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Enhancing legal certainty in the relationship between competition authorities and judiciaries

Note by the UNCTAD secretariat

Executive summary

Legal certainty is considered a fundamental principle, recognized by most jurisdictions around the world. This element of the rule of law constitutes a requirement for the operational necessities of the economic actors interacting in a given market, thereby addressing their legitimate expectations. Therefore, enhancing legal certainty in the relationship between competition authorities and judiciaries requires the decisions reached by competition authorities (with adjudicative functions) and judges to be consistent, to secure an effective competition law system and, more importantly, provide for the legitimacy of the system vis-à-vis market participants, as discussed in the present note.¹

In this regard, significant challenges facing new competition regimes include the following: need for the judiciary to develop a more comprehensive understanding of both competition law and the policies underpinning the law; need for new agencies to better understand relevant legal processes and present complex economic evidence in a manner that may facilitate assessment by non-economic experts in evaluating such evidence.

UNCTAD work on competition law and policy is focused on assisting young competition regimes to overcome such challenges.

¹ This document has not been formally edited.



Introduction

1. In July 2015, the Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices outlined enhancing legal certainty in the relationship between competition authorities and judiciaries as a topic to be considered by the Intergovernmental Group of Experts on Competition Law and Policy. Legal certainty is a fundamental principle of the rule of law, recognized by most jurisdictions around the world. A workable definition of legal certainty refers to its pragmatic application of the law, which underlines a guiding principle to secure the predictability of decisions that encompasses both notions of legitimate expectations and of non-retroactivity (or non-retrospectivity) of the law. With regard to this concept, legal certainty in the relationship between competition authorities and judiciaries may be enhanced by having authorities and judges reach coherent decisions whereby the predictability of these decisions can secure an effective competition law system and, more importantly, provide for the legitimacy of the system vis-à-vis market participants.

2. Competition authorities and judiciaries may interact in an investigative phase, during a decision-making process or following an authority's decision. The analysis in the present note addresses interaction after an agency decision has been made, due its complexity and relevance to the effectiveness and efficiency of a competition system, as well as the capacity of judiciaries to shape competition policy and the strategies of competition authorities to improve the enforceability of their decisions in a timely and coherent manner.

I. Legal certainty

3. Agencies with decision-making bodies have a responsibility to reach decisions that will be ultimately upheld by judiciaries in order to secure an effective and predictable competition regime. Such agencies fall under the third category of the United Nations Model Law on Competition.² To start, a workable coherence in the definition of the term competition as used by law practitioners, competition agency staff (lawyers or economists) and judges must be achieved, thereby securing a certain level of legal certainty in the application of competition rules. For instance, for economists, competition may be seen as a process of allocative efficiency, capable of providing maximum goods and services to consumers at the lowest price, while for lawyers, competition may be seen as a form of rivalry, requiring rules designed to ensure a minimum of fairness among competitors, both large and small. For some, competition is not revered but feared for its destructive force and ability to disrupt firms and displace workers at great social and human cost.

A. Formalistic versus economic approach

4. In some jurisdictions, whether they are mature or young competition regimes, competition law and policy has emerged as a tool for consumer welfare and allocative efficiency. Stakeholders increasingly understand competition as a dynamic process that

² Competition agencies mostly follow three different institutional models to organize their decision-making processes, as follows: bifurcated judicial model, whereby the authority is empowered to be investigative and must bring enforcement actions before courts of general jurisdictions; bifurcated agency model, whereby the authority is empowered to be investigative and must bring enforcement actions before specialized competition adjudicative authorities, with rights of appeal to further specialized appellate bodies or to general appellate courts; integrated agency model, whereby the authority is empowered with both investigative and adjudicative functions, with rights of appeal to general or specialized appellate bodies.

takes place in specific markets. This calls for deeper understanding of the nature of the competition process and the functioning of markets in order to make appropriate diagnoses of the use or abuse of market power.

5. An economic approach requires decision-makers to examine what might happen to the market in the absence of the situation under investigation and the counterfactual scenario, and reach a decision on the basis of evidence, facts and data, rather than on presumptions or purely formal analyses disconnected from market contexts. A benchmark to ensure the principle of legal certainty is respected by competition agencies with ruling functions at the administrative level thus needs to be determined, as well as whether it will be a formalistic or economic approach, along with the approach to be followed by the respective courts so as to ensure legal certainty for businesses.

6. In young competition regimes, judges need to be aware of the economic principles and underpinnings of competition law enforcement before the shift from a formalistic to an economic approach can take place. For example, in the European Union, a formalistic system of competition law was relied on for 40 years, following which the European Union shifted to a more economic approach, as detailed in box 1. However, young competition regimes may face challenges with judges that understand the impact of economics in markets and competition. A two-phase approach may therefore be advisable, whereby a formalistic approach may initially be established, with subsequent evolution towards an economic view. If young competition regimes with ruling functions employ economic reasoning in their administrative decisions, this may help judiciaries to better understand the reasoning. If legal certainty is to be ensured in the relationship between competition authorities and judiciaries, substantive (calculation of fines) and procedural (standard of proof and other aspects) law considerations should be noted in assessments. Such aspects are reviewed in the following paragraphs.

Box 1

Application of European Union competition rules: Shift in approach

Until 2003, the European Union relied to a large extent on an ex-ante system of competition enforcement. The legality of a given practice was generally checked against a system of lists, including a blacklist of prohibited practices (such as a most-favoured customer clause) and a whitelist of authorized measures (such as selective distribution agreements). Economic considerations related to the specific circumstances of a situation under examination – such as market definition and market power – were, if not absent, at least not as predominant as they might have been.

The role of judges in the European Union in relation to the shift towards greater use of an economic approach may be highlighted. Landmark cases such as *Delimitis* and *Woodpulp* underlined the economic reasoning behind European Commission decisions. For example, in the latter, the court was doubtful that the allegation that parallel price movements observed in an oligopolistic market could be sufficient proof of the existence of collusion. In 2002, a few landmark decisions by the European Commission, in particular in the field of merger control, were overturned by the General Court of the European Union.

Source: Contribution provided during UNCTAD judiciary capacity-building, 2012.

B. Calculation of fines

7. An International Competition Network survey of 17 competition agencies assessed the role of judiciaries and their interactions with competition authorities in the implementation of competition policy. The agencies interviewed stated that the main grounds for judiciary overturning of their decisions ranged from “problems related to the

calculation of fines” and “standard of proof adopted on competition cases is considered not appropriate” to “problems on procedural issues”.³ Competition authorities generally note that they are unable to immediately collect fines because of pending judicial reviews. Hence, it is crucial to expedite the process of reviewing competition cases by sensitizing judges as to how fines have been calculated and the accepted benchmark, which observes the principle of proportionality of fines and other related principles.

1. Determining appropriate sanctions

8. The legislative choice to adopt a certain system of sanctions (administrative or criminal or means of private enforcement) and enforcement level (adoption of sanctions in a concrete competition case) is essential to determine appropriate sanctions.⁴ However, any sanction, regardless of its nature, only produces 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 is significant. The legal framework needs to allow for a fine that removes at minimum the financial gains resulting from anti-competitive behaviour.

2. Appropriate sanctions in a given case

9. Determining the adequate level of fines is a demanding exercise. A fine must remove at minimum the financial gains resulting from anti-competitive conduct in order to be an effective deterrent. In most countries, the law does not provide for a fixed amount of fines, but only stipulates the maximum level, thus conferring certain discretion on a competition authority to determine an appropriate level of fines, taking into account the circumstances of each case.⁵ A number of competition authorities have adopted guidelines on the method of setting fines, which serve to promote transparency and equal treatment. Often, such 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 an appropriate fine. Aggravating factors, such as continuation or repetition of an infringement or an important role in its realization may lead to increased fines, while mitigating circumstances may result in reductions. Most importantly, cooperation by a competition law violator within the framework of a leniency programme justifies a reduction of the respective fine.

3. How to enforce sanctions effectively

10. Young competition authorities, in particular in developing countries, encounter great difficulties in enforcing their decisions. In cases of non-compliance with imposed sanctions, some authorities do not have the legal powers to enforce compliance. For example, in Indonesia and Mauritius, authorities rely upon the intervention of the courts if a company does not pay an imposed fine. In such situations, the functioning of a country’s judicial system also affects the enforcement prospects of its competition authority. That is, poor performance in the general judicial system may constitute an impediment to efficient competition law enforcement. For example, Kenya has reported that its competition authority does not have the powers to make a binding decision in cases of competition law

³ International Competition Network, 2006, Report on a survey on the relationship between competition authorities and the judiciary.

⁴ Although most competition legislation provides for administrative or civil sanctions in cases of anti-competitive behaviour, there is a trend towards criminalization. Historically, only the United States of America has imposed criminal sanctions, in terms of imprisonment, on individuals in cases of competition law violations, although a number of other countries have respective provisions in place without applying them. At present, other countries – including Canada, Israel, Japan and the United Kingdom of Great Britain and Northern Ireland – impose criminal sanctions on individuals to deal with hard-core cartels. Debate on this topic is ongoing.

⁵ For example, according to the competition law of the European Union, 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.

infringement, but depends on ministerial action in this respect, while Peru has reported that the length of judicial procedures during which a judge may order the suspension of a decision constitutes a serious challenge to effective competition law enforcement. Even if a competition authority legally has power to enforce its decisions, in practice, relevant know-how and other resources may be lacking.

C. Standard of proof in competition cases

11. Procedural rules are the expression of due process and procedural fairness. Procedures and the law of evidence thus cannot be analysed separately from substantive aspects of competition law. The main critical tool for courts is rules of procedure, and perhaps the most important among these are rules of evidence. Procedure drives outcomes and the law of evidence often determines winners and losers in courts. Competition law and economic evidence need not be convincing; ruling on competition law issues is not any more problematic or difficult than on any other form of complex litigation, such as in environmental, medical or complex tax matters. Courts should be appropriately advised by experts such as economists before making findings and conclusions, and should ensure a due process and settle disputes according to the law.

12. One of the main policy goals of competition policy worldwide (such as in the European Union) is to bring competition law in line with economic considerations, with substantial incidence of the content of the law, involving a shift from a formalistic, legal – almost literary – approach to a more contextualized, dynamic form of economic assessment based on evidence and data. Certain practices previously treated as anti-competitive and therefore illegal are now regarded as legitimate or at least not worthy of State intervention. Conversely, given sophisticated economic tools, anti-competitive practices that previously might have gone undetected or otherwise escaped scrutiny are now considered illegal.

13. Reconciling competition law with economic considerations is only part of the issue at hand, and there are other interests in conflict. Competition law cannot be reduced to a casuistic exercise; the law must be predictable and transparent, so that it is understood and applied efficiently, especially by courts. For example, cartels are now treated as a form of quasi-criminal conspiracy (or criminal offence in some States), subject to heavy penalties. Given the repressive nature of cartel law, litigation in this field is limited to procedural or due process aspects that do not consider economic views. Courts should aim to apply the law in such a manner that the system remains inclusive, robust, efficient, predictable and fair.

14. In other areas, the function of a standard of proof is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication” (Supreme Court in *re Winship* 397 US358, 370 (1970)). The purpose of a standard of proof is to allocate the risk of error between litigants and to indicate the relative importance attached to the ultimate decision. The level of persuasion required from a piece of evidence in order to be considered determinative as a violation of competition law and the standard of review exercised by a court, as well as the intensity of the scrutiny exercised by a court, differ according to the type of proceedings. The legal burden differs in administrative proceedings (to review the legality of determinations made by administrative authorities), quasi-criminal proceedings (to decide on penalties imposed on antitrust violators) and civil proceedings (to deal with damage claims based on competition law grounds, for example by the victims of a cartel).

1. Determining the standard of proof in competition cases

15. Determining the standard of proof applicable to a competition case has given rise to controversy and academic debate in developed countries. Notions such as the balance of probabilities (standard of proof in civil cases) and beyond reasonable doubt (in criminal

cases) and convincing and cogent evidence (in other areas in between) are attempts to extrapolate Anglo-American legal traditions to countries with civil law systems.⁶

2. Presenting economic evidence in courts

16. Judges with legal backgrounds may have limited economic expertise and, for this reason, economic analysis and evidence needs to be presented in a clear and simple manner. The implications of theoretical models and statistics need to be thoroughly explained. It is recommended that economic evidence be illustrated by the use of graphs and other means. Economic evidence supports legal reasoning yet does not replace it. The Supreme Court of Switzerland, in its judgment of 29 June 2012 regarding Publigroupe, noted that “the market analysis is complex and the databases are frequently incomplete. Therefore, evidence that tends to demonstrate economic and/or statistical correlations cannot be stretched too much. Hence, it is impossible to have proof in the strict sense of the word. However, the logic of the economic analysis and the probability of its accuracy must be convincing and understandable”. The Advocate General in Rhône-Poulenc SA v Commission of the European Communities (1991) noted that “economic analyses often make up an important part of the evidence in competition cases and can be of great value to the court in understanding the relevant economic context. It is thus important to obtain information on how an oligopolistic market might react in different circumstances. [But] the findings of economic experts cannot take the place of legal assessment and adjudication”.

3. Direct versus indirect evidence in competition cases

17. The analysis of competition adopts a per se approach towards certain conduct and a rule of reason approach to others. Indirect evidence may be circumstantial, involving communications or economic evidence; the former is evidence that cartel operators met or otherwise communicated, but does not describe the substance of communications. Conduct evidence is critical as it includes evidence of parallel conduct by suspected cartel members, such as simultaneous and identical price increases or suspicious bidding patterns.

4. Direct evidence in cartel cases

18. By definition, there can be no direct evidence of a tacit agreement (contract) among competitors. In most cases, there is no direct evidence of an explicit anti-competitive agreement. If a type of horizontal agreement is not prohibited per se by competition law, an assessment must be made of whether it is anti-competitive. For example, certain exchanges of information are anti-competitive, but others are pro-efficiency, while a cooperation agreement on research and development may or may not be anti-competitive. Circumstantial (indirect) evidence is used in cartel cases. Economic evidence may be ambiguous and must be interpreted correctly by investigators, competition agencies and courts.⁷

⁶ The existence of a doctrine of standard of proof has been rejected by some legal commentators as it is not used in some European legal traditions. See H Legal, 2006, Standards of proof and standards of judicial review in European Union competition law, in B Hawk, ed., *International Antitrust Law and Policy: Fordham Corporate Law 2005* (Juris Publishing); and E Gippini-Fournier, 2011, The elusive standard of proof in European Union competition cases, and F Castillo de la Torre, Evidence, proof and judicial review in cartel cases, in CD Ehlermann and M Marquis, eds., *European Competition Law Annual 2009* (Hart Publishing, Oxford).

⁷ The question of whether European Union courts must rely exclusively on direct evidence or may reach their findings on the basis of indirect evidence has received what appears to be a definitive answer; in the quasi-criminal context of cartels, where this question is most likely to occur, the courts routinely accept the use of circumstantial or indirect evidence.

II. Standards of judicial review of competition cases

19. UNCTAD research has addressed judicial review as a requirement of due process and the rule of law that may prevent flawed decisions in competition cases infringing on the rights of addressees and third parties.⁸

A. Different systems of judicial review of competition cases

20. As shown in the table, judicial review in many jurisdictions is either confined to administrative courts, or administrative courts are the courts of first instance. Some jurisdictions have constituted specialized competition appeal courts (such as Singapore and South Africa). In some cases, the decisions of competition-related judicial reviews have been overturned by the executive given exceptional situations, for example in Croatia.⁹

Overview of different types of entities in charge of judicial review in competition cases

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

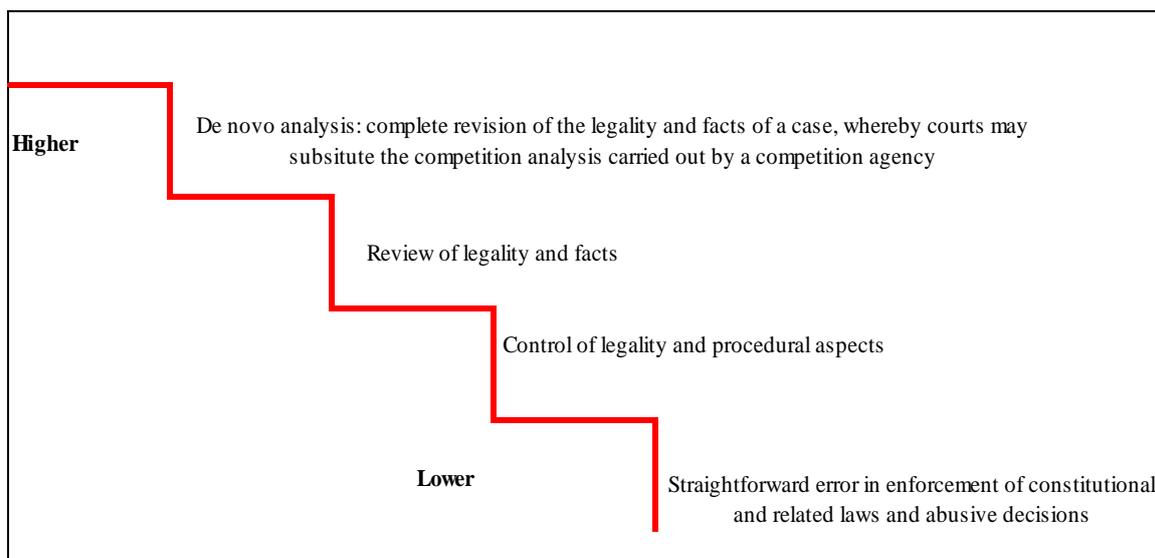
Source: UNCTAD, 2007, *Model Law on Competition* (United Nations publication, New York and Geneva).

21. In any case, the principles of independence and separation of powers, as well as the existence of judicial reviews of competition authority decisions, whether through regular courts or administrative tribunals, must ensure fairness and integrity in decision-making. However, the standard of judicial review differs widely in different jurisdictions. UNCTAD has noted at least four different levels of review in national competition regimes, which are summarized in the figure. The four standards adopted by judiciaries are described in the following paragraphs.

⁸ See TD/RBP/CONF.7/3 and TD/RBP/CONF.7/5.

⁹ See TD/RBP/CONF.7/5.

Standard of review of competition cases by judiciaries



22. De novo analysis involves a complete revision of the legality and facts of a decision made by a competition agency. Courts may, for example, substitute the antitrust analysis made by an agency. The principle of deference¹⁰ is not particularly applicable to this standard. The Menarini case, as detailed in box 2 (including its impact on the enforcement of competition rules in the European Union), is a landmark example of this approach, and the view of the private sector that expects full judicial consideration of the case.¹¹

Box 2

Court of Justice of the European Union standard of review in competition cases

The application of the European Convention for Human Rights in the enforcement of competition rules in Europe remains a controversial and challenging issue. This originated in a judgment of the European Court of Human Rights in *A Menarini Diagnostics v Italy* (judgment of 27 September 2011), stating that the fundamental right to a fair trial required courts to scrutinize, without limitations, the decision of competition authorities imposing criminal or quasi-criminal penalties. The European Court of Human Rights took a pragmatic approach, noting that even if the rules of procedure imposed a form of deferential standard under which the courts should not interfere with the margin of

¹⁰ The principle of judicial deference to administrative interpretations of law refers to the separation of powers and suggests that agency interpretation of technical rules would be better suited in certain cases rather than overall generic interpretations by judiciaries and that in such cases, a court would submit its judgment to that of another legitimate party, such as the executive in cases of competition law enforcement (see <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3075&context=dlj>).

¹¹ “Judicial review in competition cases needs to provide for a full and intense review on the factual and legal merits of the decisions under appeal if it is to fulfil its role and meet the challenges involved in these cases which involve not only the vital interests of the parties but frequently their fundamental rights. In particular, since the appeal against an authority’s decision will be the first occasion upon which the matter is reviewed by an independent judicial body in the cases we are here examining, it is appropriate that the appeal provide for full, unlimited jurisdiction for the court to review the case. A full review enables the court to assess the correctness, on the merits, of the authority’s decisions, not just its legality. It also enables the court fully to review the penalty” (Business and Industry Advisory Committee, 2011, Organization for Economic Cooperation and Development Competition Committee, DAF/COMP(2011)122).

discretion of competition authorities, the application of such rules in practice was the significant aspect for the Court.

Under European Union case law, when dealing with complex technical assessments or complex economic assessments, courts normally defer to the European Commission, as the law grants the Commission a wide margin of discretion in applying competition rules, and courts generally refrain from interfering with Commission policy. Despite this, in 2011, the Court of Justice of the European Union was asked to revisit this position in light of the European Court of Human Rights ruling in *Menarini*, and stated that, pragmatically, the duty of the European Union court of first instance was to exercise a non-deferential form of review of decisions imposing fines and, as the case may be, to establish directly the amount of fines as it deemed appropriate. That is, it would move towards a *de novo* analysis standard.

As a result, European Union courts have moved away from the deferential standard of review when quasi-criminal penalties are involved, and the European Court of Human Rights influence has led the courts, in practice, to apply a standard closely resembling the beyond-a-reasonable-doubt standard of proof, sometimes even referring expressly to it, as for example in *Dresdner Bank and Others v Commission*, stating that “any doubt in the mind of the court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point”, in particular in proceedings for annulment of a decision imposing a fine.

Given the emphasis on human rights instruments such as the European Convention for Human Rights and the Charter of Fundamental Rights of the European Union, following the entry into force of the Treaty of Lisbon, it seems unlikely that European Union courts will in future distance themselves from this approach.

Source: Contribution provided during UNCTAD judiciary capacity-building, 2012.

24. Review of legality and facts. This standard differs from *de novo* analysis in that courts do not substitute a competition agency ruling but make a referral, stating that the agency must re-assess the case in accordance with guidance and instructions from the court. The approach of judges is mixed; some jurisdictions opt for a more comprehensive approach that entails precise instructions for how an agency should re-assess a case, while others leave the agency the necessary discretion to re-evaluate a case. For example, Bulgaria (as a member State of the European Union) has reported that, in recent years, few cases have been repealed by the courts, with repeals mainly based on grounds related to standards of proof of competition infringement, whereby proceedings were returned to the Competition Commission for consideration, mainly when the review court confirmed violations of procedural rules during administrative proceedings before the agency.¹²

25. Control of legality and procedural aspects. To a lesser extent, courts are limited to verifying whether the legality of an administrative act that embodies an agency decision is in accordance with the principle of legality and procedural fairness. In many jurisdictions, young competition authorities may tend to prefer this standard due to lack of understanding among judges of competition law analysis and economics. The principle of deference is used to justify the technical discretion that an agency should have when ruling on a competition case. The International Competition Network survey noted that most jurisdictions favour a procedural review of competition cases, whereby the appeals body confines itself to consideration of the law, including a review of procedures adopted by the competition authority in the exercise of its investigative and decision-making functions,

¹² Contribution provided by Bulgaria Competition Commission, 2016.

rather than a de novo consideration of both evidence and legal arguments.¹³ For example, in Chile, the competition authority is divided into a national prosecution office and an ad hoc tribunal for competition (a specialized chamber in the Supreme Court) and, given this institutional arrangement, competition law practitioners have the understanding that review by the Supreme Court may be limited to controlling the legality of tribunal decisions.¹⁴

26. Straightforward error in enforcement of constitutional and related laws and abusive decisions. Applicability of and preference for this approach is the result of a classic, more formalistic approach to competition of law practitioners. Under this standard, judges are obliged only to intervene, on a subsidiary basis, if there is a straightforward and flagrant constitutional error or abusive decision by a competition agency in enforcing competition law. Grounds for review often include lack of jurisdiction, procedural failure and error of law, defective reasoning, manifest error of appreciation and error of fact. This standard reflects an early form of competition enforcement in mature jurisdictions but is still considered by other jurisdictions in which competition law and policy is less well-known by judges and law practitioners. In such instances, UNCTAD focuses on establishing ad hoc capacity-building programmes and technical assistance initiatives (see chapter III). An example of such judicial review is in assessments by the Court of Justice of the European Union of commitment decisions taken by the European Commission.¹⁵ In its judgment of 29 June 2010 in *Alrosa Company Ltd. v Commission of the European Communities*, the Court clarified that the General Court may not provide its own assessment of complex economic circumstances and thus substitute its own assessment for that of the Commission, thereby encroaching on the discretion of the Commission rather than reviewing the lawfulness of its assessment and clarifying that, with regard to article 9 of European Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty, judicial review was limited to establishing manifest errors. The voluntary character of commitments and principle of procedural economy¹⁶ seem to be the main reasons for the Court's judgment.

B. Challenges in judicial reviews of competition cases and impacts on the principle of legal certainty

27. Judicial review positively shapes the principle of legal certainty. The first question to be considered is whether the legal and institutional framework in a jurisdiction is sufficiently and expressly clear to divide the work of courts and agencies with regard to the enforcement of competition rules. This is critical for young competition regimes shaping the ways and means of how competition rules should be implemented and for ensuring that the legitimacy of a system is accepted by practitioners.

¹³ Accordingly, the intention is not for the courts to substitute their own appreciation, but to ascertain whether the competition authority has abused its discretionary powers. In this context, judicial review is generally seen as an end-stage process whereby judgment is passed on results or actions already taken, that is decisions taken by the competition authority in line with whether decision-making powers are vested in the chief executive, a board of commissioners or a separate quasi-judicial body in the form of a specialized competition tribunal (such as in Brazil, Peru, South Africa and the United Kingdom). See International Competition Network, 2006.

¹⁴ A disposition on competition law supports this understanding by listing the subjects eligible for appeal. However, Supreme Court decisions show that it can overrule any tribunal decision based on merits and different criteria, including changing (increasing or reducing) any penalties imposed.

¹⁵ N Harsdorf, 2011, Article 9 commitment decisions: Some comments on key questions in light of the recent case law of the Court of Justice of the European Union, *Austrian Competition Journal*, 3(5).

¹⁶ Defined as the efficiency of enforcement beneficial in terms of costs and time not only for the parties but also for the court system and therefore for public resources in general.

28. In some jurisdictions, the standard of review of a competition regime may be unclear. There are different stakeholders that may claim legitimacy to deal with competition cases, and differences in how a system provides the necessary mandate to do so. In this regard, competition agencies often claim total application of the principle of deference, whereby courts only control the legality of the administrative act, as detailed in paragraph 25. In turn, despite their limitations in understanding the dynamics of competition and antitrust analysis – when needing to, for instance, identify a relevant market in a given case – courts often claim that a review not only of the legality but also of the facts should form part of a review at the judicial level. UNCTAD has identified this as a significant challenge faced by young competition regimes, which is exacerbated when there is a perceived lack of familiarity by judges with traditional legal backgrounds with the economic concepts of competition law, such as restriction of competition, foreclosure, abuse of market power and others. As a response to such lack of knowledge, judges tend to use traditional canons of construction, such as in considering the meanings of terms or applying a strict construction to the legislative language which, in the assessment of competition cases, is ill-suited to the application of competition law. This creates frequently diverging views between competition agencies and judiciaries with regard to the interpretation of competition rules in a case. Other challenges relate to procedural shortcomings, and issues with regard to the standard of proof applied to competition cases are also recurrent in the work of judges when dealing with competition cases.

III. UNCTAD technical assistance to judiciaries

29. UNCTAD technical assistance and capacity-building programmes have assisted judiciaries in developing countries and countries with economies in transition since the adoption of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in 1980. Programmes involve a detailed mode of delivery given the particular features of judiciaries and related views on training activities in economic issues. In particular, the separation of powers between agencies and judiciaries must be respected in the preparation and conduct of training activities. UNCTAD strategies focus on developing specific ways and means to approach judiciaries institutionally without necessarily seeking the assistance of the competition agency in a given jurisdiction, as it might not be appropriate for agencies to approach judiciaries for training purposes when the latter will examine their own rulings.¹⁷ Training activities are often carried out by special training entities within the judicial branch, such as a school of judges or magistrates, whose mandate is to train judges in a number of topics of interest and relevance to their work, with instruction by judges higher in the judicial hierarchy. UNCTAD assistance includes the preparation of training activities within the official curriculums of such schools.

30. In association and/or partnership with local judicial entities, UNCTAD carries out three steps to help ensure the transparency and legitimacy of training workshops for judges.

¹⁷ However, supreme courts are at times favourable to the specific expertise of competition agencies, for example as has occurred in Indonesia and Nicaragua. The Supreme Court in Indonesia supported the competition agency by informally stipulating that district judges handling an objection case on competition law could participate in agency workshops (at which judges receive a certificate by the Supreme Court and competition agency to attest to their participation). To date, more than 300 judges have participated in such workshops. In Nicaragua, the agency is actively involved in the organization of workshops with the Supreme Court and other high court judges. In both States, judges welcomed the participation of the agency in the design and delivery of training courses. UNCTAD voluntary peer reviews on competition law and policy assist in identifying strategies for approaching judiciaries. For example, the peer review of Albania engendered a number of recommendations on how to approach judges, and a number of training workshops were subsequently organized in 2015–2016.

The first step involves establishing a memorandum of understanding with the school of magistrates in a given jurisdiction, to establish cooperation on training judges in competition law enforcement. The second step involves scrutinizing the topics, via virtual meetings, to establish those that are relevant to judges. Topics usually encompass four broad areas, as follows: overview of the role of judges in competition law enforcement; multiple criteria in competition cases; standard of proof and review in competition cases; methods of determining appropriate sanctions and fines. The third step involves a strategy to organize the training, including necessary incentives for participants and the choice of trainers (normally another judge of the same level from a jurisdiction agreed with the recipient institution). The selection of trainers and participants has an important bearing on the tangible impacts of the capacity-building programme. For instance, if higher court judges are to be trained, a different strategy is employed than that for lower district court judges. In addition, UNCTAD has designed a special strategy to train Supreme Court judges, which responds to local conditions and dynamics in the beneficiary country.

IV. Conclusion

31. The following checklist with regard to how judges should enforce competition rules to ensure legal certainty in the relationship between competition agencies and judiciaries is significant:

Independently review the evidence used to support the accusations and weigh this in light of evidence supporting the defence. The court needs the power to confront and test the evidence to the fullest extent provided for by national rules of procedure, for example by calling witnesses to be subject to examination and cross-examination before the court comes to its own conclusions; evaluate the facts in the context of the legal and economic elements making up the infringement including a full review of the economic evidence and analysis; confirm whether the burden of proof is met; verify that due process and transparency have been respected; check that any penalty is appropriate (just and proportionate to the gravity of the offence and the individual defendant's participation in any violation), consistent with penalties imposed for comparable economic offences and justified by reference to actual harm caused to consumers or a demonstrated need for deterrence.¹⁸

32. The role of judges in the application of competition rules differs markedly, however, depending on the standard of judicial review of competition cases and the institutional setting in a given jurisdiction. No one-size-fits-all approach may be established as a benchmark in this regard, although legitimate expectations for law practitioners are available as a basis for enhancing the principle of legal certainty and how an effective and productive division of labour may be fostered that ensures a smooth relationship between judiciaries and competition agencies.¹⁹ Whether a competition regime is young or mature, the judiciary should play an important role in developing competition law, as this may prompt improvements in agency analysis and decision-making, as well as in interactions between the judiciary and competition authority, which is most effective when all judicial

¹⁸ Business and Industry Advisory Committee, 2011.

¹⁹ For example, in 2011, Mexico instituted reforms to achieve an optimal balance in the division of labour between the judiciary and competition agency. The competition law system now involves a more balanced and stronger enforcement framework against more intensive judicial review. On the one hand, the competition authority has the power to conduct dawn raids and impose higher fines and criminal sanctions. On the other hand, there is an enhanced mechanism for judicial review of competition cases, involving specialized competition courts, the possibility for a full substantive review and an option to proceed directly to judicial review rather than requiring an intermediate administrative review stage (Mexico, 2011, Organization for Economic Cooperation and Development Competition Committee, DAF/COMP(2011)122).

procedures are followed and the reasoning of authority decisions is based on clear and sound legal and economic analyses.

33. Taking into account related challenges, in particular in young competition regimes, delegates at the fifteenth session of the Intergovernmental Group of Experts on Competition Law and Policy may wish to consider the following questions for discussion:

(a) How should the effectiveness of a competition regime be better assessed (agency rulings should be sound and robust, with solid economic and legal concepts, and judges with full capacity to deal with competition cases)?

(b) How should the level of understanding of economic concepts by judges be improved (the principle of deference should be such that they are no longer obliged to deal substantively with competition cases)? Is this necessary?

(c) Is a first instance review before a specialized judge a solution for countries wishing to streamline judicial reviews? Is inclusion of the topic of law and economics in the service exam for a judge an option for young competition regimes?

(d) If a jurisdiction opts for a specialized tribunal for economic issues, revisions of judicial review processes may create an opportunity for efficiency improvements, but what are the risks associated with this policy option?

(e) As specialization of a judiciary allows for a more nuanced review of competition decisions, what might be the cost-benefit analysis for young competition regimes?

(f) What are the additional risks for young competition regimes in establishing specialized courts for competition cases (considering that specialized procedural rules may provide clarity, yet there is a risk of delay if cases are subject to multiple instances of review, including by constitutional courts, and judicial substantive reviews may shift the appeals process from legal formalism to a merits-focused approach, while lobbying by vested interests may seek to shift the balance in a review in favour of private parties)?
