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Appropriate sanctions and remedies

Executive summary

Competition law and policy will only achieve their objectives and produce the desired effects – in terms of enhancing consumer welfare, stimulating competitiveness and contributing to economic development – if they are effectively enforced. Against this background, the present paper deals with the implementation of competition law and policy, in particular with appropriate sanctions and remedies and judicial review of competition cases. It provides a comparative overview of the respective legislation and enforcement practice in UNCTAD member States, and specifically addresses the challenges encountered by young competition agencies and competition agencies from developing countries. The paper proposes some strategies to overcome these challenges and suggests some issues for discussion at the 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.

Contents

Introduction

1. Today there is a widespread conviction that competition law and policy constitute an important pillar for a thriving market economy wherein competitive pressure hones productive efficiency and stimulate products and process innovation fundamental to international competitiveness and economic growth. In addition, competition law and policy are conceived as tools to ensure that benefits from trade liberalization are passed on to consumers.

2. The growing number of national and regional competition laws indicates the global dimension of this conviction: when the United Nation General Assembly adopted the Set of Multilaterally Agreed Equitable Principals and Rules for the Control of Restrictive Business Practices in 1980, fewer than 20 countries had a competition law regime in place. Today, the number of countries and regional organizations with a competition law regime has surpassed 100.

3. However, competition law and policy only produce the desired effects if they are effectively implemented. A law that only exists on paper has no great value. Effective enforcement entails significant challenges for young competition authorities, due to insufficient resources, a yet-to-be-improved level of expertise of their staff, lack of political support from other government bodies, and a general unawareness competition law and policy in the business community. Against this background, the present paper is dedicated to the implementation of competition law and policy in the context of promoting economic development. More specifically, it deals with two aspects of competition law enforcement: (a) appropriate sanctions and remedies; and (b) judicial review of competition cases.

4. Given the objective and the compulsory nature of competition laws, appropriate sanctions and remedies are of particular importance. Safeguarding competition, the primary objective of most competition laws, requires companies to comply with compulsory provisions of procedural or substantive nature. However, experience has shown that undertakings will only comply with compulsory rules if non-compliance results or may result in negative consequences for them. In this sense, the threat of sanctions appears crucial for encouraging competition law compliance. With respect to the primary objective of most competition laws, i.e. protecting the competitive process, remedies complement sanctions since they aim at safeguarding or restoring competition in cases where companies have distorted or are about to distort competition. The topic of appropriate sanctions and remedies will be explored in more detail in chapter I of the present paper.

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. Judicial review ensures that independent competition authorities comply with the law and makes them accountable for their decisions. It shall also contribute 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 the same mistake in the future. Such improved quality will have a positive impact on the reputation of a competition authority. Judicial review is dealt with in chapter II of this paper.

I. Appropriate sanctions and remedies

6. As mentioned earlier, sanctions and remedies complement each other regarding the realization of the principal competition law objective, that is to say the protection of the competitive process. However, their nature and their way of functioning are fundamentally

different. Under chapter XI of the UNCTAD Model Law, sanctions are meant to deter unlawful conduct in the future, to force violators to disgorge their illegal gains and compensate victims. They serve the purposes of punishing past and present illegal behaviour and deterring from infringing the law. Deterrence aims at preventing recidivism of individual offenders, as well as at setting an example to other potential offenders. According to a number of surveys, the objective of deterrence outweighs the punishment aspect in the field of competition law. In contrast, remedies that aim at maintaining or restoring competition in the future are not punitive in nature. Their main scope of application is the field of merger control. Typically, remedies are offered by the parties to a proposed merger in order to eliminate competition concerns and to obtain clearance by the competition authority in charge. As opposed to sanctions which are unilaterally imposed upon a competition law offender, remedies are usually negotiated between the concerned party and the competition authority.

7. Exploring the topic of appropriate sanctions and remedies not only requires an assessment of sanctions and remedies and their implementation in practice. Some thought also needs to be spent on the question of what the term “appropriate” means in this context. The appropriateness of sanctions and remedies implies a balancing decision. The objectives pursued by such measures need to be assessed in light of the restrictions of rights and freedoms, which they cause. The principle of proportionality comes into play.

A. Sanctions

1. Overview over different types of sanctions

8. Sanctions may apply to substantive competition law infringements, as well as to non-compliance with procedural rules. The present paper focuses on the first type of sanctions. Administrative or sanctions, in particular fines, are the most common form of sanctions in cartel cases. They may be imposed upon individual competition law infringers in addition to the undertaking on whose behalf they acted. This is, for example, the case in Germany, where the competition law liability of an undertaking derives from the establishment of a competition law infringement by its management or employees. Other competition legislation only provides for the possibility to fine the respective companies. Fines collected by competition authorities usually flow to the general budget of a State. Only in a small number of countries do they form part of the competition authority’s budget. Besides fines, administrative sanctions may also comprise the prohibition from serving as an officer of a public cooperation or the blacklisting of companies involved in bid rigging for future tenders.

9. As opposed to administrative sanctions that can be imposed by a competition authority, civil or criminal sanctions may only be decided upon by a court. Whereas fines may have an administrative, civil or a criminal nature, imprisonment is exclusively criminal in nature. Some countries that opted for a system of administrative sanctions, provide for criminal sanctions in specific competition cases, e.g. in the case of bid rigging in tenders organized by public authorities.

10. Administrative, civil and criminal sanctions form the category of public competition law enforcement. This means that public authorities, such as the competition authority or courts, enforce competition law provisions. More recently, private enforcement has started to play a role in the field of competition law as well. Private enforcement implies the possibility for individuals to file a claim for damages based on competition law violations in civil court outside the public enforcement procedure. In the case of initial actions, the claimant needs to prove the competition law violation, as well as the resulting damages, which in practice constitutes a major challenge. Follow-on actions are a more specific form of private enforcement, where the claimant bases the damages claim on a fines decision by

a competition authority and only needs to demonstrate the damage suffered. Furthermore, some countries allow for class actions where a representative may claim damages on behalf of an entire class of injured unidentified individuals. Apart from punitive damages awarded only in a small number of countries, these forms of private enforcement do not qualify as sanctions, strictly speaking. However, they complement the picture of competition law enforcement and are therefore mentioned in this context. Table 1 below gives a systematic overview over the various forms of sanctions in selected competition law.

Table 1
Overview of different types of sanctions in selected competition law systems

Country/ jurisdiction	Public enforcement							Private enforcement
	Civil		Administrative		Criminal			
	Fines	Other	Fines	Other	Fines	Imprisonment	Other	
Australia	X	X			X	X		Individual and class actions
Republic of Korea			X	X	X	X		Individual actions
Japan			X	X	X	X		Follow-on individual actions after decision of JFTC
Indonesia			X	X	Law 5/1999 provides for several types of criminal sanctions, which are, however, not applied in practice			
Armenia			X	X	Limited to severely anti-competitive behaviour			
Russian Federation			X	X				
Turkey			X	X				Individual actions
South Africa			X	X	X	X		Follow-on individual actions after decision of South African competition authorities
Kenya				X	X	X		Individual actions are theoretically possible, but practically not used
Zambia					X	X		
Egypt			X	X	X		X	
Tunisia			X	X	X	X	X	Individual actions

Country/ jurisdiction	Public enforcement							Private enforcement
	Civil		Administrative		Criminal			
	Fines	Other	Fines	Other	Fines	Imprisonment	Other	
European Union			Limited to undertakings/no personal liability					Private enforcement only possible on member State level
France			X	X	X	X		Individual actions
United Kingdom			X	X	X	X	X	Individual actions
Germany			X	X	Limited to bid rigging			Individual actions
Peru			X	X				
Brazil			X	X	X	X		Individual actions
Costa Rica			X	X				Individual action possible under civil law after decision of COPROCOM
Mexico			X	X	Limited to severely anti-competitive behaviour			Individual actions (legally possible, but not practiced to date)
United States	X	X		X	X	X		Individual and class actions allowing for triple damages
Canada			X	X	Limited to price fixing, market allocation and output restriction			Individual and class actions limited to actual damage (no punitive damages)

2. How to determine the appropriate sanction?

11. When answering the question of how to determine the appropriate sanction, one needs to distinguish between the legislative level, i.e. the legislative choice to adopt a certain system of sanctions (administrative vs. criminal, means of private enforcement), and the enforcement level, i.e. the adoption of a sanction in a concrete competition case.

(a) The legislative choice

12. Although most competition legislation provides for administrative or civil sanctions in case of anti-competitive behaviour, there is a certain trend towards criminalization. Traditionally, only the United States has imposed criminal sanctions in terms of imprisonment upon individuals in cases of competition law violations, although a number of other countries had respective provisions in place without applying them. Today, other countries – including Canada, Israel, Japan and the United Kingdom – impose criminal

sanctions on individuals to fight hardcore cartels and there is a lively debate on this topic. Proponents of criminal sanctions for individuals argue that these are far more efficient given the degree of deterrence that imprisonment evokes. Since the current level of fines imposed on companies in jurisdictions such as the United States and the European Union (EU) could not be raised further without economic damages and since fines would ultimately be passed on to the consumers, greater deterrence by other means would be needed. Therefore, personal liability of wrongdoers would have to play a more important role. In this context, it is also argued that pecuniary sanctions imposed on individuals would not result in the desired deterrence, since there is the risk that companies would assume the respective fines on behalf of their employees. This risk may be mitigated by a respective prohibition addressed to the company.[1] However, for a number of reasons, a State may opt against criminal sanctions for competition law violations. Firstly, it may not be appropriate to provide for criminal sanctions when a country introduces competition law. In order to allow the business community to familiarize itself with new legal obligations, there should always be a certain transition period. Furthermore, criminalization of competition law violations may not be in line with the social and legal norms of a given country. In addition, the costs of criminal sanctions, in particular imprisonment, may appear too high in comparison with the costs of other forms of sanctions. Another concern put forward against criminal sanctions in competition cases relates to higher procedural requirements, e.g. a higher standard of proof, to be respected in criminal cases. These may render the prosecution of competition law violations more difficult and decrease the number of successful cases. In summary, there are valid arguments for both views.

13. It should, however, be pointed out that any sanction, regardless of its nature, will only produce the desired deterrent effect if the probability that unlawful conduct will be detected and prosecuted is sufficiently high, and if the level of fines imposed upon the wrongdoers is significant. The legal framework needs to allow that a fine takes away at the minimum the financial gains resulting from the anti-competitive behaviour. In this context, it should be noted that UNCTAD's Peer Reviews of Competition Law and Policy in member States frequently recommend increasing the level of fines. In countries where corruption is an issue, it might be advantageous not to confer great discretion regarding the level of fines upon the competition authority, but to set the fine legally at a fixed percentage of the market volume affected by the anti-competitive behaviour.[2]

14. Apart from the trend of criminalization, private enforcement has recently also started to play a role in a number of competition law systems. Proponents of private enforcement put forward that the principle of fairness requires that antitrust infringers bear the costs of their wrongdoing, and not their victims and law-abiding businesses. Effective compensation mechanisms for private parties are also considered to increase the likelihood that anti-competitive behaviour is detected and prosecuted. Therefore, compensatory justice would inherently also produce beneficial effects in terms of deterrence. However, it needs to be pointed out that private enforcement of competition law can only complement, but not replace, public enforcement. The prevailing issue in the discussion about the interaction between public and private enforcement is the concern whether private enforcement has an impact on the effectiveness of leniency programmes. It is feared that leniency programmes lose their attractiveness, and thus become less successful, if leniency applicants face massive follow-on actions for damages based upon their submissions to the competition

[1] The South African Competition Amendments Act, 2009 prohibits companies from directly or indirectly paying any fine imposed on a manager or director who is convicted of a competition law offence, or from indemnifying them from fines of this nature.

[2] The Armenian legislator opted for this approach (Article 36 of the Law of the Republic of Armenia on Protection of Economic Competition).

authority and the latter's decision. This issue may be addressed on the legislative level if leniency applicants not only benefit from a reduction in fines, but also from a protection against private damages claims. However, it is also argued that public prosecution and private claims for damages have different objectives, and thus public leniency should not have a bearing on private actions. Furthermore, in countries with a weak judicial system, it also needs to be taken into account that private claims for damages require a high degree of technical expertise from the respective judges. In particular, assessing the dimension of damages resulting from anti-competitive conduct is a highly difficult task requiring sound economic knowledge in addition to legal expertise.

(b) Determination of the appropriate sanction in a given case

15. Given that fines (administrative, civil or criminal) are the most common form of sanctions for anti-competitive conduct, the present part of the paper focuses on how to determine the appropriate level of fines in a given case. Even experienced competition authorities, such as the German Federal Cartel Office, consider determining the adequate level of fines as a demanding exercise. As mentioned, it is postulated that a fine has to take away at the minimum the financial gains resulting from the anti-competitive conduct in order to be effectively deterrent. In most countries, the law does not provide for a fixed amount of fines, but only stipulates the maximum level of fines.[3] Thereby, the law confers certain discretion on the competition authority to determine the appropriate level of fines taking into account the circumstances of each case. A number of competition authorities have adopted guidelines setting out the method of setting fines to be followed by the authorities. Such guidelines serve the purpose of transparency and equal treatment. Often, these guidelines relate to the value of sales of goods or services to which the infringement directly or indirectly relates as a starting point for determining the appropriate fine. Aggravating factors, such as a continuation or repetition of the infringement or an important role in its realization may lead to an increase in the fine. In turn, mitigating circumstances result in a reduction of the fine. Most importantly, the cooperation by a competition law violator within the framework of a leniency programme justifies a reduction of the respective fine. In addition, competition authorities may reward a company's willingness to agree on a settlement of a cartel case with a reduction of the fine, since such settlement helps to shorten the prosecution period and to save resources. Further mitigating factors include the immediate termination of an infringement subsequent to the intervention of the competition authority, and negligent violation of competition law, as opposed to intentional wrongdoing. In exceptional cases, a competition authority may also take into account an undertaking's inability to pay in a specific social and economic context and therefore reduce the fine or allow for moderated payment modalities. Fining a company to the level of bankruptcy and thereby causing a market exit would be against the primary objective of competition laws to protect the competitive process.

16. As to the challenges faced when determining appropriate fines, young competition authorities report that they encounter difficulties gathering sufficient evidence to prove all relevant aspects for this exercise, including e.g. the duration of an anti-competitive agreement. In the case of a group of companies, it may be difficult to determine the legal entity ultimately responsible for the anti-competitive conduct. In Switzerland and some other countries, this has an impact on the maximum level of fines, which depends on the worldwide turnover of the entity responsible for the competition law violation.

[3] For example, according to the competition law of the EU, the final amount of a fine shall not exceed 10 per cent of the total turnover in the preceding business year of the undertaking or association of undertakings participating in the infringement.

3. How to enforce sanctions effectively?

17. Only if sanctions are effectively enforced will they result in the pursued objectives. However, young competition authorities, in particular in developing countries, encounter great difficulties in enforcing their decisions. Firstly, in cases of non-compliance with the imposed sanctions, some competition authorities do not have the legal powers to enforce compliance. For example, in Indonesia and Mauritius, the competition authorities rely upon the intervention of the courts if a company does not pay an imposed fine. In such situation, the functioning of a country's judicial system also affects the enforcement prospects of the respective competition authority. That is to say, poor performance of the general judicial system would constitute an impediment to efficient competition law enforcement. For example, Peru reported that the length of judicial procedures during which the judge may order the suspension of a decision constitutes a serious issue for effective competition law enforcement. Kenya reported that its competition authority does not even have the powers to make a binding decision in case of a competition law infringement, but depends on the Minister's action in this respect. Even if a competition authority legally enjoys the power to enforce its decisions, in practice the relevant know-how and other resources may be lacking. Challenges may also result from legal uncertainties as to the status of the competition authority. For instance, the Competition Commission of Pakistan frequently faces appeals questioning its constitutional legitimacy when taking important decisions. Young regional competition authorities, such as the Caribbean Community Competition Commission, may face additional difficulties resulting from uncertainties as to their jurisdictional competencies and the applicable law (regional or national). Furthermore, competition authorities in developing countries may encounter political resistance when enforcing sanctions against transnational undertakings or important domestic players. The threat by a large company to exit the market or its announcement to lay off personnel may have sufficient political weight to prevent the enforcement of sanctions. Hence, the question arises how to cope with these challenges. Political obstacles may be encountered by advocacy measures. An increased understanding of the benefits of competition will hopefully make it more difficult for competition law violators to lobby for non-enforcement of sanctions against them. Alternatively, the encouragement of voluntary compliance can play a crucial rule. Companies may be more willing to comply with sanctions for anti-competitive behaviour, if non-compliance will negatively affect its reputation.

B. Remedies

1. Overview of different types of remedies

18. Competition law remedies are adopted with the aim to maintain/restore competition in the market. This includes (a) the "micro" goals of putting the infringement to an end, compensating the victims, and curing the particular problem to competition; but also (b) the "macro goal" of putting incentives in place so as to minimize the recurrence of just such anti-competitive conduct.

19. Depending on the legal framework, competition authorities may impose remedies unilaterally or they may negotiate them with the parties concerned upon a proposal made by the latter (so-called undertakings [4] or commitments). It is true that undertakings or commitments are sometimes considered as sanctions. However, taking into account that they primarily seek to reinstall competition where it has been distorted by an anti-competitive practice, undertakings or commitments are classified as remedies for the purpose of this paper.

[4] For instance, the Australian competition law uses the term "undertaking" in this respect.

20. Remedies are conventionally classified as either structural or behavioural. Structural remedies are generally one-off remedies that intend to restore the competitive structure of the market. Behavioural remedies are normally ongoing remedies that are designed to modify or constrain the behaviour of firms (in some jurisdiction, behavioural remedies are referred to as "conduct remedies"). Some remedies, such as those relating to access to intellectual property rights, are particularly difficult to categorize on this basis. An effective package of remedies may contain both structural and behavioural remedies.

2. Structural remedies

21. They require firms to divest assets they hold. In this regard, divestiture remedies restructure the concerned entity into two or more companies, or require it to sell some of its assets to another firm. They are generally considered to be the most drastic type of remedy. They also have the virtue of being able to eliminate market power rapidly while creating or invigorating competitors. In addition, they require less oversight by courts and agencies than other remedies do. On the other hand, some structural remedies may initially be more disruptive to the defendant's business than other remedies are, and they sometimes create immediate inefficiencies.

22. For the purpose of this paper, mandatory licensing is also considered as structural remedy, given its capability to alter market structure by introducing new competitors. Compulsory licensing is in some respects an attractive tool for competition agencies, particularly when they are dealing with a dominant firm.

3. Behavioural remedies

23. Behavioural remedies (also called "conduct remedies") obligate a company either to do something or to stop doing something. This type of remedy requires that the competition law violator stop engaging in the conduct that was found to be unlawful. Such remedies directly serve the competition law enforcement objective of putting an end to the anti-competitive behaviour that motivated the case. Sometimes, they may be sufficient to restore the pre-violation level of competition in the market, as well, but not always. Behavioural remedies that impose an affirmative obligation to take certain actions on the competition law violator could, for instance, take the form of a requirement that it sells its products on a non-discriminatory basis. It is important for competition authorities to have affirmative remedies in their toolkit because in some cases, simply terminating the unlawful conduct may be insufficient to restore competition in the affected market, and divestiture may not be appropriate or feasible for one reason or another.

24. Furthermore, conduct remedies are advantageous in that they usually can be tailored to individual firms and market circumstances so as to help achieve the desired results. This distinguishes them from divestitures, which often cannot be so meticulously molded to fit the contours of each situation and which therefore tend to have more of a blunt effect on firms and markets.

4. How to determine the appropriate remedy?

25. The design of optimal remedies requires a clear identification of the competition law problem that the antitrust remedy is attempting to address. A number of general suggestions can help agencies to design and implement effective remedies. First, it is helpful to spend time early in the investigative process defining the remedial objectives and developing a plan for attaining them. Otherwise, agencies may wind up expending the resources necessary to win the case, only to find that they have not given sufficient thought to the all-important issues of what an effective remedy would be and how it could be implemented. Second, having a thorough understanding of the relevant industry and how it is likely to evolve under various remedial scenarios is also extremely helpful. Other suggestions

include making adjustments in case of competition law violators with a history of misconduct, anticipating their strategic response to a remedy, identifying and trying to minimize negative side effects, and developing a practical implementation framework. Finally, competition authorities and agencies should bear in mind that remedies are not tools of industrial planning and are generally ill-suited to achieve aims wider then addressing the competitive detriments.

(a) Remedies in mergers cases

26. In assessing remedies in merger cases, competition authorities seek to restore or maintain competition while permitting the realization of relevant merger efficiency and other benefits. In order to achieve this objective, potential remedies should be assessed in relation to their effectiveness, e.g. by interviewing players on the affected market. In a large number of jurisdictions, structural remedies are preferred over behavioural remedies in merger case given the fact that they do not require ongoing monitoring. Taking into account that the parties to a proposed merger are primarily responsible for shaping the transaction, it is advisable that the competition authorities rely upon the parties to design an appropriate remedy in dialogue with the competition authority.

27. For instance, in Japan, in many cases, the parties voluntarily hold prior consultations with the Japanese Fair Trade Commission (JFTC) in advance of prior notifications. The JFTC carries out inspections in such a prior consultation stage, and in the case that it reaches the conclusion that the transaction is problematic, the JFTC indicates the competition concerns to the parties. Then the parties propose a remedial measure on a voluntary basis, the effectiveness of which is assessed by the JFTC. Thanks to this procedure, the JFTC seldom imposes remedies in merger and acquisition cases as a formal action (cease and desist order).

28. In selecting a remedy in a merger case, the Competition Commission of Mauritius (CCM) will consider effectiveness, timeliness and proportionality of implementation costs of the remedy compared to its expected benefits. Remedies must, therefore, be specific to the identified competition concern caused by the proposed merger. The CCM cannot accept as a remedy an offer by an enterprise to take some action in one relevant market (to the benefit of consumers) to offset a loss of competition in another relevant market. It may well be appropriate for the CCM to apply a temporary remedy aimed at mitigating the effects of mergers that reduce competition, if it expects competition to develop over time (whether because of pre-existing trends and anticipated developments, or other remedies that form part of a package). For example, tying and bundling might be prohibited after a vertical merger until sufficient competition develops in the market where the enterprise has market power.

29. In addition, it would not be sensible to impose remedies if the costs of those remedies are out of proportion to any benefits that can be expected to emerge from them. The CCM will therefore consider the proportionality of the costs of any remedy it imposes to the benefits it expects to result from the operation of that remedy.

(b) Remedies against anti-competitive conduct

30. As opposed to remedies in merger cases, behavioural remedies tend to be preferred over structural remedies to address the abuse of a dominant position or the effects of anti-competitive agreements. Firstly, cease and desist orders might be used to bring the anti-competitive conduct to an end. For instance, the cartelists might be ordered to stop price-fixing agreements or a dominant undertaking might be ordered to stop bundling certain products. In certain situations, however, the respective conduct may have caused already anti-competitive harm so further measures are necessary in order to restore competition,

which may include, e.g. amendments to price structures, rebate systems, changes to trading conditions, granting access to infrastructure or intellectual property, etc.

31. In some jurisdictions, structural remedies are considered as *ultima ratio* to deal with dominant companies that severely abuse their market power. For instance, in the United States Microsoft case,[5] the District Court of Columbia had ordered the breakup of Microsoft into several different companies. However, this remedy was not upheld in the following appeal process.

5. Challenges faced in the design and enforcement of remedies

32. Designing and implementing an effective remedy is a demanding task for a competition authority. Challenges may relate to a number of factors, including the legal framework, under which the competition authority operates, the market reality in which the remedy shall produce its effects, and the legal and economic assessment capacities of the competition authority itself.

33. As to the challenges resulting from the applicable legal framework, the Zambian competition authority reports that the Zambian Competition Act does not clearly provide what remedies may be awarded for violations of the Act. Therefore, inference is drawn from the Section of the Zambian Competition Act that stipulates that the Commission may give orders or directives and may make requirements as remedies where no penalty is provided by law for a specific violation. The Commission has thus relied on this section in awarding remedies in the form of cease and desist orders, orders for refunds or replacements in the case of sale of defective products or imposing conditions to certain authorized mergers.

34. Regarding difficulties relating to the market conditions under which the remedy needs to produce the desired effects, it first needs to be mentioned that market size and number of players on the relevant market are somewhat limited in a number of developing countries. Therefore, it might be difficult to find an appropriate acquirer in the case of structural remedies consisting of divestment. In this context, the Kenyan Competition Authority points out that the potential lack of appropriate buyers of company assets to be divested may lead to a lowering of the price for the assets in question and therefore to an economic loss for the merging parties. Furthermore, according to the view of the Kenyan competition authority, drastic remedies may also negatively affect the foreign investment climate. Another challenge faced in countries with a young competition law regime stems from the fact that the business community is often not yet aware of obligations under the newly introduced competition law. Without a widespread competition culture, companies are less willing to comply with remedies formulated by the competition authority. It is suggested that advocacy programmes may address this issue.

35. Challenges in designing and implementing effective remedies may, however, also relate to factors internal to the competition authority. This is not only due to the fact that competition authorities' may lack the required resources and experiences to design an effective remedy (as reported by Burkina Faso), but also to the fact that the nature of remedy design and enforcement is highly complex, given that it is based on a prognosis of the future development of the competitive structure in the affected market. According to the experience of the German Federal Cartel Office, the formulation of cease and desist orders proves to be particularly challenging in cases where it is necessary to combine them with the obligation to grant access for a competitor – e.g. in essential facility cases. In merger proceedings, particular challenges can be encountered with regard to the design of

[5] *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000).

appropriate conditions and/or obligations. For example, conditions for a merger clearance can generally be formulated as conditions precedent or as conditions subsequent. Both scenarios can require detailed rulings e.g. regarding hold separate provisions, nomination of trustees, etc. Should a merger be cleared subject to a condition subsequent, particular problems can arise when the relevant conditions are not met because the relevant undertaking would then have to divest certain assets they have acquired in the course of the transaction.

C. Points for further discussion

36. Given the broad variety of aspects of the topic "appropriate sanctions and remedies", delegates may wish to concentrate in their deliberations on the following questions:

(a) How to set the appropriate level of fines?

(b) Are criminal sanctions an appropriate tool for competition law enforcement in young competition law regimes and developing countries?

(c) How to ensure compliance with remedies and sanctions in competition cases?

II. Judicial review of competition cases

37. Flawed decisions in competition cases may infringe the rights of their addressees and third parties. More generally, they may also negatively affect economic activity in a given country. Hence, state-of-the-art competition law enforcement requires the existence of mechanisms to ensure that decisions taken by competition agencies are fair and lawful. The addressees of a competition decision and possibly third parties need to be given the possibility to appeal against the decision, if they feel that their rights have been violated. Such mechanisms are referred to as judicial review.

38. Judicial review is a requirement of due process and the rule of law, which subjects executive and – to certain extent – even legislative action to control by the judiciary. It implies that decisions taken by public entities, government departments, sector regulators or administrative agencies can be challenged when the public entity has acted unlawfully. It reflects the separation of powers between the executive and the judiciary. In this context, it needs, however, to be noted that judicial review of competition cases also takes place in common law systems, where the initial decision is taken by a court instead of an administrative competition agency and therefore has a judicial nature.

39. Judicial review itself is subject to the requirements of due process, which implies that all administrative and judicial decisions must be taken in a fair way, respecting the procedural rights of the parties concerned. This means that the court that reviews the decision under appeal must hear both parties to the appeal. Also, the court's decision needs to be in writing and set out the reasoning that led to the court's ruling to allow the parties and understanding of the court's thinking.

40. Furthermore, judicial review creates a strong performance incentive for competition authorities. The threat of a flawed decision being challenged and eventually cancelled in court should incentivize a competition authority to diligently perform its work and base its decisions on sound economic and legal assessment. Ideally, this will lead to a higher quality of competition decisions over time, which will also help to build up a positive reputation of the competition authority's work.

41. This part of the paper firstly provides an overview of the various systems of judicial review in competition cases. Subsequently, it addresses a number of challenges that in

particular young competition authorities and agencies from developing countries face. The paper does not deal with instances where courts intervene in the broader context of competition cases, but which cannot be qualified as judicial review. For instance, neither the role of courts in civil actions for damages based on harm suffered from anti-competitive behaviour, nor eventual possibilities to file an action for damages based on breach of law by competition authorities, are discussed in this paper.

A. Different systems of judicial review of competition cases

42. In the same way in which the body in charge of carrying out investigations and taking the initial decisions in competition cases varies from country to country,[6] the characteristics of judicial review systems also vary strongly from one country to the other. Differences mainly relate to the court in charge of the judicial review, and the standard of review applied by this body.

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

43. If an addressee of a competition decision feels that the decision has violated its rights, it may appeal against the decision in 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. Table 2 below illustrates the various approaches.

[6] Most frequently, an independent competition authority is the principle 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.

Table 2
Overview of different types of entities in charge of judicial review in competition cases (first level of appeal)

Administrative tribunals	Judicial courts	Specialized competition tribunals/courts	Court/tribunal of last instance
Colombia	Algeria	Australia[c]	Bulgaria
Croatia	Australia[a]	Austria	Cyprus
Estonia	Belgium	Canada	France[d]
Greece	Brazil	Czech Republic	Turkey
Italy	France[b]	Denmark	
Latvia	Germany	EL Salvador	
Slovenia	Côte d'Ivoire	India	
Switzerland	Malta	Finland	
Tunisia	Panama	Kenya	
Venezuela, Bolivarian Republic of	Romania	Peru	
	Slovakia	Poland	
	The Netherlands	Portugal	
		United Kingdom	

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

[a] For appeals against decisions regarding anti-competitive conduct.

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

[c] For appeals against decisions in merger cases.

[d] In France, judicial review of merger cases falls within the jurisdiction of the *Conseil d'Etat* – see http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=296.

44. Most jurisdictions also allow the party that loses the appeal process to appeal against the respective 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.

2. Standard of review

45. The degree of examination applied in the appeal process is called standard of review and varies strongly in various competition law systems. It ranges from a marginal test of review limited to procedural aspects and manifest errors of law of a competition decision to an intense review going into the merits of the case.

46. Four levels of review intensity can be distinguished: according to 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, e.g. whether it has given the concerned persons the opportunity to be heard before taking any decision against them. The second level of review comprises the assessment of the legality of the decision at stake, including an assessment of the respect of procedural requirements. At this level of review, the court has to assess whether the

competition authority correctly interpreted the law. Thirdly, 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 intense standard of review allows the court to review the case fully and substitute its own analysis to the assessment of the competition authority. This is also called a de novo analysis.

47. Cyprus can be quoted as an example of a competition law system with a limited standard of review. The Supreme Court of Cyprus, which is responsible for appeals in competition cases, is limited to the review of the legality of the act and cannot go into the merits of the decision under review and substitute the decision of the competition authority with its own decision.

48. 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 of Justice of the European Union shall review the legality of the acts of the European Commission. It is said that the respective type of action was initially modeled after the *recours pour excès de pouvoir* before the French *Conseil d'Etat*, which would imply a marginal standard of review. However, according to the case law of the European Courts, judicial review in competition cases firstly has to assess whether the evidence relied upon by the European Commission is factually accurate, reliable and consistent. Secondly, the courts have to assess whether the evidence contains all the information which 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 economic nature. [7] This approach, distinguishing between the establishing of the factual substrate and the discretionary appraisal thereof including the appraisal of economic data, can be found in several cases by the European Courts.[8] In this context, it needs to be noted that the standard of review applied to the level of fine is more intense. 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.[9]

49. Examples for competition law systems, where the applicable standard of review implies a review of the merits of the decision under appeal, include Belgium and the Netherlands. In Belgium, the Brussels Court of Appeal, which has exclusive jurisdictions over appeals in competition cases, reviews both facts and law. In the Netherlands, the District Court of Rotterdam, which is in charge of reviewing decisions taken by the Dutch competition authority, the NMa, applies an intense 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 judgement for the NMa's decision. In Tunisia, the Administrative Tribunal, which carries out the judicial review in competition cases, enjoys even more far-reaching powers. In addition to reforming the initial decision based on factual and legal grounds, the Administrative Tribunal may hear new witnesses and it is empowered to even state completely new competition law infringements that can be proven as a result of its investigation of the matter.

[7] European Court of Justice, Case C-12/03 P Commission v. Tetra Laval ECR I-987.

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

[9] 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.

50. A particular aspect of the standard of review relates to 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 appealed competition decision in addition to the legal aspects of the decision. From the member States' replies to the UNCTAD questionnaire, it appears that several countries accept new evidences 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. In Germany and Switzerland, new evidence is accepted at the appeal stage without any restriction.

3. Suspensory effect

51. During the judicial review, a question whether the application of the decision under appeal is suspended until the review of the decision is complete. Different practices can be identified. In the case of Switzerland, the application of the decision is suspended at the Federal Administrative Tribunal stage (appeal instance); however, provisional measures can be ordered. The decisions of the Federal Administrative Tribunal on competition matters may be appealed to the Federal Tribunal (Switzerland Supreme Court). Appeals to the Administrative Tribunal do not have a suspensory effect.

52. In the Netherlands, a decision on fines by the NMa will be suspended during the appeal phase. (However, payment should be done within 13 weeks after the fining decision has been published. During the appeal phase, the NMa does not require the payment but can get the interest if payment is done after 13 weeks – interpretation of the Supreme Court).

53. In the case of the EU, there is no 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 and interest. In the case of Brazil, a 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.

4. Different types of decisions

54. 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 remanding the decision back to the competition authority for further examination.

B. Challenges faced in the judicial review of competition cases

55. Judicial review is an essential element to ensure the high quality of the decisions taken by competition authorities and to ensure trust in the system. However, developing countries often face difficulties in implementing an effective system for judicial review in competition cases.

56. Some of these challenges stem from the overall state of the judicial system. If competition cases fall within the jurisdiction of the general courts in a given country, any problems, such as an insufficient number of judges for the actual caseload, which affect the judiciary in general will also affect appeals against decisions in competition cases.

57. Other challenges relate to the specific nature of the competition case, which are often very complex and require both profound legal knowledge as well as a sound economic understanding. Thus, it is not surprising that an insufficient number of qualified judges figured among the challenges reported by a number of member States. In addition, in many developing countries, competition cases are handled by general courts with judges who do not enjoy relevant experience in the area of competition. This lack of qualification

of judges jeopardizes the credibility of the judicial review. In addition, it may discourage authorities in developing countries from imposing sanctions or skew their imposition of sanctions so as to reduce the likelihood of debilitating appeals.

58. Ways to address the above-mentioned issues include the establishment of specialized entities to review appeals in competition cases, e.g. through the creation of a specific chamber in the court responsible for handling these appeals or by creation of a specialized tribunals for competition cases. Furthermore, capacity-building for judges who have to assess appeals against competition decisions appears indispensable. This can, for instance, be realized through joint workshops of the competition authority and the judges exercising judicial oversight over it. Adopting more enforcement-friendly legislation and regulations and sentencing guidelines will certainly also help to improve judicial review of competition cases.

59. The length of appeal procedures constitutes a further important challenge referred to by several countries in the questionnaires. For instance, Peru reports that appeal procedures against competition decisions can last up to five years. If the appeal procedure takes too long, the review decision may not be relevant anymore or considerable problems for its application have been created. In the case of mergers, timing is particularly crucial. Therefore, a country may want to introduce expedited procedures for appeals against decisions prohibiting a merger. The European Commission reports that "the judicial process normally takes 2-3 years to complete. […] The General Court therefore adopted an expedited process, called 'fast-track procedure', that provides for written procedures and a full hearing, through which it can complete a matter within 8 to 12 months after a Commission decision, thus ensuring there is a realistic prospect of judicial oversight of time-sensitive matters such as mergers." Such expedited procedure does not exist in most developing countries.

60. Though established to protect individuals and legal entities against abusive decisions by public institutions and to establish trust in the system, judicial review may result in the contrary effect by damaging the reputation of a competition authority. This risk occurs when a large number of decisions of the competition authority are cancelled or significantly amended as a result of judicial review. In order to prevent damages to their reputation, young competition authorities should therefore carefully examine the elements and legal background of each appeal that they lose in order to comply with the legal requirements as stated by the court in the future.

61. Other challenges have been identified in the questionnaires, in particular with regard to the lack of regulations related to judicial review and the decision of jurisdiction between administrative and civil courts that lower the efficiency of the judicial review. Finally, Croatia has pointed out that it struggles paying sufficient consideration to the constant changes of EU soft law, which it considers as a source of guidance for its own competition law interpretation.

C. Conclusion, including questions/points for discussion

62. Although there is great consensus that judicial review of decisions in competition cases necessarily follows from the rule of law and is an indispensable element of a well-designed competition law regime, the features of systems of judicial review vary significantly from one country to another. Despite this great array, it can be concluded that the challenges related to judicial review of competition cases that young competition authorities and agencies from developing countries face are similar. Against this background, it is suggested that delegates consider the following question for discussion during the deliberations:

(a) How to best handle the challenges resulting from an insufficient number of qualified judges to handle competition cases?

(b) How to ensure that the length of the appeal process does not render vein the initial decision in a competition case?