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**Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed
Equitable Principles and Rules for the Control of Restrictive Business Practices**
Geneva, 8–12 November 2010
Item 6 (a) of the provisional agenda
Review of application and implementation of the Set

Model Law on Competition (2010) – Chapter XII

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COMMENTARIES ON CHAPTER XII AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATION

Appeals

- 1. Request for review by the Administering Authority of its decisions in the light of changed circumstances.*
- 2. Affording the possibility for any enterprise or individual to appeal within (...) days to the (appropriate judicial authority) against the whole or any part of the decision of the Administering Authority, (or) on any substantive point of law.*

Introduction¹

1. Chapter XII of the Model Law on Competition covers administrative and judicial review of competition decisions. Whereas subsection 1 of the Chapter refers to a review carried out by the competition authority itself, subsection 2 refers to judicial review by a body that is separate from the competition authority.

Internal/administrative review

2. The Model Law on Competition suggests that addressees of a competition decision may request a review of the respective decision in light of changed circumstances. In practice, however, it is more frequent that an assessment of a changed situation is triggered by a new application by the addressees of the original competition decision. For instance, in a case where a competition authority has prohibited a merger, the parties are free to restructure the transaction in a way that eliminates competitive concerns and to notify the redesigned transaction for approval. In competition law systems, where the competition authority is vested with the power to authorize possibly anti-competitive agreements based on efficiency considerations, the addressees of a prohibition decision may reapply for an authorization if they feel that the reasons for the prohibition no longer apply. Similarly, they must reapply for approval if the original approval was granted for a limited period.

3. Under Dutch competition law, an internal review of a contested decision by the Dutch competition authority (NMa) may precede judicial review. Since the entry into force of the Dutch

¹ See also the note by the UNCTAD secretariat on appropriate sanctions and remedies and judicial review. TD/RBP/CONF.7/5. August 2010.

Competition Act on 1 January 1998, NMa decisions applying European and national competition law have been subject to a three-stage appeals process.

4. First, it is possible for addressees of decisions (persons/undertakings) to lodge an internal administrative appeal with the NMa within six weeks. This administrative appeal allows the parties to request the NMa to review its decision. A complete review of the case will then be carried out by the NMa whereby a different outcome of the case is possible. In cases where appellants are subject to a sanction, the NMa will review its decision in the light of advice received from an independent Advisory Committee. When appellants are dissatisfied with the result of this administrative appeal procedure, they may – within six weeks – appeal the decision to the administrative law chamber of the District Court. The decision of the District Court may be appealed to the Trade and Industry Appeals Tribunal.

Judicial review

5. Taking into account the restriction of rights and freedoms by decisions in competition cases, such as the prohibition of a proposed merger or the imposition of a fine, the rule of law requires that the undertakings concerned have access to judicial review. This fundamental requirement is reflected in subsection 2 of the present Chapter of the Model Law on Competition. Judicial review ensures that independent competition authorities comply with the law and makes them accountable for their decisions. It also contributes to improving the decisions of competition authorities. It is expected that the latter will carefully analyse the reasons why the court cancelled a decision, in order to avoid making the same mistake in the future. Such improved quality will have a positive impact on the reputation of the competition authority.

6. Just as the body in charge of carrying out investigations and taking the initial decisions in competition cases varies from country to country,² the characteristics of judicial review systems vary greatly from one country to another, too. The differences mainly relate to the court hearing the review, and the standard of review applied by this body.

Different types of courts in charge of judicial review in competition cases

7. If an addressee of a competition decision feels that the decision has violated its rights, it may appeal against the decision within a specific timeframe provided for by the law. Depending on the legal system, appeals against decisions in competition cases may be made to administrative courts, to judicial courts, or directly to the Supreme Court of a country. In addition, specialized administrative courts may be established.

8. The box below illustrates the various approaches:

² Most frequently, an independent competition authority is the principal enforcement body for competition law provisions. However, in certain countries, specialized ministerial departments carry out this task, whereas in a number of common law countries, specialized or general courts are responsible for taking initial decisions in competition cases.

Box 12/1. Overview of different types of entities in charge of judicial review in competition cases (first level of appeal)³

Administrative tribunals	Judicial courts	Specialized competition tribunals/courts	Court/Tribunal of last instance
Colombia	Algeria	Australia ⁶	Bulgaria
Croatia	Australia ⁴	Austria	Cyprus
Estonia	Belgium	Canada	France ⁷
Greece	Brazil	Czech Republic	Turkey
Italy	Côte d'Ivoire	Denmark	
Latvia	France ⁵	El Salvador	
Slovenia	Germany	India	
Switzerland	Malta	Finland	
Tunisia	Netherlands	Kenya	
Venezuela (Bolivarian Republic of)	Panama	Peru	
	Romania	Poland	
	Slovakia	Portugal	
		United Kingdom	

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9. Most jurisdictions also allow the party that loses the appeal process to appeal against the decision. This means that judicial review does not stop at the level of appeal, but may include a higher instance that controls the work of the court in charge of the appeal, usually the Supreme Court or highest administrative court of a country.

10. In a small number of countries, in addition to the appeal procedure, the parties involved may request that the government, exceptionally, overturns the decision of the competition authority based on compelling public interests.⁸

³ Sources: UNCTAD Model Law on Competition (2007); Antitrust Encyclopedia in *Concurrences*, http://www.concurrences.com/nr_adv_search.php3; and member States' responses to UNCTAD questionnaire.

⁴ For appeals against decisions regarding anti-competitive conduct.

⁵ In France, judicial review of cartel and abuse of dominance cases falls within the jurisdiction of the *Cour d'Appel* of Paris.

⁶ For appeals against decisions in merger cases.

⁷ In France, judicial review of merger cases falls within the jurisdiction of the *Conseil d'Etat*. See http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=296.

⁸ In Switzerland, for instance, in addition to the appeal procedure, according to the Cartel Act, if the Competition Commission has found a competition restraint or practices of enterprises having a dominant position to be unlawful, or if it has prohibited a concentration, the parties involved may request that the Swiss Government (Federal Council) exceptionally authorizes the agreement or the concentration based on compelling public interests.

Standard of review

11. The degree of examination applied in the appeal process is called standard of review, and this varies greatly in various competition law systems. It ranges from a marginal test of review that is limited to procedural aspects and to manifest errors of law in a competition decision, to an intensive review that goes into the merits of the case.

12. Four levels of review intensity can be distinguished. At the lowest standard of review, the court only assesses manifest errors in the application of the law and cancels obviously unreasonable decisions (equivalent to the French *recours pour excès de pouvoir*). Under this standard of review, the court would control, for instance, whether the authority has acted within its jurisdiction and whether it has respected the basic principles of procedural fairness, for example whether it has given the persons concerned the opportunity to be heard before taking any decision against them. The second level of review consists of an assessment of the legality of the decision at stake, including compliance with procedural requirements. At this level of review, the court will assess whether the competition authority correctly interpreted the law. At the third level, the Court can fully review the merits of the case by assessing all relevant facts in addition to the correct application of the law to the facts. This standard goes beyond the control of legality, since the court also needs to assess the factual evidence at the basis of the competition decision. Finally, the most intensive standard of review allows the Court to review the case fully and substitute its own analysis for the assessment of the competition authority. This is also called a *de novo* analysis.

Alternative approaches in existing legislation – Standard of review

Country	
Review of the legality of a competition decision	
Cyprus	The Supreme Court of Cyprus, which is responsible for appeals in competition cases, is limited to reviewing the legality of the decision and cannot go into the merits of the decision under review and substitute the decision of the competition authority with its own decision. ⁹
Review of legal and factual aspects of a competition decision	
Belgium	The Brussels Court of Appeal has exclusive jurisdiction over appeals in competition cases and reviews both facts and law. ¹⁰
European Union	The standard of review applied by the European courts in competition cases has been fine-tuned by case law over time. Article 263 TFEU (former Article 230 EC) states that the Court

⁹ See Cyprus' response to the UNCTAD questionnaire for Sixth UN Review Conference.

¹⁰ OECD Policy Roundtables, Judicial Enforcement of Competition Law, 1996, Paul Mafféi, pp.127-132

Country	
	<p>of Justice of the European Union shall review the legality of the decisions of the European Commission. It is said that the type of action was initially modelled after the <i>recours pour excès de pouvoir</i> brought before the French <i>Conseil d'Etat</i>, which would imply a marginal standard of review.¹¹ However, according to the case law of the European courts, judicial review in competition cases must firstly assess whether the evidence relied upon by the European Commission is factually accurate, reliable and consistent. Secondly, the courts must assess whether the evidence contains all the information that must be taken into account in order to assess a complex situation, and thirdly, whether it is capable of substantiating the conclusions drawn from it. On the other hand, the European courts respect that the European Commission enjoys a certain margin of discretion in the field of competition law, especially with respect to assessments of an economic nature.¹² This approach, distinguishing between the establishment of the facts and the discretionary appraisal thereof including the appraisal of economic data, can be found in several cases heard by the European courts.¹³ In this context, it should be noted that the standard of review applied to the level of fine is more intensive. According to the relevant provision, the European courts have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce, or increase the fine or periodic penalty payment imposed.¹⁴</p>
Netherlands	<p>The District Court of Rotterdam, which is in charge of reviewing decisions taken by the NMa, applies an intensive degree of review for the decisions taken based on the application of Articles 101 and 102 TFEU (former Articles 81 and 82 EC). Furthermore, the Court can substitute its own judgment for the NMA's decision.</p>

¹¹ Meij A (2009). Judicial review in the EC courts: Tetra Laval and beyond in national courts and the standard of review in competition law and economic regulation. In: Essens O, Gerbrandy A and Lavrijssen S (2009).

¹² Court of Justice of the European Union. Case C-12/03 P *Commission v. Tetra Laval* ECR I-987.

¹³ Court of Justice of the European Union. Case 42/84 *Remia* [1985] ECR 2545; Tribunal of First Instance, Case T-210/01 *General Electric Company v. Commission* [2005] ECR II-5575.

¹⁴ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 31.

Country	
<i>De novo</i> analysis	
Tunisia	The Administrative Tribunal of Tunis, which carries out the judicial review in competition cases, enjoys far-reaching powers. In addition to reviewing the initial decision based on factual and legal grounds, the Administrative Tribunal may hear new witnesses, and is empowered even to state completely new competition law infringements that can be proven as a result of its investigation of the matter. ¹⁵

13. One particular aspect of the standard of review is the admissibility of new evidence in the appeal process. This question arises when the standard of review allows the review body to assess the factual basis of the competition decision being appealed as well as the legal aspects of the decision. From member States' replies to the UNCTAD questionnaire, it appears that several countries accept new evidence in the appeal process against competition decisions, sometimes under specific conditions: in Croatia, the Administrative Court accepts new evidence that relates to the facts presented during the initial proceedings. However, evidence related to new facts is not accepted.¹⁶ In Germany and Switzerland, new evidence is accepted at the appeal stage without any restriction.¹⁷ Finally, it should be mentioned that certain competition law regimes limit appeals to cases that are specifically defined by law, as is the case, for example, with decisions of the Swedish Competition Authority.¹⁸

Suspensory effect

14. Competition law systems differ with respect to a suspensory effect of appeals against competition decisions.

Alternative approaches in existing legislation – Suspensory effect

Country	
Brazil	In Brazil, the suspension of the payment of fine during the review process requires that the fined company block the entire amount of the fine in a specific bank account. ¹⁹

¹⁵ See Tunisia's response to the UNCTAD questionnaire for the Sixth United Nations Review Conference.

¹⁶ See Croatia's response to the UNCTAD questionnaire for the Sixth United Nations Review Conference.

¹⁷ See Germany and Switzerland's responses to the UNCTAD questionnaire for Sixth United Nations Review Conference.

¹⁸ Chapter 7 of the Competition Act 2008. Only in those cases mentioned in Chapter 7, Article 1 of the Act may decisions taken by the Swedish Competition Authority be appealed to the market Court.

¹⁹ Competition and the Judiciary, Second Phase, Case Studies, 2007, Sixth Annual Conference, ICN.

European Union	Appeals against decisions of the European Commission do not have a suspensory effect except in the case of fines, in which the payment of the fine can be suspended if a bank guarantee is provided for the full amount plus any possible interest. ²⁰
Netherlands	Any decision by the NMa to impose a fine is suspended during the appeal phase. ²¹
Switzerland	The application of decisions by the Swiss competition authority is suspended at the Federal Administrative Tribunal stage (appeal instance); however, provisional measures can be ordered. Decisions of the Federal Administrative Tribunal on competition matters may be appealed to the Federal Tribunal (Switzerland's supreme court). Appeals to the Federal Tribunal do not have a suspensory effect. ²²

Different types of decisions

15. Once the court has assessed the appeal, it generally pronounces one of the following decisions: confirmation of the decision, annulment (fully or partly), adoption of a new decision, or sending the decision back to the competition authority for further examination.

²⁰ See the European Union's response to the UNCTAD questionnaire for the Sixth United Nations Review Conference.

²¹ See the Netherlands' response to the UNCTAD questionnaire for the Sixth United Nations Review Conference.

²² See Switzerland's response to the UNCTAD questionnaire for the Sixth United Nations Review Conference.