from five years in Australia, seven and ten years in the United Kingdom, ten in Chile (TDLC), Mexico (District Courts) and Canada, twelve in the European Union, fifteen in Mexico (Circuit Courts) and Chile (Supreme Court), and twenty in the European Union. In some cases, the required years of experience are determined by the body that proposes the candidate to become a judge.

Lastly, the attribute of “good character”⁷⁷ is also a condition established as a statutory requirement for the selection of judges in many jurisdictions.

6.2 Term duration and re-appointment

International experiences provided in the previous subsection show that judges might be chosen to serve on the basis of pre-existing experience, and that some judges of courts may even join their come to those courts with prior relevant experience in competition matters.

However, even if judges lack of specific knowledge when they join a court, they are expected to gain it through immersion in the court's work, particularly if they become members of a specialised courts (Baum, 2009). Therefore, it may be expected that judges gain experience in the analysis of the in competition law if they are more exposed to competition cases during their tenure. By doing so, they are likely to increase the efficiency and uniformity with which cases are decided, as well as the quality of these decisions (Baum, 2010).

Table 6.1 provides a brief international benchmark of the term duration and re-appointment of judges.

Examples of jurisdictions included in Table 6.1 show that judges serving in courts of general jurisdiction, except for the European Union, serve in their appointment longer terms –until retirement or even with life tenures. In the case of specialised courts, the terms of service range from six years in Chile, to up to seven years in Canada and Australia, and to up to eight years in the United Kingdom. It is important to highlight that in the cases of Chile, Canada and Australia, appointments may be renewable for the same duration. This is also true for the European Union whose judges of general jurisdiction serve six-year terms.

It can be drawn from the aforementioned information that judges may have shorter appointments in order to avoid the potential risks of specialised courts⁷⁸ but are given the possibility of renewing them for a further term. This is for two possible reasons: continuity of their work and accumulation of experience in competition issues. In addition, terms may be staggered in order to ensure there will always be expert and experienced judges in the bench.

Table 6.1. International benchmark of the term duration and re-appointment of judges

Jurisdiction	Court	Judge's term of appointment	Re-appointment
United States	District Courts, Circuit Courts of Appeals, and the Supreme Court	Judges serve until they resign, are impeached and convicted, retire, or die.	Not applicable.
Mexico	District Courts and Specialised Circuit Courts	In the appointment system for judges specialised in competition, judges and magistrates must have several years of specialisation in administrative matters, and are commissioned for two, two and a half and three years; under the applicable rules, the term may be extended for four more years, as the Federal Judicature Council sees fit.	Not applicable
United Kingdom	Competition Appeal Tribunal High Court, Court of Appeal, and the Supreme Court	A person may not be a chairman or a panel member (lay member) for more than eight years. ¹ Life tenure with mandatory retirement at the age of seventy or seventy five depending on date of appointment.	The eight years term does not prevent a temporary re-appointment for the purpose of continuing to act as a member of the Tribunal for the purposes of any proceedings instituted before the end of his term of office. ²

Jurisdiction	Court	Judge's term of appointment	Re-appointment
Canada	Competition Tribunal	Each judicial member shall be appointed for a term not of no less than seven years and holds office so long as he remains a judge of the Federal Court. ³	A member of the Tribunal, on the expiration of a first or any subsequent term of office, is eligible to be re-appointed for a further term. ⁵
	Federal Court	Each lay member shall be appointed for a term of no less than seven years and holds office during good behaviour but may be removed by the Governor in Council for cause. ⁴	Not applicable.
	Supreme Court	Judges of the Federal Court of Appeal and the Federal Court hold office during good behaviour, but are removable by the Governor General on address of the Senate and House of Commons. A judge of the Federal Court of Appeal or the Federal Court ceases to hold office on becoming seventy five years old. ⁶	Not applicable.
European Union	General Court and the Court of Justice	Judges of the Supreme Court hold office during good behaviour, but are removable by the Governor General on address of the Senate and House of Commons. A judge of the Supreme Court ceases to hold office on becoming seventy five years old. ⁷	Not applicable.
		Judges are appointed for a term of office of six years. Every three years there shall be a partial replacement of fourteen Judges in each court and four Advocates General. ⁸	Renewable for a further term. ⁹
Chile	Tribunal for the Defence of Competition	Six years, with partial replacements every two years. ¹⁰	Renewable for a further term. ¹¹
	Supreme Court	Judges of the Supreme Court hold office during good behaviour, or up to seventy five years. ¹²	Not applicable.
Australia	Competition Tribunal	Up to seven years. ¹³	Renewable for a further term. ¹⁴
	Federal Court	Judges of the Federal Court hold office during good behaviour, but are removable by the Governor General on address from both Houses of Parliament. A judge of the Federal Court ceases to hold office on becoming seventy years old. ¹⁵	Not applicable.
	High Court	Judges of High Court hold office during good behaviour, but are removable by the Governor General on address from both Houses of Parliament. A judge of the High Court ceases to hold office on becoming seventy years old. ¹⁶	Not applicable.

Notes: 1. See Section 2(2) and 4(2) of Schedule 2 of Enterprise Act 2002. 2. See Ibid. 3. See Competition Tribunal Act R.S.C., 1985, c. 19 (2nd Supp.), s. 5(1). 4. See Competition Tribunal Act R.S.C., 1985, c. 19 (2nd Supp.), s. 5(2). 5. See Competition Tribunal Act R.S.C., 1985, c. 19 (2nd Supp.), s. 8. 6. See Federal Courts Act R.S.C., 1985, c. F-7, s. 5.3. There are specific requirements concerning the origin of the judges from within Canada under s. 5.4. 7. See Supreme Court Act R.S.C., 1985, c. S-26, s. 9. 8. See Art. 253 Treaty on the Functioning of the European Union and Article 9 of the Statute of the Court of Justice of the European Union. 9. See Art. 253 Treaty on the Functioning of the European Union. 10. See Article 7 of Competition Act, Decree Law 211 de 1973. 11. See Ibid. 12. See Political Constitution, Art. 80. 13. See Competition and Consumer Act 2010, s. 32. 14. See Ibid. 15. See Australian Constitution, Article 72. 16. See Ibid.

Source: Own elaboration with information of Appendix 1.

6.3 Understanding of economic evidence

Judges that review competition cases, either in generalist or specialised courts, will be continually faced with economic methods and evidence. For understanding these methods and analysing this evidence judges must have competence in economics issues or should develop it through technical capacity building (OECD, 1996).⁷⁹

The economic methods applied to competition cases encourage analytical rigor, help inform the examination of particular issues in a given case and bring complex factual settings to coherence (OECD, 2008). There are fundamental concepts used in these methods and in which judges must be knowledgeable. These concepts are relevant market definition, market characteristics, market features and theory of harm (OECD, 2016). See Appendix 2 for a brief explanation of each concept.

These fundamental economic concepts typically frame competition cases and guide the interpretation of detailed facts involving a particular issue through the application of the logical framework supplied by economics (Baker & Bresnahan, 2008).

There is a growing acceptance that courts are becoming more rigorous on the identification of the markets in which competition may be harmed and the mechanism by which this harm is done.⁸⁰ Therefore, competition authorities and parties are increasingly requested substantial economic support for arguments advanced in a competition law context, to use economic methods that help clarify the hypotheses in dispute and to present evidence that helps test them.

Even though economic methods help focus the attention of judges on the connection between the economic theory of a case and the evidence presented, sometimes the economic assumptions do not guarantee precision or may be ambiguous, and economic estimates may not be sufficiently precise for some courts to accept them as evidence.

There are a number of reasons why courts reject evidence, and in particular the economic kind. Some common reasons are:

- lack of understanding by the judges;
- existence of demanding standards of proof (OECD, 1996);⁸¹ and
- Lack of suitability in its presentation by the parties.

There are some examples of strategies that competition authorities have used in court to help judges understand complex economic evidence and theories. These examples are (OECD, 2008):

- *Presentation of evidence in a way that is credible, simple and well-supported by facts.* The challenge is to present economic reasoning in an understandable but not less precise way to judges. In order to ensure comprehensibility, the problem at issue should be clearly identified, and any economic argument should be put forward, to the extent possible, in a manner that allows the judge to easily follow it. Any economic conclusion should be based on relevant facts and should draw on established economic theory. It is vital that the economic case be aligned with the legal case, and that any witnesses that appear are well prepared.
- Appealing to judicial intuition and using real-life examples or analogies to back up arguments may also be helpful.

6.4 Use of external technical experts

In order to help judges interpret economic evidence and assess its probative value, courts may appoint external economic experts.

The use of economic experts varies significantly depending on the jurisdiction (OECD, 1996). In some competition systems, the membership of the court may include one or more economists, the court may appoint an expert to advise only the court,⁸² or the parties may provide these experts.

Of the aforementioned methods, that of court-appointed experts has the advantage of ensuring the impartiality of the experts, but it may suffer from a lack of transparency in the relationship between the court and the expert, which would result in the expert's opinion not being fully tested, as it would be in an adversarial context (OECD, 2016).

Table 6.2 provides some international experiences on the use of these external experts by the courts.

There may be other drawbacks concerning the use of external economic experts by courts, for example:

- The introduction of such experts may *create some inefficiencies*, particularly given the fact that when retained such experts will have to approach a given case from scratch.
- Also, if the experts do not have practical or real world experience, as well as experience in testifying, these may be *perceived as not credible or impartial*, even though they may be correct.
- Expert economists *can become advocates of their clients' position* and can be persuaded to advance arguments that might be considered disingenuous by the rest of the economics community.

Table 6.2. International overview on the use of external experts

Jurisdiction	Court	Conditions	Requirements
United States ¹	District Courts, Circuit Courts of Appeals and the Supreme Court	Traditionally, it is for the parties to submit expert witnesses. ² However, a court may appoint any expert that the parties agree on. ³	A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialised knowledge will help the trier of fact to understand the evidence or to determine a fact at issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. Whether these conditions are met is to be determined by the court.

United Kingdom	Competition Appeal Tribunal	Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings. ⁴ The tribunal has the power to direct the production of expert evidence, either of its own volition or the parties' request- no party may call an expert or present an expert's report as evidence without the Tribunal's permission. ⁵	The parties will be expected to agree to the experts; otherwise, and in any event, the selection is controlled by the Tribunal.
	High Court	The court may appoint an advisor that will assist the court in dealing with a matter in which the advisor has skill and experience. An advisor will take such part in the proceedings as the court may direct and in particular the court may direct an advisor to: (a) prepare a report for the court on any matter at issue in the proceedings; and (b) attend the whole or any part of the trial to advise the court on any such matter. If an advisor prepares a report for the court before the trial has begun: (a) the court will send a copy to each of the parties; and (b) the parties may use it at trial. ⁶	
	Court of Appeal	Same as above, but limited to points under appeal (usually law).	
	Supreme Court	Same as above, but limited to points under appeal (exclusively law).	
Australia	Competition Tribunal	The President may appoint a legal practitioner to assist the Tribunal as counsel, either generally or in relation to a particular matter or matters. The Registrar may, on behalf of the Commonwealth, engage persons as consultants to, or to perform services for, the Tribunal. ⁷ Parties may request the Tribunal to appoint an expert, or may provide expert evidence. Rules on expert evidence are subject to the accusatorial system (e.g. experts are mainly examined via cross-examination), and are set mainly in case law. Nonetheless, an expert witness has an overriding duty to assist the Tribunal on matters relevant to the expert's area of expertise. The expert's opinion must be relevant to a matter in issue. If the prejudicial effect outweighs the probative value, the judge has discretion to exclude the evidence. If the expert, in drawing inferences, enters into the field of mere speculation, the opinion evidence would be rejected.	Before a court will admit evidence of an expert it must be satisfied that the witness has the appropriate expertise. This is a matter of court discretion. ⁸

Notes: 1. See Box 5.1. 2. See Federal Rules of Evidence, Rule 702. 3. See Federal Rules of Evidence, Rule 706. Under this rule, the expert: (1) must advise the parties of any findings the expert makes; (2) may be deposed by any party; (3) may be called to testify by the court or any party; and (4) may be cross-examined by any party, including the party that called the expert. In antitrust cases, the appointment of experts by the court is more exception than rule – See Tahiri V Lee 'Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence' 6 Yale Law and Policy Review (1998). At 480-503. A survey of federal district judges conducted by the Federal Judicial Centre revealed that use of court-appointed experts under Rule 706 is relatively infrequent and that most judges view the appointment of an expert as an extraordinary activity that is appropriate only in rare cases. See Joe S. Cecil & Thomas E. Willging, Court Appointed Experts: Defining the Rule of Experts Appointed Under Federal Rule of Evidence 706, at 1 (Federal Judicial Centre 1993); Joe S. Cecil & Thomas E. Willging, The Use of Court-Appointed Experts in Federal Courts, 78 Judicature 41 (1994) (concise summary of survey results). However, the same survey revealed that judges frequently cited antitrust cases as the type of complex cases where court appointed experts would be both helpful and appropriate. Id. at 42. 4. See Rule 35 of Civil Procedure Rules. 5. See Rule 35 of Civil Procedure; Rule 19 of the Competition Appeal Tribunal Rules 2015. 6. See Section 70 of the Senior Courts Act 1981 and Rule 35 of the Civil Procedure Rules. 7. See Competition and Consumer Act 2010, s. 43 and 43A. 8. See Clark v Ryan. Some members of the High Court, Menzies and Windeyer, JJ., said that this rule was not complied with unless the witness gained his expertise from a course of study (see pp. 591-2). Dixon, CJ, and McTiernan, J. took the view that the expertise could be gained from either a field of study or as a result of practical experience (pp. 491-2, 498-99). A similar view has been taken in R v Silverlock [1894] 2 Q.B. 766. The High Court, however, did not reach a consensus on this point.

Source: Own elaboration with information of Appendix 1.

Ideally, economic experts should be advocates for their own economic position on a given issue, and this position should be firmly grounded in economics (OECD, 2008). In order to guarantee this, important principles should be adhered to when experts are involved in the courts' review (OECD, 2008):

- The *appointment of experts must be transparent, impartial and qualifications-based* (e.g. on their academic prestige, publications, experience in economic models applied to competition cases, or on their being specialists in competition and/or in a given industry).
- Experts shall *have good communication skills* so that they may easily convey information judges may not be familiar with (e.g. statistical economic evidence, economic or econometric models).
- The parties shall have access to the content of the expert's report, as well as the opportunity to rebut it.
- Any testimony offered by such experts, whether oral⁸³ or written, should be subject to the possibility of *rebuttal by the parties*.
- Economic experts should *not be relied upon as fact witnesses*; rather, they should focus on the economic or econometric analysis of facts that have already been introduced and established through other witnesses.
- Economic theories and methodologies should have been sufficiently tested in the community of economic experts before being presented to the court.

Economic experts retained to present economic arguments in court are more likely to be perceived as credible and impartial witnesses if they are asked to explain why a certain economic theory is sound and why it should be applied to the facts of the case (OECD, 2008).⁸⁴

These experts may also bring a new perspective to the courtroom. However, it is important to remember that experts may have both an offensive and defensive role to play in a given case.

6.5 Technical capabilities of the court's personnel

Crucial issues to enhance specialisation in competition issues are (Grameckow & Walsh, 2013):

- *entry-level training* for staff working with judges; and
- the existence of a *robust system of continuous judicial training* established with the aim to increase and keep the expertise and skills of judges and their personnel up to day.

In addition, providing *opportunities to participate in international education* conferences in specialised competition matters is crucial to learn about the best practices and experience from other jurisdictions. Even though this participation may appear to be costly, this provides the opportunity to bring knowledge back to share with the court and to help develop local training (Grameckow & Walsh, 2013).⁸⁵

Another important aspect both for specialised courts and for courts of general jurisdiction is the number of staff needed to support the court procedures. The principles to determine how many staff is needed shall be based on streamlining and responsibility optimisation within the courts (Grameckow & Walsh, 2013).

In some cases the staff of the court may be hired by a separate body and assigned to the court. See examples of the United Kingdom and Canada in Table 6.3.

Table 6.3. Examples of the United Kingdom and Canada: Staff adscription and its capacity building

Name of the court	Organisation responsible of hiring staff	Total number of staff	Capacity building
Competition Appeal Tribunal of the United Kingdom	Hiring through the Competition Service. ¹	Staff includes 14 people (with two of them working part-time). ²	The President must arrange training for members of the Tribunal as he considers appropriate. ³
Competition Tribunal of Canada	Administrative Tribunals Support Service of Canada ⁴	664 personnel for all 11 specialised administrative tribunals. ⁵	The Administrative Tribunals Support Service of Canada is responsible of maintaining a well-trained workforce while providing developmental assignment opportunities to employees. ⁶

Notes: 1. The Competition Service is a body corporate funded by the Secretary of State which funds, and provides support services – including staff, accommodation and equipment and any other services, which facilitate the carrying out by the Tribunal of its functions – to the Competition Appeal Tribunal. See Section 13 of Enterprise Act 2002. 2. See CAT Annual Report and Accounts 2014/2015 Competition Appeal Tribunal. 3. See Section 8 of Schedule 2 of Enterprise Act 2002. 4. See Administrative Tribunals Support Service of Canada Act. The Administrative Tribunals Support Service of Canada is responsible for providing support services and facilities to 11 federal administrative tribunals by way of a single, integrated organisation. These services include the specialised services required by each tribunal (e.g. registry, research and analysis, legal and other case-specific work), as well as corporate services (e.g. human resources, financial services, information technology, accommodations, security and communications). 5. See Administrative Tribunals Support Service of Canada 2015–16 Report on Plans and Priorities. 6. See 2013-2014 Part III - Departmental Performance Reports (DPR) of the Competition Tribunal.

Source: Own elaboration with information of Appendix 1.

6.6 Management systems and financial resources

Besides the expertise and experience of judges and their staff, effective implementation of competition law requires that courts adopt *robust management systems* that will allow them for a reliable and transparent management of the review process and the systematic production of statistics of the court's outputs.

Court management is directly related to delays or backlog in case reviews. An effective management programme is a means to achieve effective court management. Caseload management is a technique developed for court management in the United States, based on a set of principles and techniques used by courts to reduce and avoid delays since the 1970s. Box 6.1 describes this technique (Steelman et al., 2002).

Box 6.1. Caseload management in the United States courts

The principles of caseload management were first articulated and tested in the 1970s and 1980s when court management emerged as a distinct profession in the United States with the aim of addressing the uncertainty, delay and expenses of an archaic court system.

"Caseload management is the coordination of court processes and resources so that court cases progress in a timely fashion from filing to disposition. Judges and administrators can enhance justice when a court supervises progress from the time of filing, sets meaningful events and deadlines throughout the life of a case, and provides credible trial dates.

Proven practices in caseload management include: case-disposition time standards, early court intervention and continuous court control of case progress, use of differentiated case management, meaningful pre-trial events and schedules, limiting of continuances, effective calendaring and docketing practices, use of information systems to monitor age and status of cases, and control of post-disposition case events."¹

1. See National Centre for State Courts. Caseload Management Resource Guide, www.ncsc.org/Topics/Court-Management/Caseload-Management/Resource-Guide.aspx.

Source: Own elaboration with information of Appendix 1.

In addition to sound management systems, the transparency of the court is crucial for generating public confidence. Techniques such as Caseload management or the electronic handling of case files may contribute to the development of transparency initiatives – through the creation of public data bases that contain well-organised and structured information of cases, as well as through the provision of public statistics about the performance of courts.

Another transparency tool available to courts is the broadcasting of court sessions. For example in the United States broadcasting is permitted in courts in every state, but the rules governing filming of court procedures varies between states. In Mexico, the SCJN has a Judicial Channel that broadcasts the sessions of the court. In addition, the Specialised Circuit Courts in Competition, Telecommunications and Broadcasting in Mexico, broadcast their sessions through the Internet website of the Federal Judicature Council (CJF).⁸⁶ Box 6.2 presents the latter example.⁸⁷

Box 6.2. Broadcasting of court sessions in Mexico

In May 2009, the Federal Judicature Council (CJF) issued an agreement for the regulation of Collegiate Circuit Courts' session filming and broadcasting. This agreement emanates from a 2009 reform to the *amparo* law that mandates all *amparo* court reviews shall be filmed in order to create a digital file that could be further disseminated. It establishes that each Court shall select the issues that shall be disseminated through the CJF's Internet website or the Judicial public television channel (Judicial Channel), considering the following criteria:¹

- establishment of a novelty, relevant or important approach, or
- the determination in any civil, administrative, criminal or labour matter is transcendent or may have a high impact in the society.

Furthermore, in light of the above criteria and the strong commitment to make transparent the deliberations of collegiate circuit courts, since January of 2014 the sessions of these courts specialising in competition, telecommunications and broadcasting are live broadcasted in the CJF's Internet website² Sessions are broadcasted respecting the national provisions that protect access to public information and personal data.³

1. See General Agreement 16/2009 of the plenum of the CJF, http://dof.gob.mx/nota_detalle.php?codigo=5091712&fecha=27/05/2009.
2. See Desbalances section of the El Universal newspaper, www.eluniversalmas.com.mx/columnas/2014/01/105484.php.
3. See Latest reform of the Federal Transparency and Access to Public Government Information Law, www.diputados.gob.mx/LeyesBiblio/ref/lftaipg.htm.

Lastly, the quantity of financial resources available to the court inevitably influences its performance. However, even more crucial than the quantity of resources available is the *spending structure of the court*, which refers to the amount of financial resources devoted to specific key spending categories.

Investments in infrastructure and information technology have a direct impact in the performance of the court. International experience shows that this type of investment is one of the most effective means to increase clearance rates and reduce expected length of trials (Buscaglia & Dakolias, 1999). Table 6.4 presents an international benchmark of the financial resources and their investment in information technologies by different courts (Steelman et al., 2002).

Table 6.4. Courts' annual budget, office spaces and technological capabilities

Jurisdiction	Year	Court	Annual budget	Technological capabilities
United Kingdom	2014-2015	Competition Appeal Tribunal ¹	£4,253,000	Following an update of its IT infrastructure, the tribunal now has an electronic document and record management system, Windows 7 and Microsoft Office 2010, users' workstations and use of an owner-based platform (iTECC) shared with other government services. Provided by HM Courts and Tribunal Service.
	2013-2014	High Court ²	£1.097 million ³	
	2013-2014	Supreme Court ⁴	£7.98 million	With effect from 5 January 2014 the court began using its own IT network, moving from one provided by the Ministry of Justice. The new IT arrangements include new hardware and enhanced software provision based around Microsoft Office 365, including a new Case Management System. Data hosting was also moved to a combination of on-site server and cloud storage.
Canada	2013-2014	Competition Tribunal ⁵	CAD \$ 3,307,466	Time and effort from Registry staff will focus on providing timely training to the members and to some extent to the parties prior to using the new technology for electronic hearings. A smooth transition to this new process will ensure a strong and long lasting buy-in from all involved, which will result in hearings proceeding more efficiently while decreasing the need to print massive amounts of paper. ⁶
	2013-2014	Federal Court ⁷	CAD \$95,230,581	On the technology enabling front, the courts benefit from Digital Audio Recording System, various electronic systems were made to reduce dependency on paper and enhance accessibility of records was enhanced to increase operational efficiency. ⁸

Notes: 1. See Annual Report and Accounts 2014/2015 Competition Appeal Tribunal (CAT). 2. See HM Courts & Tribunal Services Annual Report 2013-2014 (1 April – 31 March). 3. This is the budget of HM Courts and Tribunals Service – see HM Courts and Tribunals Service annual report and accounts 2014 to 2015. 4. See Annual Report 2014-2015 (1 April- 31 March), www.supremecourt.uk/docs/annual-report-2014-15.pdf. 5. See 2013–14 Statement of Management Responsibility by the Registry of the Competition Tribunal, www.ct-ct.gc.ca/ResourcesRessources/FilesFichiers/PDFs/eng/AFS-EFA-2012-2013-eng.PDF. 6. See The Registry of the Competition Tribunal 2014-15 Report on Plans and Priorities. 7. See 2013-2014 Court Administration Services Report. 8. See Ibid.

Source: Own elaboration with information of Appendix 1.

6.7 Conclusions

There are critical factors that influence the independence and performance of judicial institutions, generalist or specialised, involved in the implementation of competition policy and law.

The factors addressed in this section are: the selection procedure of judges; their academic background and previous experience; their understanding of economic evidence; the availability of external experts; the expertise of human capital; the terms served in the bench; the court's management systems; its transparency; and the use of its financial resources. Highlighted below are the most important topics of each of these factors.

- *Selection of judges* that review competition cases often takes place in a two stage process, generally carried out by two different authorities, which helps ensure their independence. The selection process may take place following or not a public competition, and may be open to any person with a law degree or to persons termed as specialists that do not have a legal qualification but hold a form of specialisation or practical experience. The examples of Chile, Canada, Australia, the United Kingdom and the European Union illustrate the cases where members of courts that review competition cases come from different academic backgrounds (e.g. economists, accountants, financiers, etc.).

- *Prior experience* required for becoming a judge is different from jurisdiction to jurisdiction – the sample of international examples presents an ample variation ranging from five to twenty years of prior experience serving as a judge, or a practitioner, and even in some cases, this requirement is left open to be established by the proponent of candidates.
- With respect to the *term of the appointment*, international experience shows that judges that serve in courts of general jurisdiction may serve longer terms until retirement or even having life tenure (e.g. in the United States) as opposed to the shorter terms (e.g. of six, seven or eight years) served by judges of specialised courts (or by judges of the European Union). When judges serve shorter terms they may often be given the possibility of renewing them, mainly for two possible reasons: continuity of their work and accumulation of experience in competition issues. In addition, terms may be staggered in order to ensure there will always be expert judges in the bench.
- For the analysis of economic evidence judges must have *competence in economics* or should develop it through technical capacity building. Some fundamental concepts in which judges must be knowledgeable are market definition, market characteristics, market features and theory of harm. These concepts typically frame competition cases and guide the interpretation of detailed evidence.
- To help judges interpret economic evidence and assess its probative value, courts may have, appoint or request *external economic experts*. The use of these experts may create inefficiencies (they will have to approach every given case from scratch, they may not have practical experience, they may be perceived as not credible or impartial, and they can become advocates of their clients' position). Ideally, economic experts should be advocates for their own economic position on a given issue, and this position should be firmly grounded in economics. This can be achieved when the selection of experts is transparent, impartial and qualifications-based, when experts have good communication skills, when their findings and testimonies are made available to the parties for their assessment and possible rebuttal, and when their methodologies and theories have been sufficiently tested.
- The *technical capabilities of the personnel* of the court are critical to develop specialisation in competition issues. These capabilities may be developed through an entry-level training for staff to be working with judges and supported through a robust system of continuous judicial training in competition issues. International training is critical to grasp best practices and experiences from other jurisdictions and may be more effective if this knowledge is brought back and shared through local training.
- Effective implementation of competition law also requires that courts adopt *robust management systems* that will allow them for a reliable and transparent management of the process and the systematic production of databases and statistics of courts' outputs. Caseload management, a technique developed in the United States, may allow this.
- The *transparency of courts* is crucial for creating public confidence in them. Sound management techniques allow for the organisation and structuring of cases that can become public. Another transparency tool is the broadcasting of sessions. In Mexico, specialised Circuit Courts have adopted the practice of broadcasting their sessions via Internet.
- Lastly, the *amount of financial resources* available to the court also affects its performance. However, even more crucial than the amount of resources available is the *spending structure of the court*. International experience shows that investment in infrastructure and information technologies is an effective strategy to increase clearance rates and reduce expected length of trials.

7. Relationship with courts

The relationship of competition authorities and regulators with courts is defined by the institutional design of the jurisdiction's competition law organisations.

Institutional design is a critical and complex component that impacts the effective enforcement of competition law and affects competition policy outcomes.

*Independence*⁸⁸ is a fundamental institutional design factor that helps understand the relationship of competition authorities and regulators with courts. On the one hand, the independence of competition authorities and regulators is understood as their ability to exercise their functions free from external influence – be it from market participants or from the State (Alves et al., 2015). On the other hand, the independence of courts from State powers allows for impartiality and consistency in the interpretation of the competition law when market participants rightly appeal decisions made by competition authorities or regulators.⁸⁹

Interaction among courts, competition authorities and regulators, in light of the above, may be either formal or informal.

- *Formal* interaction usually takes place in the context of a judicial review.
- *Informal* interaction usually takes places in the context of conferences, seminars and workshops.

7.1 Relevance of competition advocacy

Competition advocacy falls under the category of informal interaction and refers to those activities organised or conducted by competition authorities, regulators or ministries “*related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanism, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition. (ICN, 2015)*”

Advocacy tools are generally well known, and include for example (OECD, 2004):

- publication of competition agency decisions,
- issuance of enforcement guidelines,
- publication of brochures and information booklets for the general public,
- publication of annual reports,
- publication of market studies and technical papers,
- regular communications with the press and electronic media, Internet websites,
- speeches by senior enforcement officials,

- creation of citizens' observatories,
- publication of information in the courts' transparency portals specifically devoted to providing information on their decisions and monitoring them, and
- seminars and conferences, including workshops for judges.

Competition culture is a goal of competition advocacy; it is defined by the International Competition Network (ICN) as the level of awareness of government, courts, legal community, business community, media, academia and the public at large about competition rules (ICN, 2015).

Building a competition culture is a cornerstone of a successful market economy.⁹⁰ Success in this task has obvious benefits for competition law enforcement (OECD, 2004):

- businesses will more readily comply voluntarily with the competition law;
- businesses and the public in general will more willingly co-operate with enforcement actions;
- policy makers will be more prone to support the mission of the competition agency; and
- courts will master the required technical knowledge (e.g. economic concepts) to apply competition law.

Since courts play a key role in competition law enforcement and policy implementation, having courts that understand competition policy concepts, goals, and instruments is of great importance. The competition authorities of several jurisdictions acknowledge the impact of bringing courts closer to the technical analysis pursued by competition authorities – through advocacy initiatives, such as capacity building (ICN, 2007).

The latter is of particular importance because effective enforcement of competition law and thus an enhanced competition culture, requires that courts be more familiar with competition and economics (ICN, 2002).

7.2 Technical capacity building

The results provided by the 2015 ICN survey give an interesting picture of competition awareness among courts, since it appears that courts' general competition awareness is greater than their ability to understand and interpret economic evidence. This survey concludes that in general, the relationship between courts and competition authorities needs to be enhanced and that the activities that prove most successful to enhance this relationship and increase the courts knowledge on technical economic issues are capacity building activities, such as conferences, seminars, workshops and training programmes targeted at court members (ICN, 2015).

The aforementioned report concludes that “tailor-made training for judges is reported as the most effective way of improving the judiciary's awareness of competition law and economics. (ICN, 2015)”

7.2.1 Providers of specialised training

The promotion of competition culture is a mission shared among the competition authorities, other government bodies with competition powers, the legal community, the academia, the non-governmental organisations, as well as other actors located abroad.⁹¹

- *Government* institutions vested with competition powers, such as ministries or sector regulators, may engage in advocacy or technical capacity building activities, separately or jointly with the competition authorities.
- *Legal community* comprises competition law specialists and lawyers who operate in other areas of the law (e.g. intellectual property rights, commercial, sector specific, etc.) (ICN, 2015).⁹² It is also common that legal bars and/or legal associations organise conferences or seminars aimed at training or at discussing issues related to procedural and economic aspects of the competition law.
- *Academic community*, understood as the university professors (or equivalent) in a jurisdiction that primarily pursue research on competition law or economics.⁹³ Research conducted by academia and research centres may inform how competition law is interpreted by the courts, and their outputs may be discussed in conferences, seminars, workshops and even technical trainings sessions. International capacity building may also be offered by academia for the instruction of court members of different jurisdictions in competition law and economics.⁹⁴
- *Non-governmental organisations*,⁹⁵ may also be organisers and/or providers of capacity building activities that target court members. Moreover, sometimes these organisations promote joint research projects or events, with government, academia or the legal community or through a national network.⁹⁶

In addition, international organisations may play a key role in providing, supporting and facilitating capacity building initiatives, such as technical assistance, training programmes, seminars or expert meetings, among others.

7.3 International facilitation

International facilitation is crucial to promote a better understanding of the competition laws around the world and of the means to implementing them, thus ultimately promoting international convergence of competition policy.

Members of competition authorities, regulators, ministries, courts and experts can participate in neutral international fora to discuss issues related to competition law and enforcement – including the responsibility of the courts in the implementation of competition law and policy, the role of economics and economists, and how to accommodate multiple criteria, different standards of proof and diverse approaches to judicial review in competition cases (OECD, 1996).

As pointed out by a report issued by the ICN in 2002, the role that various international organisations – such as the ICN, the Organisation for Economic Co-operation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD), among others⁹⁷ – play in facilitating fora for discussion, technical capacity building, and diffusion of international best practices through advocacy activities devoted to the judiciary should be acknowledged (ICN, 2002). In addition, other international networks of regional dimension also play an important role in promoting a better understanding of different competition laws, as well as in facilitating the international convergence of these laws, which should also be recognised. The remaining subsections will briefly describe key aspects of the facilitation provided by some of the aforementioned international organisations and networks.

7.3.1 *Organisation for Economic Co-operation and Development*

Competition law has gone global in the last twenty years. In that period, there has been an increase of over 600 per cent in the number of jurisdictions with competition law enforcement since 1990, from fewer than twenty to about one hundred and twenty in 2015. This is one of the major policy achievements of the last twenty five years, to which the OECD and its Competition Committee have greatly contributed, through the discussion and promotion of better practices in the field of competition law advocacy and enforcement (OECD, 2014).

Competition law systems around the world are remarkably similar even though the wording of their laws and their substantive elements vary to some extent, and their procedural approaches may vary even more. Common elements in these different systems include prohibitions against cartels, the review of mergers based primarily or exclusively on their effects on competition, and an ability to take action against firms with market power that behave anti-competitively (OECD, 2014).

Today, many competition cases have an international dimension. The number of these cases is rising rapidly, perhaps partly as a consequence of increasing international trade and the growth of global supply chains (OECD, 2014).

Because of the increasing number of competition cases with cross-border dimension, effective co-operation between competition authorities is increasingly important. Although co-operation has increased over the last twenty years, the need for co-operation is perhaps increasing still faster. The latter is also true for the judiciary. Therefore, since 1996 the OECD has organised seminars on judicial enforcement of competition law in its Competition Committee, in the Latin American Competition Forum, and through its Competition Centres in Hungary and Korea (OECD, 1996) (OECD, 2008).⁹⁸

This report and the workshops organised in Mexico City in October, November and December 2015 are also part of the OECD's efforts to facilitate the access to experiences and best practices related to the role of courts in the implementation of competition law and policy to national judges.

7.3.2 *International Competition Network*

The International Competition Network (ICN)⁹⁹ is the only international body dedicated exclusively to competition law enforcement and its members represent national and multinational competition authorities.¹⁰⁰

The ICN has a specialised group – the Advocacy Working Group – that undertakes projects to develop practical tools and guidance and to facilitate experience-sharing among ICN member agencies, in order to improve the effectiveness of ICN members in advocating the dissemination of competition principles and to promote the development of a competition culture within society.

In 2005 the ICN identified the judiciary as one of the key stakeholders that may impact the implementation of competition law. Since then, the network has conducted work to address challenges faced by courts and competition agencies, alike, also conducting in studies on the relationship between these two institutions. These studies provide valuable information about courts and judges dealing with competition cases as well as about legal systems in different jurisdictions. The ICN has also devoted special attention to the use of economic evidence by courts as well as to the identification of problematic areas when communicating with judges.

7.3.3 *United Nations Conference for Trade and Development*

In 2003 the UNCTAD¹⁰¹ launched a programme devoted to strengthening institutional and capacity building in the area of competition and consumer law and policy in Latin American countries. This programme has a component dedicated to judges designed to improve the judicial review of competition cases and prevent flawed decisions that may infringe the rights of parties to the proceedings or other third parties, or negatively affect economic activity in a given country.

7.3.4 *Association of European Competition Law Judges*

“The Association of European Competition Law Judges is a group of judges from the Member States of the European Union who hear cases in their national courts involving both national and European competition law.”¹⁰²

The main goal of the Association of European Competition Law Judges (AECLJ)¹⁰³ is to promote increased knowledge and understanding of competition law and policy issues throughout the judiciaries of the EU Member States. It provides a forum for the exchange of knowledge and experience in the field of competition law between judiciaries across the European Union thus promoting the coherency and consistency of approaches for the application of Articles 101 and 102 of the Treaty on the Functioning of the EU.

Since May 2004, Regulation 1/2003 has modified the enforcement of European competition law placing a renewed emphasis both on public enforcement by national authorities in the Member States and on private actions in the national courts. Both judicial review of the actions of national authorities and conduct of private actions falls to the national judiciaries in the Member States, who thus now have an increased role in the European system of competition law.

Given that European competition law is now also applied by national judges, it is crucial that judges dealing with this field of law in different Member States are able to communicate on an informal level, in order to discuss matters of common concern and enquire about parallel proceedings. Therefore, the consistent application of European competition law largely depends on the existence of a network to facilitate the exchange of experiences.

7.3.5 *Ibero-American Association of Judges in Regulatory Law*

Latin America has undergone a rapid evolution in the laws and institutions responsible for economic competition and regulated sectors. Latin American economies that were once characterised by a high degree of protectionism and state-owned enterprises are increasingly integrated into global trade through reforms for the opening of their economies and the deregulation of various economic sectors.

As part of this effort, the vast majority of countries in the region have adopted competition laws to safeguard benefits to consumers and ensure a level playing field for companies competing in their markets. With an increasing number of solved cases by competition authorities and sector regulators it is only natural that those involved often request the intervention of the judicial review bodies. Taking into account the complexity of the issues reviewed, some jurisdictions have chosen to create specialised courts dealing with decisions on cases in this area. With the progressive involvement of judges in cases involving competition and regulation issues, there has been an increase in the demand for training and technical knowledge.

The Ibero-American Association of Judges in Regulatory Law (AIJDR)¹⁰⁴ was created in 2013; it is based in Mexico City and is currently composed of thirty two judges, from twelve countries, including Spain.

The judges in the region face common challenges such as limited experience in the resolutions of cases (the oldest laws in the region have not existed for much longer than twenty years) and limited resources to invest in the strengthening of their technical capabilities. The goal and main reason for creating the AIJDR is to carry out various activities to facilitate the creation and diffusion of knowledge among its members, and to ensure the adoption of sound and accurate judgments based on international best practices.

7.4 Conclusions

Interaction among courts, competition authorities and regulators may be either formal or informal. Formal interaction usually takes place in the context of a judicial review. Informal interaction usually takes places in the context of conferences, seminars or workshops. When these activities are organised by competition authorities, regulators and ministries to promote competition culture, they are referred to as competition advocacy initiatives.

Courts are a key stakeholder of competition advocacy initiatives and it is a best practice in many jurisdictions that competition authorities, regulators and ministries endeavour to bring courts closer to competition and economic concepts through these initiatives. This is typically achieved through tailor-made capacity building initiatives.

Moreover, international experience shows that the provision of tailor-made capacity building initiatives may be a mission shared by other government bodies with competition powers, the legal community, the academia, the non-governmental organisations, and other actors located abroad.

In addition, international organisations may play a key role in providing, supporting and facilitating capacity building initiatives, such as technical assistance, training programmes, seminars or expert meetings, among others. International organisations like the OECD, the ICN and UNCTAD are neutral international fora where competition authorities, regulators, ministries, courts and experts have discussed issues related to effective competition law enforcement.

Another best practice to increase knowledge and understanding of competition law and policy issues throughout the judiciaries is the creation of or adhesion to regional networks of judges. Two international networks stand out; the Association of European Competition Law Judges and the newly created Ibero-American Association of Judges in Regulatory Law.

Considering the objective of this report, it should be highlighted that it is imperative that the Ministry of Economy, the new specialised courts in competition and telecommunications, and the competition authorities create, strengthen and maintain informal channels of communication that are open and clear, and that promote the exchange of experiences and best practices, in particular on the substantive and procedural soundness of the decisions of the competition authorities, as well as on the outcomes of the courts' reviews.

Finally, this report is expected to become a reference document for court members, in particular for judges of the Mexican courts specialised in competition, telecommunications and broadcasting in the performance of their tasks, as well as in the planning and modification of their operation, with the aim of making them more independent, transparent, effective, uniform and predictable – in the benefit of consumers, market participants and the Mexican economy in general.

Appendix 1. International experiences of selection methods, academic background and professional experience of judges

Table A.1 in provides international examples that illustrate a variety of different selection methods, academic background and experience requirements for the selection of judges serving in courts of general or specialised jurisdiction that review competition cases.

Table A.1. Selection methods, academic background and experience¹ of judges²

Court		Type	Selection method														Academic background			Experience			Type of member		
			Proposed							Selected															Type of procedure
	Members	Specialised	Generalist	Executive Branch/Head of Cabinet	Central Bank	Ministry of Industry	Judicial Branch	Legislative Branch	Member State	Executive Branch/Head of Cabinet	Central Bank	Ministry of Industry	Judicial Branch	Legislative Branch	Member State (with opinion)	Public competitive	Direct appointment	Lawyer	Economists	Other (Business, accounting, marketing, other relevant)	Years	Judicial	Professional or academic	Judicial	Lay
CHILE																									
TDLC		✓																							
	President						✓			✓						✓		✓			10		✓	✓	
	Member				✓						✓					✓		✓			DP		✓	✓	
	Member				✓							✓				✓			✓		DP		✓	✓	
	Member				✓					✓						✓		✓			DP		✓	✓	
	Member				✓					✓						✓			✓		DP		✓	✓	
Supreme Court			✓																						
	President			✓ ^{2nd}			✓ ^{1st}							✓				✓			15	✓	✓	✓	
	20 Members			✓ ^{2nd}			✓ ^{1st}						✓					✓						✓	
MEXICO (3)																									
District Courts		✓																							
	Judge (1 st Court)												✓			✓		✓			10	✓		✓	
	Judge (2 nd Court)												✓			✓		✓			10	✓		✓	
Circuit Courts		✓																						✓	
	President (1 st Court)												✓			✓		✓			15	✓		✓	
	Member (1 st Court)												✓			✓		✓			15	✓		✓	
	Member (1 st Circuit Court)												✓			✓		✓			15	✓		✓	
	President (2 nd Court)												✓			✓		✓			15	✓		✓	
	Member (2 nd Court)												✓			✓		✓			15	✓		✓	
	Member (2 nd Court)												✓			✓		✓			15	✓		✓	
Supreme Court (4)			✓																						
	President			✓									✓			✓		✓			10	✓	✓	✓	
	10 Members			✓									✓			✓		✓			10	✓	✓	✓	
CANADA																									
Competition Tribunal		✓																							
	Chairman					✓			✓								✓	✓			DP	✓		✓	
	≤ 5 Members					✓			✓								✓	✓			DP	✓		✓	
	≤ 8 Members					✓			✓								✓		✓	✓	DP		✓		✓
Federal Court			✓																						
	Chief Justice					✓			✓								✓	✓			10	✓	✓	✓	
	31 Members					✓			✓								✓	✓			10	✓	✓	✓	
Court of Appeal			✓																						
	Chief Justice			✓					✓								✓	✓			10	✓	✓	✓	
	12 Members			✓					✓								✓	✓			10	✓	✓	✓	
Supreme Court			✓																						
	President			✓					✓								✓	✓			10	✓	✓	✓	
	8 Members			✓					✓								✓	✓			10	✓	✓	✓	
	10 Members			✓									✓				✓	✓			10	✓	✓	✓	

Court	Type		Selection method													Type of procedure	Academic background			Experience			Type of member	
	Proposed	Selected	Proposed							Selected							Lawyer	Economists	Other (Business, accounting, marketing, other relevant)	Years	Judicial	Professional or academic	Judicial	Lay
Members	Specialised	Generalist	Executive Branch/Head of Cabinet	Central Bank	Ministry of Industry	Judicial Branch	Legislative Branch	Member State	Executive Branch/Head of Cabinet	Central Bank	Ministry of Industry	Judicial Branch	Legislative Branch	Member State (with opinion)	Public competitive	Direct appointment	Lawyer	Economists	Other (Business, accounting, marketing, other relevant)	Years	Judicial	Professional or academic	Judicial	Lay
AUSTRALIA																								
ACT	✓																							
1 Presidential (Judge of Federal Court or External Territory Court)																								
3 Deputy Presidential (Judge of Federal Court or External Territory Court)																								
7 Non-presidential			✓						✓							✓		✓	✓	DP		DP		✓
Federal Court/ Appeal Court		✓																						
Members			✓						✓							✓	✓			5	✓	✓	✓	
High Court		✓																						
Chief Justice			✓						✓							✓	✓			5	✓	✓	✓	
7 Justices			✓						✓							✓	✓			5	✓	✓	✓	
UNITED KINGDOM																								
CAT	✓																							
President			✓			✓			✓							✓	✓			10	DP	DP	✓	
Chairmen (19 currently)			✓			✓			✓							✓	✓			7	DP	DP	✓	
Ordinary members (14 currently)					✓	✓					✓					✓	✓	✓	✓	DP	DP	TB		✓
Appeal Court		✓																						
Chief Justice						✓			✓							✓	✓			DP	✓		✓	
38 Ordinary Justices						✓			✓							✓	✓			DP	✓		✓	
EUROPEAN UNION																								
General Court		✓																						
At least 28 Judge								✓						✓		✓	✓	✓	✓	12	✓		✓	
Court of Justice		✓																						
28 Judges								✓						✓		✓	✓	✓	✓	20	✓		✓	
11 Advocates General								✓						✓		✓	✓	✓	✓	20	✓		✓	
UNITED STATES																								
District Courts		✓																						
1 Judge per Court (49 courts)			✓										✓			✓	✓			DP	✓	✓	✓	
Court of Appeals		✓																						
3 judges per Court (13 courts)			✓									✓				✓	✓			DP	✓	✓	✓	

Notes: 1. The years of experience required by the position in some cases are determined by the proponent. In such cases the acronym "DP" is specified. 2. See below in this appendix specific information about each jurisdiction. 3. Explanatory note: In the creation of the courts specialised in telecommunications, broadcasting and competition, the process of appointment of judges was not public, nor competitive in all cases; at least three cases were direct appointments, like the appointment of the last of the members due to the retirement of one of the judges. And at least three of the judges (two of the First Tribunal and one of the Second) have extensive academic experience.

The information used in this table for each jurisdiction is elaborated upon hereunder.

Chile – The TDLC is comprised of five judges (three lawyers with an antitrust background and two with undergraduate or graduate education in economics).¹⁰⁵ The President shall be a lawyer, and is chosen by the President of Chile from a list of five candidates elaborated by the Supreme Court as a result of a public competitive process. The president of the TDLC must have renowned professional or academic activities in competition, commercial or economic law, and a minimum of ten years of professional experience. Two of the other four members, one being a lawyer and the other an economist, are designated by the Council of the Central Bank, as a result of a public competitive process. The other two members, a lawyer and an economist, are selected from two lists, each of three candidates, compiled by the Council of the Central Bank as a result of a public process and confirmed by decree of the President of Chile; they are appointed by the Supreme Court and the Central Bank, respectively.

The lawyer and economist members of the TDLC must all have expertise in competition law. The economists must have post-graduate studies in economics.¹⁰⁶ The Supreme Court is comprised of twenty one judges (known as Ministers).¹⁰⁷ The Supreme Court judges are appointed by the President of Chile, subject to approval by two-thirds of the Senate. The President may only nominate judges from a list provided by the Supreme Court.¹⁰⁸ At least five judges must have a non-judicial career, while possessing at least fifteen years of professional activity and be renowned in the professional or academic fields.¹⁰⁹ At least one of the nominees for the Supreme Court must be the most senior judge of the appellate courts. All others must be selected on the merits (usually of their career as judicial member; a minimum of fifteen years of practice is required).¹¹⁰

*Mexico*¹¹¹ – The Federal Judicature Council (CJF) is the judicial body responsible for establishing the requirements that must be fulfilled by candidates of the specialised courts in competition, telecommunications and broadcasting. For the selection of these specialised courts the CJF issued the following requirements to be selected as a specialised judge. For the:

- First and second Specialised District Court, the interested candidate shall demonstrate experience as a district judge in administrative matters of at least ten years and currently found in tenure.
- First and second Specialised Collegiate Circuit Court, the interested candidate shall demonstrate experience as a district judge in administrative matters of at least fifteen years and currently found in tenure.

The candidate must demonstrate to be someone measured, prudent and honourable in the resolution of cases and shall have the following attributes:

- Studies, or a certificate, in the specialised matter, bearing in mind that a post-graduate degree related to the special matter is not an indispensable requirement.
- Proof of good performance (shall not have been sanctioned by the CJF over the last five years).
- A written motivation essay, detailing the reasons underlying his or her interest in the position.¹¹²

The CJF selects the specialised judges and has established that they must take a specialised training course in competition, telecommunications and broadcasting provided by the Federal Judicature Institute (IJF).

As regards to the SCJN, it is comprised by eleven judges, known as Ministers. These judges are proposed by the President and confirmed by the Senate.¹¹³ They must have held on the day of the election the professional degree of lawyer for a minimum of ten years and professional experience in the judicial branch or law practice.

Canada – The Competition Tribunal may have up to six judicial members appointed from among the judges of the Federal Court¹¹⁴ and no more than eight lay members.¹¹⁵ Judicial and lay members are appointed by the Governor in Council on the recommendation of the Minister of Justice. Pre-requisites to be a lay members is to have a post-graduate degree in industrial organisation economics, business, commerce or finance or a professional qualification in business, accounting or law or extensive business related experience as a senior corporate executive, senior academic or senior public servant.

As regards lay members, the Governor in Council may establish an advisory council to advise the Minister with respect to appointments of lay members, to be composed of not more than ten members who are knowledgeable in economics, industry, commerce or public affairs and may include, without restricting the generality of the foregoing, individuals chosen from business communities, the legal community, consumer groups and labour. The Minister shall consult with any advisory council so established before making a recommendation with respect to the appointment of a lay member.¹¹⁶

The Federal Court has one Chief Justice and thirty six other judges.¹¹⁷ The judges of the Federal Court are to be appointed by the Governor in Council by letters patent under the Great Seal.¹¹⁸

The Federal Court of Appeal is comprised by one Chief Justice and twelve other judges.¹¹⁹ The judges of the Federal Court of Appeal are to be appointed by the Governor in Council by letters patent under the Great Seal.¹²⁰ A person may be appointed a judge of the Federal Court of Appeal or the Federal Court if the person:

- is or has been a judge of a superior, county or district court in Canada;
- is or has been a barrister or advocate of at least ten years standing at the bar of any province; or
- has, for at least ten years, (i) been a barrister or advocate at the bar of any province, and (ii) after becoming a barrister or advocate at the bar of any province, exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held under a law of Canada or a province.¹²¹

The Supreme Court is comprised by one Chief Justice, and eight judges.¹²² Justices of the Supreme Court of Canada are appointed by letters patent under the Great Seal by the Governor General in Council, a process whereby the Governor General, the Vice-Regal representative of the Queen of Canada, makes appointments based on the advice of the Queen's Privy Council for Canada.¹²³ Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.¹²⁴

Australia – The Australian Competition Tribunal (ACT) at present is comprised by four presidential members and seven non-presidential members.¹²⁵ Questions of law shall be adjudicated by the presidential member.¹²⁶ A presidential member of the Tribunal must be a Judge of a Federal Court other than the High Court or a court of an external Territory. Other members of the Tribunal must appear to the Governor General to be qualified for appointment by virtue of his or her knowledge of, or experience in, industry, commerce, economics, law or public administration.¹²⁷ Subject to this, a member of the Tribunal holds office for such period, not exceeding seven years, as is specified in the instrument of his

or her appointment and on such terms and conditions as the Governor General determines, but is eligible for re-appointment.

There are forty-six Federal Courts.¹²⁸ Each court has one judge, except if full (appeal) court, in which case three judges.¹²⁹ The Governor General shall appoint a judge from the Federal Court. A person shall not be appointed as a Judge unless he or she is or has been a judge of a prescribed court or of a court of a State or has been enrolled as a legal practitioner of the High Court or of the Supreme Court of a State or Territory for not less than five years.¹³⁰

The High Court has actual and potential original jurisdiction and can hear appeals from the Supreme Courts of the States, any federal court or court exercising federal jurisdiction (such as the Federal Court of Australia), and decisions made by one or more Justices exercising the original jurisdiction of the court.¹³¹ Appeals are usually heard by five or seven Justices.¹³²

United Kingdom – Competition Appeal Tribunal is the instance in which decisions are taken by panels comprised of one chairman and two panel members. The CAT has a President and one panel of chairmen (currently nineteen) and a panel of members (currently fourteen).¹³³

The President of the Tribunal is appointed by the Lord Chancellor (upon the recommendation of the Judicial Appointments Commission) and must appear to the Lord Chancellor to have appropriate experience and knowledge of competition law and practice. Chairmen are appointed by the Lord Chancellor. Panel members are appointed by the Secretary of State.¹³⁴

The President must: (a) have a ten year general qualification;¹³⁵ (b) be an advocate or solicitor in Scotland of at least ten years' standing; or (c) be a member of the Bar of Northern Ireland or solicitor of the Supreme Court of Northern Ireland of at least ten years' standing (Joelson, 2006).

There are no requirements regarding panel members other than they are appointed by the Secretary of State. Nonetheless, they are selected for their expertise in law, business, accountancy, economics and other related fields, following an open competition according to the guidelines of the Office of the Commissioner for Public Appointments.

The decisions of the Tribunal may be appealed on a point of law or as to the amount of any penalty to the Court of Appeal in England and Wales, the Court of Session in Scotland or the Court of Appeal in Northern Ireland.¹³⁶

The Court of Appeal's main judges are the Lords Justices of Appeal. The Senior Courts Act 1981 provides that the Court of Appeal comprise thirty eight ordinary sitting Lords Justices and the Lord Chief Justice, Master of the Rolls, President of the Queen's Bench Division, President of the Family Division, and Chancellor of the High Court. Lords Justices have, since 1946, been drawn exclusively from the High Court of Justice. The division of work in the Court of Appeal is demonstrated by the 2005 statistics, in which Lords Justices sat 66 per cent of the time, High Court Judges 26 per cent of the time and Circuit and Deputy High Court Judges 8 per cent of the time.¹³⁷

All Court of Appeal judges are senior judges with lengthy judicial experience. Appointment is by The Queen on the recommendation of a selection panel convened by the Judicial Appointments Commission.¹³⁸

European Union – The General Court is made up of at least one judge from each Member State (twenty eight in 2015). The judges are appointed by common accord of the governments of the Member

States after consultation of a panel responsible for giving an opinion on candidates' suitability to perform the duties of a judge.¹³⁹ They appoint their President, for a period of three years, from amongst themselves. Their term of office is six years, and is renewable.¹⁴⁰ The General Court has general jurisdiction over administrative matters.

The Court of Justice is composed of twenty-eight Judges and eleven Advocates General. The Judges and Advocates General are appointed by common accord of the governments of the Member States after consultation of a panel responsible for giving an opinion on prospective candidates' suitability to perform the duties concerned.¹⁴¹ Judges of the General Court and the Court of Justice, as well as Advocates General, are chosen from among individuals whose independence is beyond doubt and who possess the qualifications required for appointment, in their respective countries, to the highest judicial offices, or who are of recognised competence. Judges or Advocates general from the Court of Justice should possess more than twenty years of experience with high-level duties, and that judges at the General Court should have more than twelve years of experience with similar duties.¹⁴²

United States – There are forty nine District Courts,¹⁴³ each having one judge and a jury. These judges are proposed by the President and confirmed by the Senate. There are thirteen Courts of appeals¹⁴⁴ presided by three judges. These judges are proposed by the President and confirmed by the Senate.¹⁴⁵ Informally, a number of mechanisms are in places that influence Presidential appointments and Senate confirmations. Of these, one of the most important (and not politically influenced) with regard to a candidate's endorsement is The American Bar Association's (ABA's) committee for the review of the integrity, competence, temperament and experience of a candidate to the federal judiciary. The ABA prefers a minimum of twelve years of legal experience for a federal judge.

Appendix 2.

Fundamental concepts used in the analysis of competition cases

Relevant market definition – is one of the most important analytical tools available to the competition authorities to examine and evaluate the competitive constraints that a market participant faces and the impact of its behaviour on competition.¹⁴⁶ Relevant markets are commonly defined in two dimensions, product and geographic. Sometimes a temporal dimension may also be considered, for example when customers are not able to substitute products between periods (for instance, in peak electric consumption hours or when airports are congested). Product markets are determined by the empirical question of substitutability of products by customers, as well as on relative price levels. Demand substitutability considers the degree to which customers respond to a change in relative prices (or quality, availability or other characteristics) by substituting away to alternative products. Supply substitutability considers the degree in which suppliers of alternative products could switch their production facilities in response to a change in relative prices (due to demand or other market conditions).

Geographic markets are delineated by the willingness or ability of consumers to substitute a product in another geographic location, or when geography limits suppliers' willingness or ability to serve customers. Geographic markets may be local, regional, national or international.

There are several, qualitative and quantitative, methods and tests for identifying substitutes. The application of any method requires the identification of the effective substitutes of the product and the geographic location. Qualitative methods include interviews to suppliers who claim knowing their customers as well as their potential competitors in other markets, and the assessment of the extent to which customers view products as functional substitutes, the latter often carried out through a survey (Davis & Garces, 2009).¹⁴⁷

Quantitative methods, when possible to use, shall be a supplement to qualitative methods. Several quantitative methods use price information for market definition.¹⁴⁸ Some commonly used quantitative methods focus on: cross-price elasticity, price correlations, diversion ratios, and the critical loss analysis (Motta, 2004) (OECD, 2012a).¹⁴⁹ Tests such as the hypothetical monopolist test and the SSNIP test are theoretical approaches, typically known for guiding the analysis of market definition in both the product and geographic dimensions (Motta, 2004).¹⁵⁰

Market characteristics – help to understand how a market operates and provide an indication of how competitive it is. Market characteristics commonly analysed are (US DOJ & FTC, 2010) (Competition Commission, 2013):

- *Market participants* are those that earn (or potentially earn) revenues in it.¹⁵¹ Suppliers of the same product in other geographic markets that may be rapid entrants, and not current producers in the examined market, but who are likely to provide a rapid supply without incurring in significant sunk costs, in response of a SSNIP, are also considered market participants of the examined market. Recent behaviour of the market participants shall be analysed.¹⁵²

- *Market power* is defined as the ability of one or several market participants to keep the price above the competitive level, or restrict output below this level, without the consequent loss of sales or becoming unprofitable in the long-run – in the market examined (OECD, 2011c) (OECD, 2012a).¹⁵³ Characteristics that are commonly used for analysing market power are *market shares, conditions of entry and expansion, concentration, buyer power, and the existence of joint power* (Carlton & Perloff, 1994) (Motta, 2004).¹⁵⁴
- *Market outcomes*, are indicators that provide evidence about how the market is functioning. Some useful indicators of the competitive process are *competition itself, price, profitability, quality and innovation*.

Market features – When there is a suspicion that a market is not functioning well the origin may lie in structural, conduct or regulatory features, or a combination of all, affecting its performance.

- *Structural features* of a market refer to the environment in which market participants operate. Such features may include the level of *market concentration, the degree of differentiation, vertical integration, conditions of entry, exit and expansion, economies of scale and scope, information asymmetries, switching costs* and the *degree of buying power* (Bain, 1962) (Competition Commission, 2013).¹⁵⁵ *Essential facilities* are structural features or key infrastructure which is fundamental to economic growth in both developed and developing economies (OECD, 1996).¹⁵⁶ Very generally speaking, an essential facility may be taken as a facility to which access is essential for the provision of goods or services in a related market and where it is not economically efficient or feasible for a new entrant to replicate the facility. A range of facilities have been represented as "essential":¹⁵⁷
 - railways (track, stations);
 - airports (slot allocation; ground handling services) and airline computer reservations systems;
 - ports;
 - distribution networks of public services providers e.g. electricity wires and gas pipelines;
 - bus stations;
 - some intellectual property rights.¹⁵⁸
- *Conduct features* of a market refer to the behaviour and practices of market participants.¹⁵⁹ The conduct that may harm competition, intentionally or inadvertently, is related, but not exhaustively, with that exerted by *oligopolies, or facilitating horizontal coordination, vertical agreements* (downstream or upstream), or *industry or consumer practices or strategic reaction to regulation* (Competition Commission, 2013).
- *Regulatory features*¹⁶⁰ of a market refer to the diverse set of instruments which governments at all levels implement. For example, regulation affects industry structure by imposing barriers to entry or may also affect the behaviour of companies and consumers – in the case of suppliers it may facilitate co-ordination and in the case of customers it may create switching costs.
- *Barriers to competition* are any structural, regulatory or conduct feature of the market, with the object or effect of preventing or distorting competition in the relevant market.

Theory of harm – Harm is understood as an adverse effect on competition caused by structural, regulatory or conduct features of the market (or a combination thereof). This effect may appear in the market as prevention, restriction or distortion to competition. A theory of harm is considered a hypothesis of how harmful these effects are in a market, how these affect consumers, and what features are causing them. Developing theories of harm requires the analysis of the market characteristics, its outcomes, the structural, regulatory and conduct features that may be affecting the competitive process, and the consideration of aspects that may benefit competition. Therefore, the key issue in developing these theories is to grapple with whether structural, regulatory or conduct features, or a combination thereof, can lead to a decrease in the context of competition in the market, with implications in its outcomes (prices, profitability, quality, innovation, etc.). Reliable data is a requirement of a well-developed theory.

Endnotes

- ¹ The Constitutional reform created the Federal Economic Competition Commission as an autonomous body with competition enforcement and advocacy powers in all sector of the economy, with exception of telecommunications and broadcasting, where the Federal Telecommunications Institute, also created as an autonomous body by the aforementioned reform, is the competent authority.
- ² The Twelfth Transitory Article of the Constitutional reform provides for the establishment of specialised courts in competition, telecommunications and broadcasting by the Federal Judicature Council. In September 2013, the Council created two Specialised District Courts (the first and second), each presided by a judge; and two Specialised Collegiate Circuit Courts (the first and second), each comprised of three judges, known as Magistrates. See also General Agreement 22/2013 of the CJF Plenum of 07.08.13, published in the Federal Official Gazette in 09.08.13, by which the auxiliary Courts and Tribunals became specialised Courts, which took up their duties as of 10.08.13, http://dof.gob.mx/nota_detalle.php?codigo=5309912&fecha=09/08/2013.
- ³ Specifically, requests for the opening of investigations of anti-competitive conduct (see articles 53, 54, 56 and 66 of the FECL), unlawful concentrations (see article 62 and 66 of the FECL), barriers to competition and essential facilities (see article 94 of the FECL); opinions on public policy restrictions (see sections XII, XIII, XIV, XV and XVII of article 12 of the FECL); decisions on market conditions (see article 96 of the FECL); opinions on the granting of concessions, permits and licences (see article 98 of the FECL); or requests for the opening of a market study (see section XXIII of article 12 of the FECL).
- ⁴ See the mission of the Ministry of Economy, www.economia.gob.mx/conoce-la-se/mision-y-vision-se.
- ⁵ A competition law system or a competition system is understood in this report as the set comprised by the national policy, legislation, regulation and case law on competition, as well as by the institutions responsible for creating, implementing and promoting their understanding and knowledge.
- ⁶ These workshops provided invaluable inputs to this report. There were 180 participants trained in the workshops: Specialised District Courts (12); Specialised Collegiate Circuit Courts (19); Administrative Collegiate Circuit Courts (9); TFJFA (1); SCJN (2); State Courts (2); Labour Courts (2); Criminal Courts (2); Civil Court (1); COFECE (20); IFT (23); Ministry of Economy (16); Ministry of Communications and Transport (1); Federal Regulatory Improvement Commission (2); Legislative Branch (1); private sector (57); academia (7) and the OECD (3).
- ⁷ See Appendix 2 for a definition of market power.
- ⁸ See indicated reference for evidence on how competition policy affects macro-economic outcomes.
- ⁹ See Market examinations in Mexico: A Manual by the OECD Secretariat for information on the different forms that structural, regulatory and behavioural restrictions can adopt.

- ¹⁰ See OECD (2011c), p. 16. It may also be seen as the “*process by which governments attempt to foster competition and create the right environment for competition by prohibiting, or putting restrictions on, certain types of business practices and transactions that unduly limit competition.*”
- ¹¹ See OECD (2011c), p. 16. “*Broadly speaking, the objectives of competition policy can be thought of as fostering competitive markets and promoting innovation, with implications for prices, welfare and economic growth.*”
- ¹² See Motta (2004), p. 18. “*Economic welfare is the standard concept used in economics to measure how well an industry performs. It is a measure which aggregates the welfare (or surplus) of different groups in the economy. In each given industry, welfare is given by total surplus, that is the sum of consumer surplus and producer surplus. The surplus of a given individual consumer is given by the difference between the consumer’s valuation for the good considered (or her willingness to pay for it) and the price, which effectively she has to pay for it. Consumer surplus (or consumer welfare) is the aggregate measure of the surplus of all consumers. The surplus of an individual producer is the profit it makes by selling the good in question. Producer surplus is therefore the sum of all profits made by producers in the industry. [...] It is difficult to say whether competition authorities and courts favour in practice a consumer welfare or a total welfare objective. [...].*”
- ¹³ Article 1 of the FECL that establishes “*This Law implements article 28 of the Political Constitution of the United Mexican States pertaining to free market access, economic competition, monopolies, monopolistic practices and concentrations. Further, this Law pursues public objectives and serves society’s interests, and is applicable to all areas of economic activity and its observance is obligatory in the Mexican Republic.*” Article 2 states “*The purpose of this Law is to promote, protect and guarantee free market access and economic competition, as well as to prevent, investigate, combat, prosecute effectively, severely punish and eliminate monopolies, monopolistic practices, unlawful concentrations, barriers to entry and to economic competition, as well as other restrictions to the efficient operation of markets.*”
- ¹⁴ Published in the Federal Official Gazette in 24 December 1992.
- ¹⁵ Reform published in the Federal Official Gazette in 28 June 2006.
- ¹⁶ The included practices are: predatory pricing, exclusive dealing, cross subsidisation, price discrimination and raising rivals’ costs. Article 10 of the FECL of 1993 specifically mentioned five types of relative conduct: vertical market segmentation, resale price maintenance, tying sales or purchases, exclusive dealing and refusal to deal. The sixth category of this Article specified boycott to dissuade a customer or supplier, and the seventh included other types of vertical agreements. The application of the latter general category corresponded to Article 7 of the FLEC bylaws, which added five elements to the list of relative practices: predatory pricing, exclusive dealing, cross subsidisation, price discrimination and raising rivals’ costs. The reform of 1993 included the relative monopolistic practices of the bylaws into the law in order to give them greater operative force.
- ¹⁷ See Article 34 bis 3 of the reform published in the Federal Official Gazette in 28 June 2006.
- ¹⁸ In Mexico these appeals proceedings are similar to the *habeas corpus* figure in other countries. They are established by the Constitution, to grant all persons protection against acts of government. These can be brought by any party based on wide-ranging grounds, including that a law is unconstitutional or that any government action is not supported by substantial evidence or founded on reasoning that is illogical or contrary to general principle of the law. For this reason, in 2007 the OECD expressed the view that “*Amparos are a necessary instrument provided by the constitution to check the arbitrary use of government power, and competition law, like all legislation in Mexico must accommodate this. However, competition and sector legislation must be as clear and unambiguous as possible to limit the abuse of*

amparo proceedings [...]. If the CFC or regulator were to have a clearly specified power granted by legislation, then this would help to defend their actions against amparo [...]. Also, decision-making must be as rule based as possible. This is important for enhancing economic efficiency by giving firms more certainty for investment and other decisions, but also for reducing the legal grounds for challenging agency actions. Specialised amparo courts with economic expertise to hear cases from the CFC and other agencies that deal with economic issues should be set up. [...] Finally, it would increase the efficiency of these proceedings if procedural rules were tightened to require that all amparo actions against a decision be bundled together, rather than allowing them to be brought in a long sequence, which causes extensive delays."

¹⁹ Reform published in the Federal Official Gazette in 10 May 2011.

²⁰ The reform further enhanced the authority's power to gather information; allowed settlements between the authority and the market participants under investigation, and enhanced the transparency and predictability of the authority's procedures.

²¹ See section 5 for more information about the benefits of court specialisation.

²² See Section 1. These specialised courts were set up in 2013.

²³ Published in the Federal Official Gazette in 23 May 2014. The Federal Economic Competition Law published in 1992 was repealed as of 7 July 2014 by Decree published in the Federal Official Gazette in 23 May 2014.

²⁴ See Box 3.6.

²⁵ Article 28 of the Constitution establishes that only in cases where COFECE imposes fines or orders the divestment of assets, rights, partnership interests or stocks, shall these be executed until the *amparo* proceeding has been resolved, in case it is so lodged.

²⁶ See the General Agreement 22/2013 of the Plenum of the Federal Judicature Council, relating to the termination of duties of the Fourth and Fifth District Courts of the First Region's Auxiliary Centre and their transformation into First and Second District Courts on Administrative Matters Specialised in Economic Competition, Broadcasting and Telecommunications, based at the Federal District and with territorial jurisdiction across the Republic; relating to the termination of duties of the Second and Third Circuit Collegiate Courts of the First Region's Auxiliary Centre and their transformation into First and Second Collegiate Circuit Courts on Administrative Matters Specialised in Economic Competition, Broadcasting and Telecommunications, based at the Federal District and with territorial jurisdiction across the Republic; and relating to their domicile, start of operations date and shift rules and system for the reception and distribution of matters among the indicated courts; and relating to the name change of the common post office of the First Region's Auxiliary Centre, www.dof.gob.mx/nota_detalle.php?codigo=5309912&fecha=09/08/2013.

²⁷ In this report efficient operation of markets implies vigorous competition in the marketplace, where there is effective interaction between suppliers and its buyers. A market operating under this condition may be understood as a well-functioning market where structural, conduct or regulatory features that detract it from a desired competitive process are not relevant or do not have a significant impact.

²⁸ In some jurisdictions market participants themselves can also be instrumental in implementing competition policy through private actions presented to and decided by courts on the basis of competition law.

- 29 The function of courts is to carry out the judicial control function. Guaranteeing the efficient performance of markets is an essential and direct duty for competition authorities and for the other authorities designing and implementing economic policy. Also, in this report hereinafter courts will also refer to tribunals.
- 30 Well-functioning courts are those that do not suffer from inefficiencies which may be sufficiently serious to negatively impact a jurisdiction's economic performance. Non-exhaustive examples of these inefficiencies are: long trial length; lack of independence, fairness of adjudication, accessibility to justice services, predictability of decisions and accountability; lack or poor specialisation of courts; limited size of courts; poor case flow management techniques; poor investment in infrastructure and information technology; and inefficient use of resources and technology.
- 31 Transaction cost economics describes the firm as a governance structure or an organisational construction and where property rights and contracts are treated as problematic because both can be costly to define and enforce and hence arise only where expected benefits exceed the expected costs. Moreover, property rights have security hazards of two types: expropriation by government and expropriation by the market (rivals, suppliers, customers). In the case of contracts, transaction costs are related to those for obtaining necessary information, bargaining and deciding in a negotiation, as well as those related to inspecting to make sure that the terms of the contract are being observed.
- 32 See note 28.
- 33 See (David, et al., 2014) p. 6. "*Or, to protect substantive fundamental rights, such as private property or the freedom of commerce.*"
- 34 See OECD (1996), p.56. Quote from Diane P. Wood, Judge, Seventh Circuit Court of Appeal, Illinois, United States.
- 35 See subsection 6.3.
- 36 See *Ibid.*
- 37 Common law systems (see section 2.4.1) are essentially based on judicial precedent; i.e. their law creation does not arise from an act passed by the legislative power, but from the decisions adopted by courts. Therefore, judicial precedent, once set, constitutes the legal rule that other courts in the jurisdiction will have to follow from then on.
- 38 Courts, like any institutions are made up of formal rules (for example, legal) and informal norms (for example, historical and cultural) and the enforcement characteristics of both determine how they function, as well as their performance.
- 39 See Key features of Common Law or Civil Law systems, <http://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law>. The common law or Anglo-Saxon law system has been adopted mainly in countries that were part of the English colonies and protectorates. The characteristics of common law are: there is not always a written constitution or codified laws; judicial decisions are binding (see note 37); generally, everything is permitted that is not forbidden by law; and it is less prescriptive than a civil law system. The civil law system has its origin in Roman law and it has been mainly adopted by French, Dutch, German, Spanish or Portuguese colonies or protectorates; it also includes Central and Eastern European and Eastern Asian countries. This is a system of codified laws. The characteristics of civil law are the following: generally there is a written constitution and laws enshrining basic rights and obligations, and it is a more prescriptive system than common law. See also The Common law and Civil law traditions, for more information about these systems, www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf.

40 See Ibid.

41 Comment by Magistrate Patricio González de Loyola. Circuit Magistrate. First Collegiate Circuit Tribunal on Administrative Matter, Specialised in Economic Competition, Broadcasting and Telecommunications located in Mexico City: *“Mexico belongs to the roman-canonical legal tradition; in this case, the indirect amparo is the only procedural means that allows for the examination of competition authorities’ actions and decisions. In this case, judges review the constitutional and legal compliance of the general legal rules, as well as the resolutions issued for their enforcement, without carrying out any investigative activity.”*

42 See (David, et al., 2014) pp. 7-8. Both reviews may also have different degrees of intensity. Low intensity reviews refer to those that explore whether the authority has gravely disregarded the limits of its discretion, while paying attention not to substitute its decision. Intermediary intensity reviews do not have the purpose of substituting the authority’s decision but place a more intensive level of scrutiny of the rationality of the decision of the authority, while still providing it with some margin of appraisal in complex economic and technical issues. High intensity reviews exercise a comprehensive review of the facts that may lead to a substitution of the competition authority’s decision (in reviews on the merits), and/or providing the authority with a very limited margin of discretion in the options available to it (in the judicial review). In high intensity reviews, a review on the merits means that the residual competence is transferred from the authority to the court which may choose to reconsider the question de novo and substitute the authority’s judgement; whereas a judicial review can only substitute issues covered by the specific ground of the review, and therefore the authority keeps residual competence in the matter.

43 See Idem, pp. 11-12. In the exercise of their discretion, authorities may have various options at their disposal in setting the appropriate remedial action or sanctions. For example: (i) a simple means-end rationality test which will consider whether the amount of penalties imposed would indeed be a rational means to a purported end; (ii) the assessment of the proportionality of the sanction which is a trade-off device that inquires whether the level of the penalty is proportionate to the effective enforcement of the competition law; and (iii) a cost benefit analysis, namely a balancing test that tries to measure the costs and benefits of a remedial option or of alternative remedial options, before choosing the most appropriate one.

44 In the Mexican system, the legality of the procedure and the decisions can be reviewed in an *amparo*; exceptionally an *amparo* can also be used against acts that may directly and immediately violate substantive rights (freedom, as well as life, property, safety and equality), as is the case for fines imposed as enforcement measures. Moreover, in the rulings adopted by Mexican courts in cases of high technical complexity a weak substantive scrutiny, as well as the procedural one, is used.

45 Comment by Magistrate Patricio González de Loyola. Circuit Magistrate. First Collegiate Circuit Tribunal on Administrative Matter, Specialised in Economic Competition, Broadcasting and Telecommunications located in Mexico City: *“It is important to point out that the extent of the review on the merits varies across jurisdictions. In some of them there are important degrees of deference, since judges do not substitute the reasoning of the specialised authority unless it is clearly incorrect or arbitrary. In Mexico there are important precedents (some set by the Supreme Court of Justice of Mexico) that grant degrees of judicial deference in favour of the competition authorities.”* See also note 42.

46 Comment by Magistrate Patricio González de Loyola. Circuit Magistrate. First Collegiate Circuit Tribunal on Administrative Matter, Specialised in Economic Competition, Broadcasting and Telecommunications located in Mexico City: *“In the Mexican system, the review is carried out to the extent indicated by the claims of violation brought forward by the appellant, which differs from the United Kingdom’s standard of review presented as an example.”*

47 See section 4.

- 48 Depending on the jurisdiction these could be civil, administrative or criminal.
- 49 See section 4.
- 50 Experiences across countries demonstrate that effective judicial enforcement of the competition law does not necessarily require either type of courts or judges.
- 51 See section 4.
- 52 See (ICN, 2015), p. 13.
- 53 See (Fox & Trebilcock, 2015), p. 5 and (ICN, 2002), p. 39.
- 54 See subsection 4.2. The justification of this specialisation is based on the distinctive expertise required to hear competition cases, which may not be held by judges adjudicating all types of civil and criminal matters in general.
- 55 See (ICN, 2015), p. 13.
- 56 See (Fox & Trebilcock, 2015), p. 4.
- 57 The cases of Australia and the United States present features of the bifurcated (see subsection 3.1 above) and integrated models (as will be described in this section).
- 58 Specialisation is also perceived as a means for boosting competition culture within the judiciary. See also section 7.
- 59 See Competition Appeal Tribunal (CAT), www.catribunal.org.uk/.
- 60 These are non-exhaustive faculties. For consulting the statutory powers of the CAT see the Competition Appeal Tribunal, www.catribunal.org.uk/.
- 61 See Box 4.5.
- 62 Sometimes even life tenure. See subsection 6.2.
- 63 With regard to the Mexican system, Article 120 of the *Amparo Law* reads “*Upon admission of the expert evidence, an expert, or the number of experts that are considered appropriate for carrying out the proceedings in question, shall be appointed, notwithstanding the fact that each party may appoint an expert to join the one appointed by the court or to present an opinion separately; this appointment must be done within three days following the date of entry into force of the order admitting the evidence (...)*”.
- 64 See Ginsburg and Wright (2012), p. 793. “[...] which is subjective and difficult to measure; expert judges may increase or decrease the quality of judicial outputs.”
- 65 See Baum (2009), p. 1676. However, there may be arguments against the causal relationship of task specialisation and greater efficiency. See (Ginsburg & Wright, 2012), p. 788 “*Although many specialised courts have been created [...], there is still no empirical foundation for the proposition that specialist judges are more efficient than generalist in the production of judgements. Even as simplistic a metric as the time it takes for as specialist versus a generalist court to dispose of comparable claims remains undocumented.*”

- ⁶⁶ See (OECD, 2008a), p. 7. Judges' expertise in economics and economic methodologies may be increased through capacity building. This is particularly important since the developed analytical skills will allow them also to become more sophisticated in competition economics and at the same time would be informed about the limitations of economic evidence (for example one can rarely depend on uncontested data to produce a single numerical solution to a given problem). See also subsection 6.3.
- ⁶⁷ See 2014 Annual Report on Competition Policy Development in Mexico, [https://one.oecd.org/document/DAF/COMP/AR\(2014\)21/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2014)21/en/pdf). For example, in the few years that the two new District Courts specialised in competition, telecommunications and broadcasting of Mexico, as well as the two Collegiate Circuit Courts specialised in these same areas, have been operating, the average time for the resolution proceedings has dropped from 18 to 8.7 months.
- ⁶⁸ See subsection 2.4.2.
- ⁶⁹ See subsection 6.6.
- ⁷⁰ In the case of Mexico, by decree published in the Federal Official Gazette on 6 June 2011, Articles 94 and 107 of the Political Constitution of the United Mexican States, among others, were reformed, creating Circuit Plenums to strengthen the Federation's Judiciary and in recognition of the members of the Collegiate Circuit Courts, actual creators of law interpretation criteria, who will solve the thesis contradictions generated in the same territorial circumscription with the aim of streamlining criteria. See General AGREEMENT 8/2015 of the Federal Judicature Council Plenum, on the establishment and functioning of Circuit Plenums, www.dof.gob.mx/nota_detalle.php?codigo=5383772&fecha=27/02/2015.
- ⁷¹ In the case of the Mexican system, Circuit Plenums provide another reference and solid basis that promotes uniformity and predictability among new specialised courts.
- ⁷² For instance, records of telephone calls among employees of the companies involved, with the communication between them increasing during the periods close to the dates on which the submission and opening of the technical and economic proposals for each of the tenders was to take place.
- ⁷³ See subsection 6.6.
- ⁷⁴ The factors presented in this report shall not be considered as an exhaustive list of determinants of courts performance.
- ⁷⁵ See sections 1 and 7.
- ⁷⁶ Mexico is the exception in the sample of countries of this section.
- ⁷⁷ See specific examples in Appendix 1. And see What Does it Take to Satisfy Character and Fitness Requirements?, www.americanbar.org/publications/syllabus_home/volume_44_2012-2013/winter_2012-2013/professionalism_whatdoesittaketosatisfycharacterandfitnessrequire.html. In the United States, the first step toward satisfying the Character and Fitness requirement is understanding what is expected from someone in the legal profession. According to American Bar Association, the top four areas of concern that may put into question the attribute of "good character" are the existence of criminal record, untreated mental illness and substance abuse, lack of candour, and financial irresponsibility.
- ⁷⁸ Except in the case of European Courts.
- ⁷⁹ See also subsection 7.2.

- 80 This may be case in too in Latin-America. See Interview to Diane Wood, Judge of the Seventh District Appeals Court in New York, by Competition Policy International, www.competitionpolicyinternational.com/assets/JR/Wood-interview-Spanish.pdf. “Competition law is an economic law, as well as the laws that regulate commodities markets and shall touch upon economic aspects, o like some laws related to the responsibilities of suppliers. Therefore, I consider that economics is an inevitable part of competition law and I would like to think that, as it evolves, the Latin-American systems will rely more on economic evidence.”
- 81 See (OECD, 1996),p. 13. The standards of proof that are required in competition cases may be subject to several variables: (i) constant change and evolution in the evidentiary standard of cases – as competition laws are modified by legislatures and as courts gain increasing sophistication in competition analysis; (ii) classification of competition cases in civil or criminal – in the latter cases the prosecutor is guided by a stricter standard, where the crime must be proven beyond reasonable doubt; (iii) sufficiency of proof is an issue with which courts almost often struggle. The areas that commonly lack sufficiency of proof are agreements (which have been proven with the simplest and most straightforward type of evidence, but increasingly unavailable; therefore, in cases where such evidence is missing courts may ask whether conscious parallelism is sufficient to prove an agreement), market definition (proven by what is considered to be more specialised economic evidence focusing on the issue of the willingness of buyers to substitute among different products; where this evidence is presented courts often struggle in identifying it, as well as determining whether any conclusion concerning the relevant market is of fact, of law, or of both), intent (proof of which is often needed in criminal cases; however, in civil cases sometimes courts also struggle with the standard of intent required), and substantiality (in many countries competition law requires that restraints to competition are proven to be sufficiently harmful to demonstrate substantial or undue harm to competition; often courts struggle to decide on the standard of sufficiency); and (iv) the trend towards liberal or judicial standards can conflict with the need for protection of due process; often courts do not sacrifice due process requirements in their quest for more accuracy in competition cases. However, by developing an enforcement culture – based on sound economics – by competition agencies, encourage courts to accept an economic methodology. This task is carried out through the supply of sound economic evidence by competition authorities.
- 82 See Presentation made by Frederic Jenny, The role and the contribution of economic analysis in the enforcement of competition rules, in the workshop of December 3, 2015. When courts retain their own expert in competition proceedings, there is a need for the court to define the expert’s mission in a relevant way. Such a definition also requires the court to have a sufficient understanding of economics. There are three tools that can be used to increase the level of economic understanding of courts: institutional (through a specialised court or by economists that are ad hoc panel members in court proceedings); procedural tools (such as pre-trial conferences between the judges and the parties ‘experts’ or the through ‘hot-tub’ technique, where the expert of one party testifies in the presence of the expert of the other party, and where each expert can comment on the expert testimony of the other party); and methodological tools (having some notions of basic scientific methodologies can help judges understand what the experts are saying and help them assess the general quality of the expertise which they present it). The Daubert criteria in the United States that relate to ‘relevance’ and ‘reliability’ to assess the quality of the expertise of these experts can be a great help for courts as well).
- 83 See (OECD, 2008), p. 10. When possible, oral expert testimony can help to confirm the robustness or legitimacy of the theoretical foundations that are being used in assessing market power or in proving the existence of consumer harm. Oral presentations have the potential to do three things: (a) to make the approach used comprehensible in a non-technical way; (b) to summarise the key findings and arguments; and (c) to provide a platform for counter arguments to be used in a constructive manner.
- 84 See (OECD, 2008), p.7. Rather than plead for the application of any theory with the only purpose of serving the client's cause.

- 85 See (Grameckow & Walsh, 2013), p. 24. When the native or predominant language of the country is not English it shall be considered as a training priority developing the language skills that will allow judges and other staff to benefit from international opportunities, especially when international training is considered as a means to share information gained.
- 86 See Live broadcasting, www.cjf.gob.mx/SesionesVivo.htm.
- 87 Other jurisdictions like the United Kingdom have recently allowed (31 October 2013) the Court of Appeal to have cameras for a (70-second broadcast delay) "live" broadcast feed for the first time. Cameras have now been allowed in some courts due to changes made by the Crime and Courts Act 2013. Currently, only one court can broadcast per day, www.channel4.com/news/cameras-in-court-first-watch-live-video.
- 88 See Box 3.1.
- 89 See also section 2.
- 90 See (ICN, 2002), p. 32. Competition culture may be perceived as closely related to the longevity of the market economy and may be perceived as strong when for example: there is long experience with competition policy; the resolution of cases have significant media coverage; specialised courts in competition are in place; there is interaction with universities; and decisions are published. A weak competition culture is perceived when for example: competition policy is recent; courts lack experience in competition cases; and market participants do not accept competition principles.
- 91 Dialogue organised by one or more of the aforementioned actors, in the form of conferences, seminars, workshops, trainings; will often include the participation of the other actors, either in the form of audience or as speakers.
- 92 See (ICN, 2015), p. 16. The 2015 ICN survey indicates that the number of specialists' competition lawyers within a jurisdiction can be considered as a good indicator of the relevance and understanding of competition matters within that jurisdiction. Typically, such a specialised legal community develops when a country has multiple law firms specialising in competition law, and where these firms and its lawyers area members of a national and/or international bar or a lawyers' association, which may have a special section on competition.
- 93 See Idem, p. 16. The number of these professors indicates the level of competition expertise and is often positively correlated with the development and implementation of competition policy. Often academic research focused on competition law an economics contributes to raising the competition culture of a country and may inform the design and enforcement of competition rules. Moreover, academia may generate expertise hubs by creating centres focused on competition law and policy research, or by providing university and graduate degree programmes in the fields of competition law and economics.
- 94 For example there are important initiatives in the United States undertaken by the School of Law of the George Mason University or by the International Judicial Academy that offer specialised competition law and economics training for judges. See Law and Economics Centre of the George Mason University School of Law, <http://masonlec.org/about/> and the International Judiciary Academy, www.ijaworld.org/.
- 95 These may be think tanks, specialised in economic competition and may also have an effect on competition culture; their research outputs may inform and guide competition policy and law enforcement.
- 96 The Alliance for Competition is a specialised competition network, hosted by the Centre for Research and Development (CIDAC), comprised by CIDAC, the Mexican Institute for Competitiveness (IMCO),

the Centre for Research and Teaching of Economics, Mexico's competition authorities (COFECE and IFT), the Federal Judicature Institute, the OECD, the Inter-American Development Bank (IADB), the World Bank (WB), the British Embassy in Mexico, and the United States Agency for International Development (USAID). This Alliance promotes better understanding about the benefits and culture of competition in Mexico among regulators, judicial officials, international organisations, the policy research community and civil society. More information available at: www.alianzaxcompetencia.mx/about/.

97 The Inter-American Development Bank (IADB) and the Regional Competition Centre for Latin America also facilitate the creation of capacities and the exchange of experiences among judges from different jurisdictions, www.iadb.org/es/temas/comercio/promoviendo-el-funcionamiento-eficiente-de-los-mercados-centro-regional-de-competencia-para-america-latina,7750.html.

98 See OECD Korea Policy Centre (OECD/KPC), www.oecd.org/competition/seoulrcc and the OECD Regional Centre for Competition (RCC OECD-GVH) in Budapest www.oecd.org/competition/budapestrcc.

99 ICN members produce products through their involvement in flexible project-oriented and results-based working groups. The working group members work together largely by Internet, telephone, teleseminars and webinars. This allows for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community.

100 See the Internet page of the Advocacy Working Group of the International Competition Network (ICN), www.internationalcompetitionnetwork.org/working-groups/current/advocacy.aspx.

101 See the Internet page of the United Nations Conference for Trade and Development (UNCTAD), [http://unctad.org/fr/pages/newsdetails.aspx?OriginalVersionID=660&Sitemap_x0020_Taxonomy=Competition per cent20Law per cent20and per cent20Policy](http://unctad.org/fr/pages/newsdetails.aspx?OriginalVersionID=660&Sitemap_x0020_Taxonomy=Competition%20Law%20and%20Policy).

102 See Ibid.

103 See the Internet page of the Association of European Competition Law Judges (AECLJ), www.aeclj.com/240/About-the-Association.html.

104 See the Internet page of AIJDR, <http://www.aijdr.org/>.

105 See Article 9 of Chile's Competition Act, Decree Law 211 de 1973.

106 See Article 6 of Chile's Competition Act, Decree Law 211 de 1973.

107 See Chile's Political Constitution, Article 78.

108 See Chile's Political Constitution, Article 32 (12), 53 (9), Article 78.

109 See Chile's Political Constitution, Article 78.

110 See Article 254 of the Organic Code on Judicial Organisation of Chile.

111 See General Agreement of the Board of the CJF that clarifies and specifies the requirements that judges of the specialised courts in competition, telecommunications and broadcasting shall have, www.cjf.gob.mx/.

- 112 See General Agreement of the CJF Plenum of 9 August 2013, Federal Judicature Council,
www.cjf.gob.mx/.
- 113 See Article 94 of the Political Constitution of the United Mexican States. Ministers are designed by two
 thirds of the Senate. The President chooses in case this voting does not take place in 30 days.
- 114 See Canada's Competition Tribunal Act R.S.A., 1985, c. 19 (2nd Supp.), s. 3(2).
- 115 See Canada's Competition Tribunal Act R.S.C., 1985, c. 19 (2nd Supp.), s. 16.
- 116 See Canada's Competition Tribunal Act R.S.C., 1985, c. 19 (2nd Supp.), s. 3(3) and (4).
- 117 See Canada's Federal Courts Act R.S.C., 1985, c. F-7, s. 5.1 (1).
- 118 See Canada's Federal Courts Act R.S.C., 1985, c. F-7, s. 15. All the Canadian laws must be ratified by
 the sovereign or his or her representative, and bear his or her signature. Moreover, all of them begin with
 the sentence "'Her Majesty, by and with the advice and consent of the Senate and House of Commons of
 Canada, enacts as follows (...)'. The signature of the sovereign or his or her representative is known as
 Royal Assent and it is necessary for the legislation to be in force. All laws must also bear a seal known as
 the Great Seal.
- 119 See Canada's Federal Courts Act R.S.C., 1985, c. F-7, s. 5(1).
- 120 See Canada's Federal Courts Act R.S.C., 1985, c. F-7, s. 5.2 (1).
- 121 See Canada's Federal Courts Act R.S.C., 1985, c. F-7, s. 5.3. There are specific requirements concerning
 the origin of the judges from within Canada under s. 5.4.
- 122 See Canada's Supreme Court Act R.S.C., 1985, c. S-26, s. 4 (1).
- 123 See Canada's Supreme Court Act R.S.C., 1985, c. S-26, s. 4.
- 124 See Canada's Supreme Court Act R.S.C., 1985, c. S-26, s. 5.
- 125 See Australia's Competition & Consumer Act 2010, s. 37.
- 126 See Australia's Competition & Consumer Act 2010, s. 42.
- 127 See Australia's Competition & Consumer Act 2010, s. 31.
- 128 See Australia's Federal Court Annual Report 2014-2015, [www.fedcourt.gov.au/publications/annual-
 reports/2014-15/part-1](http://www.fedcourt.gov.au/publications/annual-reports/2014-15/part-1).
- 129 See Australia's Federal Court Act 1976, s. 14; s. 25.
- 130 See Australia's Federal Court Act 1976, s. 6.
- 131 See Australian Constitution, s. 73.
- 132 See Australian Constitution, s. 72.
- 133 See United Kingdom's Section 12(2) of Enterprise Act 2002.

- 134 See United Kingdom's Section 12 of Enterprise Act 2002.
- 135 See United Kingdom's Section 12(2) of Enterprise Act 2002.
- 136 See Competition Appeal Tribunal Annual Review and Accounts 2013/2014, www.catribunal.org.uk/files/AnnualReview_13_14.pdf.
- 137 See Court of Appeals of England and Wales, www.channel4.com/news/cameras-in-court-first-watch-live-video.
- 138 See Courts and Tribunals Judiciary, www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/coa-judges/.
- 139 See Official Journal of the European Union. Council Decision of 25 February of 2010 relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010D0124&from=EN>. In accordance with Article 255 TFEU, the panel comprises seven persons chosen from among former members of the Court of Justice and the General Court of the European Union, members of national supreme courts and lawyers of recognised competence, one of whom is proposed by the European Parliament.
- 140 See Curia – Court of Justice of the European Union, http://curia.europa.eu/jcms/jcms/Jo2_7033/.
- 141 See Article 253 of the Treaty on the Functioning of the European Union.
- 142 See Art 19 Treaty of the European Union and Article 253 and 255 Treaty on the Functioning of the European Union. The assessment criteria of the Committee are more comprehensive than the standards stipulated in the Treaty. See The Council of the European Union, Activity Report of the Panel provided for in Article 255 of the Treaty on the Functioning of the European Union., <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-02/rapport-c-255-en.pdf>. In addition, besides ensuring, as it does, the personal suitability of each candidate, it is not the panel's job to take part in determining the composition of the Court of Justice or of the General Court. It therefore does not give preference to any particular professional path nor any one field of legal competence more than another, in its assessment of the suitability of the candidatures for the duties for which they are proposed. It considers all professional paths in the field of law to be equally legitimate in applying for the office of Judge or Advocate-General in the Union's courts and, in particular, those of judge, university professor, juris consult, lawyer or high-level official specialised in the field of law.
- 143 See U.S. Code, Title 27, § 402. In the following circumstances appeals may be taken from decisions and orders of the Commission directly to the United States Court of Appeals for the District of Columbia: (1) By any applicant for a construction permit or station license, whose application is denied by the Commission; (2) By any applicant for the renewal or modification of any such instrument of authorisation whose application is denied by the Commission; (3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorisation, or any rights thereunder, whose application is denied by the Commission; (4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been modified or revoked by the Commission; (5) By the holder of any construction permit or station license which has been modified or revoked by the Commission; (6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection; (7) By any person upon whom an order to cease and desist has been served under section 312 of this title; (8) By any radio operator whose license has been suspended by the Commission; (9) By any

applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

144 See 15 U.S.C. §§ 21(c), 45(c).

145 See Article II of the United States Constitution.

146 See Article 58 of the FECL. See OECD (2012a) for international best practices on the use of this analytical tool.

147 See (Davis & Garces, 2009), p. 167. Qualitative assessments include the evaluation of various product characteristics and the uses to which consumers put the product.

148 However it is important to note that suppliers may also compete in other dimensions, such as quality, quantity, service, marketing, or innovation. So it is recommended that markets are analysed in those terms also, rather than on price alone.

149 See (OECD, 2012a), for information about other type of tests (e.g. FERM test), and (Motta, 2004) for other type of tools (e.g. own price elasticity and price differences) and other type of (e.g. temporal, seasonal, multiple or secondary (or after)) markets.

150 See (Motta, 2004), p. 102. The hypothetical monopolist test analyses the degree to which customers could and would switch among substitutes if a (hypothetical) monopoly supplier, not subject to price regulation, maximises its profits by consistently charging higher prices. The test is described in terms of price, because it tests whether the aforementioned supplier would be able to exploit its market power, that is, to raise prices of products inside the candidate market by a small but significant amount. SSNIP test (small, but significant non-transitory increase in price) is a methodological tool of the hypothetical monopolist test, where substitution by customers would prevent the hypothetical monopolist from imposing the small, but significant non-transitory increase in price. A common benchmark used for the size of the small but significant non-transitory increase in price is 5 – 10 per cent.

151 Near future potential entrants are included. Also, when relevant, vertically integrated market participants may be included.

152 See Subsection V of Article 59 of the FECL.

153 See also Subsection I of Article 59 of the FECL, which provides that substantial market power is present if market participants may establish prices or restrict supply in the relevant market where their actual or potential competitors are unable to oppose this power. See also Subsection III of Article 59 of the FECL.

154 These characteristics are an indirect approach of assessing market power. Direct quantitative techniques to assess market power involve the estimation of residual demand elasticities and the use of logit demand models. These techniques are not described in this manual but can be reviewed in Motta (2004).

155 See (Competition Commission, 2013), p. 36 and (Bain, 1962) for product differentiation as a structural feature.

156 See (OECD, 1996), p. 72. Essential facilities doctrine specifies when the owner(s) of an “essential” or “bottleneck” facility must provide access to that facility, at a reasonable price.

- ¹⁵⁷ Some international examples of essential facilities cases are: *United States vs Terminal Railroad Association* (1912); *United Press* (1945); *Otter Tail Power Co. vs United States* (1973); *Aspen Highlands Skiing Corp. vs Aspen Skiing Co.* (1985); *MCI Communications Corp. vs AT&T Corp.* (1983); *Verizon vs Trinko* (2004); *Commercial Solvents* (1974); *Magill TV Guide* (1989); *Oscar Bronner* (1998); and *NDS Health/IMS Health* (2001).
- ¹⁵⁸ See (OECD, 1996), p. 73. “There is a degree of commonality between some intellectual property rights and other “essential facilities”, some of which involve the exercise of landed property rights or the operation of a network based on wayleave rights. But intellectual property rights cannot bear the blanket description “essential facilities” because competitors may be able to develop alternative intellectual property in order to compete in the market.”
- ¹⁵⁹ See the FECL. In the case of Mexico, the FECL establishes three types of anti-competitive conduct: Absolute monopolistic practices (“cartels”), relative monopolistic practices (“abuse of dominance”), and unlawful concentrations.
- ¹⁶⁰ Regulation includes laws, formal or informal orders and subordinate rules, and rules issued by non-government or self-regulatory bodies.

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