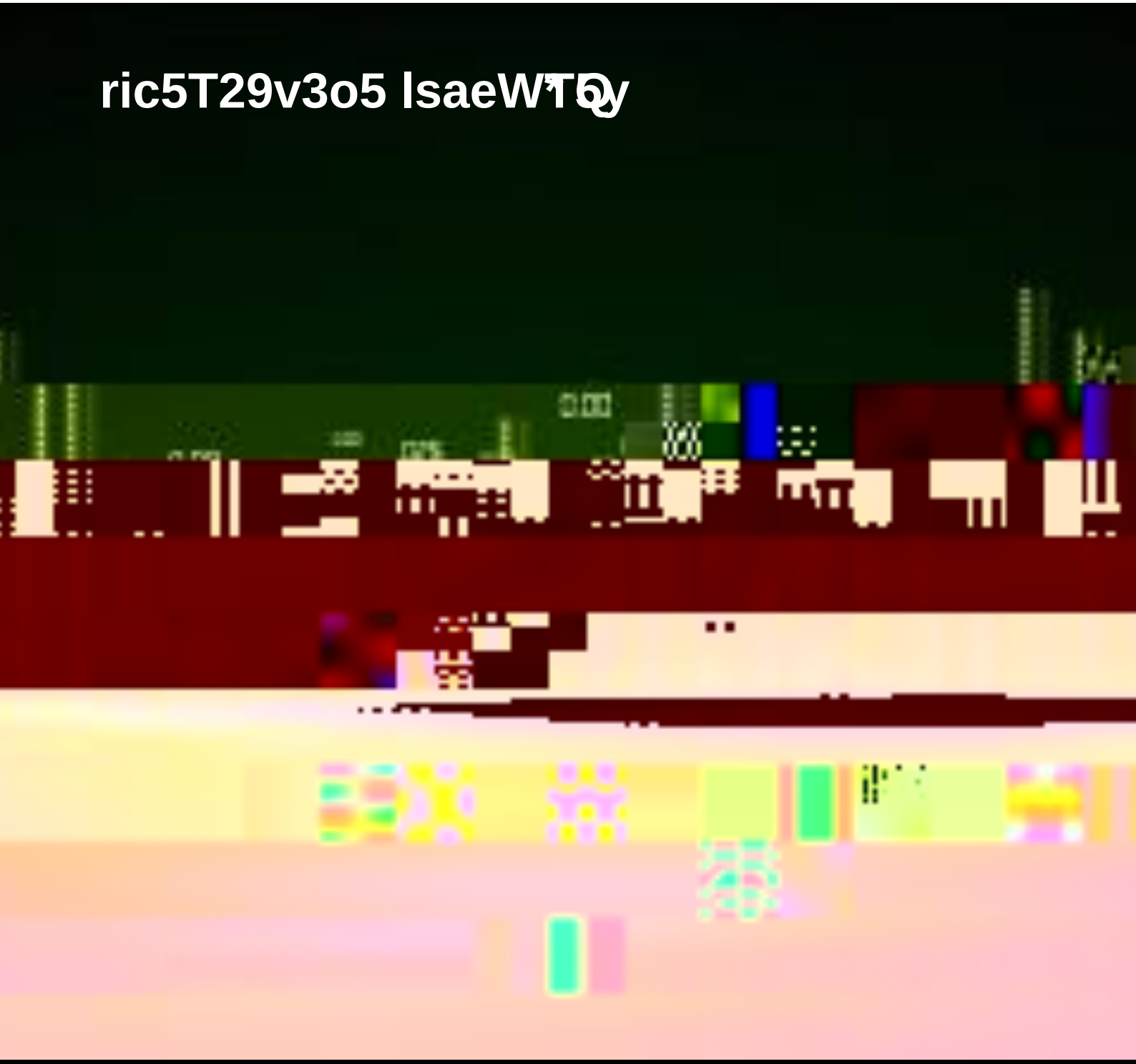

Judicial Scrutiny of Financial Penalties in Competition Law: A Comparative Perspective

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Abstract

The study proceeds to a comparative analysis of the judicial scrutiny of financial penalties for competition law infringements in the following jurisdictions: European Union, United States, Germany, United Kingdom, France and Chile.

Keywords: fines, financial penalties, judicial review, judicial scrutiny, proportionality

JEL Classification: K21, L40, L49

CENTRE FOR LAW, ECONOMICS & SOCIETY

UCL FACULTY OF LAWS

Judicial Scrutiny of Financial Penalties in Competition Law: A Comparative Perspective

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Contents

A. General discussion on the role of judicial scrutiny and discretion[1]

Mainstream law and economics perceives judicial review as having primarily an error-correction function[2]. Judicial review may also play additional roles, such as to guarantee procedural fairness through the protection of the rights of the parties, to ensure accountability with the promotion of deliberative and administrative processes or to ensure consistency, from a legal perspective, in the action of the reviewed authority, or finally to protect substantive fundamental rights, such as private property or the freedom of commerce[3]. At the same time, judicial review may impose costs on the regulators, the undertakings and the wider economy and may affect the effectiveness of the action of competition authorities. An intensive judicial scrutiny of the action of the authorities may discourage competition authorities from taking action, when this may be judged controversial, because of the fear of being overturned by the courts. Hence, the effectiveness of competition law enforcement may be negatively affected, in particular general deterrence. Furthermore, the principle of the separation of powers may lead courts to impose some self-restraint

circumstances.

When the implementation of competition policy is entrusted to an independent administrative authority (administrative enforcement system), such as an integrated competition law agency exercising the functions of case selection, investigation, examination and adoption of the final decision, the courts exercise a merely

exercising an appellate function. In addition, in the context of an administrative enforcement system, one may advance the argument that policymaking should not be delegated in the hands of politically unaccountable judges but remain in the hands of politically accountable agencies. The legal framework needs, therefore, to strike a careful balance between the need to ensure accountability and accuracy of the interventions of competition authorities, without inadvertently holding back their action and transforming the courts into com

law, the decision was taken for improper purposes, when the authority impermissibly expands its discretion or takes into account unlawful considerations in its decision,

Irrationality/unreasonableness in the exercise of any discretion (a concept which can be interpreted in different ways)[7], and

Procedural impropriety: when, for instance, the authority has not followed the right procedures, such as the requirement to give reasons, the right to be heard and the rule against biased decision-making.

The courts also accept that a **breach of legitimate expectations** constitutes a discrete ground for judicial review, when an individual has been given an expectation that the authority in charge has not fulfilled.

These categories are nor exhaustive nor mutually exclusive. Although the process of judicial review and its emphasis on the legality of the autho
the court will not engage thoroughly with questions of fact and policy but will instead focus on issues of law, the boundaries between these three categories are often difficult to establish, with the result that their relation can be better explained as forming a *continuum.* This is the reason why a manifest error in the assessment of facts may constitute a ground for review, without the court being expected to conduct a full factual assessment.

In contrast, a **review on the merits** (or often referred to as an **appeal process**) will examine all possible grounds of review, including a full factual assessment of the

whether the decision of the authority was right. The court will attempt to go beyond the usual grounds of review in order to determine what the decision of the authority should have been, in view of its statutory duties. A decision may thus be found legal,

[7] English courts tend to consider that an irrational or unreasonable decision must be "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it": *Council of Civil Service Unions -v-*

following judicial review, if it was made according to the law, and it is not unreasonable or made with procedural impropriety, but nonetheless may be found wrong, after the careful examination of facts in the process of a review on the merits. However, courts will not engage with ques

gaps in delegated authority in order to

[8].

variable. In the context of judicial review courts may engage in a limited intensity review by exploring if the authorities have gravely disregarded the limits of their discretion, also paying attention not to substitute their decision for that of the authorities **(low intensity**). Courts may also exercise a more intensive level of scrutiny of the rationality of the decision of the authority, again without substituting their decision for that of the authority. Yet, they may show particular self-restraint to engage with some of the most complex and expertise-demanding factual assessments of the authority, providing authorities some margin of appraisal in complex economic and technical issues (**intermediary intensity**). In such cases the competence to set the fine is not transferred from the authority to the court but remains with the authority, which is limited however in the options available to it, as it is not possible to choose the option declared illegal by the court. Courts may finally exercise a comprehensive review of the facts, which may lead them to substitute their own judgment for that of the authority (in the context of a **review on the merits** or), and/or provide to the authority a very limited margin of discretion with regard to the options available to it (**high intensity judicial review**

tly to the allocation of the residual competence recognized in the area under examination. In the context of a review on the merits, the residual competence is transferred from the authority to the court, which may choose to reconsider the question *de novo* and substitute its judgment and discretion

transfer of competence from the authority to the court. The authority keeps residual competence in the matter, even if the court may choose to substitute its judgment for that of the authority. The Court can only substitute its judgment to that of the authority *only* for the issues covered by the specific ground of review that has been found successful.

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[8] *George Washington Law Review*, 54 (4), 469-511, 470.

One may also refer to the possibility of further appeals from the courts exercising a limited or unlimited judicial review function to a superior court (e.g. Supreme Court).

Material procedural irregularity

One may adopt a simple **means-**

Having in mind these principles, we will examine the practice of judicial scrutiny of fines in Chile, before exploring the balance between effectiveness of competition policy and the protection of rights reached by other key jurisdictions.

B. Judicial scrutiny of fines in Chile

1. General data

The final judgments of the specialised Competition Tribunal (TDLC) can be reclamación *sui generis* procedure introduced for the implementation of Chilean Competition Law. This procedure allows the Supreme

It is noteworthy that the analysis undertaken by the Supreme Court when reviewing

Table 11: Judicial Scrutiny of Regulatory Fines in Chile

Electricity and Fuels Commission (SEC)			
Case/company	**Fine imposed by SEC**	**Appeal Court**	**Supreme Court**
OSRAM. Fine imposed for not providing required information.	UTA 200	Confirmed	Confirmed January 2014
OSRAM. Fine imposed for not certifying electric products.	UTA 140 plus trial expenses	Confirmed	Confirmed January 2014

Securities and Insurance Commission (SVS)			
Case/company	**Fine imposed by SEC**	**Appeal Court**	**Supreme Court**
María Luisa Solari and Marcel Zarour. Fine imposed for the use of privileged information	UF 1,000 and UF 2,725	Confirmed	Confirmed December 2013
administrator for the use of privileged information.	UF 350	Confirmed	Overturned (annulled fine) November 2013
PriceWaterhouseCoopers. For breaching duties of care of an external audit firm.	UF 8,000	Confirmed	Confirmed November 2013
Pablo Alcalde. Fine for modifying the financial statements of a company.	UF 25,000	Confirmed	Confirmed October 2013
Juan Cueto. For use of privileged information.	UF 1,620	Confirmed	Confirmed November 2012
Banchile stockbrokers.	UF 300	Overturned (annulled fine)	Confirmed fine October 2011

[Information obtained from the press]

formula for optimal enforcement we introduced in the first part of this report, an optimal sanction should depend on the harm inflicted by the infringement and its probability of detection, the low probability of detection of competition law infringements and the significant harm that they inflict on consumers and the economy overall should justify a much higher level of penalties.

2. Case Studies

We proceed to the analysis of the most important cases of the Supreme Court examining the fines imposed by the Competition Tribunal. Cases in which Supreme Court has reduced the fines imposed by the TDLC are the following:

1.	CONSTRUCTORA E INMOBILIARIA INDEPENDENCIA LTDA. (COMPLAINT) vs. AGUAS NUEVO SUR MAULE S.A. *et al.* DECISION 85	Abuse of dominance	Construction	**Reduced** **(-47%)**

In 2005, a private construction company and the FNE filed complaints against a sanitary services provider (Aguas Nuevo Sur). It was argued by the construction company that the defendant charged arbitrary and discriminatory prices for its services for real estate projects in the rural areas of certain regions of Chile.

The FNE extended the complaint to other three sanitary services providers (ESSAL, ESSBIO and Aguas Andinas). The FNE argued that between 2003 and 2005 the companies made abusive requirements and charges for their sanitary services (clean water and sewer system) for users in urban and rural areas near to the their respective concession areas and that they had misused a reimbursable financing contribution system that was established in order to finance the expansion of the provision of sanitary services, to new real estate projects and developments, in their concession areas.

The FNE[13] required a fine of 65.000 UTM (5,400 UTA) for ESSBIO, 44.000 UTM (3,600 UTA) for Aguas Nuevo Sur, 48.000 UTM (4,000 UTA) for ESSAL and 50.000

[13] http://www.tdlc.cl/DocumentosMultiples/Requerimiento%20FNE.pdf

calculations regarding how much additional charges they made to some construction companies, but does not explain how it got to the established number in detail.

In July 2009 the TDLC issued a sentence[14]. For the purposes of determining the amount of the fine, the TDLC considered article 26.c DL No. 211 which states that the seriousness of the conduct, the economic benefit and previous offenses, must be taken into account.

The TDLC found regarding the claim presented by the construction company, that Aguas Nuevo Sur had indeed charged abusive prices in some cases and imposed a fine of 1,338 UTA based on the additional amounts charged.

Regarding the claim presented by the FNE, the TDLC found that Aguas Nuevo Sur and ESSBIO had misused the existing state reimbursable financing contribution system. The TDLC determined that Aguas Nuevo Sur had perceived benefits of at least 44,000 UF (2,130 UTA) and ESSBIO at least 41,000 UF (2,000 UTA). These results were obtained after a detailed review of information provided by Sanitary Services Supervisor Authority.

In addition, the TDLC found that the abusive behaviour was important.

Therefore the TDLC imposed a fine for Aguas Nuevo Sur Maule of 1,254 UTA (in addition to the previous fine) and for ESSBIO SA fine of 2,341 UTA.

The other undertakings were not sanctioned. Nevertheless, for all of them, the TDLC required some changes in the pricing politics and recommended changes in the regulation to the authorities.

The fine was reduced by the Supreme Court among other reasons because the defendants have not been previously convicted for breaches of competition law. Those reasons made the Supreme Court conclude that the fines imposed by the TDLC were disproportionate.

> **Paragraph 18:** the judgment under appeal and, accordingly, will reject the claim of Aguas Nuevo Sur Maule S.A. and ESSBIO S.A. and will confirm the
>
> considers that the amount of the fine set forth in the judgment are disproportionate to the conduct which is attributed to the two companies. In particular, the realization of type of letter c) of Article 3 of Decree 211 [Competition Act] are based on a series of observations about the new consumption factor, that even when founded, do not demonstrate exactly the amounts that would benefit the water companies to the expense of construction. Moreover, as recognized

[14] http://www.tdlc.cl/DocumentosMultiples/Sentencia_85_2009.pdf

by the ruling, Aguas Nuevo Sur Maule S.A. and ESSBIO S.A. have not been previously convicted for breaches of competition law and taking into account the request of both subsidiary undertakings for the purposes of requesting a reduction of fines, this Court will grant the request to the manner determine

2.	FNE (COMPLAINT) and BANCO DE CHILE vs. FALABELLA Y PARIS S.A. DECISION 63	Collusion	Retail	**Reduced (-25%)**

In this case the fine is reduced by 25%, considering (i) the duration of the harmful event (duration of the anticompetitive behaviour); (ii) the economic benefit reported by the acts committed in that period (the context of the anticompetitive conduct was a technology trade fair, which lasted four days, in which LCD TV sets would be offered at special prices).

Indirectly, the Court also considered that the fine requested by the FNE was lower than the fine imposed by the TDLC.

Paragraph 34: ive review of the arguments contained in the complaint initiated by the National Economic Prosecutor's

behaviour of the defendants. However, after weighing in the facts, they differ in the amount of the fines imposed: the amount recommended by the National Economic Prosecutor's Office is

Paragraph 35:
behaviour[] needs to be taken into consideration. Therefore, one of the factors that need to be borne in mind in determining the amount of the fine to be applied is the duration of the harmful event and its consequences over time. Indeed, the realization of the so-called "Technology IN Trade show of Banco de Chile" took place over four days (6 , 7, 8 and 9 April 2006), a situation which rules out a persistent or continuous violation of competition [law].

Also, the amount of the fine should consider, among other things, the economic benefit accountable to the acts committed in that period. Therefore, it would be logical to consider a reasonable percentage that corresponds to the duration of the facts, unlike
judgment that in the final part of its reasoning [paragraph] 163°,

4.	FNE'S COMPLAINT vs. LA ASOCIACION GREMIAL DE BUSES INTERBUS *et al.* DECISION 82	Collusion	Transport	**Reduced (-50%)**

In this case the fine was reduced by 50%, considering (i) the number of parties sued, (ii) the size of the market in which they operate, and (iii) the section of the bus routes involved in the collusion agreement.

> **Paragraph 11:** ircumstances considered for the calculation of the fine, according to the forty-second paragraph of
>
> Competition Act does not apply, because as is asserted in the sixth paragraph of the same judgment, that provision defined as aggravating circumstances for the former criminal responsibility on violations of competition law, the fact that it was a trade association who breached the law. On this basis, as well as considering the number of member of the trade association, the size of the market in which they operate, the section of the route which ultimately generated the illicit agreement, allows the Court to reduce the amount of the fine imposed on the defendant. This does not [] in any way diminish the reproach against the conduct [] which justifies its sanction.
>
> For these reasons and for the provisions of Article 27 of the Competition Act, the Claim raised in the main of pages 492 against siders the

5.	FNE'S COMPLAINT vs. EMPRESA ELECTRICA DE	Abuse of domina	Electricity	**Reduced (-25%)**

The TDLC found that John Malone had breached the conditions established for the 2004 merger. This justified imposing a measure and a penalty, both provided for in Article 26 of DL No.211. The first measure had the aim of obliging John Malone to sell its ownership in DirecTV Chile, within a short but reasonable time. For the purposes of determining the amount of the fine, the TDLC considered that the seriousness of the conduct, the economic benefit and previous offenses, must be taken into account[20].

The TDLC found that there was ample evidence that Mr. Malone was the controller of VTR and because of this quality was aware of the conditions imposed in 2004 and that while remaining VTR controller and knowing the condition affecting VTR, he acquired and maintained until now shares of DirecTV Chile. Despite being warned of the wrongfulness of such conduct by the FNE when the investigation was initiated, he continued to infringe the conditions imposed. His conduct not only affected the legality of the 2004 merger but also generated adverse market effects. It enabled a company with a dominant position in the cable TV market to influence, through a common controller, its competitor, DirecTV. The offence reported VTR important . The offence was maintained for almost three years. The Tribunal, however, noted that Mr. Malone was not a repeated offender. Consequently, the TDLC imposed a fine of UTA 4,000.

Fine reduced by the Supreme Court

During the procedure, the Supreme Court proposed some guidelines for a conciliatory agreement to the parties (FNE and John Malone). The agreement was reached on April 2013 and included provisions that ensured the compliance with the 2004 conditions. The agreement established in detail how and when Mr. Malone was going to sell its ownership in DirecTV. Also, Mr. Malone agreed to pay the FNE CLP 120 million (UTA 240/ USD 230.000) in order to cover the litigation costs. On the other hand, the FNE, taking into consideration that the settlement ensured compliance with the 2004 conditions, withdrew its claim to maintain the UTA 4,000 fine imposed by the TDLC.

The Final sentence was issued on June 2013[21]. Considering the agreement and thhcom

of refrigerators, which have been participating in an international cartel since 2004. As a result of the cartel, prices increased more than 80% between 2004 and 2008. This also resulted in higher prices for refrigerators in the Chilean market (this input represents about 20% of the refrig
number of jurisdictions.

The case is of particular interest for Chilean competition law, as it constitutes the first case in Chile in which the tribunal made use of the leniency program for the detection of cartels, hence representing a milestone in the history of cartel persecution in Chile. In particular, Tecumseh constitutes the first company that met the legal requirement to be exempted from any fines. The TDLC ruled unanimously against the two companies and fined Whirlpool for the sum of UTA 10,500 (approximately US$ 10 million) plus legal expenses.

The FNE argued that the companies had colluded and increased the transport fares, among other infringements.

The TDLC found that 8 of the transport companies and the 4 taxi transport companies that provided services in Osorno had engaged in anticompetitive conduct by reaching an agreement to increase their fares. An interesting feature of this set of collusive practices was that they were orchestrated by the Regional Secretary of the Ministry of Transport.

Fine requested by the FNE

s brief and requested a 100 UTA fine for the instigators of the agreement and a 50 UTA fine for the companies that were coerced to enter into the agreement[31]. There is no analysis of the benefits received by the companies and no economic reports were presented.

Fine imposed by the TDLC

On January 2010 the TDLC issued a judgement, holding that the cartel and its effects were proven[32]. For the purposes of determining the amount of the fine, the TDLC considered article 26.c DL No. 211, stating that the seriousness of the conduct, the economic benefit and previous offenses, should be taken into account.

The TDLC found that the fares increase was of 50% for the minibuses and of 17% for the taxies, and that the fine should at least be equal to the economic benefit obtained by the involved companies. Nevertheless, the Tribunal noted that since the Regional Secretary of the Ministry of Transport induced the agreement, or at least helped to reach it, companies should not be heavily fined. Furthermore, some liability was alleviated since they were intimidated or forced to sign the agreement. Finally, the Tribunal noted that the number of vehicles owned by every company should be taken into account when determining the fines. The TDLC decided to impose fines of UTA (*Unidad Tributaria Annual*) 12, 8, 7, 4, and 3 to the different transport companies according to the weighting of the abovementioned factors.

Fine increased by the Supreme Court

The transport companies and the FNE appealed and brought the case before the Supreme Court,[33] which rejected the claims submitted by the transport companies

[31] http://www.tdlc.cl/DocumentosMultiples/Requerimiento_FNE_C_149_07.pdf
[32] http://www.tdlc.cl/DocumentosMultiples/Sentencia_94_%202010.pdf

found that collusion was the most serious of all anticompetitive behaviours. It also f
intervention could diminish the liability of the involved transport companies, but not in such a magnitude as that considered by the TDLC. Therefore, the Supreme Court increased the fine of 2 of the transport companies to UTA 50 and increased the fine of 3 of the transport companies to UTA 35.

3. Proposals for reform

In recent years, there has been considerable attention brought to the analysis of the fining policy of the

the regulation of the banking sector, sanitary sector, electricity and fuel sector, telecommunications sector, securities and the insurance sector[36]. Yet, as it was remarked by the study, in view of the difficulty of detecting competition law

C. A comparative perspective: tour d' horizon of the practice of judicial scrutiny and the role of the courts in promoting effective competition law enforcement

1. The EU level

In *Les Verts v. European Parliament*, the Court of Justice of the EU (CJEU) emphasized that the European Community is a community based on the rule of law, inasmuch as neither its Member states not its institutions can avoid judicial review of their actions to determine whether those actions are in conformity with the Treaty[38]. The control of legality exercised by the European judiciary of the measures adopted by the European institutions constitutes the cornerstone of this institutional framework.[39]

There are two routes to contest the legality of the remedial action of the European Commission. First, Article 263 TFEU provides that the Court may review the legality of the decisions or acts of the Commission that are capable of affecting the interests of individuals. Challenges are made at first instance to the General Court of the EU,[40] and appeals on points of law can be made from the General Court to the CJEU. Second, the judicial control of the appropriateness of the amount of fines is more intensive, following the interplay of Article 261 TFEU and of Article 31 of Regulation 1/2003. Pursuant to these provisions, the CJEU is endowed with unlimited jurisdiction to assess the appropriateness of, and if necessary to vary, downward or upward, the amount of the fine imposed by the Commission. Hence, it has judicial scrutiny over material errors of law, facts, procedural irregularities, unreasonable exercise of discretion, and, under certain circumstances, also over evaluative judgments and predictions of the European Commission. The Court is not able to impose a different fine but to rule on existing fines set by decisions of the Commission[41].

Concerning the possibilities of challenging the decisions of the European Commission, those to which the latter are directly addressed, together with third

competitors), may file an appeal with the General Court. The grounds of review are lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any rule of law relating to its application, and misuse of

[38] Case C-294/83, *Les Verts v. Parliament* [1986] ECR 1357, para. 23.

[39] The General Court was called Court of First Instance, before the entry into force of the Treaty of Lisbon in December 2009. It was originally set up in 1989. The Court of Justice (ECJ) is assisted by Advocates general who deliver an opinion on a case prior to the judgment of the ECJ.

[40] A fast track procedure is available in certain cases. See codified rules of the General Court, Art. 76a.

[41] Case T-275/94, *Groupement des cartes bancaires "CB"/Commission* [1995] ECR II-2169, paras 59 & 60. See e.g. GERARD
2010). Available at SSRN: http://ssrn.com/abstract=1675451 at 4.

powers. The European Courts do not exercise a formal appellate jurisdiction on the merits, but a simple control of legality, although with regard to fines they may substitute their own assessment to that of the European Commission. Yet, as we

that were found illegal.

The intensity of review is traditionally a limited one under Article 263 TFEU. The

it, but it can only verify whether the Commission has produced sufficiently precise and coherent proof to support its case, whether it has misinterpreted or misapplied

the assessment of the evidence before it, so that the latter cannot support its conclusions as to the nature whether unlawful or otherwise--of the practice[42]. However, since its creation in 1989, the General Court has intensified the judicial

[46], as well as in Article 102 cases).[47] In other recent cases, however, the European Court of Justice h

Community Courts fully exercise their unlimited jurisdiction and not just verify [50].

The approach followed by the EU Courts has been variable. The General Court has pr

decision was based on errors of law. For instance, in view of Article 23(3) of Regulation 1/2003, the Commission is bound to take into account both the gravity and the duration of the infringement. In addition, the Commission has adopted Guidelines binding its own discretion, in view of the principle of legitimate expectations, with the aim to ensure greater legal certainty for undertakings. The Court thus makes sure that the legal framework of Regulation 1/2003 is respected, as well as general principles of EU law (e.g. proportionality), while it also interferes with the methodology adopted by the Commission in a specific case, if this does not comply with the methodology advanced by the Commission in its Guidelines, according to the principles of EU administrative law[51].

It could be argued that the General Court, despite being able to consider the extent to which the Commission provided a sufficiently clear and exhaustive statement of

constrained in its ability to appraise its suitability in light of the nature/gravity of the infringement and its duration. However, although it is acknowledged that the review

involving complex economic appraisals, it should be noted that in some recent cases, the Court of Justice prescribed rigorous standards of judicial review for the decisions of the Commission by the General Court and established its full jurisdiction to review decisions in which the Commission imposes fines. In particular, the Court ot use the Commission's margin of discretion - either as regards the choice of factors taken into account in the application of the criteria

of those factors - as a basis for dispensing with the conduct of an in-depth review of [62]

Yet, limits relating to the different functions of competition authorities and courts exercising a judicial review may limit judicial scrutiny of complex economic assessments[63]
choice of interpretation of the economic elements that it takes into account in its

rules of economic discip [64]. It is on the

[65].

In the context of the exercise by the General Court of an unlimited jurisdiction on fines, it was -law gives the European [66]. First, the basic amount of the fine, which is related to the value of sales, depends on the gravity of the infringement, the latter being determined by reference to numerous factors, such as

the legal framework[68]. Accordingly, the Commission may impose penalties at a higher level than the ones it has imposed in the past for certain categories of

deterrent effect of the fine, exercising a limited review in this case[74]. Judicial scrutiny is also limited in the context of the appreciation by the Commission of the quality and

on appeal, save f [80]. For instance, out of the 660 pleas directed against fines, only 59 were successful, that is less than 10%. Among those that succeeded most often, Camesasca *et al* cited those challenging the proportionality of the infringement duration (23%), those claiming discrimination (17%), or a misapplication of the Leniency Notice (13%). In contrast, pleas challenging the assessment by the Commission of turnover, gravity and mitigating circumstances,

is suggested that the European Convention on Human Rights constitutes perhaps

proceedings before non-judicial authorities, the Court adopted a substantive test to determine whether the exercise of administrative powers by public authorities could be considered as falling within the scope of Article 6(1),.[90]

[107]. Thus, it was suggested that in cases concerning infringements of the latter kind the safeguards enshrined in Article 6 of the Convention and expressly

competition agencies, which could also be judicial organs. One could distinguish between

to a quasi-adversarial model, where the decisions of the OFT, or now the CMA, are subject to strict and intensive scrutiny in law, facts, and policy, the CAT having the authority to substitute its assessment to that of the CMA. The intensity of judicial control exercised over remedies and penalties is particularly strong, in comparison to the situation in the EU generally.

In a full merits (appeal) review, the CAT proceeds to extensive findings of fact in cases where the evidence relied on by the CMA is challenged, very often on the basis of extensive new material introduced by the appellant, and rebuttal evidence introduced by the CMA[127]. However, the Tribunal exercises an appellate function and cannot proceed to the same analysis of the factual record as a court (or a regulator) would do in the first instance. The fact that it is an (appellate) review (and not a review de novo), limits to an extent the factual record submitted by the parties, and thus examined by the authority[128]. Hence, some weight will still be provided to the analysis performed by the relevant competition authority in the first instance[129]. As the decision under challenge is a multi-faceted policy decision, the CAT is more likely to allow the legitimate judgment of the regulator to stand, unless it can be shown that there is some error in the basis for [130]. In contrast to judicial review or to the ordinary approach of an appellate court, the CAT is, however, willing in an appeal to determine disputes of primary fact, and proceeds more frequently than other appellate courts to cross-examination of witnesses[131]. This might seem, at first sight, to blur the distinction between an appeal process and an examination of the facts of the case at first instance. The appellate process certainly involves the rehearing of a case, but the content of such a rehearing is something that depends on a variety of factors. Writing in the context of an appeals process to the decision of a court at first instance, Mary L.J., noted that:

> The review will engage the merits of the appeal. It will accord appropriate respect to the decision of the lower court. Appropriate respect will be tempered by the nature of the lower court and its decision-making process.

---

decision'. Such decisions may also be made by the various sectoral regulators pursuant to the competition jurisdictions they hold concurrently with the OFT. Schedule 8 provides for two different types of review depending on the type of decision under appeal. In most cases, according to paragraph 3(1) of the Schedule, the CAT *'must determine the appeal on the merits by reference to the grounds of appeal set out in*

> There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged. At one end of the spectrum will be decisions of primary fact reached after an evaluation of oral evidence [,] where credibility is in issue [compared to] purely discretionary decisions. Further along the spectrum will be multi-factorial decisions often dependent on inferences and an analysis of documentary material.[132]

Hence, re- ense

discretion unless the decision of the lower [authority] was reached on wrong [133]

have something of a range of meaning at the lesser end of the range it merges with

semantic exercise which does not answer such questions of substance as arise in any appeal [134]. As the CAT has clearly explained in *M.E. Burgess*
whether to take its own decision, the Tribunal is mindful of the fact that it is an appellate tribunal [reviewing] an administrative decision and should not therefore turn itself into the primary decision- [135]. There is a perceptible

imposed. The Tribunal is not bound by the OFT/CMA Guidance on penalties[138]. However, it will not disregard either the Guidance or the CMA reasoning in the specific case[139]. The Tribunal also takes into account the objectives pursued by the CMA y on fines, as explained in the *Guidance on penalties* when examining their reasonableness or proportionality[140], while affording the OFT (or the CMA) some margin of appreciation[141]. The latter concept is interpreted

[142]. The Tribunal has

Although the UK competition law enforcement system and, in particular, the judicial scrutiny phase has entered into an era of reform, the recent proposals by the Government on *Streamlining Regulatory and Competition Appeals* do not suggest any modification of the type and intensity of judicial scrutiny of penalties for infringement of competition law, although they suggest a move to a less intrusive judicial control for other types of decisions[149].

b.

on the members of the *Liquid Gas Cartel*
million.[155]

The objection against a fine decision by a competition authority is addressed to and will in the first instance be reviewed by this competition authority. The

offences usually deal with minor matters and concern low fines, such as minor traffic infractions. Compared to the nature and gravity of other administrative offences, it is an abnormality that competition law infringements, with its huge fines, are classified as administrative and not criminal offences. Nevertheless, the courts do apply the relaxed rules of procedure even to complex cases where fines in the amount of several million of euros are concerned. One of the most important relaxations of the stringency of criminal trials is § 77 OWiG, which allows the court substantial flexibility with regard to the extent to which it allows evidence to be introduced in trials on administrative offences. In particular, the court may reject applications for taking evidence where it is persuaded that the evidence before the court has already revealed the truth. While such shortcuts are arguably an efficient way of disposing of minor run-of-the-mill administrative offence cases (such as traffic offences), the courts' discretion when deciding on multi-million euro fines on undertakings, or hundreds of thousands of euro fines on individuals, is problematic.[157] The courts relatively frequent use of § 77 OWiG in competition cases is particularly problematic in view of the statutory admonition that the courts should take account of the

Decisions of the Court have no *erga omnes* effect. Therefore, the sanctioned undertakings which did not challenge the decision of the FCA do not benefit from any eventual annulation of this decision in favor of other undertakings[161].

The Court can reduce, confirm or increase[162] the fines imposed by the FCA. The Court can also impose fines to a non-fined undertaking should the procedure before the Court provide sufficient evidence for doing so[163]. Nevertheless, the scope of the decision of the FCA may put a limit on the scope of the judicial scrutiny exercised by the Court. Therefore, for instance, when a decision rejecting a complaint is challenged, the Court cannot impose a fine on the undertaking, but the FCA still must take the case[164]. Except a few decisions[165], it is well established that the Court cannot decide *ultra petita*. Therefore, the Court cannot increase a fine without a prior and reasoned request (generally from the Minister of the Economy)[166].

In contrast with the EU jurisprudence[167], the Court controls if a fine was justified in principle[168]. The Court makes its own assessment of the proportionality of the fines imposed by the FCA. The most frequent reason to reduce the fines has been the financial and economic difficulties faced by the fined entity. In a very famous case (the *Steel cartel* case), the Paris Court of appeal has substantially reduced the fines

the reduction has been up to 90% for some undertakings)[169]. This judgment has been influential in the decision of the FCA to adopt its sentencing guidelines

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1 692.62 Tm[(4o)-42(n)-6(8939712950E-06)]Tm 0.07945 -7.4 2(1)3465554 Tm 8[(2).04 Ee 3 ime)(S22FCA (o)6((c)10(o)-.61 6)2s

According to the Court[170], the SG complies with the legal framework (Article L. 442-6 of the French Commercial Code). The Court has ruled that, thanks to the SG, the FCA has described and explained its method of setting the amount of the fines imposed on entities. The Court has ruled that the SG has no normative value, since it must be considered as a guidance statement (administrative directive)[171]. The Court controls if the FCA has correctly applied the criteria set out in Article L. 442-6 of the French Commercial Code (seriousness of the practices, damages caused to the Economy, personal situation of each fined entity and reiteration).

Since the decisions rendered by the FCA are more reasoned, the ability for the Court to have its own assessment of the facts is limited. Therefore, the Court controls if the FCA has failed or erred in its assessment of the elements contained in the file. The Court has ruled that an appellant cannot refer to prior decisions or jurisprudence in order to argue a violation of the principle of equality of treatment, since this assessment must be done on a case by case basis[172]. What may appear more contestable is that the Court has also ruled that an undertaking cannot invoke as well the treatment of another party to the same procedure under the same reasoning[173].

We can suppose that the Court should increase its control on the assessment of the facts by the FCA. Nevertheless, because of the SG, the decisions rendered by the

sentencing judge imposes a sentence that varies from the Guidelines on the basis of a policy disagreement[178]. In view of the institutional characteristics of the Sentencing Commission, which has capabilities to collect and analyze empirical data and national experience, the Supreme Court felt that although the Sentencing Guidelines

they should be offered some degree of respect[179]. According to Justice Breyer (concurring opinion) in *Pepper*:

> (t)he trial court typically better understands the individual circumstances of particular cases before it, while the Commission has comparatively greater ability to gather information, to consider a broader national picture, to compare sentences attaching to different offenses, and ultimately to write more coherent overall standards that reflect nationally uniform, not simply [180].