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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Executive Summary of the roundtable on the standard of review by courts in  
competition cases****Annex to the Summary Record of the 129th meeting of Working Party No 3. on Co-  
operation and Enforcement**

4 June 2019

The executive summary by the OECD Secretariat contains the key findings from the roundtable on the standard of review by courts in competition cases held during the 129<sup>th</sup> Meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 4 June 2019.

More documentation related to this discussion is at  
<https://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

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## *Executive Summary of the roundtable on the standard of review by courts in competition cases*

By the Secretariat\*

Working Party No. 3 of the OECD Competition Committee held a roundtable on the standard of review by courts in competition cases on 4 November 2019. The roundtable took stock of the different standards of court review of first-instance competition decisions, taken either by a competition agency in an administrative setting or a trial court in a judicial setting, and looked at the review of the investigative process and final decisions, and the review of factual findings and conclusions of law.

Based on the background paper prepared by the OECD Secretariat, written submissions from delegates, and the contributions by expert panellists and delegates to the discussion, the following key points emerged:

### **1. Meaningful review by a competent and qualified court or tribunal of competition enforcement actions and decisions is a fundamental element of due process and supports the credibility and legitimacy of enforcement.**

Competition enforcement takes place in either judicial systems (where the competition authority investigates cases, and can challenge conduct and mergers deemed to harm competition, but the first-instance decision is taken by a court) or administrative systems (where the competition authority is the investigator as well as the decision-maker at first instance).

The effectiveness and credibility of enforcement requires that, in addition to the *ex ante* internal checks and balances and procedural guarantees for parties that competition authorities put in place, there is access to an impartial *ex post* review of competition cases by an independent court. This review can help delimit the discretion of authorities, protect the parties' rights and, ultimately, support the legitimacy of competition enforcement.

The delegates and experts agreed that review by courts is a fundamental element of due process. Without adequate review, parties, and in particular losing parties, would lose trust in the soundness and fairness of competition enforcement.

The discussion at the roundtable showed that the existence of an in-depth court's review *ex post* promotes the thoroughness of the investigation *ex ante*, as the authority knows that it will have to defend the case before the court. Some delegates mentioned the need for detailed description of the case facts and the reasons for the findings, to avoid that enforcement decisions are set aside for lack of substantiation.

### **2. The intensity of review varies among jurisdictions and covers, to different extents, both findings of fact as well as conclusions of law.**

The discussion showed that the review of competition enforcement actions and decisions is fairly thorough across OECD Members, independently of whether the court system

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\* This executive summary does not necessarily represent the consensus view of the Working Party No3. It identifies key points from the discussion at the roundtable, including the views of a panel of experts, the delegates' oral and written contributions, and the background note prepared by the OECD Secretariat.

allows the court to review the merits of a decision or examine the decision on specific grounds only.

Delegates pointed out that an in-depth court review can guarantee that decisions are effectively checked and helps make competition enforcement more accurate and consistent. At the same time, a complete reassessment of the case, the evidence that supported the decision and the correctness of the decision itself, can lead to substitute the decision of the authority or of the trial judge with that of the review judge, who may be less of an expert than the first-instance decision-maker.

The discussion showed that findings of fact are usually accorded deference if supported by evidence, to defer to the investigation role of the competition agency and reflect the fact that the first-instance decision-maker has some margin in seeking and assessing evidence and reaching decisions. Even so, a finding of evidentiary insufficiency or lack of relevance of the evidence to the conclusions can justify setting aside the appealed decision.

Delegates and experts pointed out that review courts do not usually defer to the legal conclusions reached by first-instance decision makers, whether competition authorities or lower courts, since the assessment of the law, its interpretation and its application to the facts are deemed to be their core tasks. Still, an expert proposed that, in judicial systems where the first-instance adjudicators are independent from the enforcement authority, even conclusions of law should be reviewable on a reasonableness standard (i.e. whether the decision was a reasonable one), rather than a correctness standard (i.e. whether the decision was the right one to take). The reason is that the first-instance decision-maker is the expert body entrusted with making the decision on the case, including the assessment of how the law applies. In administrative enforcement systems, such deference might be the result of the separation of powers between administrative bodies and courts.

### **3. Procedural steps can be appealed either as part of and together with the final decision or on a standalone basis; in the latter case, there is a risk that review will delay the enforcement process.**

Delegates discussed the review of decisions taken as part of the investigative process, like requests for information, seizures and decisions qualifying information as confidential. In some jurisdictions, procedural acts cannot be appealed separately as standalone acts that produce legal effects; they can only be challenged as part of and together with the final enforcement decision. Some jurisdictions also allow appeals investigative decisions like the decision to close a competition investigation due to, for example, insufficient evidence or different enforcement priorities.

The discussion showed that the standalone challenge of procedural decisions can lead to delays, in cases where the court's review of the interim actions suspends the investigation. In some cases, this led to law amendments or case law developments that allow appeals against procedural actions only at the end of the process, together with the enforcement decision. The experts also pointed out that delays may also prompt more out-of-court settlements, in particular in cases where time and certainty are critical.

### **4. Capacity building of judges and the participation of competition authorities in court proceedings as amicus curiae can help ensure that courts have access to competition expertise.**

In most OECD jurisdictions, competition cases are heard by courts of general jurisdiction. Some OECD Members have specialised competition tribunals. Jurisdictions that have specialised tribunals usually choose the composition of the tribunal to ensure sufficient

competition law and industry expertise, for example by appointing as members expert judges and lay persons who may be competition economists or industry experts or representatives. The discussion showed that competition law can be enforced effectively by both courts of general jurisdiction and specialised tribunals or specialised chambers of general courts.

Several delegates pointed out that, in jurisdictions where competition law and its enforcement are fairly recent and such enforcement is entrusted to the courts of general jurisdiction, capacity building of judges is very important, in particular as regards economic concepts and methods of economic analysis used in competition law, which are not typically part of law studies.

Competition authorities can provide competition law expertise by participating in court proceedings to which they are not a party, as *amicus curiae*. Courts in European Union (EU) Member States can also ask for the oral or written intervention of the European Commission, and the discussion showed that this has been used with positive results. Likewise, the discussion showed that courts in Member States refer question of EU law to the European Court of Justice for a preliminary ruling and find this process useful.