



International Competition Network
Competition Policy Implementation Working Group: Sub group 3

Competition and the Judiciary

A report on a survey on the relationship between Competition Authorities and the Judiciary

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Contributions to this report were received from the following ICN member agencies:

- *Brazil's Council for Economic Defense*
- *Canada's Competition Tribunal*
- *Chile's Fiscalía Nacional Económica*
- *Chile's Tribunal de Defensa de la Libre Competencia*
- *European Community's Directorate General for Competition*
- *Jamaica's Fair Trading Commission*
- *Mexico's Federal Competition Commission*
- *Netherlands' Competition Authority*
- *New Zealand's Commerce Commission*
- *Peru's Instituto Nacional de Defensa de la Competencia y de la
Protección de la Propiedad Intelectual*
- *Poland's Office of Competition and Consumer Protection*
- *Portugal's Competition Authority*
- *Romania's Competition Council*
- *South Africa's Competition Commission and Competition Tribunal*
- *Spain's Directorate General for Competition and Competition Court*
- *Tunisia's Competition Council*
- *Turkey's Competition Authority*
- *Zambia's Competition Commission*

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COMPETITION AND THE JUDICIARY

Introduction

The report of CBCPI Working Group presented at the 2003 annual conference identified five key stakeholders that may impact the implementation of competition law in developing and transition countries: (i) government, (ii) civil society, (iii) the judiciary, (iv) the business community, and (v) the community of competition "professionals".

Having these key elements in mind, and after working on competition advocacy issues in regulated sectors, SG3 continued this year with work on competition advocacy addressing the relationship between competition authorities and the judiciary.

The independent and effective review of competition agencies' decisions by courts is a necessary, critical, and important aspect of many well-functioning competition regimes. A judiciary familiar with competition law including its economic aspects is an important element of a country's competition policy system.

Competition goals, instruments and benefits are not always understood by society. In developing and transition countries, in particular, the use of competition policy as a tool to aid to promote market reforms can be challenging for this reason. Society in these countries, including judges, is more accustomed to government intervention and price controls than to competition policy goals. To address these challenges faced by courts and competition agencies alike, SG3 undertook a study on the relationship between competition agencies and the judiciary.

Questionnaire's Structure (Methodology)

The subgroup developed a questionnaire analyzing the role of the judiciary and its interaction with the competition authorities in the implementation of competition policy. The questionnaire was designed for respondents from developing and transition countries but was also answered by several developed countries. The experience from countries that are at different stages of institutional development has proven to be very informative and useful in the preparation of this report.

The questionnaire was divided into four sets of questions, so as to deal separately with the different aspects of the relationship between courts and competition agencies.

Section 1 seeks to understand the structure of a competition authority's decisions in each country. It also provides the context for the answers to the remaining sets of questions in sections 2-4.

Section 2 refers to possible interventions by the judiciary before the final decision of the competition authority. These questions are important because they aim to measure the judiciary's level of involvement during the investigation, as well as the role of the judiciary in the decision-making process.

Section 3 focuses on the role of the judiciary after a competition authority has taken its final decision. Questions in this section are separated among merger cases, conduct/infracton cases, and enforcement of monetary sanctions so as to determine the differences in the judiciary's role in these three kinds of issues. The questionnaire splits each of these sets of questions into three subsets of questions.

Section 4 gathers information on measures competition agencies employ in order to resolve various difficulties they face with respect to the judiciary.

Before reporting on the results of the survey, it is important to note that the questionnaire did not seek to address the merits or correctness of judicial decisions. Rather, the objective was to examine competition authorities' perceptions about instances where courts and competition authorities come to different conclusions.

It is important to emphasize that the responses to this questionnaire are based on competition authorities' assessment and perceptions of judicial intervention and the answers therefore are subjective. Moreover, some of the respondents from new agencies may have limited experience with judicial intervention in cases because of a limited number of cases underway or completed.

Answers' Profile

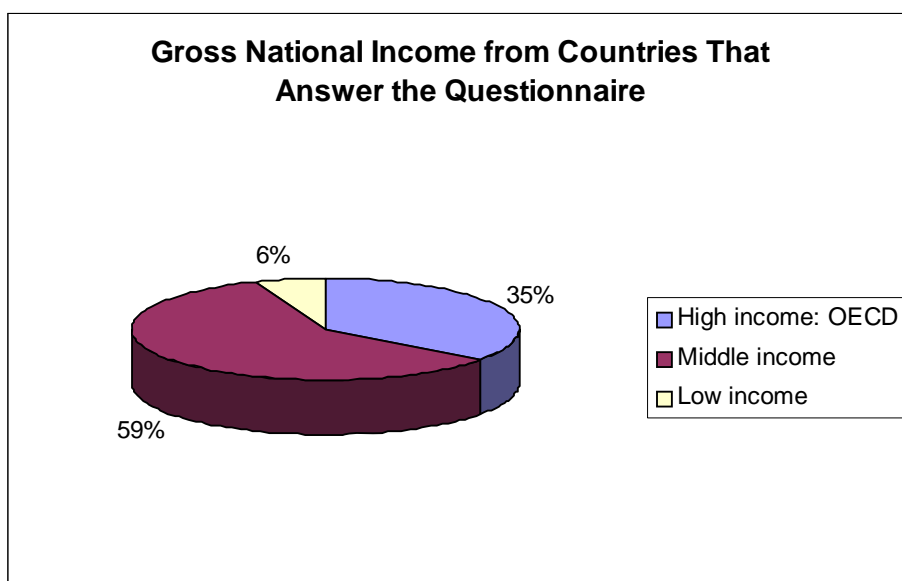
Eighteen agencies from 17 jurisdictions answered the questionnaire.¹ The respondents represent almost 20% of ICN members.

The Questionnaire was sent to those ICN members who voluntarily responded to an open call made by SG3 by the end of October 2005. Additionally, SG3 chairs asked some developing countries from Latin America, Europe and Asia to contribute as well. Some of them answered the invitation.

Among the respondents, 11% were specialized tribunals within the judiciary, 11% were administrative decision-making bodies, 22% were administrative investigation bodies and 56% were agencies that unify investigation and decision-making under one single body. All but one of the respondents had jurisdiction over mergers as well as anticompetitive conduct.

In terms of its economic characteristics, the sample of survey respondents is distributed as shown in the graphic below²:

Graph 1

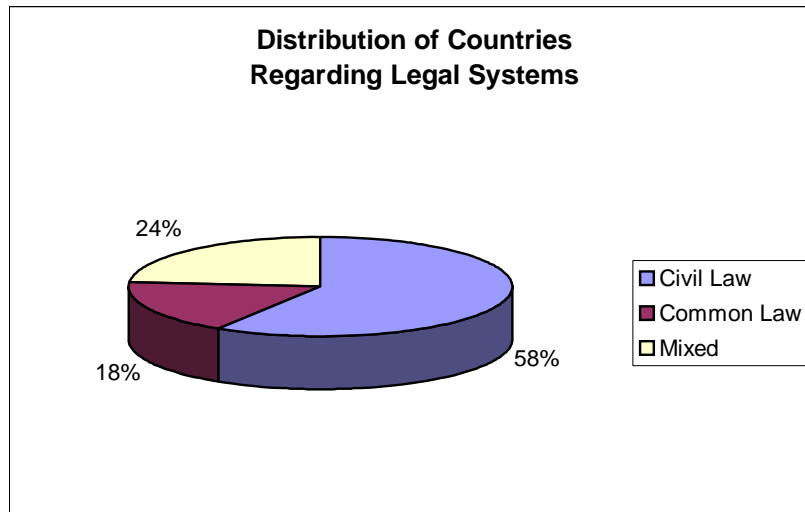


¹ From Chile, we have received answers from the investigative body (*Fiscalia*) and from the judicial tribunal (*Tribunal de Defensa de la Competencia*).

² Source: *World Development Indicator*. World Bank. Countries were divided among income groups according to 2004 gross national income (GNI) per capita, calculated using the World Bank Atlas method. The groups are: low income, \$825 or less; lower middle income, \$826–3,255; upper middle income, \$3,256–10,065; and high income, \$10,066 or more.

Regarding the legal system adopted in each country, the sample is distributed as illustrated in the graphic below³:

Graph 2



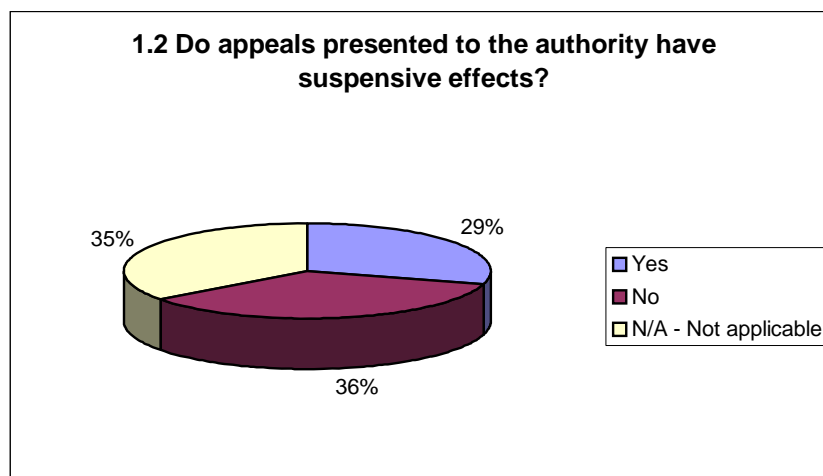
The Results

Section 1

The set of questions in this section provides a general overview of the impact of judicial review on a competition authority's decision.

The responses to questions about the suspensive effects of the competition authority's decisions by the judiciary are demonstrated on Graphs 3 and 4⁴:

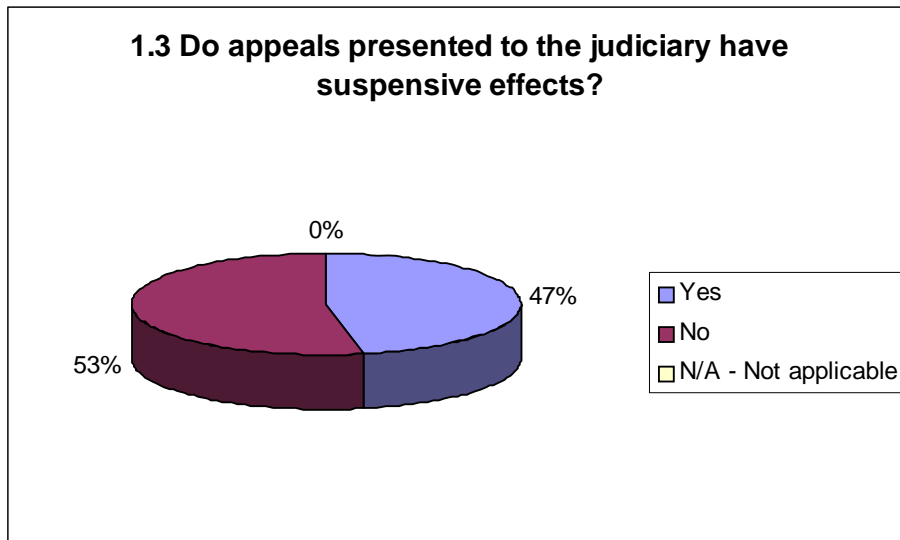
Graph 3



³ Source: Civil Law Section, Faculty of Law, University of Ottawa. (<http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde.html>)

⁴ All remaining Tables and Graphics are based on answers to the questionnaire.

Graph 4



Decisions on appeals to courts of a competition authority's decisions take time. The survey asked whether a competition authority's decision is suspended pending an appeal. For the majority of respondents, appeals to the judiciary do not have suspensive effects, allowing the decision to become enforceable while the appeal is being considered⁵.

Another question is if the judiciary is empowered to make a substitute decision when reviewing a competition authority's decision. For 47.1% of the interviewees, the judiciary has the authority to make a decision, in 23.5% of the responding jurisdictions the judiciary has to refer the decision back to the competition authority and for 29.4% it is a discretionary action, i.e., the judiciary can take a decision or refer the decision back to the competition authority. Overall, 76.5% of the competition authorities may have their decision overruled by judicial revision without a referral back to the agency.

In all countries the competition authority can appeal a decision of a lower level court to a higher level court.

Regarding perceptions about an increase in appeals to the judiciary over the past 3 to 5 years, 53% of the survey respondents answered that they believe appeals have increased, 41% of respondents answered that they believe appeals have not increased. For 6% this question did not apply.⁶

Among respondents that answered that judicial appeals have been increasing, 78% were from developing countries. One hypothesis is that these numbers may be a sign of institutional development in these countries, showing that increased enforcement efforts are leading to more appeals to the judiciary. However, any such conclusion may need further testing⁷.

⁵ If appeals suspend the enforceability of a decision, the impact of a decision will tend to decrease, particularly since appeals take time.

⁶ Because their decisions were never appealed before.

⁷ The indication of further studies on this Report only intends to demonstrate the limitations of the survey. The analysis of the questionnaire's answers suggested some other more complex questions that were not addressed on its design.

Section 2

This set of questions focus on judicial measures that can be taken during the investigation/authority’s decision process.

It is important to note that this kind of judicial intervention does not apply to 55.6% of the respondents, so the results presented are only for 44.4% of the interviewees or 8 respondents.

A majority of these respondents (62.5%) share the view that the judiciary only rarely intervenes in the investigation process carried out by the competition authority. The replies also indicate that most injunctions are related to procedural issues and concern conduct cases.⁸

Although 62.5% of the remaining respondents said that these judicial measures are rarely granted, five of them indicated some possible reasons for such measures. These reasons are demonstrated on Table 1 below:

Table 1
Reasons Why Injunctions are Granted

Judges are not sufficiently familiar with the economic concepts need to assess competition cases	There are difficulties that hindering competition agencies to explain their views to the judiciary	The judiciary considers that the competition authority abuses its investigative powers	Competition authorities have less resources at their disposal to defend their case	Other reasons, such as:
				Judges required to make hasty decisions on complex facts
2	2	1	3	2

Table 1 above shows that some competition authorities feel that there is an imbalance between the authority and the appellant parties before the judiciary. Although the study did not specifically qualify this issue, lack of resources was noted to be a problem for the authorities. This imbalance could be concluded from the 50% of the answers indicating that “there are difficulties that hinder competition agencies to explain their views to the judiciary” and that “Competition authorities have fewer resources at their disposal to defend their case.” This majority of responses cited reasons that are perceived shortcomings by the competition authorities, and not of the judiciary.

Regarding the negative effects that such measures can have (Table 2), the main concern seems to be the delay⁹ in competition proceedings for five of the eight countries answering this set of questions, as illustrated in Table 2 below. Moreover, four

⁸ See the glossary at the end of the report.

⁹ E.g. by changing proof proceedings, intervening in evidence gathering etc – without formally suspension of the process.

interviewees identified the automatic suspension of the process as another negative effect¹⁰.

Table 2
Primary Effects of Judiciary Intervention

Proceedings before competition authority are automatically suspended if the judge grants the injunction	There is a considerable delay in the competition of the proceedings	Investigation is closed as a result of numerous injunctions	Judges can directly intervene on evidence gathering procedures	Others, Such as:	N/A
				There is no specialized court When judiciary prevent the presentation of some information it sometimes jeopardize the success of investigation	
4	5	2	5	2	1

Section 3

This section analyzes measures taken by the judiciary after the competition authority has made its decision (e.g. to prohibit a merger or approve it conditionally or unconditionally; to condemn a company for having engaged in anticompetitive conductor restrictive agreements; to impose fines on a company for its anticompetitive behaviour, etc.).

The first subset of questions was designed to provide a general scenario about what happens –or may happen- after a competition authority’s decision. The subsequent questions are more specific as to potential factual situations. These questions divide the overview questions into specific developments related to merger cases, conduct cases, and the enforcement of monetary sanctions.

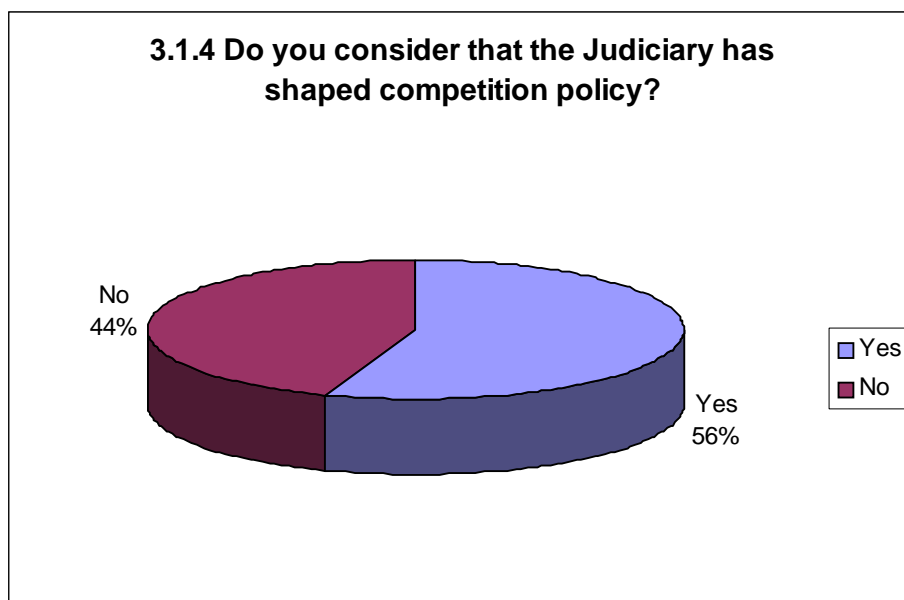
In the general overview section, 83.3% of responses indicate that the competition authority decision is enforceable immediately¹¹, without necessity of any additional procedure.

Another question in this subset was about the perception of whether the judiciary has shaped competition policy¹². Results can be seen on Graph 5 below.

¹⁰ This smaller set of responses is a small universe of responses and not necessarily representative of competition agencies as a whole. Caution should be made in drawing strong conclusions from this seven agency set of respondents.

¹¹ Eighty-eight percent of interviewees have a department that monitors a decision’s implementation.

Graph 5



Although the distinction between common and civil law approaches and the complexities that each approach entails are beyond the scope of this survey, it is interesting to note that only one of the respondents who answered "NO" to the question about the judiciary shaping its policies was from a common law country. It is possible that differences between civil law systems on the one hand and common law systems on the other hand may lead respondents to view differently what is meant by the judiciary "shaping" competition policy. To "shape" competition policy can mean building a policy and developing it further by determining its purposes and the interests it should protect in the absence of comprehensive and detailed competition laws and regulations (as is done by the judiciary in a common law system). To "shape" competition policy can also mean interpreting the scope and objectives of existing legislation (as is done by the judiciary in a civil law regime). If further work is to be done in this area, it might be interesting to flesh out some of these complexities to explain how each system interacts with the judiciary.

Among the respondents who answered NO to this question, only one is from a developed country with a relatively high level of institutional maturity regarding competition policy. One might conclude that the judiciary plays an increasingly prominent role in shaping competition policy as a jurisdiction builds experience with competition law.

Regarding the main reasons why competition authorities' decisions are overturned, Table 3 shows that the most quoted answer in the survey is that there are divergences in the way competition authorities and the judiciary interpret competition rules. Nine of 18 interviewees (50%) responded this way. Of this group, 56% out of the nine are from developing countries.

¹² Answered by all respondents.

The second most cited response was that judges are not sufficiently familiar with the economic concepts needed to assess competition cases. Eight of 18 interviewees cited this reason (44.4%), 75% of these eight respondents were from developing countries.

The next most given responses were that (i) there are problems related to the calculation of fines; (ii) the standard of proof adopted on competition cases is considered not appropriate and (iii) there are problems on procedural issues. Items (i) and (ii) were marked by six of the 18 interviews (33.3%) and among those, in item (i) 50% were developing countries and in item (ii) 66% were developing countries. Item (iii) was marked by five of the 18 interviewees (27.7%), being 60% of them developing countries.

Items (ii) and (iii) may show that competition authorities' procedures may need to be reviewed and improved in order to meet judicial standards.

Table 3
Main Reasons Why Your Decisions Have Been Overturned

Judges are not sufficiently familiar with the economic concepts need to assess competition cases	There are difficulties that hindering competition agencies to explain their views to the judiciary	The standard of proof adopted on competition cases is considered not appropriate	There are problems related to the calculation of fines	There are divergences in the way competition authority and the judiciary interpret the competition rules	The judiciary considers that the competition authority abuses its investigative powers	The judiciary considers that competition authority is not competent to assess a particular conduct or merger case	The standard of review applied by the judges is very comprehensive	There are problems on procedural issues (*)	Other (**)	NA (Never happened)
8	3	6	6	9	1	0	4	5	2	3

(*) Definition of interested party; Merger - (i) deadline expiration, condition of interested parties and (iii) legal value of the proceedings before the competition agency; Conduct - (i) concerning deadlines; interruption of deadlines and (iii) confidential condition of documents included in the administrative file; Failure to abide by the requirement to let the parties know about dissenting votes of the Board of Members regarding the case.

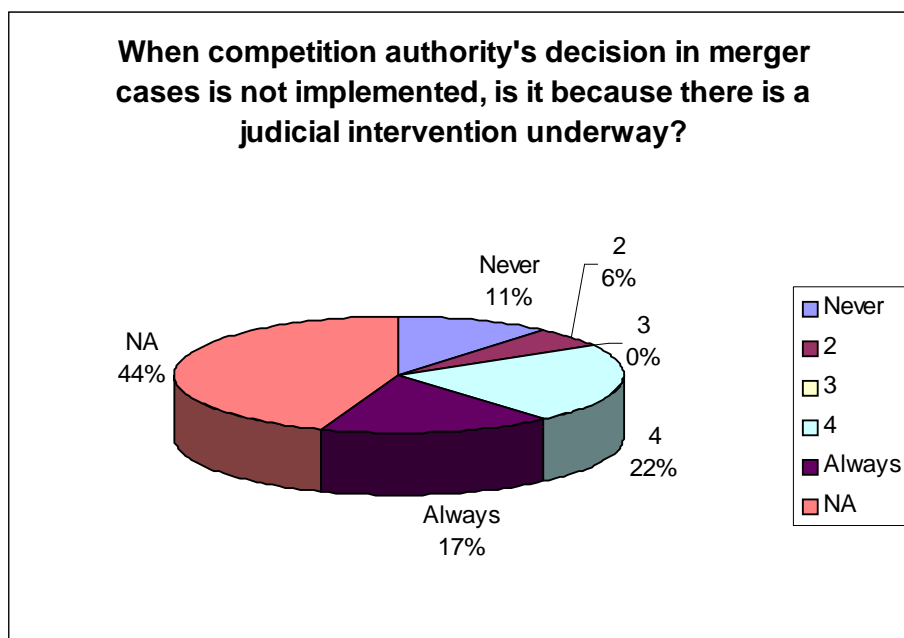
(**) Different interpretation of the law; appeal courts are very conservative; annulment because Board Members involvement in the investigation.

The survey results in Table 3 indicate that competition authorities' decisions can be overruled for a variety of reasons. It is important to note, however, that none of the respondent agencies had its competency questioned by the judiciary (problems with authority or that the competition authority abuses its powers was not considered as a problem). This result suggests that the judiciary recognizes the powers of the authority to make a competition decision and it also recognizes the validity of the decision.

Section 3a of the Questionnaire – Mergers

Regarding merger cases, answers from the survey indicate that competition authorities' decisions are implemented always or almost always for 77.8% of the respondents. When the decision is not implemented/complied with, it is as a result of a judicial intervention, as Graph 6 demonstrates below:

Graph 6



The great number of “Not Applicable” answers is due to reasons such as: (i) the respondent does not have merger control; (ii) responses are from tribunals which are already part of the judiciary, (iii) the competition authority has never had an appeal on a merger case; and (iv) the interviewee is from an investigation body that does not take decisions.

The appeals filed in merger cases are always or almost always on substantive issues (merits of the case) for 44.4% of interviewees and on procedural issues for 33.3% of the interviewees¹³, meaning that for this sample, merger cases are appealed more often on the merits.

As to the question whether competition authority merger decisions are upheld by the judiciary, 9 out of the 18 interviewees (50%) quoted that this question is not applicable. Reasons cited for that were: (i) the respondent does not have merger control; (ii) the number of cases completely decided by courts is not representative; (iii) the competition authority has never had an appeal on a merger case; and (iv) decisions are taken within judiciary. One interviewee did not answer this question. Our sample was therefore reduced to 8 respondents.

Sixty-two percent of these 8 remaining interviewees quoted that decisions in merger cases would always or almost always be confirmed by the judiciary. This sample suggests that on mergers the judiciary generally seems to be in accordance with what competition authority decides.

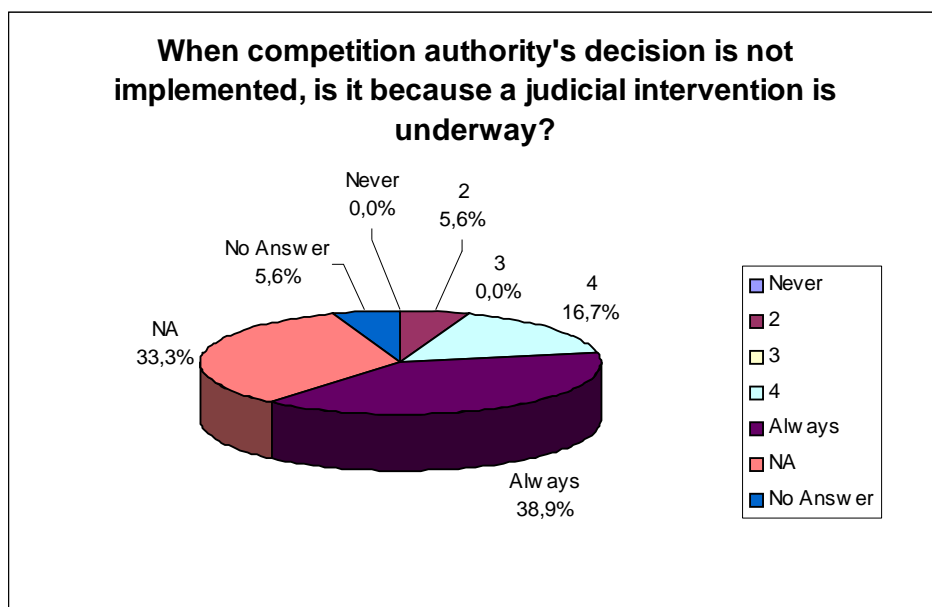
In the instances where the judiciary modifies a competition authority’s merger decision, the survey responses indicate that the bases for doing so are both procedural and substantive. Five interviewees (63%) cited this factor.

¹³ Methodology explanation: interviewees were asked to indicate how frequently appeals of merger cases are filed on grounds of substance and on grounds of procedure, separately. If a respondent chose always for substance and always for procedure it means that a party files appeal always on both grounds. The authors of the questionnaire were not concerned about any particular kind of combination but with the final result of all interviewees.

Section 3b of the Questionnaire - Conduct

Regarding conduct cases, the survey answers indicate that a competition authority's decisions are implemented always or almost always for 56.6% of the interviewees. When a decision is not implemented, it most often happens in cases where there is a judicial intervention underway, as Graph 7 demonstrates.

Graph 7



The conduct case appeals filed are always or almost always on substantive issues (merits of the case) for 66.7% of interviewees and on procedural issues for 33.3% of the interviewees¹⁴, meaning that, for this sample, conduct cases are also appealed more often on the basis of the merits.

As to the question about how frequently the judiciary upholds competition authority's decisions in conduct cases, 6 out of the 18 interviewees (33.3%) quoted that this question is not applicable. Reasons cited for that were: (i) decisions are not enforceable; (ii) the number of cases completely decided by courts is not representative, (iii) the competition authority has never had an appeal on a conduct case; and (iv) decisions are taken within judiciary. Two interviewees did not answer this question.

Our sample was therefore reduced to 10 respondents. According to 40% of these 10 remaining interviewees, competition authority decisions on conduct cases are upheld by the judiciary always or almost always, while 50% of respondents quoted that their decisions are upheld rarely or half of the time. Ten percent quoted that the judiciary never upholds their decisions. This seems to differ from the responses for merger cases, where respondents indicated a higher rate of acceptance by the judiciary. The questionnaire did not assess it, but an additional survey on this disconnect could clarify this issue.

Fifty percent of respondents to whom this question was applicable indicated that judicial decisions overturning competition authority decisions are commonly based on both procedural and substantive issues.

¹⁴ See footnote 12.

Section 3c of the Questionnaire - Fines

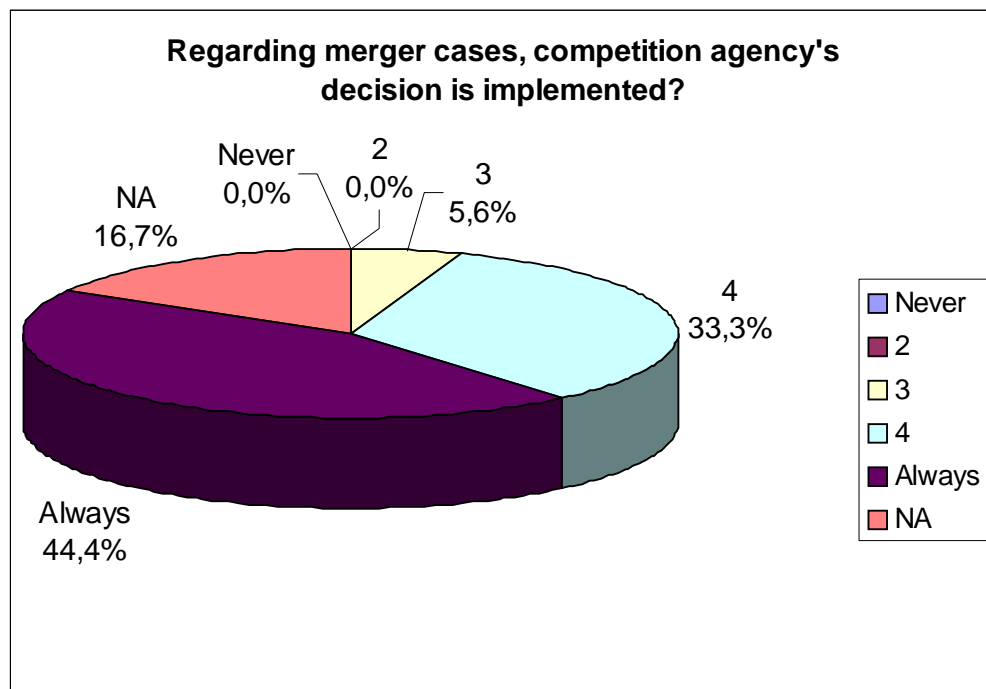
Regarding the enforcement of monetary sanctions, our sample was reduced to 14 responses, as this question was not applicable for four interviewees.

Answers indicate that fines imposed by the competition authorities are collected always or almost always for 57.1% of the sample. When they are not collected, it most often happens in cases where there is a judicial appeal underway (according to 78.6% of the interviewees).

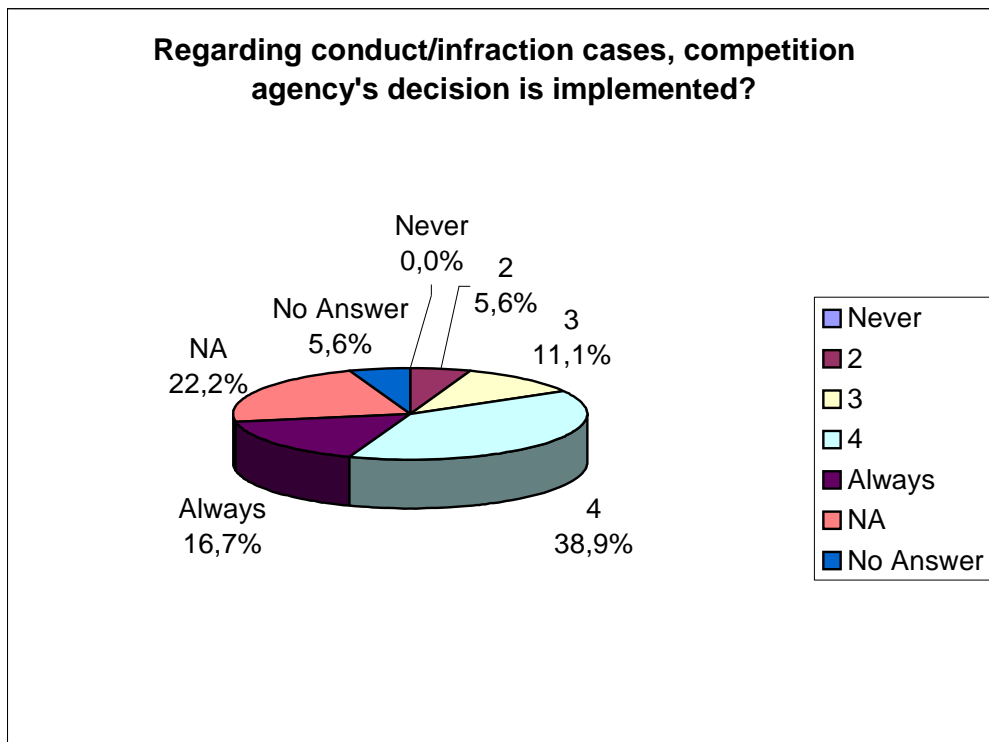
Comparing statistics on competition authority decisions implemented in merger cases (77.8% for always/almost always), decisions implemented in conduct/infraction cases (56.6% for always/almost always) and collecting of fines (57.1% for always/almost always), the questionnaire results suggest that conduct/infraction cases and enforcement of monetary sanctions are the areas where decisions taken by the authority are immediately enforced less frequently.

We can also see this result comparing the other possible answers (half the time, rarely and never) in the three cases as demonstrated in Graphs 8, 9 and 10 below:

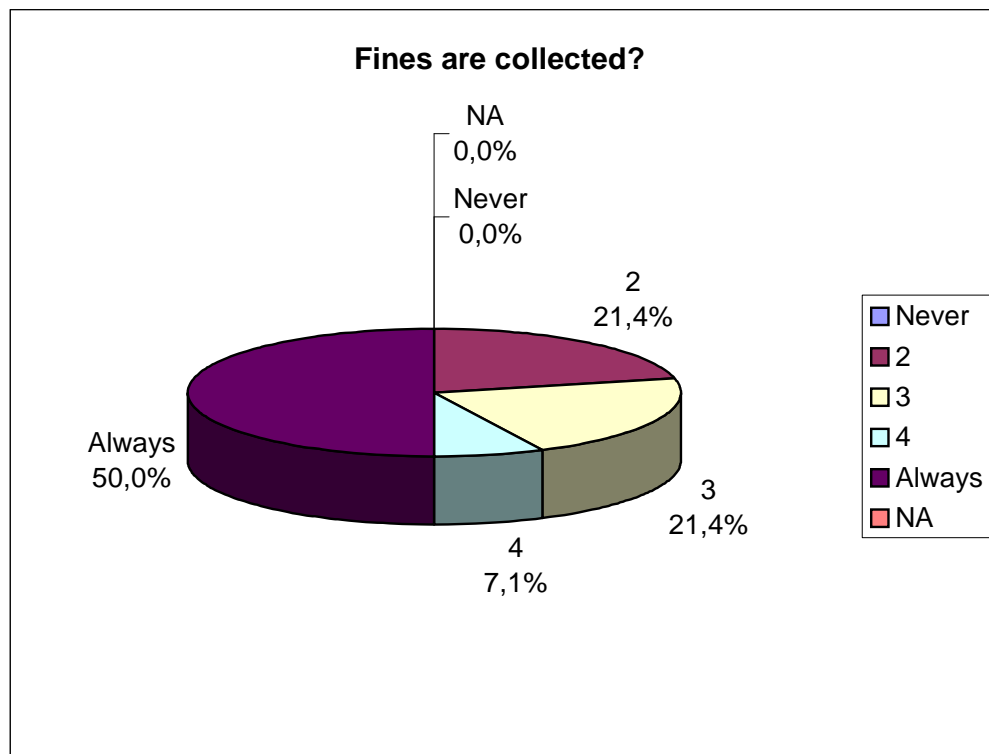
Graph 8



Graph 9



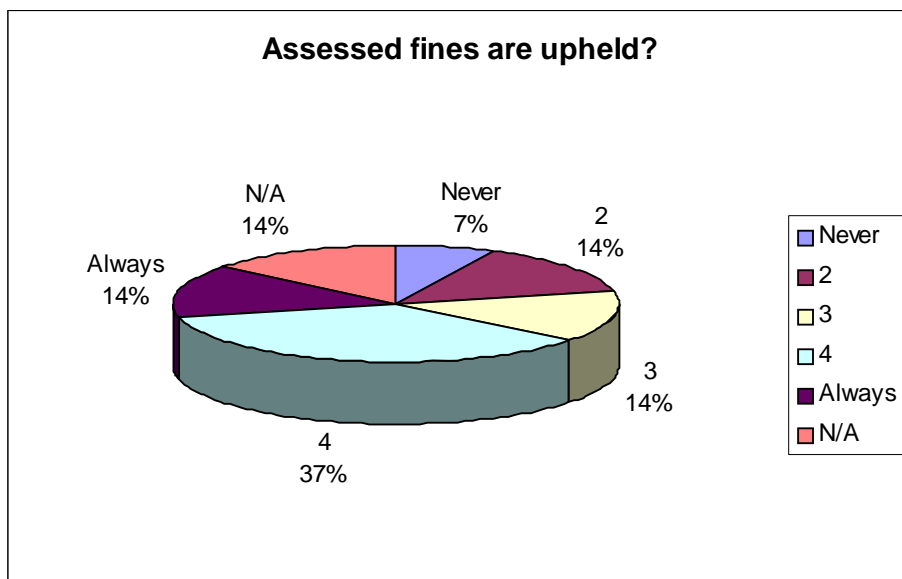
Graph 10



With these graphs we see that the other options (half of the time, rarely and never) have a higher percentage of answers in the cases of conduct cases and imposing of fines, compared to merger cases.

Graph 11 displays responses to the question of whether fines are upheld after having been subjected to judicial review. Only 14% of the interviewees replied that fines are always upheld; 37% replied they are almost always upheld; and 14% of the respondents replied that fines are upheld half of the time. This outcome suggests that the success on enforcement of fines the way it was imposed by competition authorities still remains an issue for a majority of jurisdictions researched.

Graph 11



Of total responses, 43% of interviewees answered that the imposition of collateral security fines on appeal are mandatory. The granting of the collateral security has two direct effects: (i) appeals are not filed exclusively to avoid immediate payment, and (ii) in theory, it prevents the filing of an appeal without any basis. In this sense, the collateral security can reinforce the competition authority’s decision.

Section 4

Regarding what countries are doing to solve difficulties they have faced, the questionnaire posed two questions.

The first one was intended to determine whether competition authorities have contacted the judiciary for matters other than on specific cases. According to the responses, 77.8% of the interviewees have done so. This suggests that competition agencies are already aware of the great importance of interaction with the judiciary in order to promote competition concepts, goals and instruments.

The second question asked competition authorities to identify shortcomings in the interaction with the judiciary and the measures actually taken to solve them. To compile these answers, the study aggregated similar responses and created eight answer categories.

The perceived lack of specialized knowledge on competition issues by the judiciary was mentioned most often by the interviewees. The necessity for more specialized staff and/or resources allocated to the competition authority, the long average duration of reviews, the need for amendments to the law and the of lack opportunity to talk to judges were other common concerns mentioned by the interviewees.

The study further qualified the results by the level of institutional development of each agency, in order to see the different types of concerns under each different level of institutional development. Of the 11 responses regarding the lack of specialized knowledge as a shortcoming, 8 of them were made by developing countries, which may indicate that this is a concern in these countries that have less experience with competition issues and are still building and consolidating its institutions. Developed countries quoted the long average duration of reviews more often as a shortcoming (2 of 3 responses).

Table 4

Lack of specialized knowledge on competition issues by Judiciary	Investigation body needs more specialized staff and/or resources	Lack of faculties to investigation body (leniency programmes, for example)	The long average duration of reviews	Lack of authority to impose fines	Lack of opportunity to talk to judges on general matters and not only on a case basis	Different views on law interpretation	Need for amendments to the law	Not answered
11	3	1	3	1	3	2	3	1

The survey also indicates that some jurisdictions are attempting to address the perceived lack of specialized knowledge. Over half of the interviewees replied that they have organized joint seminars and workshops with the judiciary.

Remedial measures can be seen in Table 5 below:

Table 5

Joint Seminars and Workshops	Sending Materials to Judges	Formal meetings to discuss the case challenged	The judicial tribunal has economist	Improve staff/resources the investigation level	Amendments to the law (*)
9	1	1	1	1	1

(*) Amendments proposed in order to (i) facilitate review of cases at the Supreme Court; (ii) facilitate and clarify the standard of proof to be used.

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 pendency of 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.

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Glossary

Conduct cases means any case related to infraction to the law by an anticompetitive practice; e.g., abuse of dominance and cartels. This does not include mergers.

Decision means any final decision issued by the competition authority, be it a decision on a merger case (prohibition, conditional or unconditional approval), or a decision on a conduct case (e.g. condemning companies for anti-competitive behavior; decision imposing fines or remedies).

Fines means the penalty applicable on conduct cases when party is condemned for an anticompetitive practice, fines imposed for procedural infringements and/or for non-compliance with the decision.

Injunction means any kind of juridical measure that can be granted by the judiciary during the investigation process.

Suspensive Effects means that the competition authority decision can be enforced until the judiciary has ruled over the appeal. A suspension of the enforceability can either be granted by the judge on the parties' request or it can be an automatic consequence of the appeal (*de iure*).

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