



International Competition Network

Competition Policy Implementation Working Group - Sub group 3

## **Competition and the Judiciary**

2<sup>nd</sup>. Phase – Case Studies

6<sup>th</sup> ICN Annual Conference

Moscow, Russia

May-June, 2007.

*Agencies that participated on the Second phase of this Study:*

- *Brazil's Council for Economic Defense (CADE)*
- *Canada's Competition Tribunal*
- *Chiles's Tribunal de Defensa de la Libre Competencia*
- *El Salvador's Superintendencia de Competencia*
- *Mexico's Federal Competition Commission*
- *Spain's Competition Court*
- *Turkey's Competition Authority*

*The sub group special thanks for helping on the revision of this report: European Community's Directorate General for Competition, United States Department of Justice, United States Federal Trade Commission.*

## 1. Introduction

Important conclusions emerged from the 2006 CBCPI report. Among these conclusions was the identification of the main stakeholders to the implementation of competition law in developing countries, including, *inter alia*, consumers, businesses, and the judiciary. Based on this study, SG3 decided to deepen the studies of one of those stakeholders, the judiciary, more specifically focusing on the relationship between the judiciary and competition agencies, in order to provide a better knowledge on the issue and suggesting some measures to improve such relations. At that point, it was quite clear that the judiciary's review of competition authority decisions could shape competition policy, and thus deserved attention from the CPI Working Group.

Once SG3 established the main objectives for the new task<sup>1</sup>, the study was undertaken based on questionnaires that analyzed the role of the judiciary and its interaction with the competition authorities in the implementation of competition policy. SG3 intended to identify the main challenges faced by young agencies from developing and transition economies, though the questionnaires were also applied to experienced jurisdictions in order to have a point of reference for the newer jurisdictions.

With the responses to the questionnaires, SG3 elaborated a report in which the findings of the research were brought to light and examined. This report provided a diagnosis of the main difficulties faced by competition authorities on this matter, from the responding agencies perceptions. The conclusions were extensively discussed during the 2006 ICN Annual Conference, especially in the breakout session.

Based on the mentioned conclusions, SG3 understood that the development of case studies could improve the knowledge on this important dimension of competition policy implementation. It was defined as the main objective of this second phase:

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<sup>1</sup> In this sense, the focus of the subgroup would be: (i) to draw a map of the interaction between competition authorities and the judiciary in order to help improve implementation and enforcement of competition law. In other words, the subgroup will focus its work on sharing approaches for improving competition analysis within the judicial system, while fully respecting the principle of the independence of the judiciary; (ii) to survey challenges faced by jurisdictions with new competition laws in terms of their relationship with the judiciary.

*to address the challenges faced by jurisdictions on different stages of the enforcement of competition laws in terms of their relation with the judiciary, identifying actions, measures or shortfalls from the selected authorities' experiences and reporting about the tools that, according to such experience, would be useful to the competition authorities for increasing both the scope and the quality of their relation with the judiciary.*

SG3 efforts were all concentrated in the provision of a report that could contribute to improve the implementation of the competition policies in young agencies regarding the presentation and upholding of sound agency decisions.

## 2. Methodology of the study

In order to accomplish the main objectives of the study and to make viable and consistent the development of the cases studies, SG3 decided to elaborate a term of reference. This term of reference was divided into three parts: *1 - Country's Institutional Framework*; *2 - Interaction between Competition Authorities and the Judiciary*, also divided into experiences faced on the investigative phase and on the decision-making process; and *3 - Difficulties detected in the relationship between competition authorities and the Judiciary - Measures taken or to be taken to solve or improve this relation*.

The issues addressed in each part of the case study were organized from the most general aspects of the country's institutional environment to more specific experiences of the authorities.

The first part, *Country's Institutional Framework*, gives an overview of the legal and political organization that might influence the competition law(s), the nature or basis for the repression of anticompetitive conduct, whether administrative, criminal responsibility or both, the decision making process of the competition authorities, the independence of the agency decisions and the basis and extent of the judicial review.

The second part, *Interaction between Competition Authorities and the Judiciary*, identifies situations in which competition authorities and the judiciary interact, whether in the investigative phase, during the decision making process or after the agency decision was made. This part provides the boundaries within which occurs the interplay of competition and judicial authorities.

Finally, the third part, *Difficulties detected in the relation between competition authorities and the Judiciary - Measures taken or to be taken to solve or improve this relation*, addresses the core issue of this research work: the effectiveness and efficiency of the decisions as a result of the interaction between competition authorities and a judicial system, and the capacity of the judiciary to shape competition policy and the strategy of competition authorities to improve the enforceability of their decisions.

The terms of reference were adopted as a guideline in order to enable a division of tasks among participating jurisdictions responsible for the study and to provide food for thought and suggestions to young agency ICN members to improve their performance.

## **The 2006 Report**

The 2006 Report was elaborated based on responses to a questionnaire from 18 competition authorities from 17 countries (approximately 20% of ICN members at that time).

The report reached six main conclusions:

*1 The judiciary shapes competition policy results irrespective of the legal tradition and development level. This conclusion shows that the report of CBCPI Working Group in 2003 was correct to identify the judiciary as an important stakeholder to be addressed in the ICN studies.*

*2 The main concerns regarding judiciary expressed by respondent authorities seem to be related to interventions by the judiciary AFTER the competition authority has taken a binding decision. From the survey results, it appears that competition authorities' decisions are most likely to be overturned when conduct cases or the amount of fines are being reviewed, as opposed to mergers. The main issues identified in the report appear to be common for all respondents, independent from their legal systems (whether they are civil law or common law systems).*

*3 It is of increasing importance to address the concerns regarding judicial interventions with respect to conduct cases and fines, since in a majority of respondent jurisdictions' judges are shaping competition policy and playing an important role in the development of competition policy:*

*a. Review of conduct cases: One of the main issues offered by competition agencies relates to a perceived lack of familiarity of judges with the concepts of competition law. The consequences are frequently diverging views between the judges and the competition agency with regard to the interpretation of the competition rules. In addition, there are a couple of other relevant issues mentioned by respondents, including procedural shortcomings, or issues with regard to the standard of proof applied to competition cases.*

*b. Enforcement of monetary sanctions: Respondent competition authorities were asked for the reasons why they are unable to immediately collect fines. Seventy-nine per cent of them said that the pending judicial review was the main reason for not being able to collect a fine right away.*

*The possible reasons for this outcome were not analyzed in detail by the study but they were indicated to be related to shortcomings in the rules on calculation of fines and/or again to insufficient familiarity of judges with complex competition issues.*

*4 Since the judiciary plays a role in competition matters in all jurisdictions, having a judiciary that understands competition policy's concepts, goals and instruments is of great importance. What is identified by the results of the report is the urgency to bring judges closer to the technical analysis made by competition authorities, especially in developing countries. This is an important conclusion for providers of technical assistance but also an opportunity for competition authorities to conduct initiatives with the aim to develop an improved level of mutual understanding.*

*5 Competition authorities seem to be beginning to address these issues, and are organizing seminars and joint workshops with the judiciary, which are important steps for institutional strengthening. Further research should be undertaken in order to support competition agencies in their efforts to reach out to the judiciary.*

*6 It is common sense that decisions challenged in court increase in proportion to the level of maturity of a competition authority. For that reason, a natural conclusion is that it is important that competition authorities and courts in developing countries understand each other better to improve the effectiveness of competition policy as a whole.*

This Second Phase Report will follow those conclusions and intend to deepen the issues using case study analysis.

### 3. Participant Countries Profile and Characteristics

Competition Authorities from seven countries agreed to participate in a case study: Brazil, Canada, Chile, El Salvador, Mexico, Spain and Turkey.

This group of countries provides a wide range of institutional backgrounds including the jurisdiction that enacted the first competition law in the world, Canada, which was enacted in 1889<sup>2</sup> to a jurisdiction with one of the newest competition law, El Salvador, which enacted its Competition Law in 2006. All of them follow the civil law regime, except for Canada, which has a mixed system – civil and common law – being its Competition Act based on the latter. Also a wide range of political regimes is considered: constitutional monarchy (Canada and Spain), and republic (Brazil, Chile, El Salvador, Mexico and Turkey) and organized in a parliamentary (Canada, Spain and Turkey) or presidential regime (Brazil, Chile, El Salvador and Mexico).

However, judiciaries in the countries studied have the same characteristic of being independent, by the force of the countries' constitutions that also guarantee to the judiciary the power to review any decision made by the competition authorities.

The survey pointed out that all the countries consider competition as an exclusively federal/national issue, held by the central power. Spanish Law, however, also envisages giving Autonomous Communities (regional authorities) power to implement the Competition Law and decide about antitrust cases. This power must be coordinated between the federal and regional authorities to protect the unit of the national economy and the existence of a single market. Autonomous Communities have the power to enforce Spanish Competition Law regarding anticompetitive practices (agreement and abuse of dominance) with no national market effects. It is interesting to observe, nevertheless, that such permission of regional local authorities to enforce competition laws originated from a judgment from the Spanish Constitutional Court, the higher jurisdiction in Spain.

A common characteristic observed among the studied countries is that competition law has its basis on constitutional principles (*e.g.* Brazil) or dispositions, although the way the judiciary can review agencies decisions varies, as it will be commented later on.

Although the role of the participating competition authorities vary among countries,

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<sup>2</sup> Experts acknowledge however that only in 1986, when Canada's new Competition Law was passed by Parliament, Canada could be said to have a modern and effectively enforced competition law.



from jurisdictions where only one body is responsible for investigation and adjudicative functions (El Salvador, Mexico and Turkey) to countries that have two separate bodies for those functions (Brazil, Canada, Chile and Spain), all of them stated to be independent<sup>3</sup> and autonomous bodies, even if some of them are related to Ministries, for budgetary purposes.

In all of the countries, competition decisions are made by a board, composed of three to fourteen members, all appointed by the government (executive branch), with a term of office which varies from two (Brazil) to ten (Mexico) years. Renewals of mandates are possible in most of the countries, except in Chile and Mexico.

Just two of the countries (Canada and Turkey) mentioned to have a legal requirement that some of the members appointed to the competition authority board must be judges. None of the competition authorities' boards are composed by judges only, although two of them are considered judicial bodies (Canada and Chile), while the others have decisions of an administrative nature.

The only countries that have competition infractions that are considered criminal offenses are Canada and Brazil. In Brazil, the Competition Authority decisions are administrative, but a special law defines some conduct as criminal as well. In both jurisdictions, only the judiciary can decide on the competition infractions as criminal offenses. All countries studied have competition provisions that are considered civil infringements.

It is interesting to observe that it was the Judiciary who determined the administrative/civil nature of Canadian Competition Law by confirming that competition come under the trade and commerce powers of the federal government, allowing competition provisions to be included among civil/administrative offenses. Until this decision, anticompetitive practices were considered as crimes only.

If, on one hand, the view in the international community that some competition offenses (especially the most harmful ones, like cartels) are criminal in nature helps to deter the most harmful practices and make investigation and condemnation more effective, on the other hand, having some other offenses addressed on an administrative level at a different standard of proof allows other infractions to be repressed<sup>4</sup>.

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<sup>3</sup> Although the Spanish Competition Court (*Tribunal de Defensa de la Competencia*) is indeed an independent body, it does not have power to approve, block or impose restrictions to mergers, but only to issue a non-binding opinion to the Council of Ministries, which is responsible for the decision on such cases.

<sup>4</sup> As Canada mentioned: *the standard of proof under the criminal portion [of the competition law] is "beyond a*

#### 4. The Judicial review structure

El Salvador envisages in its Competition Law the review of the agency's decisions by a specialized Court. The Contentious Administrative Court may rule on the legality of the agency's decision and the Supreme Court of Justice can suspend the decision taken if there has been lessening of constitutional rights, or even declare it illegal.

There is a similar provision in the Chilean Competition Law, in which the punishment of anti-competitive conduct is decided by a Tribunal within the judiciary division and, as so, reviewed directly by the Supreme Court, through a special appeal that proceeds to challenge only its final pronouncements. Investigations are carried out by an administrative body. Before presenting a case to the Supreme Court, which renders the final decision, parties may seek for a "reconsideration" of the decision from the Tribunal.

Canada, on the other hand, does not appear to have the same provision in its competition law. Any aspect of the competition law that is found to be in violation of the Constitution will be struck down by the judiciary. All decisions of the Competition Tribunal can be appealed to the Court of Appeals and those can be also appealed to the Supreme Court. Criminal decisions follow the same way, although generally Canadian Supreme Court requires a leave to appeal. Appeals are typically presented regarding questions of law rather than questions of facts.

Turkey's competition authority decisions may be appealed initially to Chamber 13 of the Council of State, which is a specialized Chamber for competition and regulatory matters, composed by people with varied backgrounds. The Chamber's decision may later be reviewed by Council's Plenary. The Council can only confirm or reverse the decision, based on legality issues (deciding whether penalties, for instance, were legally imposed or not) and the observance of procedural rules, but not increase or decrease the penalty imposed (which was identified in the 2006 Report as a problem of the judicial intervention).

Spanish Competition Authorities' decisions are administrative acts and can be reviewed by Administrative Courts. Specifically decisions of the Competition Court can be appealed before the Administrative Chamber of the National Court where a specialized competition section reviews them. Some decisions of the Competition Service (those that decide directly or indirectly about the case, cause irreparable damage to legitimate interest,

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*reasonable doubt*". For the civil portion it is "balance of probabilities".

etc.) can be appealed before the Competition Court. This review cannot be considered as judicial because of the administrative nature of the Competition Court. Spain and Turkey made references that appellate bodies with some familiarity of economic/business concepts made judge's lack of specialization on competition analysis to be no longer a concern.

Brazilian Competition Authority<sup>5</sup>'s decisions have also an administrative nature and the competition law forbids revision of CADE's (the Brazilian decision making body) final decision under the administrative level. However, the Constitution guarantees that no harm or threats to rights may be barred from examination of the Judicial Power. Due to this warranty, parties can take any issue to be reviewed by the Judiciary. The limits to judiciary intervention are not defined by the Constitution or the Law and it will be subject to how courts classify CADE's decision. As said, CADE's decisions are administrative acts. Administrative acts can be classified into two categories: bounding acts and discretionary acts. An administrative act is considered a bounding act if it follows the exact elements defined by law, including how the Administration should enforce its decision. In this sense, there is no limit to the judiciary's intervention on the decision's merits, since no harm or threats to any rights can be barred from examination by the Judicial Power. Discretionary acts, on the other hand, cannot be overruled by the Judiciary Power on a merit analysis basis. Discretionary acts are pronounced according to the Authority's opportunity, convenience, justice and equity principles. In this sense, Courts would not have the elements to overrule a discretionary decision, but solely to control its legality. An example will be addressed below.

Among the responding jurisdictions, there is a consensus on the Judiciary's intervention to rule on the legality of the decision and the observance of procedural rules. However, it will be observed later on that, in practice, judicial review includes the amount of the fine and the merit of the decision (e.g. "*there is no infraction to competition law on this case*").

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<sup>5</sup> The Brazilian Competition Policy System (Brazilian Competition Authorities) is composed by the Secretariat of Economic Law of the Ministry of Justice (SDE), the Secretariat for Economic Monitoring of Ministry of Finance (SEAE) and the Council for Economic Defense (CADE). The Secretariats are responsible for the investigation/analysis of the process while CADE is an "administrative tribunal" responsible for rendering the final decisions.

## **5. Competition Authorities and the Judiciary Power**

### **a. Investigative Phase**

All the responding competition authorities have wide investigative powers granted by the Competition Acts. In general, judicial authorization is not necessary for competition authorities to investigate, except for some specific investigative tools: raids and unauthorized inspections (common for all responding countries), for compelling access to documents when parties obstruct it (Turkey, Brazil and Canada) and questioning witnesses under oath (Canada)<sup>6</sup>. In Chile, such authorization should be requested by the investigative body to the Competition Tribunal (considered as a judicial body).

For the countries which have separate bodies for investigative and adjudicative functions, such division of powers have not been contested by the judiciary and on the few times it occurred (Brazil and Turkey), both of the countries reviewed its procedure. Turkey, based on a judicial sentence that annulled the authority's decision due to the lack of separation between investigation and decision making instances, changed the Law in order to allow investigative staff to participate on the adjudicative functions and vice versa.

The decision to open or close an investigation was not mentioned as an issue presented before judiciary review (although Turkey mentioned that an appeal against such decision is possible). Reasons cited for that include: (i) the judiciary does not intervene until the end of the process as it is only seemed to be "used" for appeals against a final decision; (ii) decisions related to investigation can or have to be appealed to the body which makes the final decision (a different body, in the case of Brazil, Canada, Chile and Spain, or the Board, in the case of Turkey and El Salvador); and (iii) there is not a formal decision from the investigative body to be appealed.

The case studies<sup>7</sup> reinforced the conclusion reached in the first study that judicial intervention during or against investigative procedures is not considered to be a concern, although it is a relevant issue for Brazil, as it will be commented below.

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<sup>6</sup> Since some competition offenses (e.g. bid riggings and cartels) are also considered criminal offenses, the Brazilian antitrust authorities may use wiretapping as an investigative tool. However, such tool can only be used if requested and used on the criminal process by a public prosecutor.

<sup>7</sup> Canada, El Salvador and Turkey expressly stated that judicial intervention on the investigative phase cannot happen; Spain stated that it would be "extremely strange".

Turkey gave an example of a possible intervention on this phase related to interim injunction (on the merits, but not related to investigative tools or procedures) that can be granted by the authority. For instance, in a case of refusal to supply of a specific product, the authority can issue an injunction ordering the investigated party to supply the product until a final decision is reached. Such a preliminary decision can be appealed by the party to the judiciary.

With respect to the last example, Canada noted that there is only one possibility that the judiciary may intervene in the investigative body (the Competition Bureau), which is when the Bureau makes a consent agreement with the private parties. This hypothesis, however, has never been tested.

The Brazilian Constitution, by its article 5, XXXV (inserted on the chapter of fundamental right and guarantees), broadly disposes that any issue may be taken to judicial review (“XXXV – *the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power*”). No special requirement is necessary for that. In this sense, a single procedural question can be the basis for the request of the annulment of a process. Under the request of the parties, the judiciary may issue any kind of decision: suspending the investigations, ordering measures to be taken, prohibiting measures and investigative steps to be taken, prohibiting the investigative body to close its analysis and send the case to the Tribunal to be judged, prohibiting CADE (the Brazilian decision making body) to judge, canceling or ordering to repeat investigative acts (e.g. hearings), prohibiting the analysis of documents and data seizure on a raid, prohibiting the hearing of a specific witness, declaring that an information or a document is not necessary for the investigation/analysis. It may also rule that an action related to the collection of evidences was illegal and cancel the investigation, *in totum* or partially. In this sense, it may declare null the collection of some evidences and order to disregard them, or decide to cancel the investigation due to a procedure<sup>8</sup> error on the opening act, obliging the authorities to repeat it all over. All of those situations have already happened in Brazilian cases.

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<sup>8</sup> The Competition Law has some disposition on specific procedures for the administrative process that is characterized, in Brazil, as a less formal and faster process. The judiciary sometimes understands that when such procedures differ from the Procedural Civil Code, it causes an illegality on the process, even been disposed on

## **b. Revision of the Competition Authority Final Decision**

One of the first report conclusions was that judicial intervention mostly refers to substantive aspects<sup>9</sup> of the authorities' decision and that it happens in conduct cases. To reaffirm such conclusion, Spain reported three interesting cases that concerned three different situations:

In a conduct case, the Supreme Court considered “pro-competitive” (judicial analysis on the merits) a firm strategy previously judged by the Spanish Competition Court as anticompetitive, even after the National Court (a specialized chamber for administrative matters) has confirmed the authority's decision. When an annulment was based on a procedural problem, the judiciary decided to refer the decision back to the Competition Court. On a merger case (when the Competition authority does not have the power to decide but only to issue a non-binding opinion) the judiciary clarified that the Council of Ministers (the authority competent to make a decision on a merger review) must follow the Competition Court opinion or justify sufficiently any divergence from its recommendation. Spain commented that this judicial position made the Council of Ministers start to be more careful when it disagrees with the Competition Court opinion, which also makes more difficult for the Council to do so.

Finally, another possible intervention of the judiciary in the competition process may occur when there is a civil suit in course. For the countries that assessed this, it is a new issue, and some of them mentioned that there is already an internal debate on whether the judiciary must wait for the administrative decision, or even to call the authority to participate on the civil suit. Spain mentioned that a future law reform includes mechanisms to coordinate those actions. In Brazil, a public prosecutor raised a “puzzle” that addresses the question which involves private litigation: if both decisions- judicial and from the competition authorities – concluded for the existence of the cartel, ok. However, what happens if a judge condemns someone for a cartel and the competition authority determines that the cartel has not existed? Since in Brazil decisions are taken by a board of commissioners, it is not possible for the Board to participate on the judicial process, not even as *amicus curiae*.

Turkey reported that when the revision is based on procedural issues, the Council

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the Law.

<sup>9</sup> One of the issues raised on the first report was the lack of familiarity of judges in some jurisdictions to competition analysis.

refers the decision back to the Authority for a new decision issuance. There was a case, however, that the Authority had its decision cancelled due to a problem of the number of members of the Board who took the decision (*quorum*).

To exemplify a judicial intervention on competition issues, Brazil presents a decision overruled by the Judiciary, still pending final decision: on 1999, the three main steel Brazilian producers were found guilty of cartel practice and were imposed a fine of 1% of its 1996's revenue (year of the practice). After more than one year without increasing prices, the Companies readjusted them on similar dates and levels (parallel price behavior), issuing communications to clients on almost the same date. After that, the Companies and the Steel Association went to the Secretariat of Economic Monitoring (SEAE - one of the bodies responsible for antitrust investigation) office to inform that they would increase prices by a specific amount on a specific date. This fact started the process for a cartel investigation against the Companies. In 1999, CADE decided to condemn the Companies, based on the 'parallelism plus doctrine', by a combination of structural factors favorable to collusion (*e.g.* few players, high entry barriers) and the meeting at SEAE, which demonstrated that the Companies had previously jointly discussed price increases. The First instance Court overruled CADE's decision by understanding that the cartel practice hadn't existed, since there was no proof of collusion, but maintained the fine imposed due to the parallelism of prices. The main problem on this case is the level of proof of a cartel adopted by the judge and, most important the delay of the decision enforcement – more than 10 years after the infringement of the law.

Similar to other countries, Chile has the understanding that the Supreme Court review could be limited to controlling of the legality of the decisions rendered by the Tribunal. A disposition on the Competition Law supports such understanding by listing the subjects that are eligible for appeal. However, decisions of the Supreme Court show that it can overrule any Tribunal decision, based on merits and on different criteria pattern, including changing (increasing or reducing) penalties imposed. In this sense, the first decision of the Supreme Court that overruled a Tribunal decision cancelled an imposition from the Tribunal to the bigger Chilean supermarkets chains to consult any operation of concentration on supermarket industry they may be interested in.

After such decision, five others were overruled, one on legality basis and the four other on its merits. In one of them, it has also modified the fines imposed. Among the four mentioned cases, which were cancelled or modified by the Supreme Court, two of them referred to cartel cases, where the Court ruled that there was insufficient evidence of collusion to condemn the parties. In an opposite situation, the Supreme Court condemned a firm that charged prices below its average total cost for predatory pricing, reviewing a decision of the Competition Tribunal that had dismissed the case. In another case, Supreme Court raised a fine imposed by the Tribunal based on the *lack of knowledge of the consumers* that were damaged by the illicit conduct. Finally, a Tribunal decision that imposed to the Municipality the obligation to call for a new public action to contract garbage services and the end of the current contract was annulled because Supreme Court understood that the competition authority did not have competency to make decisions involving Municipalities.

El Salvador has not had any decision reviewed by the judiciary so far. Worth to remembering that the Competition Law was enacted in 2006.

## **6. Shaping Competition Policy**

In Brazil, it can be said that the judicial intervention and review of decisions mentioned in the above sections has been the changing competition authorities' behavior: the authorities are paying more and more attention to procedures; making the administrative processes closer to the judicial standards (what have been called as the "*judicialization*" of the decisions) and are making efforts to improve the quality of the evidence. Considering that the administrative process is ruled by differentiated principles such as celerity<sup>10</sup> and informality, the "*judicialization*" of the process may turn the administrative process into a slower and bureaucratic process and raise the cost of the analysis. On the other hand, the anticipation of some judicial questions is positive for enforcement and has improved the quality of agency decision-making, considering the phase of the review by the judiciary.

Canada expressly stated that *the judiciary can and does shape the competition policy*, through the interpretation it made of the law. Once the Competition Tribunal (which is considered as part of the judiciary), the Court of Appeals or the Supreme Court makes an

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<sup>10</sup> A principle under which the analysis of an administrative process should be expedite.



interpretation of law or regulation terms, the Competition Bureau disregards the meaning it used to give to that term and adopts the judicial interpretation.

Spain gave many examples by which the judiciary shaped its competition policy, such as: (i) on merger reviews that the Council of Ministers must agree - or present strong reasons not to – with the Competition Court’s opinion; and (ii) the recognition of the Constitutional Court that Autonomous Communities could apply competition rules<sup>11</sup>. That country also described two very important Supreme Court decisions related to civil damages claims that, as already mentioned, may be a cause of intervention of the judiciary on competition authorities’ decision. In one case, the claimant was requiring an injunction in respect to an alleged abuse of dominant position and claimed damages. The Supreme Court dismissed the case stating that only the competition authorities, and not civil courts, were competent to apply European<sup>12</sup> and national competition rules directly. Contrary to such understanding, in another case, the Supreme Court decided to directly apply European competition rules. The Spanish authority reported that since this decision, the Supreme Court and Court of Appeals have applied the European Competition Law, although the application of the Spanish law is still reserved to the administrative authorities.

By contrast, Turkey’s authority did not consider that the Council of State (the authority which receives appeals) shapes competition policy since it only decides on the legality or the illegality of the authority’s decision, following the interpretation given to the law provisions by the authority’s decisions.

Turkey presented a sole case where the Council of State overruled a competition decision on substantive basis. The Competition Authority understood that a TV broadcast company, which has exclusive rights on the professional football league matches, engaged in price discrimination by charging different broadcasters different prices for the three minute highlight segments of the matches. The Council found the practice pro-competitive since it would allow more sections of the population to be reached by searching differentiated charging. The Authority appealed against Council’s decision, which is still pending final

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<sup>11</sup> As per Spanish statement: “*this judgment and its consequences have been one of the most important changes of the competition policy in Spain*” It is important to highlight that Constitutional Court is not considered part of the Spanish Judicial Power but a specific and higher jurisdiction, ruled directly by the Spanish Constitution. Moreover, although the mentioned judgment opened the implementation of competition law to the regional authorities, it was necessary to a new Law to develop it.

<sup>12</sup> In EC law, since the modernization of the EC antitrust regime in May 2004, national courts can apply Article 81 and 82 directly

decision.

On an opposite view, Brazil faced a similar situation: all over the country, but especially on the Northeast region, which is the poorer region, public prosecutors, under judiciary's authorization, were making consent agreements in order to establish a "discount" cap on the price that the drug producers practice to drugstores. The agreement caused the perverse effect of a minimum price being fixed by public prosecutors while competition could offer lower prices to consumers.

Though El Salvador has never had a case, it is worth to note that the competition authority does not have power to enforce its own decisions, and shall require assistance of the General Attorney through the judiciary.

The only country that specifically remarked on the increase in the number of judicial reviews was Spain, which mentioned that it has not noticed an increase in appeals and suggested that the reasons for it is that only the decisions that impose fines on a company or reject an appeal presented to the authority are appealed to the judiciary, which may mean that possible reviews by the authority may prevent judicial reviews. It is important to note that Spain is a developed country. The other participants, all developing countries except for Canada, stated such increase, while noting the increase of their own activities, not only in terms of numbers of decision made, but also in terms of the content of these decisions (more restrictions imposed on mergers, more requirements imposed on conduct cases, an increase on the condemnation for anticompetitive practice, the increase of the amount of penalties).

## **7. Shortcomings on the relationship between Competition authorities and the judiciary and measures taken to clear them**

As expected, all countries but one reaffirm that *lack of specialized knowledge on competition issues by the judiciary* is an important issue affecting competition policy implementation. At least for developing countries, such statement showed to be the most important worry and to which measures are pointed to.

Although Spain was the only country that did not cite the lack of specific knowledge as a main concern of competition policy implementation, it mentioned seminars, conferences and training programs as measures taken to improve the relationship with the judiciary.

It is interesting to note, however, that the Spanish experiences and initiatives involve the judiciary itself on the organization of the events for judges. The respondents noted that some international experiences, Brazil included, showed that events organized exclusively by competition authorities to judges were not successful.

On the other hand, Turkey expressly mentioned that lack of expertise and training is considered a relevant issue for competition policy on the review by the judiciary. To address this issue, the Competition authority is encouraging the study of competition law in academia, as well as the provision of other events gathering academics, members of judiciary and investigative staff. Following the same line, Chile cited the inclusion of competition issues in academia was helpful – legal courses specifically- in addition to broad events to spread the subject. The broad debate, gathering academics, international community, judiciary members and lawyers, was also referred to as a useful measure.

Chile indicated that even though the court that receives competition authorities' appeals is very specialized in constitutional and administrative matters, it seems that the lack of familiarity with economic concepts involved in the competition analysis may cause some distortion on the competition policy (e.g. the predatory pricing case above mentioned, condemned on a different economic criteria than the standard traditionally used in antitrust evaluation). On the other hand, the Supreme Court required a higher standard of proof for collusion, which is internationally recognized to be the most harmful practice to competition.

As mentioned earlier, different from the main conclusion reached by the 2006 Report, Spain does not focus the problem on the lack of familiarity of judges with competition analysis elements (although it also does not disregard it) due to the fact that appellant bodies

in Spain have some experience and training in this area, but pointed to the delay caused by judicial intervention (even when the judiciary decides not to annul or replace the decision, but to refer it back to the authority), a problem also highlighted by Brazil, for whom the delay of the judicial decision weakens the competition decision as well as authority's reputation.

The suspension of fines enforcement, as well as the possibility of not having a mandatory deposit of the fine amount or a similar guarantee, while the case is under judicial review is appointed as a concern for the majority of the responding countries. Brazil reported that the enforcement of its decisions have significantly improved after CADE's attorneys started to be successful in requiring the judiciary to oblige parties to deposit the total amount of fine in order to appeal the decision. Turkey, on the other hand, observes that it is under discretion of the Council of State to suspend execution of the fine, as well as to require a guarantee to present the appeal.

Finally, it is worthy to mentioning that Spain also expressed concerns on the private enforcement of the competition law. To address this issue, it suggested events to discuss coordination on competition authorities and the judiciary and changes on the Civil Procedure Code. A still pending issue is what may happen to private enforcement actions and private damages action. An initial question refers to the necessity of having or not a competition authority decision to support a private request, or if the judiciary should require it.

In a recent ruling, a judge expressly suggested that Law & Economics should be included on the civil service exam for judges. Brazil succeeded in including it on the exam for public prosecutors. The consequence of this is that it would encourage Law schools to include the subject in their regular program.

Another suggestion was made by the Federal Judge Association to prepare booklets on specific subjects – unilateral conduct, cartel and merger analysis– to be used as a guiding reference.

## 8. Conclusions

The case studies have shown that regardless of the political system and the structure of the competition authority, or even the existence of specialized courts, competition policy results from the interplay between the competition bodies and the judiciary. The responses support a conclusion of last year's work: the judiciary plays an important role in the development of competition law in many jurisdictions. The responses indicate that judicial review can prompt improvements in agency analysis and decision-making. The higher the number of decisions taken by the competition authority, the higher the number and the amount of fines imposed, and the higher the number of challenges to merger and acquisitions, the closer the interplay and the higher the number of opportunities for the competition authority to explain or defend its decisions.

From the suggestions collected from the case studies, the recognition of a need for training in economic matters has to come from the judges themselves and be supported by the competition community in order to be most effective. The responses suggested initiatives to improve the interaction of competition authorities and the judiciary, among them the presence of the competition authority when its cases are been reviewed by the judiciary in order to explain the reasons of the decision. From the responding competition authorities' perspectives, the interaction with the judiciary is most effective when all judicial procedures are followed, and the reasoning of authority's decision is based on clear and sound legal and economic analyses.