
6 December 2017**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Global Forum on Competition****JUDICIAL PERSPECTIVES ON COMPETITION LAW****Summaries of contributions****-- Session II --****7-8 December 2017**

This document reproduces summaries of contributions submitted for Session II at the 16th Global Forum on Competition on 7-8 December 2017.

More documentation related to this discussion can be found at

<http://www.oecd.org/competition/globalforum/judicial-perspectives-competition-law.htm>.

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Judicial Perspectives on Competition Law

-- Summaries of contributions --

Abstract

This document contains summaries of the various written contributions received for the discussion on "Judicial Perspectives on Competition Law" held during the 16th meeting of the Global Forum on Competition in Paris, France (7-8 December 2017, Session II). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

*Algeria**

Judicial perspectives on competition law in Algeria remain closely linked to the gradual establishment of a market economy and its corollary a competitive market.

The reforms initiated since the end of the 1980s and which continue to date go in this direction knowing that they take their sources from the different Constitutions of 1989, 1996 and in particular that of March 7, 2016 which has in its article 43 "Freedom investment and trade is recognized. It is exercised within the framework of the law. The state works to improve the business climate. It encourages, without discrimination, the development of enterprises in the service of national economic development. The state regulates the market. The law protects the rights of consumers. The law prohibits monopoly and unfair competition.

The Conseil de la concurrence considers that the judicial perspectives can not accommodate the presence of certain ambiguities characterizing the Algerian competition law (which we will explain in part1).

In a second part we will present the case law on competition law recorded between 2013 and 2014 while underlining that in the three cases that were appealed, the judge of the Court of Appeal, exercising his mission of control did not have to challenge the College's decisions.

In a third part we will highlight the interactions between the Competition Council and the judicial body as codified in Ordinance 03-03 of 19 July 2003 amended and supplemented on competition.

Finally, in a fourth and last part, while highlighting the weak practice of the competition law by both the Algerian judicial body and the Competition Council, we express our conviction that to strengthen the effectiveness of the Council of Competition, competition and allow the market to play its full role, inspiration from the case law of the old and successful competition.

* This translation of the summary reflects the original version sent in French.

Argentina

In Argentina, the relationship between the Competition Authority and the judiciary power has always been under constant debate. Since the enactment of Act 25,156 in 1999, jurisprudence has been ambiguous and contradictory. This undesirable circumstance has led to an unclear legal structure in which the private sector cannot foresee the branch of the judiciary that shall analyze a case, which results in a lack of predictability when considering which court of appeals shall understand on competition matters.

Over the last two decades, the discussion has been focused on whether the Federal Court of Appeals on Civil and Commercial Matters or the Criminal Court of Appeals on Economic Matters, shall intervene as an appeals court in antitrust issues.

Act 22,262, enacted in 1980, made violations of competition law a criminal offense that would be tried before a criminal court.

Act 25,156, enacted in 1999, among other reforms, eliminated criminal charges among the sanctions for violation of the law established that the National Court for Commercial Appeals of the corresponding Federal Chamber of a given province in the country shall intervene as an appellate body on the decisions held by the Competition Authority.

However, Decree 1019/99 enacted the ACL and removed any references to the “National Court for Commercial Appeals” and “a given province of the country” as stipulated by Act 25,156 original text.

Two years later, Regulatory Decree 89/2001 of the ACL, established that the Civil and Commercial Federal Court in the city of Buenos Aires, and the respective Federal Chamber with powers in any given province of the country shall have the faculties to intervene in cases of appeals filed against decisions made by the TDC, according to the terms set forth in section 53 of ACL.

In September, 2014, Act 26,993 established that the National Court of Appeals in Consumer Relations shall act as an appellate body on the decisions held by the Competition Authority. However, said body has not been created yet.

Applicable laws in Argentina have been blamed for not providing certainty as to which courts have competent jurisdiction to review antitrust cases. Likewise, the development at the ASCJ, although providing some clarity with its decisions, is yet to provide a clear-cut indication as to which court shall be entrusted with full powers to undertake judicial review on appeals of the decisions of the Competition Authority.

During 2016, the CNDC drafted a new competition bill, along with congressmen that had already been involved in previous proposals, which creates a specialized appellate body on competition matters, in order to give certainty and predictability to the decision-making process in competition cases in Argentina.

Brazil

CADE's written contribution on "Judicial Perspectives on Competition Law" analyses important aspects of the judicial adjudication of competition law in Brazil. First, it provides a brief overview of the Administrative Council for Economic Defense (CADE), which is the Brazilian Competition authority ultimately responsible for ensuring a healthy competition environment in Brazil, and of the Brazilian Judiciary Branch, drawing attention to its role in the scope of competition. Next, it will examine the interaction between CADE and the Brazilian Courts. This section provides some statistics related to this interaction between CADE and the Courts, including the number of judicial cases and the average rate of success in judicial review. The section also gives examples of successful judicial case in Brazil. Finally, the contribution will address the recent decision to create specialized courts to deal with competition law in Brazil. As a conclusion, the contribution highlights the importance of the relationship between CADE and the Judiciary and that there is significant rate of success of CADE's decisions in the judiciary. Moreover, it reinforces the proposal to create specialized courts to deal with competition law and international commerce in Brazil.

Egypt

The Egyptian Competition Law (ECL) was issued in 2005 as an economic and criminal law that falls within the jurisdiction of the criminal court. All ECA's decisions are therefore referred to the public prosecutor and then to the competent courts for decision making and sanctioning.

This paper examines the public prosecutor and the competent courts' perspective on Competition Law and discusses the extent of their specialization and expertise on the matter. It also discusses the efficiency of the Egyptian judicial system when it comes to the evidentiary assessment of competition cases.

For that reason, we have to tackle the public prosecutor's competence when it comes to assessing competition cases (I) before considering the competent courts judgments and their efficiency when it comes to competition law analysis (II).

*El Salvador*¹

1. Challenges before the office of the administrative contentious of the Supreme Court of Justice

The contested administrative litigation processes are approximately 90% of the procedures sanctioned by the Institution. To date, judgment has been issued in 24 cases, of which 21 have been in favor of the Superintendence of Competition (in some cases the judicial authority has only modified the amount of the fine), 2 were abandoned by the economic agents who challenged them, and 1 was declared against. On this last comment that the procedure was rolled back at the time of illegality and is currently in the process of issuing the final resolution.

2. Before the constitutional room of the Supreme Court of Justice

The resolutions by means of which the Superintendence of Competition sanctions the economic agents for the commission of anti-competitive practices may be challenged before the Constitutional Chamber of the Supreme Court of Justice, for violations of constitutional rights and guarantees committed within the investigation procedure of the same.

To date, the Institution has been sued in three cases, which were accumulated, and in all of them the Constitutional Chamber has issued a favorable ruling for the Institution.

On the other hand, this Superintendence has the faculty to interpose demands of protections before the Constitutional Chamber of the Supreme Court of Justice, for violation of its constitutional rights within the framework of processes in which it has intervened as part, including the administrative contentious processes that the economic agents initiate to contest, of illegal, the resolutions that impose fine on them commission of anticompetitive practices.

In view of the previous thing, this Institution has demanded in protection in two occasions to the Administrative Contentious Chamber, the Constitutional Chamber having ruled in one case in favor (206-2012) and in another against (175-2015) the Institution.

¹ SC final note: It is worth mentioning that a great variety of circumstances, acts and/or considerations can occur and those might not necessarily be considered in this contribution. Consequently, this document is illustrative and for its nature it shall not be considered as binding for any act of the SC, its staff and authorities including investigations and Decisions issued and/or to be issued. Nothing in this document shall be understood as prejudging the analysis the SC and/or its staff and authorities could perform in specific cases or as an institutional statement.

European Union

The European Union (EU) competition enforcement system is an administrative system, entrusted principally to the European Commission, under the judicial control of the Court of Justice of the European Union. It is the College of Commissioners that decides on cases after an investigation of the Directorate General for Competition. It is for the European Commission to ensure the application of the principles laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union² (TFEU) and in the EU Merger Regulation. The enforcement activity of the European Commission is subject to a wide and thorough scrutiny by the Court of Justice.

The wide scope of this scrutiny is illustrated notably by the Court's control not only over the legality of actions of the Commission, but also over the claims for failure to act and for damages. The Court can review the Commission prohibition decisions in merger and antitrust cases, as well as, for instance, conditional and unconditional clearance decisions in mergers and rejections of complaints in antitrust. Also, the legal standing of the applicants before the Court is relatively broad, and is not limited, for example, to the notifying parties in merger cases or the parties on which a fine has been imposed in antitrust cases.³

The Court may annul a Commission decision, in full or in part, on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.⁴

A Commission decision in antitrust/cartel and merger cases may be appealed, at first instance, to the General Court, which has the powers of full judicial review.⁵ This entails that the General Court can review all points of fact and law and thus can verify evidence, factual findings and the legal qualifications derived therefrom. The General Court must also establish that the European Commission has sufficiently reasoned its decision. The General Court must not however substitute its own economic assessment for that of the European Commission (see below). Appeals against judgments and orders of the General Court may be brought before the Court of Justice on points of law only.

² *Official Journal C 326, 26.10.2012.*

³ Pursuant to Article 263 TFEU, 4th para, an action for annulment may be instituted by any natural or legal person directly and individually concerned by a regulatory act.

⁴ Second paragraph of Article 263 TFEU.

⁵ See Article 256 TFEU and Article 58 of the Statute of the Court of Justice of the EU.

Italy

In Italy the enforcement of Competition Law is carried out by AGCM (public enforcement), which is an independent Administrative Authority, as well as by the Judges before which consumers and business can directly ask for damages and injunctive reliefs in case of anti-competitive conducts (private enforcement). As for public enforcement, the Italian Code of Administrative Procedure reserves exclusive jurisdiction on the decisions issued by the Italian Competition Authority to administrative courts. As for private enforcement, competition law disputes fall under the jurisdiction of the judicial sections specialized in company law of Milan, Rome and Naples. These specialized judicial sections have jurisdiction over actions for damages and requests for interim relief relating to infringements of the Italian Competition Act or of Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU).

The development of the competition case law in Italy seems to confirm that the Italian administrative Courts, while not being specialised in the competition realm, are fully aware that antitrust disputes typically imply a thorough economic analysis, and take it in due account. Italian administrative Courts will normally check the reasonableness and consistency of administrative decisions, without substituting their own assessment to that of the administration. The Italian case law shows an increasing willingness of administrative Courts to access and discuss the facts of the case, as well as the economic analysis of those fact carried out by the Authority, with a view to ensuring the effectiveness of the judicial review, as well as the fullest safeguard of the rights of defence of the undertakings concerned.

The review of the AGCM's decisions often requires sophisticated economic analysis. Several judgements show a remarkable economic sensitivity and a growing familiarity with economic issues by the administrative Courts. A telling example is the development of the notion of "concerted practice", which has been enriched over time to capture several forms of coordination between competitors falling short of a full-fledged agreement. By the same token, the Italian case law went far beyond a formalistic approach when it ruled that antitrust infringements may be committed through the distorted use of rights which are formally legitimate, but "exercised in a reprehensible manner for a purpose different from that meant by the laws conferring such rights".

The organizational choice to concentrate antitrust disputes on specific chambers has clearly contributed to form a pronounced sensitivity for sophisticated economic reasoning, economic theories and methods underpinning competition policy.

The recent transposition of the Antitrust Damages Directive into the national legislation will certainly contribute to the development of private enforcement in Italy and provide further opportunities for fruitful interaction between the AGCM and the specialized Courts. Firstly, the specialized Courts may request assistance from AGCM to ensure that a specific evidence refers to a leniency program or commitments and is thus included in the so called "black list". Secondly, AGCM may submit observations to a specialized Court before which a discovery order is sought, with a view to stating its view on the proportionality of the disclosure request. Finally AGCM may assist the specialized Courts with regard to the determination of the quantum of damages. Such assistance is subject to a request by the specialized Court and is left to the discretion of the AGCM. The described set of cooperation tools has created a very promising framework for joint work

and exchange between the AGCM and the specialized Courts. However, since the transposition of the Directive in the Italian legislation is very recent, it is still early to provide an assessment of the application of these cooperation mechanisms.

The AGCM believes that active engagement with national Courts is crucial to ensure mutual understanding and further improve the techniques of judicial scrutiny. From 2014 to 2016, the AGCM carried out a training project for Italian and French judges on competition rules in the European Union, co-financed by the European Commission. The project was led by the Italian Competition Authority and co-organised by two major Italian judiciary bodies.

The main objective pursued by the project was to provide bespoke advanced training to selected national judges who were already familiar with the fundamental tenets of economics concepts and methodologies relevant to competition enforcement. Accordingly, the project was intended to familiarise national judges with the theoretical and practical instruments to deal with competition cases entailing complex economic assessments, thus contributing to increase legal certainty, promote efficiency and foster consistency across the EU. A second project, under the heading “Antitrust economics for judges”, focused on the role of economics in the competition assessment, with the aim to provide judges with a technical expertise in the face of increasingly complex antitrust analysis.

The fruitful training experience coordinated by the Italian Competition Authority proved that Italian judges are eager to participate in capacity building initiatives, particularly when they follow a case-based approach, whereby judges have the opportunity to discuss the practical aspects of real-life scenarios and to address typical challenges faced in competition review. In the past, the Italian Competition Authority had been reluctant to engage in training projects for judges, in light of the role that the Council of State and TAR Lazio play vis-à-vis its decisions. However, the involvement of the National School of the Judiciary enabled to overcome the hesitancy, insofar as the AGCM could cooperate with the public body responsible for the training of the Italian judges.

Providing also specialized courts with similar training programs on specific aspects of competition law and policy could facilitate an harmonious development of private antitrust enforcement.

Kazakhstan

The courts almost all over the world are the final instance over the decisions of competition authorities, and each country certainly has its own specifics.

At the same time, the competition authorities over the world face similar issues when dealing with courts.

Competition cases are often characterised by complex litigation and differing sets of economic evidence. Compounding these difficulties, judges may also face the prospect of overturning decisions from a competition agency with vast resources and expertise that may exceed their own.

The article highlights the investigation of the violations of the Competition Law of the Republic of Kazakhstan procedure, as well as the process of interaction between the competition and judicial authorities.

The first part of the article highlights the current perspectives of an investigation of violations of the Competition Law of the Republic of Kazakhstan, including the cases in which the courts decision among process.

The second part of the article includes judicial cases of the Competition Law of the Republic of Kazakhstan enforcement.

The third part of the article contains conclusions made on the basis of current judicial system of the Republic of Kazakhstan and experience of interaction between competition and judicial authorities.

Korea

The history of Korean competition law traces back to 1980 when the Monopoly Regulation and Fair Trade Act (hereinafter the“MRFTA”) was enacted. Korea’s competition enforcement has greatly made a leap forward both quantitatively and qualitatively, which can largely be attributed to the litigation, i.e. the fierce legal battle between the antitrust agency and companies.

Competition enforcement in Korea is heavily dependent upon administrative intervention of the KFTC. On the other hand, the judiciary plays an important role that the competition authority’s measures are not arbitrary and excessive by conducting ex post review. Therefore, the competition authority and the judiciary are in a cooperative relationship with good will, which entails a little bit of tension at the same time.

Also, the Court can vacate and remand the relevant measures imposed by the KFTC. Furthermore, such decision by the Court does not only annul or alter KFTC’s disposition, but also can bring about changes to the system. As such, ex post control by the Court can contribute to legal development as well as enabling a more sophisticated enforcement of law.

This paper introduces major Supreme Court cases such as regulations and systems related to competition law litigations and abuse of market dominance by POSCO, and cartels by 16 life insurance companies.

Latvia

Latvia: Evaluation of economic evidences in competition cases during investigation and court proceedings

During the last three years, the Competition Council of Latvia (hereafter – the CC) had significantly enhanced the level of economic argument practice in both its enforcement and advocacy activities. The CC's current experience with economic evidence analysis before courts may be stratified into three main groups:

(1) cases handled via approaching the existing infringements as violations by objective, where the courts themselves have decided to consider additional economic evidence to evaluate the actual effects of the infringements in question. The Moller case⁶ could be mentioned as one example. In this case independent Volkswagen auto dealers created an intra-brand cartel (market sharing). During court proceedings the prosecuted undertakings proposed to reassess the relevant case on efficiency grounds arguing that official Volkswagen auto dealers would be able to deliver higher quality standards and enhance inter-brand competition via sharing of the bids.

(2) cases in which undertakings have used external experts to conduct and submit economic analysis, concerning the wider context and the actual effects of the infringement, enabling the CC to deliver a corresponding economic opinion. The one that could be mentioned in this respect is KNAUF case⁷ - an abuse of dominance by introducing loyalty rebates in the retail carried out by the largest plasterboard producer in Baltics that at the same time is wholesaler active in the Latvian domestic market.

(3) cases the CC handled by ex-officio directly implementing new economic analysis methods.

The AKKA/LAA abuse of dominance case⁸ - concerning an Article 102 infringement by the Consulting agency on copyright and communications/Latvian authors' association (hereafter – AKKA/LAA). The CC compared the fees in force in 20 Member States by employing the purchasing power parity index and found that the rates calculated by AKKA/LAA in Latvia exceeded the average level of those charged in those other Member States by 50% to 100%. CC concluded that there is abuse that resulted in excessive prices and imposed a fine. After a series of appeals in the national courts, the ECJ had been requested to provide a preliminary ruling, which had been published on 14 September 201⁹. This case shows considerable in-depth courts interest to analyse economic arguments and methods during court proceedings in national courts. The request to the ECJ for a preliminary ruling about the methodology may be a sign of

⁶ The [CC decision](#) (Moller case), December 15, 2014 (available in Latvian). [CC press release](#) in English, 20.01.2015.

⁷ The [CC decision](#) (Knauf/Norgips), September 30, 2016 (in Latvian). [CC press release](#) in English, 26.10.2016.

⁸ The [CC decision](#) (AKKA/LAA), April 2, 2013 (in Latvian). CC press release.

⁹ The [Case C 177/16](#) (Autortiesību un komunikēšanās konsultāciju aģentūra/Latvijas Autoru apvienība), September 14, 2017.

change that court is approaching to verify also economic concepts in the line with the EU case law.

The practices of administrative courts reveal that courts in Latvia are carefully evaluating economic and other analytic arguments while examining cases. Although in some cases it shows new approaches by courts that are not in line with national and the EU case law. The lack of economic expertise of behalf of the Latvian courts and sufficient specialisation in general administrative courts should be balanced by courts requirement for the parties to show their in-depth analysis and courts careful impartial evaluation of these arguments. Also possible efficient solutions, addressing the relevant set of issues, may be defined as certain number of national judges beginning to specialise in competition law matters, providing consequential training (perhaps, by the CC itself of other field professionals) for the mentioned judges.

Lithuania

In Lithuania the courts have recognized that their assessment of lawfulness and legitimacy of the Competition Council's (CC) economic evaluation is limited.

Lack of economic expertise on the part of judges limits the scope of judicial review to some extent.

However, the adversarial nature of the process in the court provides an opportunity for the applicants to question the CC's conclusions. The judges, although usually not economic experts themselves, in general can evaluate if some important aspects of economic evaluation are lacking/not correct if so pointed out by the appealing undertaking.

There are rules of thumb (legal presumptions and safe harbours) which are easier to apply than detailed economic assessment. For instance, it is an established practice that hard core cartels by object do not require assessment of restrictions by effect and in such cases it is not necessary to define the relevant market precisely.

We believe that rules on burden and standard of proof overall provide an adequate mechanism to evaluate the aptness of economic assessments. As a general rule, it is for the CC as a competition authority to prove the existence of the infringement to the requisite legal standard. It is for the undertaking invoking the benefit of a defence against a finding of an infringement to demonstrate that the conditions for applying such defence are satisfied.

The CC does not have experience with hot-tubbing. It is possible that such approach could perhaps contribute to more efficient proceedings, especially in private litigation. However, at least within the existing legal framework concerning the review of the CC's decision, at the present moment it would seem that some aspects of hot-tubbing could be difficult to implement in practice.

The CC interacts with the courts to some extent. In 2017 the CC organised a seminar for the representatives of the judiciary on fundamentals of the competition law and some events are planned in the future.

We do not believe that cooperation between competition agencies and courts to improve competition law enforcement and awareness could be recognised as inappropriate *per se*. However, it is also true that some limits to this cooperation exists.

From publicly disseminated information it appears that there have been some seminars/other training opportunities for Lithuanian judges concerning competition law.

Because in general competition law cases are quite difficult, and competition law cases are not very frequent, in our opinion, judicial specialisation in competition law would be advantageous. Ideally, there would be a specialised court to deal with competition law cases (ideally it could deal with both public and private enforcement, and so could develop a uniform approach and gather experience faster). However, at least in small countries this is not very likely.

*Malaysia*¹⁰

Scholarship and roundtable discussion report that competition law encompasses a complex system of rules and procedure¹¹, and is fundamentally subjective, it has been submitted that the cases 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 rights of the 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 ¹². The competition issues in competition cases also demonstrate a close and fundamental relationship between economics and competition law, where the economics provides the substantive basis of the law.

This paper will highlight a “workable direction” that an emerging economy like Malaysia should adopt in decision making of competition cases. This paper will first discuss the competition authorities’ regulatory process in Malaysia. The first part will highlight the current Malaysian framework, the second part will discuss the “accepted” functions as in the developed economies, the three most important function being ensuring procedural process, applying substantive or economic principles, and bringing a certain degree of flexibility in decision making. The third part of the paper will discuss the present challenges in Malaysian judiciary in competition cases. The Judicial review process, application of economics and law and adopting the role of economic ambassador in competition decision making. The fourth part will highlights the transition best practices to Malaysian judiciary in addressing competition judicial norms.

¹⁰ Prepared by: Associate Professor Dr Wan Liza MD Amin, Member Judges Malaysian Appeal Tribunal, Faculty member Universiti Technology Mara (UITM), Law faculty, Malaysia. This paper does not represent UITM or the Malaysian Competition Appeal Tribunal, all the discussion is the author’s own opinion

¹¹ OECD, 1996

¹² David, et al 2014

*Mexico**

Judges play a critical role in ensuring that competition enforcement is executed according to sound legal precedent and economic principles. The main challenges for competition agencies regarding its relationship with the Judiciary include judges' familiarity with competition law concepts, accurate interpretation of competition rules and appropriateness of standards of proof.

To address these concerns and enhance the competition regime, in 2013, the Mexican Constitution was reformed, establishing new competition specialized courts aiming at a better understanding and enforcement of competition law.

The COFECE works towards a stronger relationship with the Judiciary, ensuring a fluent communication with the Courts and Tribunals and following recent developments on the judicial constitutional interpretation criteria in order to strengthen the Commission's decisions and its effectiveness.

This close collaboration is also established through capacity-building workshops, seminars, academic programs and conferences organized by the Federal Judiciary Council to strengthen judges' understanding of competition policy goals, competition law concepts and technical analysis tools, in which COFECE participates.

* Federal Economic Competition Commission (COFECE).

Papua New Guinea

In 2009, the Papua New Guinea (PNG) Independent Consumer and Competition Commission (ICCC) filed proceedings against one of PNG's biggest and oldest companies that had been operating in PNG since 1918.

This case was important for the ICCC because it was the first competition case pursued since the ICCC's inception in 2002 for an alleged breach of the ICCC's market conduct rules; the *Independent Consumer and Competition Commission vs PNG Mainport Liner Services, Steamships Trading Company Limited, Steamships Limited, Kambang Holdings Limited and Consort Express Lines Limited* (the case).

In this contribution, we will not be focusing on the court proceedings, but will instead be focusing on the challenges the ICCC faced as a young competition agency trying to pursue its very first case of potential substantial lessening of competition (SLC) in a market.

On 12th November, 2009, PNG Mainport Liner Services (Mainport) entered into an acquisition agreement with Kambang Holdings Limited (Kambang) to acquire 17.6% of the total shares issued in and forming the issued capital of Consort Express Lines Limited (CEL).

Prior to the acquisition, Kambang held 33.3% shares in CEL, Steamships Trading Company Limited (Steamships) held 33.3% shares in CEL and Anton Lee Transport Limited held the remaining 33.3% shares, comprising the total shares issued in and forming the issued capital of CEL.

On 31st August, 2009 before Mainport acquired the 17.6% shares that Kambang held in CEL, Mainport was amalgamated into Steamships and legally ceased to exist. This raised questions on the validity of the acquisition agreement itself given that the acquirer at the time of the acquisition was "non-existent" but for the purposes of this contribution, we will not discuss that aspect as it is a matter of company law and not competition law.

By acquiring the 17.6% shares from Kambang (through its subsidiary Mainport) Steamships had the majority shareholding interest in CEL at 50.9%. Steamships had effectively gained control over its largest competitor CEL, across both the PNG coastal shipping services and the PNG stevedoring and handling services industry. The three key markets identified as being affected by this acquisition were:

- a) coastal shipping services market,
- b) stevedoring and handling services market, and
- c) wharfage market.

Consistent with its mandate, the ICCC felt the need to investigate this acquisition further. In filing the proceeding the ICCC faced two main challenges:

1. Identifying the relevant markets; and
2. Conducting research on the markets identified.

This is the basis of the ICCC's contribution to this call.

*Peru**

The judicial review of the decisions issued by Indecopi continues to be a complex matter for Peruvian judges, mainly when Indecopi's decisions have relied on theories and economic evidence to prove a breach of the Competition Act, which has resulted in a long review process. Although the judicial authority has installed specialized courts to handle Indecopi's cases, at the level of its first two instances, final decisions by courts are regularly issued several years after the oral hearings were held. This aspect may weaken the effectiveness of the enforcement of competition law. Therefore, Indecopi has sought to help the judiciary by providing training in the treatment of specific issues resorting to programmes aim at presenting the international experience and standards of proof, but challenges like the delay in the issuance of decisions and the appointment of prosecutors specialized in market cases, remain.

* This document was prepared by Enrique Priori of the Legal Affairs Department of Indecopi with the support of Rodolfo Tupayachi from the Economic Studies Department. Comments from Jesus Espinoza from the Defence of Free Competition Commission and Javier Coronado CEO of Indecopi.

Portugal

The judicial review system in Portugal has evolved towards an increasing degree of specialisation, in particular since 2012 when the Competition, Regulation and Supervision Court was created.

This evolution has allowed for timelier decisions by the specialised Court, which are crucial for effective enforcement and deterrence of competition law infringements.

Another positive aspect of this evolution is the fact that the Competition, Regulation and Supervision Court has resorted to novel approaches towards the assessment of economic evidence, by using economic advisers in abuse of dominance cases. This approach has strengthened the assessment by the Court of economic reasoning used in competition cases.

However, the system may be further fine-tuned, by reducing the current rotation of judges in the specialised Court and by considering the creation of a specialised section in the Appeal's Court for competition, regulation and supervision matters.

Russian Federation

Interactions between Russian Competition Authority – Federal Antimonopoly Service (the FAS Russia) - and courts are exercised both in public and private competition enforcement. It should be noted that depending on kind of enforcement, the Competition Authority plays different roles and has different functions in course of judicial system.

In accordance with the Russian legislation private disputes are considered by general jurisdiction courts or arbitration courts depending on who stands as a plaintiff before the court (individual or legal entity). Private claims are filled to courts in accordance with rules of jurisdiction.

Competition authority has a right to participate in judicial consideration of cases on violation of antimonopoly legislation, opened on the basis of claims of other persons. That is why when considering such cases the court should inform competition authority on consideration of such a case in order to ensure its participation. The procedural status of competition authority is determined in accordance with the nature of a dispute.

The existence of a decision of the antimonopoly authority that confirms the violation of the antimonopoly legislation is not a compulsory requirement to satisfy the claim for compensation of damages. However, the analysis of enforcement practice shows that in almost all cases claims for compensation of damages (as well as for recovery of unreasonable earnings) are initiated after a decision on violation of the antimonopoly legislation made by the antimonopoly authority.

It should also be noted that courts recognize the importance of the decision of the antimonopoly authority in considering cases of compensation for damages in a different manner. Some courts consider it as a sufficient proof of the unlawfulness of the defendant's actions. In other cases, courts proceed from the fact that the violation of the antimonopoly legislation is not in itself a civil violation and, therefore, cannot be the basis for repayment of the amounts paid as part of the obligation as damages.

Nowadays in the Russian Federation economic entities and courts are not ready for enforcement of antimonopoly legislation without participation of competition authority. In particular, if the arbitration court found out that a person complained both to the court and competition authority, the court usually postpones the consideration of a case until the decision of competition authority is made. This situation happens because in case of private enforcement, arbitration courts must consider a claim as a civil dispute and as a violation of antimonopoly legislation. Arbitration procedural Code does not contain a basis for refusing to accept or return the claim related to antimonopoly legislation, because it means civil dispute between the Parties.

Moreover in practice plaintiffs often face a problem of creation of evidence base. It should be noted that in Russian procedure law a person, involved in a case and not able to collect evidence from the person it has, has a right to appeal to arbitration court for disclosure of such evidences. That is why major of claims on compensation for damages for violation of antimonopoly legislation are filled on the basis of the existing decision of competition authority.

Serbia

The judiciary in Serbia has important roles in the implementation of competition policy since the Administrative Court, as the main judicial body in competition cases, ensures that procedural due process is observed (including that fundamental procedural rights are protected) and competition rules are applied in a correct and consistent manner. The Commission for Protection of Competition of the Republic of Serbia (CPC), which acts as investigator, prosecutor and decision-maker, should continue to play its role in that respect.

The CPC and the Administrative Court act in accordance with the principle of separation of powers and respect their competencies in terms of competition cases – competition enforcement is entrusted to the CPC, and the role of the Administrative Court is to verify the legality of the contested CPC decisions.

In terms of judicial control, the Administrative Court is empowered by ordinary means of complaint to review decisions of CPC. The Administrative Court is allowed to review CPC decision in disputes of full jurisdiction (i.e. may resolve the protection of competition legal matter on its own). However, in spite of the fact that the Administrative Court has explicit power when it comes to disputes of full jurisdiction, it has not used this authorisation in deciding on the legality of the CPC decisions yet.

At the same time, it needs to be emphasized that such practice of the Administrative Court is not entirely surprising because it seems that the relatively new specific area of competition law and the decision-making manner of the CPC also present an obstacle for thorough and final resolution of the dispute in a full jurisdiction dispute. The position of the Administrative Court thus seems to be restrained because of the nature of competition law enforcement, which involves the necessity of making complex economic assessments in competition cases (market definition and assessment of competitive effects may require extensive use of economics).

The Administrative Court should not be reluctant to use the full review powers granted to it since only the exercise of unlimited jurisdiction can guarantee the principle of effective judicial protection. Judges should be encouraged to become more sophisticated in competition economics which means that competition law should play a role in the ongoing education and courses attended by judges in Serbia.

Serbia did not establish specialised courts to deal with competition law matters and does not have experience regarding the use of such specialised courts. However, it appears that competition law might be better enforced by specialised tribunals or at least specialised (commercial) chambers, whose members would be experts in economics or competition policy.

Slovak Republic

Contribution of the Slovak Republic on the Judicial Perspectives on Competition Law elaborates on the involvement and role of the courts in the Slovak Republic in the competition law enforcement.

Increasing pace of the development in technologies influence development in digital economy and formation of new markets. The number of challenges for competition authorities increases. Solid economic analysis justifying the arguments of the authority are nowadays must in complex cases. Since courts review the decisions of the Slovak Competition Authority, they play an important role in the enforcement. Thus, the procedural rules, as well as technical support and organisational structure may influence the effectiveness of the overall enforcement.

The contribution draws some examples from the experience in Slovak Republic in this regard.

Chinese Taipei

The Fair Trade Commission (FTC) in 2015 summarized recent administrative lawsuits that involve concerted actions related to the Fair Trade Act (FTA), and found out that the constituent elements of concerted actions, including “the definition of the relevant market,” “mutual understanding,” “concerted action” and “sufficient to affect market function” are the issues concerned with administrative litigation. In recent years, the administrative court has ruled on 10 cases that involve concerted actions related to the FTA, in which the administrative court ruled in favour of the FTC in 7 cases, but there were still 3 cases regarding which the FTC was not supported by the administrative court.

From the judicial perspectives of the administrative court, when evaluating the economic evidence for “defining the relevant market,” the FTC should explain reasonable substitutability based on the evidence, in which an empirical study of the market is especially important. When determining “concerted action,” the administrative court supports the use of indirect evidence and additional factors by the FTC in presuming that a mutual understanding exists between enterprises in regard to the concerted actions. Furthermore, when determining “sufficient to affect market function,” the administrative court believes that market share is not the only indicator for measuring market power. If the concerted action can reduce the pressure of competition or negatively affect the intensity of competition, then it is “sufficient” to affect the market function, which is consistent with the FTC’s opinion.

The FTC often arranges lectures and academic conferences. Besides inviting scholars and experts in competition law-related fields, the FTC also invites judges and lawyers to speak on topics or attend the events. The FTC can also use the events to explain its position in law enforcement and the development trends of competition law, these exchanges and discussions will also drive developments of the FTA and competition policy.

Turkey

Turkish Competition Authority (TCA), which began its operations in 1997, is celebrating its 20th anniversary this year. Just like all types of administrative acts and transactions by any other public institution, the professional decisions of the Authority are subject to judicial review. This review is conducted by Administrative Courts. Despite occasionally becoming a topic of discussion, specialized courts have not yet been implemented in Turkey.

During those 20 years, Courts showed the utmost respect to the field of specialization of the Authority, with the Authority implementing the requirements of the Court decisions, not simply on the surface but by internalizing them. This was principally a process of mutual learning.

During the first few years of its operation, certain decisions taken by the Board were annulled by the Courts due to mistakes of procedure. In time, the number of annulled decisions decreased, but the Courts began to identify certain mistakes of economic assessment instead of procedure.

An example is the TCA's decision about the Türk Havayolları A.O. (Turkish Airlines) which was annulled by the 13th Chamber of the Council of State.

Pegasus Hava Taşımacılığı A.Ş., which is a private airline company operating in Turkey and making flights exclusively out of one of the two airports in İstanbul (Sabiha Gökçen Airport), made an application to TCA and claimed that Turkish Airlines, flying out of both of the airports, abused its dominant position by engaging in exclusive practices in both domestic and international flights. TCA did not find a violation in the investigation conducted and rejected the complaint.

This decision was annulled by the first instance court and the appeal of the Authority to the Court of Appeals (Counsel of State) was dismissed. Court, annulled this decision on the grounds that TCA made a ruling without acquiring sufficient evidence and conducting extensive analyses into whether or not there was an abuse of dominant position.

Despite the fact that a majority of the decisions taken by the TCA have been affirmed by the courts, the decision about AFM - Mars Sinema Acquisition (13th Chamber of the Council of State), the decision about Mey İçki - Anadolu Efes Acquisition (13th Chamber of the Council of State) and the decision about Maya-Lessfare (Öz Maya) Acquisition (Ankara 8th Administrative Court) can be used to form an opinion on the approach of the courts to some decisions requiring economic analyses.

Ukraine

Quite often the lack of economic expertise on the part of judges creates obstacles to the effective enforcement of competition law, especially in complex matters involving economic analysis as one of the principal tools of proving theory of harm (e.g., tacit collusions; abuse of dominance, etc.).

So far, courts' approach to such matters varies from full upholding of the AMCU conclusions without deeply examining it, on the one hand, to invalidating the AMCU decision due to the lack of evidence (and sometimes setting a standard of proof on the unrealistic level), on the other. All in all, such matters have been dealt with by the courts on a case by case basis.

In principle, courts are free to appoint expert examination of economic matters. On the other hand, the courts themselves have developed a rather restrictive interpretation of law that the AMCU is the only authority which can make conclusions with regard to a number of economic matters, such as market definition, abuse of dominance, etc., and the courts are not in the position to re-examine such matters (including through appointing independent experts), but are to make sure that in doing so AMCU follows its own methodologies (which have been approved by the Ministry of Justice and are binding). When occasionally some courts do refer economic issues to independent experts, very often experts refuse to deal with the referred issues due to the lack of competence.

Companies seeking to invalidate AMCU decisions very often rely in the court on expert reports which show results different from AMCU conclusions. So far, the courts have been reluctant to use such alternative reports as evidence in the case (also due to a high probability of a bias of such experts paid by the party) or to re-examine AMCU conclusions by appointing independent experts. However, sooner or later, such court-appointed experts will be involved, primarily in most complex cases based on sound economic analysis which judges are usually unqualified to examine and review.

As for the examples of occasions and projects when the competition authority sought to engage with the judiciary – in the past, AMCU as a competition agency had regular practical workshops with commercial court judges who dealt with competition matters.

Normally, courts refuse to interfere into AMCU discretionary powers to define markets, establish infringements, impose fines, and review AMCU decisions only from the standpoint of consistency and relevancy of evidence.

In Ukraine, competition matters are handled by commercial courts with the Higher Commercial Court being the highest instance body (not counting the Supreme Court which is charged with fixing inconsistencies of jurisprudence of lower instance courts, but very rarely allows for review ('grants certiorari') and deals with competition matters.

Currently, Ukraine is in process of judiciary reform, when the Higher Commercial Court is to be abolished, but instead the Commercial Law Chamber is to be created at the level of the Supreme Court; key judges from the Higher Commercial Court who dealt with competition matters have been already promoted to the Supreme Court justices. New procedural codes are to be introduced. Under the new pattern, general competition matters will remain in jurisdiction of commercial courts; unfair competition cases involving intellectual property will be handled by the specialized intellectual property

court (yet to be created), while public procurement cases (where AMCU is the authority dealing with complaints) are to be heard by administrative courts.

The advantages of judicial specialization can be reduced by appeals' mechanisms to generalist courts. In Ukraine, traditionally there have been judges specializing in competition law cases at the level of 1st instance courts (especially in Kyiv) as well as at the cassation court (the Higher Commercial Court); at the same time, competition law specialization has been much less pronounced at the 2nd instance courts (appellate courts). Due to this, at the level of appeal, very often the judges would not go into much detail but would rather uphold the decision of the court of 1st instance; or vice versa, reverse the 1st instance court judgment, but without proper reasoning.

BIAC

BIAC welcomes the opportunity to contribute to the Global Forum's Roundtable on *Judicial Perspective on Competition Law* which is designed to elicit the main challenges that judges face when applying competition law, and find ways to address them. BIAC is highly supportive of attempts to assist courts in effectively applying competition law and reviewing the acts of administrative authorities on competition law matters.

BIAC's view is that the judicial review of competition decision is essential to ensuring equitable and correct application of competition law, thereby promoting economic welfare for society as a whole. As noted in the OECD's 2016 paper '*The resolution of competition cases by specialised and generalist courts: Stocktaking of international experiences*':

"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)."

On a micro-level, the effective judicial review provides an opportunity to revisit decisions made by the competition authority that may be erroneous, thereby ensuring the protection of the parties' individual rights and the application of the rule of law. By providing for a purely judicial review of competition law decisions, a legal system can effectively separate the investigatory/prosecutorial role from judicial authority, thereby safeguarding due process rights and providing for appropriate checks and balances.

An accessible, effective and credible judicial review process must provide a meaningful opportunity to challenge and correct errors in authority decisions, including the adjustment of any unjust penalties. By providing that the competition authority will be held accountable to an independent judiciary, legal systems further encourage rigour within the authority's proceedings. A review procedure that does not provide a practical opportunity to challenge authority decisions, or under which the authority never loses an appeal, does not promote the reputation of the authority or the credibility of the law, any more than one under which the authority always loses. A well-balanced review underlines the legitimacy of authority decisions and, as a public process, enhances the overall standing and respect for enforcement efforts.¹³

¹³ See BIAC's Contribution to Working Party No. 3 Roundtable on *Institutional and Procedural aspects of the relationship between competition authorities and courts and update on*

BIAC would therefore respectfully submit that every jurisdiction should have an independent court system that can effectively review competition decisions, as well as adjudicate competition law disputes between private parties. To be effective, the relevant procedures must provide parties with a meaningful opportunity to obtain judicial review. As competition law issues often arise in time-sensitive matters, for example when relating to the review of transactions, judicial procedures must provide for a sufficiently speedy process to ensure that those parties that seek to challenge an authority's decision are able to do so practically. An effective review also requires a full review on the merits by a court with full, unlimited jurisdiction to assess the correctness of the authority's decisions (not just its legality) and with the resources to independently review and test the evidence to the fullest extent provided for by national rules by procedure, for example by calling witnesses to be subject to examination and cross-examination before the court comes to its own conclusions. BIAC submits that these principles for effective judicial review need to be the backdrop to the Roundtable discussions.

The need for full and effective judicial review is particularly acute in jurisdictions that have adopted an administrative competition enforcement system. In such systems, a full appeal on the facts and law to an independent judiciary is crucial, as “[c]ombining the function of investigation and decision in a single institution can save costs but can also dampen internal critique.”¹⁴

In addition, effective judicial review is essential to protect due process rights of defence, especially where sanctions are quasi-criminal in nature; the European Court of Human Rights, that adjudicates fundamental rights rules within the 47 member states of the Council of Europe, has established that “Article 6(1) ECHR [that protects the right to a fair trial] requires that subsequent control of a criminal sanction imposed by an administrative body must be undertaken by a judicial body that has full jurisdiction. Thus, the Court must be able to quash in all respects, on questions of fact and of law, the challenged decision.”¹⁵

developments in procedural fairness and transparency (October 18, 2011), available at <http://www.oecd.org/daf/competition/ProceduralFairnessCompetition%20AuthoritiesCourtsandRecentDevelopments2011.pdf>

¹⁴ See ‘OECD Country Studies – Competition Law and Policy in the European Union’ (2005), p. 62, available at www.oecd.org/daf/competition/prosecutionandlawenforcement/35908641.pdf.

¹⁵ *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011.