Introduction

1. BIAC welcomes the opportunity to contribute to WP3’s follow up on the two discussions held in 2010 on procedural fairness and in particular to submit these written comments which focus specifically on judicial review of decisions by competition authorities. BIAC also looks forward to participating in the roundtable discussion of developments in procedural fairness and transparency.

2. In previous contributions1 BIAC has commented on the inherent difficulties of constructing a fair and just process under a regime where the authority not only investigates and prosecutes cases but itself decides the outcome of those cases and BIAC has a clear preference for decisions in competition cases to be taken by an independent judicial body. The discussions within WP3 in 2010 included suggestions to improve authority procedures, including where the authority is also the decision-maker. This paper looks specifically at how judicial review of authority decisions finding infringements of competition law or applying merger control powers can contribute to ensuring that, taken as a whole, a country’s competition enforcement system satisfies requirements of fairness and justice.

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3. The architecture and detail of the relationship between competition authorities and courts in each country depends on multiple factors including the overall institutional framework and judicial traditions, as well as the structure of the competition authority and its enforcement and decision-making powers and processes. Thus, there is no one ideal set of procedural rules for judicial review. BIAC’s comments will focus on those features of judicial review of decisions taken by competition authorities which, in BIAC’s submission, should be regarded as basic standards which any such procedure should deliver and by which any efforts to seek best practices should be guided. BIAC will also comment briefly on the role of the courts in approving consent agreements.

The Role of Judicial Review of Competition Authority Decisions

4. Judicial review plays a crucial role in respect of decisions taken by competition authorities. Basically, its objective is to eliminate erroneous decisions in the specific cases under appeal, thereby not only protecting the parties’ individual rights but promoting economic welfare for society as a whole. More generally, it ensures that the rule of law applies and is seen to apply. It safeguards due process and provides or enhances appropriate checks and balances, which is vitally important where the agency is an administrative body which both prosecutes and decides its own cases and may also play a significant role in setting enforcement priorities and shaping competition policy.

5. Judgments in decided cases provide guidance on the meaning and scope of substantive competition law, which is frequently not self-evident from the texts of the legislation (and may differ from the stated view of the authority itself), enhancing legal certainty both for citizens striving to understand and comply with the law as well as for the authorities in their subsequent work.

6. An accessible, effective and credible judicial review process which leads to the correction of legal and factual errors in authority decisions and to the adjustment of any unjust penalties imposed provides accountability for the authority and encourages rigour within the authority’s proceedings. A review procedure under which the authority never loses an appeal does not promote the reputation of the authority or the credibility of the law, any more than one under which the authority always loses. A well-balanced review underlines the legitimacy of authority decisions and, as a public process, enhances the overall standing and respect for enforcement efforts.

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2 This paper does not deal with appeals from competition decisions made by an independent judicial body.
3 Unsupported by the evidence, poorly reasoned or legally incorrect.
4 As well as in other cases where there may be shortcomings in respect of due process and fairness.
Particular Challenges in these Cases

7. There are particular challenges for courts charged with reviewing decisions by authorities in competition cases. In particular, traditional canons of construction such as looking to the ordinary meaning of the words or applying a strict construction to the legislative language are ill-suited to the application of competition law since competition law incorporates economic concepts such as "restriction of competition", "foreclosure", "abuse of market power" and many others which may be unfamiliar to judges with traditional legal backgrounds and which cannot be defined in the abstract. Instead these concepts develop constantly as economic research improves the understanding of competition’s role in helping markets work optimally.

8. Decisions in competition cases are important and challenging because they can interfere with the fundamental rights of the parties concerned, not only in cases where fines and imprisonment are imposed but also when decisions lead to mandatory changes to business practices, such as defining the customers with whom a party must deal or compelling the grant of licences to intellectual property.

9. In addition to these profound effects on the individual interests of the parties, competition decisions can impact, in some cases quite directly, on economic incentives for business and hence the well-being of society more generally.

When Judicial Review should be Available

10. The defendant should be able to appeal against any authority decision which is adverse to its interests, including not only decisions finding that competition law has been infringed (whether or not sanctions are imposed), or ruling on proposed merger transactions, but also against decisions which include any other material findings, such as those regarding market definition or the existence of market power.

11. The position of third parties in respect of decisions by competition authorities is fundamentally different from that of the parties in respect of whom the decision was made. In some systems, third parties who can demonstrate a sufficient interest are able to take a formal role in the proceedings and it may be appropriate for such third parties to have standing to appeal where they can demonstrate that their specific individual rights have been infringed by the decision, subject always to safeguards to avoid anti-competitive tactical appeals. In other cases there should be no need and no right for third parties to be able to appeal a decision.

An Effective Right of Recourse to the Courts

12. In order to be effective, the right of parties to appeal against an authority decision must be timely. It is trite but true that justice delayed may be justice denied and nowhere is this more true than in the case of appeals against authority decisions in competition cases.
13. The right to a timely appeal means that appellants who assert their rights diligently and cooperate properly with the court’s procedures can obtain judicial review of the authority's decision within a timeframe that will enable them to secure the practical benefit from any judgment on appeal which reverses or revises the authority's decision. In the case of decisions on proposed merger transactions, factors such as competing bids for the target, stock market fluctuations and the sometimes fragile economic position of the target may mean that to be timely an appeal needs to be completed within weeks rather than months. The same timescale may be necessary in other cases such as decisions in unilateral conduct cases which may lead to significant changes to a company's business model, may impact its commercial relations around the world and so create uncertainty as to its value and future viability. In some jurisdictions the scale of financial penalties alone may create similar uncertainty in some cases.

14. At the same time, the issues at stake in these appeals may involve review of a protracted administrative procedure leading up to the decision, extensive files and complex factual and legal disputes and economic evidence, meaning that a thorough review will require substantial attention. It is essential, in this context, that courts reviewing these cases have sufficient resources to address them promptly and efficiently, without any delays due to non-critical administrative steps5 or because of any backlog of the court's case work. Where the courts offer an expedited procedure for urgent matters, this should be available at the parties' option in competition appeals. If normal court procedures are insufficiently expeditious, these cases may need to be expedited systematically.

15. However speedy the judicial procedures may become, it will remain necessary to safeguard the parties' rights pending the outcome of their appeal. Parties should not be required to take any steps, including the payment of substantial penalties, which are irreversible or which may interfere with or damage the effectiveness and continuity of their business operations pending the outcome of the appeal. This will mean that an appeal should have suspensory effect on measures ordered by the decision, subject to the ability for the court to rule that a decision should have immediate executory effect in exceptional cases where this is shown to be essential whilst the appeal is pending.

Appropriate Qualifications and Expertise

16. In accordance with basic principles of effective judicial control, the court responsible for judicial review in these cases should consist of impartial judges immune from political influence. The significance of the court being and being seen to be impartial and independent will be particularly obvious in cases where the position of national champions or state-owned entities are at stake or where not all of the interested parties are from the agency's jurisdiction but is not limited to these cases, being

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5 For example, in some jurisdictions translation issues can lead to delays which should be avoided by reducing the burden of translation or ensuring sufficient resources so that translations can be effectively immediate.
equally important whenever the decision of an authority forming part of the public administration of the State is challenged.

17. The particular requirements for an effective review of findings in competition cases outlined in section II above mean that it is vital for the judicial authority hearing these cases to have appropriate expertise, including an understanding of the economic underpinnings of competition law. This expertise needs to be sufficient to evaluate the competing economic theories and expert opinions which are of ever-increasing importance in competition cases. BIAC is aware of initiatives to provide judicial training in competition law6 and would urge that such training be a mandatory requirement for all judges involved in hearing and deciding these appeals. Specialist panels or tribunals have been established in some jurisdictions which may facilitate the acquisition and maintenance of the necessary knowledge and expertise among the judiciary but is not, in BIAC’s view, essential provided there is sufficient investment in judicial training of members of the general court hearing these cases.

18. Even a well-trained and experienced judiciary will need to be able to call upon effective support, including court-appointed experts in economics and other disciplines as well as industry experts where the issues at stake in the appeal require this. The resources available to the court should include access to such support.

19. International organizations including the OECD can usefully promote the development of appropriate judicial expertise by sponsoring training programmes and opportunities for judicial exchange. BIAC would suggest that this work should extend not only to OECD member countries but also, crucially, to all candidate countries for OECD membership and other countries with which the OECD co-operates through enhanced engagement and as global partners.

A Full Review

20. BIAC submits that 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 fulfill its role7 and meet the challenges involved in these cases which involve not only the vital interests of the parties but frequently their fundamental rights8. 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 case9. A full review enables the court to assess the

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6 Such as the UK Enterprise Act 2002, Sch 2, para 8, which imposes an obligation on the President of the Competition Appeal Tribunal to arrange training for the Tribunal's members.
7 As summarised in section II above.
8 See section III above.
9 Indeed, Art 6 of the European Convention of Human Rights, to which many OECD members states are party, requires that where an administrative authority imposes a sanction which is penal in nature like fines in competition cases there must be a possibility for subsequent judicial control by a court having full jurisdiction to review and revise all elements of fact and law involved. See for example Affaire A. Menarini Diagnostics (Req 43509/08, judgment of 27 September 2011 of the ECHR).
correctness, on the merits, of the authority's decisions, not just its legality. It also enables the court fully to review the penalty. In practical terms this means that the court should

a. 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;

b. 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;

c. confirm whether the burden of proof is met;

d. verify that due process and transparency have been respected; and

e. 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.

21. In this context, courts should be wary of excessive deference to the administrative authority and undertake their own full review, rather than, for example, relying on the authority's assessment of matters of fact.

Cases Resolved on Consent

22. Where a country's competition law provides for separate bodies responsible for enforcement and adjudication, the question arises of the proper role of the judicial body where the enforcement authority has entered into a consent agreement, particularly one entered into with parties to a merger.

23. With respect to judicial review of these consent agreements, competition law regimes need to strike the right balance between two considerations. First, providing parties to a proposed transaction reasonable certainty that a proposed resolution negotiated between the parties and the enforcement authority will be accepted by the courts; and on the other hand, ensuring that the judicial body has appropriate oversight over the consent order process – including taking into account legitimate concerns raised by affected third parties, for example in relation to errors in law or excess of jurisdiction on the part of the enforcement authority.

24. A consent agreement should not be subject to a full review on the merits. In contrast to the authority's enforcement decisions discussed above, the rights of the parties to a consent agreement require no such full review. To the contrary, legal certainty requires that there be a strong presumption that consent agreements will be approved by the judicial body. However, care should be taken to ensure that the
judicial body plays a meaningful role in ensuring the fairness and thoroughness of the enforcement authority's review and decision-making process.

Conclusions

25. BIAC submits that judicial review respecting the standards outlined in this brief paper is essential to fulfill the crucial role judicial review needs to play in competition cases and would urge the Competition Committee to work towards ensuring that such standards be accepted as a minimum for judicial review of decisions taken by administrative authorities in competition cases and to work towards promoting judicial training in competition law and economics and exchanges among OECD members, candidate countries and other countries with which the OECD co-operates.