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PARAGUAY AND URUGUAY IN MERCOSUR: USING COMPETITION POLICIES AS AN EQUALIZING TOOL

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"In the same way that the existence of political freedom entails the elimination of abuses of political power, the existence of economic freedom entails the elimination of abuses of economic power"

Luis Diez-Canseco²

1. Introduction:

Paraguay was once called by an author "an island surrounded by land".³ Its fate is strongly tied to that of its larger neighbors, Argentina and Brazil. Recognizing this realities, it joined them, as well as Uruguay, in a very ambitious project: the Common Market of the South, MERCOSUR.

MERCOSUR is not just a marketing strategy for the area. It is of vital importance for those involved in the project, in spite of the regular problems affecting the integration process. Brazil and Argentina need their smaller partners because they offer legitimacy to the idea of a common market- "the more the merrier" is a common phrase that easily fits this situation- and the smaller partners, Paraguay and Uruguay, need their partners to abide to common rules that protect the rights of all. In trade relations, as in all relations, the absence of rules means that the law of the strongest is in vigor. This will only mean that the party that is less favored will eventually get out of the deal. Therefore, a fair and clear set of rules is in order.

This is one of the reasons why, if MERCOSUR is to succeed as a project, it has to embrace the idea of competition defense as a matrix over which the commercial relations among the economic factors of the different members of the common market are traced.

Paraguay and Uruguay need competition regimes. In the inside and towards the outside. The purpose of this paper is precisely to explain why.

2. Paraguay

2.1 The Paraguayan economy- General Characteristics:

Paraguay's gross exports in 2001, still included primary products, such as: woods, meat products, leather, oil seeds, cotton fibers, tobacco, cereals, fresh fruits and vegetables, preserved fruits, coffee grains, mate, vegetable and essential oils, cane sugar products, canned palmhearts, cereal flour, gray portland cement, silk cocoons and flour⁴. Almost half of the 5.000.000 inhabitants reside in the rural areas, thus turning the economy into a very agricultural-based one. Yet there are many industries developing, in the manufacture of clothing, shoes, some electrical appliances, bicycles, motorcycles, autoparts, car tires, among others. It has established, since the year 2000, an extensive program of maquiladoras, similar to the one implemented in Mexico, with relative success so far.

Paraguay is in the process of implementing economic reforms, towards what has been called the process of State Reform. In the past months, this process has been somewhat shadowed by the resignation of the Head of the Reform Secretariat, although the successor has manifested his intentions to carry on with the privatization of the first two state-owned enterprises that are in charge of services such as telecommunications (COPACO) and public waters (CORPOSANA).

Paraguay's prospects are linked to MERCOSUR, especially to its largest trading partner, Brazil, and to commodity prices. Brazil is vulnerable because of its large external financing requirement and its exposure to contagion from Argentina, a less important destination for Paraguay exports, but still a major source of foreign exchange earnings in the form of tourism receipts and remittances, which will contract sharply in 2002. The deep crisis in Argentina is focusing attention on Paraguay's own structural deficiencies, as reflected in the guarani's

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² From his presentation at the Seminar on Competition Policies in Latin-America and the Caribbean held in San José, Costa Rica in September of 2000, under the auspices of the IADB, CEPAL and UNCTAD.

³ Juan Bautista Rivarola Matto, "La isla rodeada de tierra", El Lector Editorial, Asunción, 1987.

⁴ Information available at www.proparaguay.gov.py

recent weakness. The eventual sale of COPACO and the awarding of the concession for CORPOSANA this year could generate some important foreign exchange inflows before year-end, helping the currency to stabilize.⁵

The main deterrent of reforms and modernization in Paraguay is political instability, which always seems to find its way into the spotlight, moving the focus away from those issues that are actually relevant for the country's development. The debate over competition policies, will be fruitful in the sense that it will help identify those deficiencies in the economic structure that need profound rethinking before the country can engage in a serious reform process.

2.2 Reasons for a competition law in Paraguay:

Paraguay needs a competition law for many reasons, but the most important ones are:

- In the internal market, it needs the law for the same reasons every other jurisdiction does: to create effective competition, therefore promoting economic efficiency and consumer welfare;
- But there are reasons that go beyond the "textbook" reasons: One of them is the fact that Paraguay is involved in the process of State Reform, and this includes the privatization of many enterprises that perform public services. A competition law is necessary as the framework from which will derive the regulatory laws that will govern these newly privatized entities, and needless to say, these must take into consideration competition concerns. This is not just privatization, but liberalization. When privatization does not include the effective rule of competition in the market, then the only change is the substitution of that of a public monopoly for a private monopoly.

This is surely not the objective of the process of State Reform. The experience of privatization in Argentina during the 1990's, in which the existing competition law was not considered in the privatization of many public entities, led to the general dissatisfaction of the public with inefficient, high-cost services rendered by monopolistic firms⁶. This is an error that must be avoided;

- Also a very important reason is that of creating juridical security, which is a fundamental tool in the promotion of investments. Investors trust an environment where legislation is clear, fair and up to date with world standards;
- Finally, in the global arena, Paraguay is on the one hand a Member of MERCOSUR, and on the other hand it is negotiating several trade liberalization agreements, such as the FTAA (Free Trade Area of the Americas) and MERCOSUR agreements with the European Union and the Andean Community, as well as many bilateral agreements.

This means that more markets are opening up to Paraguayan products and services, but also that more and more products and services will be competing in the Paraguayan market. More competitors, and bigger competitors, will compete with national producers. While this is something to look forward to - increasing competition can only benefit consumers in theory - without a clear set of rules for all the competitors in the market - incumbents and newcomers - the benefits of trade liberalization and economic integration will be outshadowed by the restrictive practices of those with dominant positions in the market.

2.3 The draft of Competition Law in study in Paraguay:

2.3.1 History of the Draft. Reasons behind the approach taken:

From the mid-nineties, legislators presented several drafts to the Congress for study. These drafts were the consequence of the concern created in the legislative by the absence of a body of law that englobed all aspects of competition defense, but, given the particularities of the matter, none of them was the body of law that the country needed, given the international tendencies and the needs of the national economy. As an illustration of this, it can be stated that one project was very similar to the Sherman Act, and though this body of law has often been praised for its conciseness, this type of legislation can only work in a common law jurisdiction, like the U.S., where the law is interpreted and developed by the courts, while in civil law jurisdictions, like Paraguay, the role of jurisprudence is very different. Specially, in Paraguay, as in the EC or in other civil law jurisdictions, the enforcement of the law would be trusted upon an independent government agency, and not on the courts, therefore a more extensive and clear body of law was necessary.

Another draft presented and discarded was very similar to the previous Argentinean Law - Law 22.262 of 1980. This law had already been derogated in Argentina by a more modern body of law -the present Law 25.156/99, which included the novelty of the previous control of mergers. It made no sense to copy after a law that was already outdated and had not proven to be very efficient.

⁵ The Economist- Economist Intelligence Unit- Country Report-Paraguay- March 2002

⁶ Petrecolla, Diego-former President of the National Commission for Competition Defense of Argentina: excerpt from his presentation in the Seminar on Competition Policies in Latin-America and the Caribbean, organized by the IADB-CEPAL and UNCTAD, San José, Costa Rica, September 2000.

Therefore, the Ministry of Industry and Trade set to work on a draft of Competition Law that fulfilled the countries' needs. A first draft was prepared by the Ministry, but it was not mature enough yet to send it to Congress.⁷

In the year 2000, this project was furtherly pushed by the hiring of new local counseling in the fields of law and economics, as well as an international consultancy with an expertise in the area of competition law.⁸ Thus, the "task force" was created, with the help of local counseling.⁹

The new draft was first created as a hybrid, considering the proposals presented to Congress by legislators and the first draft by Dr. Stanley. Of course much attention was given to the competition laws of the neighboring countries that had competition regimes in vigor, Argentina and Brazil. This was a first step towards the harmonization of the competition laws in MERCOSUR. The European model was taken as an example, specially the laws of Spain and Portugal, due to their similar position at the times these laws were drafted: small players among economic giants, all together in the same Common Market.

2.3.2 A very important component of the drafting process: transparency.

From the moment the "hybrid draft" was created, it was sent for study to every party that might be interested, with a specific concern to the private sector (unions of industries, production sectors in general, supermarkets, trade associations, etcetera). This resulted in a very fruitful exchange of ideas that, together with the work of the task force, resulted in a much more satisfactory draft of law.

But besides the exchange of ideas, this process also included the organization of three seminars on competition policies. The first seminar was an introduction to competition as a subject. This is very important in countries with no competition culture. Indeed, the most common confusion that arises when introducing the concept of competition is that the general public thinks about competitively. And, as basic as it may sound to do it, it is always important, before even trying to explain why we need to have a competition law, to make sure that the concepts are properly understood and interpreted.

The second and third seminars were more focused on the contents of the law. The interest that this raised in the private sectors, as well as in the legislature, was immense. Once again the "marketing" strategy for the promotion of the draft was really simple: transparency. The drafters must be willing to take every phone call, to meet with every interest group, and even to go visit them at their own business facilities. At the beginning there is always some resistance from groups that are afraid that the law is directly aimed at banning them from conducting their business the way they have always done. But once these groups understand that their concerns are being heard and considered, they can become huge contributors to the process of drafting, promoting and passing the law. After all, they are the substance of the law, why not be a part of its creation?

As a great example of the contribution that these interest groups gave to the drafting process, it was during one of this presentations that two main features of the draft were changed: the process of merger review, and the composition and process of election of the members of the Commission. Other important contributions given by private interest groups were the more accurate definition of predatory pricing and the distinction with occasional sales.

The task group also met with legislators to explain to them the main contents of the law and its aim, even though the draft was not yet formally presented to Congress. These interviews were very important as a way to sense the degree of acceptance that the law would have in the legislature, and legislators' main concerns regarding the draft, in order to consider them for the future.

As a final remark, another important factor in the process was how the audience - be it the private sector, be it other public entities, be it the legislature - regarded the task force. It was very important that this group, even though dependent on another Ministry, appears to them to be a group of technicians, not politicians. This created a good basis for discussion; once again, transparency led to the audience's trusting the speakers.

2.3.3 The Philosophy behind the draft:

The economic objectives pursued by this draft are defined by the characteristics of an incipient economy and the need to encourage investments:

- To protect still incipient and weak businesses from the abuse of dominance by bigger competitors;
- To protect consumers from abusive prices and a lack of options,

⁷ The author of this first draft was Dr. Patricia Stanley, who was then the negotiator in the Mercosur and FTAA's competition policies groups. The previous negotiator and a strong promoter of the drafts was Ing. Jorge Achón.

⁸ This was possible due to the cooperation of the Inter American Development Bank and the United Nations Development Program, under Program ATN/SF-5888/PR.

⁹ The author of this new draft was an international consultant, Dr. Nuno Ruiz de Azevedo, a portuguese attorney and professor of Competition Law. The local counsel was formed by the author of this paper, as well as the Economist Bruno Hug de Belmont, and Attorneys Patricia Stanley and Javier Parquet.

- But, by no means to harms jobs either in an abusive firm or in the affected firms.
- The competition law has to be a fundamental instrument in the process of State Reform and in economic reactivation, combining the opening of markets and trade liberalization with a clear and equal set of rules for all the economic factors. Free competition should act as a "market democratization" element.¹⁰

2.3.4. Principles of the draft:

- Free competition includes, for competitors, the freedom to buy, to sell and to access markets on non-discriminatory conditions, without any restrictions but those based on special laws;
- The prices of goods and services will be determined freely with the exception of special regulations;
- The simple conquest of markets resulting from a natural process of economic efficiency does NOT constitute a violation to free competition.

2.3.5 Scope of application:

The law applies to all undertakings, natural or legal persons that engage in economic activity in the national territory, with or without profit in mind. It also applies to those enterprises with legal domicile outside the country, as long as their practices have effect in the national territory.

As for the firms' representatives, they are liable for illegal practices if they intervene in activities sanctioned by the law.

2.3.6 Enforcement Authority:

The law creates the National Commission for Competition Defense, an autonomous body that is composed of five Vocals, one of whom presides over the Commission. This is the deciding (judging) body. There is a dependent technical body, the Technical Secretariat, which performs investigative tasks.

The Commission has the last word in the investigative procedures (for restrictive practices) and in the authorization procedures for agreements that are capable of being authorized. There is an exception to this in the review process for operations of concentration, where the Commission issues a recommendation to the Minister of Industry and Trade, who has the right to follow this recommendation or not, and the final word in opposing the merger or conditioning it. This is due to the reality that the decision to oppose a concentration, especially in a developing economy, is a political decision most of the time, and, at least at the beginning stages of a competition regime, it should be left to the politicians to make that decision. This would also avoid conflicts of interest and manipulation of the Commission by the Executive Branch.

2.3.7 Prohibited restrictive practices:

In general, the law bans the following practices:

- Agreements: Agreements between undertakings and decisions of associations of undertakings which have as their object, produce or may have the effect of impeding, restricting or creating a false appearance of competition in the whole or part of the national territory,
- Abuse of a dominant position: Abusive exploitation by one or more undertakings of their market dominance in the whole or part of the national territory,
- Abuse of economic dependence: This is a special feature of the Paraguayan Draft. It consists of the abusive exploitation by one or more undertakings of economic dependence on them on the part of its competitors, clients or suppliers, who do not have an equivalent alternative. This is different from abuse of a dominant position, because in this case the infringing firm does not have a market share that is significant enough to be considered a "dominant position", but nevertheless, it might be involved in a commercial relation where its counterpart really has no choice of dealing with anyone else and has to take whichever price or conditions the infringing firm is willing to offer.

During the drafting process, this was a particular concern expressed by primary producers of edible goods, but in small markets this situation tends to be present in all areas of the economy and it is one of the main reasons for the closure of many small businesses, which are a highly important part of the Paraguayan economy.

Once again, the inclusion of this provision was the object of concern: drafters feared it might sound too "over-protective" and "anti-efficiency" prone, but it is important to recall that under this draft, all conclusions must be based on economics, this means, the abuse of a dominant position is not a per se violation, but instead requires a rule of reason approach. Harm must be shown, justifications can be offered. Although it might be too general as it stands in the draft, it is surely to be the object of a Commission Regulation, once the draft is passed as a law, to clarify it and make proper use of this tool.

¹⁰ Ruiz, Nuno: Presentation of the Draft of Competition Law Seminar, Asunción, Paraguay, May 2001.

- Predatory Pricing: This is, the non-occasional sale of goods and services when the price charged by the producer or seller is unjustifiably below the actual cost of production, acquisition or replacement.
- Conditioning contracts: This means conditioning the signing of a contract on supplementary obligations which are manifestly exorbitant, by their own nature or compared with the normal commercial uses.
- Operations of concentrations of firms: Mergers and acquisitions that pose a significant threat to effective competition, or create or reinforce a dominant position in the whole or part of the national territory.
- International obligations: Also in violation of the law are those other practices restrictive of competition that are incompatible with the obligations Paraguay has assumed or assumes in the future in international agreements. So far, the only international agreement signed by Paraguay in the area of competition is the Protocol of Competition Defense of MERCOSUR, but it is in the process of negotiating two very important agreements on this area, the Chapters of Competition Policies in the FTAA agreement, and also the Biregional Agreements MERCOSUR-EUROPEAN UNION. These issues will be discussed further in the MERCOSUR chapter of this paper.

2.2.8 Authorized practices:

There is a range of practices that, even though they may restrict competition, are authorized by the law because they respond to other needs of the economy or because they do not pose a serious threat, such as:

- The agreements between undertakings that are the result of the application of special laws or regulations,
- De minimis standard: Vertical agreements will not be considered to pose a threat to competition if the total market share of the undertakings involved does not surpass the 10% threshold of market share. The threshold for horizontal agreements is a 5% total market share for the participating undertakings

-Mergers and acquisitions:

There was a special constitutional concern when drafting the procedure for merger control. Actually, this is a clear example of when procedural matters can change substantive aspects of the law. Once a merger proposal has been notified, the authority has a certain amount of time to consider the petition, but, taking into account the limitations of a new agency, what happens if after this time had elapsed there is no answer from the authority? This is what is called in administrative law "the value of administrative silence", and there are two possible answers: a tacit approval or a tacit denial. The Paraguayan Constitution, following the tradition of French administrative law, has adopted the theory of tacit denial, therefore, it was not possible to provide for the tacit approval of these filings. On the other hand, to grant a tacit denial in every unanswered filing would have a tremendously damaging effect on the economy, deterring investments and promoting inefficiency on the authority.

This led to a transformation in the review process for concentration operations: instead of granting the authority the power to authorize, condition or ban an operation, the only powers granted are the last two: to condition or ban the operation. This means that the involved parties still have the obligation to file their operation if it falls within the legal thresholds, and the authority has a certain period of time to exercise its right to oppose it or impose certain conditions. If the time elapses without the authority doing either of these two, these rights are extinguished. In the future, if conditions change and a concentration that was not considered to be harmful to competition becomes so, the concentration can be challenged by the authority, but under the normal procedure to investigate anticompetitive practices instead of the procedure for the review of concentration operations. The parties cannot complete the operation until these period of time for the authority to exercise its power to ban or condition is elapsed.

2.3.9 Practices capable of authorization

There is a range of practices which, notwithstanding their likelihood of having anticompetitive effects, are capable of being granted an authorization by the authority. There is a special procedure for this.

The practices are:

- Agreements among firms that contribute to improving the production or marketing of goods and services, or to promoting technical or economic progress, as long as these agreements do not confer on participating firms the ability to eliminate competition in respect of a substantial part of the products or services in question;
- Agreements among firms that have as an object the promotion or protection of exports, as long as they do not alter competition in the internal market and are compatible with the obligations Paraguay has assumed in its international agreements;
- Agreements among firms that significantly enhance the social and economic level of depressed areas or sectors.

These provisions are similar to the European Commission's rules on the granting of exemptions¹¹, and have the same objectives of promoting development and growth, even more in the case of a developing country.

2.3.10 Different procedures

There are three different procedures established by the law: one for investigation of abusive practices, whether unilateral or involving one or more agreements, another one for granting approval of an agreement that is capable of authorization, and finally, the process for review of concentration operations.

2.3.11 Sanctions

As is currently the case in the European Union, the only penalties imposed are pecuniary fines. There was much debate on whether imprisonment should be a possible penalty. So far, the answer has been no. There is still a great deal of work to be done in the area of competition advocacy, the Agency has to be created and, through its work, the Agency must gain credibility before it can ask a judge to send high executives to jail.

There would be two important negative consequences if jail penalties were to be imposed. First, this is a power only a criminal judge has, and the idea has been to keep the decision making power in the Commission. Its decisions are subject to appeal, but before a specialized Tribunal that deals with appeals of the acts of organs of the Executive Branch.

There is also the issue of leniency. The United States has, as do many jurisdictions, a leniency program for a party in a cartel that denounces its existence. In the United States this is possible even when the "repented" party is liable criminally. This is not the case in Paraguay, where, as in most civil law jurisdictions, the public prosecutors have no authority to make a "deal" with the defense. This is the case for what are called "public criminal actions", where the public prosecutor ought to continue with the process, notwithstanding what the parties involved have to say about it, and even if the injured party wishes to settle the case. The victim only has this right in a "private criminal action".

This is a problem that had to be faced, for example, by Brazil, when, in the year 2000, it implemented its leniency problem. In order to grant leniency, antitrust offenses have to be de-criminalized so that this problem of the prosecution not having the authority to make a "deal" would not arise.

3. Uruguay

3.1 The Uruguayan Economy- Similarities and Differences with Paraguay

Uruguay, even though it shares some characteristics with Paraguay given its similar size, is somewhat more industrialized. It exports various manufactured goods to MERCOSUR and beyond. Historically it has held an important artisan industry of woven clothing, specializing in woolen products. It is also an agricultural-oriented economy, its main exports being raw and manufactured agricultural goods such as beef, leather, wool, wheat, soy beans, dairy products, and to a smaller degree, wine. But, as stated before, in past years its exports have included many industrialized products, such as bicycles, motorcycles and even automobiles.¹²

Even though Uruguay suffered a dictatorial military government from 1973 to 1985, it maintained the same economic system that dates from the beginning of the 20th century. It is a hybrid system, which combines the democratic government regime characteristic of western countries, with an economy that is strongly tied to State action, not only through regulation, but also in the development of monopolistic regimes in important industrial and service activities.¹³

Therefore, there is a strong culture of state involvement in the economy and a strong rejection of privatization. Several referenda have been held and so far none of them has approved privatization of state enterprises that provide public services. The crisis in Argentina, which is associated with an unsuccessful policy of currency convertibility, but also with an incorrect assignment of public services' entities in the privatization process, does not help the cause of competition in the public eye either.

All these characteristics, combined with the small dimensions of an internal market of three million inhabitants, and the still limited industrial development of the country, have historically rendered it irrelevant to discuss the need to defend competition. In the main industrial or services sectors, either the law has designated a monopoly in favor of a state enterprise, or the size of the market has impelled the existence of many competitors, and this resulted in the creation of natural monopolies or oligopoly structures¹⁴

Among the measures that Congress will probably consider in the first quarter of 2002 is the establishment of a regulatory agency for energy and water. Unlike the coalition partner Partido Nacional, the center-left

¹¹ Treaty on the European Union, Art. 81(3)

¹² Web page of the newspaper "El Observador", at www.observa.com.uy

¹³ Hargain, Daniel: "Competition Defense Legislation in Uruguay"- Article published in the Latin-American Competition Bulletin, N. 13, November 2001, p. 102.

¹⁴ Hargain, Daniel: op.cit. , page 102.

Encuentro Progresista-Frente Amplio (EP-FA) does support the government's economic reform proposals. The EP-FA is seeking a public plebiscite to repeal one of the government's most important victories, the partial liberalization of the oil market. The EP-FA also campaigning to call a plebiscite against an earlier law that liberalized the telecommunications market, allowing the Administracion Nacional de Telecomunicaciones (Antel, the state telecoms company) to form joint ventures with the private sector in the mobile telecoms business through its subsidiary, Ancel.¹⁵

3.2 The existing laws relating to competition defense and prospects for further progress in the area:

Notwithstanding the lack of political support for the idea, and due to the international obligations Uruguay assumed when it joined the World Trade Organization, as well as its membership of MERCOSUR and the current negotiations of the FTAA and MERCOSUR-European Union Agreements, Uruguay has been faced with the need to legislate on competition defense.

According to Dr. Hargain, the urgent need to legislate in the matter, as well as the lack of previous experience on competition, are the reasons why, in comparison with other countries, the Uruguayan dispositions are so concise and lacking of a polished technical treatment of the institutions that conform the law of Competition, but he rescues the fact that the intention was to create a basic regulatory scheme, and the practice of it would allow to appreciate the needs of the country in this matter, evaluating the results obtained in a prudential lapse of time, and then formulate a new legislative proposal.¹⁶

The author of this paper has intentionally avoided a specific description of the Competition Laws of Uruguay, due to a lack of sufficient expertise on the area, but instead has chosen to make a general comparison between the draft in study in Paraguay and the existing laws in Uruguay.¹⁷

3.3 Reasons for a competition law in Uruguay

Before comparing the two legal solutions proposed, the existing law of Uruguay and the proposed law in Paraguay, it is important to identify, within the Uruguayan reality, why it is necessary to have a competition regime.

Uruguay, as well as Paraguay, is in the process of economic reform. Whether liberalization of the public-operated services occurs in the immediate future or takes longer, it must be based on a fair competition structure. This can also help the Government gain public approval for the reforms, the main reason why the people opposing them referendum after referendum being their distrust of the market. If people perceive the open market as a positive element, a creator of more business opportunities and of jobs, something that helps the country move away from recession, their support may shift to economic liberalization.

In the trade area, as well, Uruguay depends heavily on Brazil and Argentina for its export markets. If it has the mechanisms to remove unnecessary barriers it can improve the stream of trade with them and its continuity.

4. Comparison between the system proposed in Paraguay and the actual system in force in Uruguay:

In one way or another, both legal systems are a work in progress. The Paraguayan one, because it is still to be passed as a law by Congress, and the Uruguayan one, because, even though it constitutes positive law, it is yet to be developed into a more exhaustive legislation that takes into consideration the international tendencies and the economics of antitrust, as well as the particular needs of the Uruguayan economy.

When comparing the two approaches, the attempt was made to identify certain aspects that are specifically relevant considering the incipient nature of competition defense in both countries. Therefore, some aspects of the law were left undiscussed, especially the procedural aspects, which were only considered as regards their general purpose and the lapses of time allowed for them, two issues that reflect policy issues rather than mere procedural matters.

4.1 Enforcement agency:

The first difference that strikes the reader when comparing the two systems resides in the characteristics of the enforcement agency. In the Paraguayan proposal, the idea is to create an independent, autonomous agency, and to limit the powers of the Executive Branch to the final decision on concentration operation cases. In Uruguay, the organ responsible for enforcement is a dependency of the Ministry of Economy and Finances. It is important to note that the objectives of competition, when faced to those of public finances or trade, might be antagonistic.

¹⁵ ¹⁵ The Economist- Economist Intelligence Unit- Country Report Uruguay- March 2002, page 2.

¹⁶ Hargain, Daniel. op.cit.: page 106.

¹⁷ For a through description of the Competition Legal Regime in Uruguay, see Hargain, Daniel, op.cit.

Therefore, it is not the best solution to have these two interests merged in the same enforcer. Considering the relatively low weight of competition interests in developing economies, the enforcer will generally give more importance to the other interests at stake, and competitors and consumers will suffer the consequences.

Relation with public entities and regulatory agencies: The Uruguayan law does not address this issue. The Paraguayan Draft states that the only organs with competence to investigate and decide in the procedures established by the competition law are those established by it. This means that, in case there is conflict between the interests of the Commission and some regulatory agency or public entity in some matter that relates to the economic activity regulated by this agency, as long as the matter refers to competition in that activity, the competence to decide belongs to the Commission. If the matter is related to any other aspect of economic activity (technical matters, safety, etc.), the regulatory agency or public entity will have the power to decide.

Division of functions: In the Uruguayan law, both the activities of investigation and decision are on the enforcement organ, the General Directorate for Trade of the Ministry of Economy and Finances, while in the Paraguayan draft these tasks are divided between the Technical Secretariat and the Commission itself.

4.2 Definitions:

The Paraguayan draft gives several definitions of some terms in the law that are not familiar to the legal lexicon, but to the economic one. This is unusual for legislative technique, which is more bound to leave definitions for the interpreter of the law. Nevertheless, in this case the drafters found it more useful, given the novelty of the matter in Paraguay, to define those terms with which the legislator, the enforcement agency and the general public are not familiar, to avoid misinterpretations. The draft defines: free competition, undertaking, relevant market, abuse of a dominant position, abuse of economic dependence, predatory pricing and terms related to it as effective price and discounts directly related to the transaction in its origin, concentration operations and Global Gross Income calculation.

4.3 Scope of application:

Territorial- Effects Doctrine: Both the Uruguayan law and the Paraguayan draft state that the laws apply to practices that *may have the effect* of harming competition in the territory of each country. The Paraguayan draft is more specific in that it states that it will apply to those undertakings with a legal domicile abroad that perform economic activities in the Paraguayan territory as long as their actions, activities or agreements produce effects in the national market. Even though the Uruguayan law does not specify this, by using the language of "effects", the same application could be made of it. The effect doctrine was first stated in United States jurisprudence under the landmark case of *U.S. v Alcoa*, where it was settled that the Sherman Act applies to foreign conduct if it has an intentional or at least foreseeable effect on U.S. commerce.¹⁸ This same requisite was later legislated by Congress in the Foreign Trade Antitrust Improvements Act of 1980. The European Commission has been inclined to embrace the "effects test" doctrine of U.S. antitrust laws, but the European Court of Justice has not done so expressly. Nevertheless, in the *Woodpulp I* case¹⁹, the ECJ said that Community Law should be applied to conduct performed abroad because the anticompetitive activities had been "implemented" within the Community.²⁰

Subjects of the law: The Paraguayan draft recognizes as subjects of the law those undertakings, whether public or private, that perform economic activities within all or part of the national territory, with or without profit purposes, and also those that are established abroad but whose activity is inside the national territory, or has effects inside it, as stated in the previous paragraph. An undertaking is the natural or legal person involved in the agreement, concerted practice, abuse or concentration. Those conducts are imputable to the undertaking that controls the undertaking at stake when it determines the latter's behavior. Finally, the law also applies to those natural persons that exercise the representation of the undertakings when they intervene in the acts sanctioned by the law.

The Uruguayan law states that its subjects are "the undertakings that perform an economic activity, whichever their legal nature". The law does not define what an undertaking is. Dr. Hargain has interpreted that, since under Uruguayan taxation and administrative law undertakings are not subject to rights and obligations, but their titleholders, the business persons that produce goods or services, throughout an organization that combines

¹⁸ *U.S. v. Aluminum Company of America*, 148 F.2d 416. (1945)

¹⁹ *Ahlstrom & others* ("Woodpulp") (1985) 3 CMLR 474, pp. 27, 50.

²⁰ *Joelson, Mark R.*: "An international antitrust primer", Kluwer Law International, The Hague, 2001. pp. 208-209.

other's work and capital. He also includes within the subjects of the law the economic agents (every subject that performs an economic activity, whether the State, consumers or suppliers), and associations of undertakings.²¹

In general, both systems acknowledge undertakings as their subjects, but the divergences in the interpretation of this term could lead to different outcomes in decisions.

4.4 Recognition of economic efficiency:

The Paraguayan draft makes a special recognition of the principle that the simple conquest of the market based on the better efficiency of the undertakings in relation to its competitors does not constitute a restriction to competition. There is no such recognition in the Uruguayan law.

4.5 Recognition of international obligations:

The Paraguayan draft also has a special provision that forbids all those practices restrictive of competition that are incompatible with the obligations resulting from the International Agreements ratified by Paraguay. This is a provision that applies both to those obligations that exist when the law is passed and to those assumed by Paraguay afterwards, therefore turning these future agreements into positive law and a part of the competition law as soon as they are ratified by the Legislative. The Uruguayan law does not refer to the matter.

4.6 Practices covered:

As regards the prohibited practices, both systems consider the abuse of a dominant position (following the European terminology instead of the U.S. concept: "monopolization"²²), concerted practices or agreements between undertakings, including the subordination of celebration of contracts to abusive conditions not related to the object of the contract or the uses of commerce, and both give a special importance to predatory pricing. Nevertheless, as noted before, Paraguay includes in its Draft a new provision: the abuse of economic dependence, which is a response to the needs of a small economy. Given that Uruguay shares this characteristic with Paraguay, it might profit from legislating this institution as well.

4.7 Exceptions:

4.7.1 Legal exceptions-Public services:

The Uruguayan law excludes from its scope of application those established by law and by reasons of general interest (articles 7 and 36 of the Uruguayan Constitution), or that result from the public service character of the activity at stake. As previously quoted, according to Dr. Hargain, there is no definition of the latter category, and the interpretation of this article is yet to be determined.

The Paraguayan draft also excludes those undertakings that are excluded by special laws, but it does not exclude public enterprises, and it is important to remember that, as regards competition, when there is conflict between the opinion of the Commission and another public entity or regulatory agency, the Commission has the last word.

4.7.2 *De minimis* standard:

In the Paraguayan draft, there is a *de minimis* standard for the application of the law. For horizontal agreements, the threshold is a 5% market share of the undertakings combined, and for vertical agreements the threshold is a 10% market share of the undertakings combined. For abuse of a dominant position, the threshold to consider that an undertaking holds such a dominant position is a 30% market share. There are no such thresholds to be met in the Uruguayan law.

4.8 Agreements that are capable of authorization- individual and block exemptions:

The Paraguayan draft establishes certain categories of agreements that are capable of being authorized by the Commission, either because they contribute to improving the production or marketing of goods and services, or to promoting technical or economic progress, as long as these agreements do not confer on participating firms the ability to eliminate competition in respect to a substantial part of the products or services in question; or because they have as an object to promote or protect exports, as long as they do not alter competition in the internal market and are compatible with the obligations Paraguay has assumed in its international obligations; or because they produce a significantly important elevation of the social and economic level of depressed areas or sectors.

²¹ Hargain, Daniel: op.cit. p. 107.

²² According to Professor Joelson, (see footnote 25), there is a difference in this approach, due to the fact that under American jurisprudence, one of the requisites to prove that a firm is monopolizing is that it holds a market share of at least 75%, whilst in the European approach, a dominant position has been held to exist when the undertaking holds a market share in the range of 40-50 %.

The "export-cartel" exception is a well-known figure in competition laws in all jurisdictions, and though the author does not agree with its existence, it is impossible to eradicate this provision unilaterally, because it would result in an unfair situation between different countries, therefore it is the opinion of the author that, until international treaties are agreed upon banning their existence, countries, especially developing economies like Paraguay, need to exempt them from the scope of application of the competition laws.

These exemptions can be granted by the Commission individually, or for a whole category of activities, as a block exemption.

As stated previously, these provisions are similar to the European Commission rules on the granting of exemptions²³, and they have the same objectives of promoting development and growth.

Uruguay has not considered yet the possibility to grant exemptions to certain practices or categories of it. This might develop from the practice of the law in the future.

4.9 Sanctioning:

Neither system provides for criminal sanctions for infringing practices. This might be beneficial for both in the future, in case they decide to have leniency programs, as Brazil has done. If Argentina follows, this could be very positive if the cooperation between enforcement agencies in MERCOSUR goes further, and cartels are prosecuted throughout the common market. A common leniency program may enhance the detection of cartels that operate within or have effects in the territory of the four countries.

As for the civil sanctions involved, the Uruguayan system may lack celerity in the enforcement of the law, given the requirement to first issue two warnings against the infringing party, afterwards a cessation order, and only then a pecuniary fine. In practice, it is very likely that companies will wait until the cessation order is issued, only in time to avoid the fine, therefore the warnings might result a deterrent of the law being enforced, instead of the opposite.

The Paraguayan draft establishes the possibility to issue cessation orders directly, without previous warrants, and, in case of noncompliance, pecuniary fines. This gives the Commission more authority to enforce the law and is a deterring factor for potential infringers.

4.10 Control of concentration operations:

As stated previously, in the Paraguayan draft there is the obligation to notify concentration operations above a certain threshold, and the Commission has to issue an opinion to the Minister of Industry and Trade regarding the proposed operation. The Minister has the power to condition the operation or to oppose to it, but not to authorize it. The authorization is implied if the Minister does not exercise his right within a specific period of time.

The Uruguayan law does not address the control of operations of economic concentration. It has chosen so far to attack abuse of dominance in a corrective way, and left aside the possibility of preventing the acquisition of a dominant position by firms through mergers or acquisitions.

4.11 Secrecy:

The Paraguayan draft establishes that all those who take part in the investigations provided for in the law or who have knowledge of them by reason of their profession or position are bound to secrecy concerning facts they come to know through them, and that beyond the criminal or civil responsibilities they may incur in if they violate the secrecy duty, this will be considered a grave disciplinary fault. The draft also establishes that both the Technical Secretariat and the Commission may order at any time during the procedures, by their own initiative or upon requirement of one of the parties, that certain data, documents or parts of them be considered confidential to protect commercial secrets, and they will form a separate part of the files.

The Uruguayan law establishes that the data and information obtained during the investigations can only be used for the purposes contained in the law. In view of this, the General Direction for Trade has issued a set of guidelines, which include a provision that grants the party providing the information for purposes of the investigation to request that certain data provided has a confidential character, with due justification for it.²⁴

4.12 Procedures:

The Paraguayan draft has three different procedures established for different purposes: an investigative procedure for sanctioned practices, an authorization procedure for those agreements passive of authorization, and a procedure for control of economic concentration operations. The Uruguayan law has only an investigative procedure, because it does not contemplate authorization of practices or control of concentration operations.

²³ Treaty on the European Union, Art. 81(3)

²⁴ Hargain, Daniel: op.cit. p. 114.

4.13 Deadlines:

In the Paraguayan draft, the maximum duration for the investigative procedure in the Technical Secretariat is 12 months after the opening of the procedures, and the Commission also has this same period of time, 12 months after the investigation is opened, to issue a decision.

It does not establish a deadline for the authorization procedure, therefore this must be established by regulations of the law.

As for the control of concentration operations, the Minister of Industry and Trade has 90 days, from the date the operation is notified to the Technical Secretariat, to oppose the operation or condition it.

The Uruguayan law establishes the following deadlines in the investigation procedure: for the enforcement organ to decide on the opening of the procedure, ten days. After that, the alleged infringer has ten days to respond to this accusations, and after this, the enforcement organ has ten days to make a final resolution on the opening of an investigation. The process of obtaining and offering proofs should take no longer than sixty days, after which the parties have fifteen days to contest the evidence obtained. Finally, the enforcement organ has sixty days to issue a decision. Therefore, the total lapse of time that an investigative procedure can take is one hundred and seventy five days, almost six months, half the time required by the Paraguayan draft. Compared to the usual time an investigation takes in other jurisdictions, such as Argentina, Brazil, the United States, the European Union, this might not be enough in practice to conduct a full investigation.

4.14 Damages:

The Paraguayan draft refers to the procedure established in the civil laws for the reparation of damages to the injured party. But it also states that, in such procedures, the Commission may, upon request by the competent judge, issue a report related to the magnitude and precedence of such a reparation.

In the Uruguayan law, the injured party must also resort to the usual civil procedures for damage reparation, since these are beyond the attributes of the General Directorate for Trade.²⁵

4.15 Possibility of arbitration or conventional termination of the procedures:

The Paraguayan draft establishes the possibility of a procedure ending by an agreement between the parties, as long as it also entails the cessation of the infringing conduct, and it is not contrary to the legal order and/or the objectives of the law, or harmful to the interested parties or third parties. This possibility is only valid during the lapse of time from the opening of the procedures until the charges have been officially notified to the alleged infractor, when the Technical Secretariat decides to open an investigation.

The Uruguayan law refers this possibility to formal arbitration by specialized bodies, and this possibility persists during all the stages of the procedure, having the effect of suspending them.²⁶

The Uruguayan system is much more open to the parties solving the conflict by themselves, and less intrusive in business practices, but although this might be positive in that sense, it might be overlooking the interests of other affected parties by the agreement, such as other competitors or consumers.

5. MERCOSUR:

5.1 The decision-making process in MERCOSUR:

MERCOSUR being an intergovernmental body, not a supranational one²⁷, its decision making process is by consensus of all the Party States.²⁸ These decisions have no direct applicability, direct effect or immediate application. They must be incorporated in the juridical order of the Party States.²⁹

The system for the Resolution of Conflicts in MERCOSUR starts with the presentation of a Claim before the Trade Commission³⁰. The parties can skip this step and go straight the procedure established under the Brasilia Protocol for the Resolution of Conflicts within MERCOSUR, which entails three stages: Direct Negotiations, Mediation of the Common Market Group and finally the Arbitration Procedure.

²⁵ Hargain, Daniel: op.cit. p. 115.

²⁶ Uruguay- Decree N. 86/01- Article 7.

²⁷ Ouro Preto Protocol, Art. 2.

²⁸ Ouro Preto Protocol, Art. 37.

²⁹ Ouro Preto Protocol, Art. 40.

Ruiz, Nuno: "El derecho y la política de competencia comparados en la Comunidad Europea, el MERCOSUR y Chile"- Boletín Latinoamericano de Competencia, N. , pp.127-8.

³⁰ Annex I to the Ouro Preto Protocol.

Arbitration is the only procedure that is finished through a decision that does not need consensus, but only a two-to-one majority. Therein lies its importance as a means of solving conflicts in MERCOSUR.

5.2 The objectives of MERCOSUR. Towards the 5th freedom:

The main objective of the integration process is the creation of a Common Market among the Party States of MERCOSUR.³¹ This phase implies the presence of five main freedoms and the regulation of certain aspects necessary for its full operation. This five freedoms being: free circulation of goods, capital, people, services and competition.³²

But the concept of free competition in MERCOSUR is to be understood in a broad sense, including commercial defense mechanisms, consumer defense, external commercial policies, direct investment and the harmonization of legislations in the areas of commercial, taxation and intellectual property law. The Protocol for Competition Defense of MERCOSUR is part of a three-package deal of instruments that also includes the Regulation of Safeguards applicable to third countries (Dec. CMC N. 17/96), the Protocol for Consumer Defense, the treatment of dumping and export incentives within MERCOSUR (Dec. CMC 10/94), yet to be implemented.

The main idea behind this trio of policies is that, considering the asymmetry in the dimension and economic power among the members, the only way to address a common policy of economic competition is to act at the same time over their power to maintain or introduce artificial elements of competitive distortion among firms that operate in different markets, through public policies, many of them the product of periods of strong protection to national competitors.

This might entail the possibility that, while advancing on the area of competition defense understood in this way, the Party States might exclude in the intra-MERCOSUR trade the utilization of anti-dumping measures, as established in the national legislations.³³

5.3 The Protocol for Competition Defense of MERCOSUR³⁴ - Characteristics and main provisions:

5.3.1 General characteristics:

According to Peña³⁵, there are some dominant features in the negotiation of the Fortaleza Protocol:

- its insertion in a broader context of policies and instruments designed to insure adequate conditions of economic competition within MERCOSUR; and in particular, those public policies that might have the effect of distorting relative competitively among firms which operate in different markets,
- its coverage of both distorting practices originated by firms, and those originated by public policies,
- the constant link between the free circulation of goods and services - free trade - and competition defense, and;
- the relation between competition defense and the balanced distribution of the benefits of integration among countries of different economic dimensions.

The Protocol has already been ratified by Paraguay and Brazil, and is pending legislative approval by Argentina and Uruguay.

5.3.2 Main provisions:

5.3.2.1 Scope of application:³⁶

The Protocol applies to the acts performed by natural or legal persons, public or private, or other entities that have as their object to produce, or produce effects on competition in the scope of MERCOSUR and that affect trade between the Party States. This includes undertakings that exercise a state monopoly, as long as the rules of the Protocol do not impel them from the normal performance of their legal powers.

The requisite of affecting "trade between the Party States", means that it belongs to the exclusive competence of each Party State to regulate acts performed in their respective territories by a natural or legal person, public or private, or any entity domiciled in it which produces effects on competition that are restricted to its territory.

³¹ Treaty of Asunción, Article 1.

³² Jaeger, Augusto Jr: "Mercosul e a liberdade de concorrência", Boletín Latinoamericano de Competencia, N. 11, December 2000, pp. 25/26.

³³ Peña, Félix: "Una política de competencia económica en el Mercosur"- Boletín Latinoamericano de Competencia, N. 12, July 2001, p.15.

³⁴ Dec. 18/96 of the Common Market Counsel, also known as the Fortaleza Protocol, because it was signed in the Fortaleza Summit in December of 1996, in Brazil.

³⁵ Peña, op.cit, p. 16.

³⁶ Fortaleza Protocol: Articles 2-3.

5.3.2.2 Conducts and practices included:

In general, the Protocol bans those acts, individual or concerted, manifested in any way, which have as their object or effect to limit, restrict, falsify or distort competition or the market access or constitute an abuse of dominant position in the relevant market of goods or services in the scope of MERCOSUR and that affect the trade between the Party States.³⁷ This is a rule-of-reason definition of anticompetitive practices.³⁸

There is also the recognition that the mere conquest of the market resulting from the natural process founded in greater efficiency of the economic agent in relation to its competitors does not constitute a violation on competition.³⁹

Finally, the Protocol includes an illustrative list of practices that, when fulfilling the requisites previously defined in Article 4, constitute practices that are restrictive of competition. These non-exhaustive list includes:

- I.** to fix, impose or practice, directly or indirectly, in agreement with competitors or individually, in any way, prices and conditions of purchase or sale of goods, services or production;
- II.** to obtain or influence the adoption of commercial conduct that is uniform or agreed upon between competitors;
- III.** to regulate markets of goods and services, establishing agreements to limit or control the research and technological development, the production of goods or services, or to difficult investments destined to the production of goods or services or their distribution;
- IV.** to divide the markets of services or products, finished or semifinished, or the sources of supply of raw materials or intermediate products;
- V.** to limit or impede access to the market by new undertakings;
- VI.** to agree on prices or advantage conditions that may affect competition in public biddings;
- VII.** to adopt in relation to third contracting parties, unequal conditions in the case of equivalent services, placing them in a situation of competitive disadvantage;
- VIII.** to condition the sale of a good on the acquisition of another or to the use of a service, or to condition the performance of a service on the use of another or the acquisition of a good;
- IX.** to impede competitors from obtaining inputs, raw materials, equipment or technology, or the channels of distribution;
- X.** to demand or concede exclusivity for the disclosure of advertising in the media;
- XI.** to condition the purchase or sale on the condition of not using or acquiring, selling or supplying goods or services produced, processed, distributed or traded by a third party;
- XII.** to sell, for reasons non justifiable by business practices, merchandise below cost,
- XIII.** to reject without justification the sale of goods or the performance of services;
- XIV.** to interrupt or reduce in great scale the production, without a justified cause;
- XV.** to destroy, render useless or store raw materials, intermediate or final products, as well as to destroy, render useless or difficult the functioning of equipment destined to produce them, distribute them or transport them;
- XVI.** to abandon, make others abandon or destroy crops or plantations without a justified cause;
- XVII.** to manipulate the market to impose prices.

This list was based on the Brazilian Competition Law, and it is important to notice that, after the new Legislation was passed in Argentina in 1999, the practices there included are similar to these. The same thing occurs with the Paraguayan Draft. Therefore, the path towards legislative harmonization has been laid. Yet, this is a statement that will only become true once the Protocol is enforced. Any differences between the Protocol and the National Laws, if the latter are applied in the context of regional commerce, will be detected then. Nevertheless, since the lists of practices are only exemplary, it does not constitute a serious problem if the wording is not exactly the same, or if some practices are included in one body of law and not in another. Any deficiencies found in the Protocol will be resolved through proper further reclamation.

This is also true for the differences in governmental policies regarding competition: it is in the political arena that each country's commitment to competition freedom will either shine or be missed. As an example, in the future negotiation of the treatment of state aids by the Competition Committee, a work that is related to the work of the Committee of Commercial Defense of Mercosur, disciplining Brazil's heavy subsidization programs will be a tough challenge for the negotiators.

³⁷ Fortaleza Protocol: Article 4.

³⁸ Oliveira, Gesner: "Aspects of competition policy in Mercosur", Boletín Latinoamericano de Competencia, N.11, December 2000, p. 37.

³⁹ Fortaleza Protocol: Article 5.

One last point to be made: Argentina and Uruguay have not yet ratified the Protocol. Why is that?. According to government officials of these countries, the reasons are substantively different. In the case of Argentina, problems seem to be related to the formal procedure. Argentinean legislators want the Protocol to be more specific about the right of appeal of a Directive by the Trade Commission of Mercosur adopting an opinion of the Competition Defense Committee of Mercosur. This is implied in the procedure, given that the Constitutions of the four countries grant this right to their citizens, and this is not subject to a waiver by parties. Therefore, since the enforcement agencies of each country are responsible of enforcing the Mercosur-level Directive, the final enforcement in the country at stake is embodied in an administrative act, which is subject to appeal. This is the state of things right now, and what the Argentinean Congress seems to want is an express explanation of this state of things in the Protocol. Since this is a procedural matter, it can be included in the Regulation currently under negotiation. The author is not aware of any other problem in Argentina for the ratification of the Protocol to come through.

In Uruguay, problems for ratification of the Protocol seem to run deeper, and are associated to certain provisions of the Protocol that call for the introduction of free competition conditions in the activities of Public Monopolies or State-owned enterprises. As was explained before, in Uruguay there is a great belief in governmental involvement in the economy, and so far, it has not been possible to open these markets to free competition. But this position used to be much stronger, nowadays there is a lot of political support for the idea of free market and competition, and things might begin to swift in another direction.

5.3.2.3 Procedure:

According to Dr. Ruiz⁴⁰, the procedure can be summarized in the following steps:

- any Party State or interested person may present a complaint before the national authorities and these may open, *ex officio*, an investigation;
- the national authorities must perform a summary evaluation of the problem and submit it to the Committee for Competition Defense (the intergovernmental body formed by the representatives of the four Party States), which can proceed with the investigation, or foreclose it, depending on the authorization by the Trade Commission (the decisions are actually taken by this organ, the Committee for Competition Defense is bound by the directives issued by the Trade Commission, having no decisive power itself),
- the national authority of the place of residence of the affected undertaking conducts the investigation with the collaboration of the other national authorities, and at the end, presents its opinion to the Committee,
- on this basis, the Committee proposes the Trade Commission the adoption of sanctions or any other appropriate measures;
- it is up to the Trade Commission to issue the final decision in the form of a Directive and to define the sanctions that will be applied by the national authority;
- if there is no consensus on the Trade Commission, the decision is rendered to the Common Market Group, and if even there no consensus is achieved, the Party States can resort to arbitration according to the rules of the Brasilia Protocol.

There is also the possibility for the parties involved to agree on a voluntary cessation of the activities under investigation, and the express declaration of the right to a defense of the undertakings under investigation, although this right is not clarified in the Protocol, but in its Regulation that is currently being negotiated.

5.3.2.4 Limitations of the System:

The system, as it exists at the moment, faces serious limitations for its enforcement. Some of these are being taken care of by the negotiation of a first regulation that will address the specific procedure for investigations, the delimitation of the scope of application and definition of the relevant market, and other important issues. But there are yet two important aspects of competition policy which have not yet begun to be negotiated: the regulation of concentration operations (though this is established as a task in the Protocol itself)⁴¹, and the regulation of State Aids that may result in a distortion of competition among the Party States.

There are other aspects that depend solely on the political will of the Party States, such as the ratification of the Protocol in Argentina and Uruguay for its full enforcement, and the lack of a national legislation and creation of a national enforcement authority in Paraguay. The Uruguayan legislation, as it exists now, might need further development in order to be in accordance with those of its partners in MERCOSUR.

Finally, for the Protocol to be effective, the Party States have to work in the creation and strengthening of a competition culture. According to Oliveira,⁴² "Both the public and the private sector are not

⁴⁰ Ruiz, Nuno: op.cit. p. 150. Fortaleza Protocol: articles 10-21.

⁴¹ Fortaleza, Protocol. Art. 7.

⁴² Oliveira, Gesner: op.cit. p. 38.

used to the inherently competitive market game. There are still traces of interventionism in government regulations, and corporate leaderships are still not sufficiently aware of competition policy". Oliveira also calls for granting high priority to the institutional development of national agencies, giving them adequate resources, and promoting technical cooperation among agencies.⁴³

6. The possibilities that entails a common competition regime for Paraguay and Uruguay:

6. 1 What has MERCOSUR done so far for them?

In its eleven years of existence, MERCOSUR has had its share of advocates and detractors. This is a reality that seems to be more noticeable in periods of economic crisis, in the four countries. But the benefits of the integration process cannot be overlooked by this setbacks. As Peña states: "The complexity of the enterprise, as well as the economic difficulties that the partners of MERCOSUR have faced are in a fair share originated in factors that are external to the region".⁴⁴

Peña draws our attention to the results achieved since the beginning of the process, such as the growth of reciprocal trade, of foreign investment directed to MERCOSUR, and the production and distribution strategies of multinational, regional, and even medium and small-sized businesses that have responded to the signals sent to investors by the governments. Beyond the mere economic figures, he describes MERCOSUR as an expression of a regionalism that is open, competitive and democratic, what was denominated in 1995, during the "Tequila crisis" as the "MERCOSUR brand".⁴⁵

In this environment, Paraguay and Uruguay have gained a new status in the international community: they are no longer two small economies that range between three and five million inhabitants, they are now part of a the third biggest trading block in the world. This gives them a tremendously bigger stance in international negotiating forums, as well as an added appeal to investors: they are the doors to a market of two hundred million consumers.

In the political arena, MERCOSUR constitutes a stabilization factor. In the Protocol of Las Leñas, the Party States agreed on a "democratic clause", according to which, if a de facto government is established in any of the countries, this means its expulsion from MERCOSUR. During the two institutional crisis that Paraguay suffered, the first one in April of 1996, which led to the incarceration of General Lino Oviedo after a failed coup attempt, and the second one in March of 1999, which led to the resignation of President Raúl Cubas - the political and social reaction movement that was called by the international press "the Paraguayan March"- the support of the other MERCOSUR governments, as well as all the international community, was a key factor in the restoration of democratic and juridical order in Paraguay. It was also a clear demonstration that the democratic clause was not just a dead letter, but in full vigor.

But the most important contribution of MERCOSUR to this two countries resides in the trade area. Commerce with Argentina and Brazil is vital for their economies, and has always been, even before 1991. Though trade barriers still exist, and commercial defense mechanisms are used in a distorting way, the instruments and forums are now in place for this distortions to be challenged. As a negotiator once simply stated: "At least now you have a place to complain". This statement might be oversimplified, but so far it is the clearest and most effective explanation of the benefits of integration for Paraguay and Uruguay.

As an illustration of this, in the past year, there was a controversy due to an administrative order ("Portaria") from the Brazilian Government that banned the introduction into the Brazilian market of car tires that were recycled. Immediately, Argentina issued a similar prohibition, though the impact of this latter one was only a potential one, since the main export market for this products was Brazil. The producers of this tires were established in Paraguay and Uruguay, and this prohibition was tragical for them in the sense that they lost their main export market. This not only meant jobs being lost, but also the deterrent of an pro-environmentalist economic activity.

The reaction of the two affected countries was channeled through the mechanisms for Dispute Settlement in MERCOSUR. First, Paraguay contested the measure through the presentation of a claim in front of the Trade Commission, and afterwards, while Paraguay was preparing to go to Arbitration, Uruguay did, and the result was that the Arbitrage Panel ruled in its favor, ordering Brazil to withdraw the prohibition.⁴⁶ Brazil lifted the prohibition and this benefited both Paraguay and Uruguay, and the stream of commerce in this area of economic activity was restored.

Uruguay had also achieved a significant victory in a prior arbitration case that related to a ban in the importation of bicycles. But this new juridical triumph was encouraging in the sense that it gave the smaller

⁴³ Oliveira, Gesner: op.cit. p. 41.

⁴⁴ Peña, Félix: op.cit. p. 8.

⁴⁵ Peña, Félix: op.cit. p. 8.

⁴⁶ Newspaper article- ABC Color, Asunción, Paraguay. March 13th, 2002: "Brasil levanta la prohibición de importación de cubiertas".

members of MERCOSUR a renewed belief in the system and they will not hesitate to take their complaints forward in the future and to make full use of the mechanisms of dispute settlement as a means of lifting barriers to trade and other economic deterrent behavior by their counterparties.

6.2 The golden pot at the end of the rainbow: the example of the European Community:

In the same way that in the early days of the EC there were those "europeists" who believed in the system no matter what the situation was in that particular stage of integration, MERCOSUR too has its own group of "believers", or how they like to call themselves "mercosurians", those who believe in the objective of the common market beyond any difficulty the project might face. It should come as no surprise then, that for them, the example to look at is always Europe, in spite of the differences in the structural aspects of both regions.

But the EC represents an example to follow not only in its actual conception, the best guidance it gives MERCOSUR is precisely its developing history, MERCOSUR negotiators, particularly in the Technical Committee N. 5, which negotiates Competition Defense, often look at certain stages in the development of the competition policies in the European Community to shed light on controversial issues. This had led them many times to take a solution that is not precisely the present state of the law in the EC, but what it was decades ago, when the integration process was at an earlier stage, because those needs might be more similar to the ones MERCOSUR is facing at the moment.

This is also due to the special character that competition policies have in the EC: they are an instrument towards market integration, without which the consolidation of the Common Market would not have been possible. And the dynamic characteristics of the EC, defining no final point for the integration process, also pose a magnificent example to follow: only history will tell when the "ever closer union" is close enough.

Europe is a great example as well, because of the coexistence, at the beginning of the integration process of enormous differences between the Member States. A clear example are Spain and Portugal, which, after their accession to the EC in 1986 have experienced a significant improvement on their economic structures, gaining in efficiency and productivity. Europe has been beneficial for everybody, the gap between richer and poorer countries has been significantly narrowed. It is a great example of how the interests of the largest and smaller economies can be balanced towards the greater good. MERCOSUR can certainly benefit from its experience.

It is not strange, therefore, that the EC and MERCOSUR are now embarking on a very ambitious project: the negotiations for the first bi-regional agreement in history. This agreement, as proposed, would go beyond the mere reduction of tariffs, to extend to cooperation in a wide arrange of areas, including competition policies. Through a wide range of programs, MERCOSUR will benefit from the experience of the EC in competition defense, and the enforcement organs in both regions will be able to cooperate with each other in investigations and other activities.

Similar cooperation agreements are being negotiated in the context of the Competition Chapter for the Free Trade Area of the Americas (FTAA).

6.3 What lies ahead:

The successes in the trade area that Paraguay and Uruguay have accomplished through the enforcement of the MERCOSUR mechanisms may very well be expanded to the area of competition defense.

As an example, in the face of a currency crisis like the one that followed the devaluation of the Real in January of 1999, where the Brazilian products dramatically "invaded" the other countries' markets, rendering competition impossible for the remaining producers, the mechanisms of the Fortaleza Protocol could be triggered to impel them from being sold at below-cost prices, that were caused not only by the sudden devaluation, but also by a heavy subsidization program.⁴⁷ Yet to be seen are the consequences of the current Argentinean Crisis on the trading conditions, but for sure, this effects would better be faced if the Fortaleza Protocol was in full vigor, and if Paraguay and Uruguay had in effect a competition regime that allowed them to cope with this dramatic changes in the economy of the region.

The main worries of these smaller economies that the expansion of bigger competitors from the Brazilian or Argentinean markets will mean the extinction of its medium and small-sized firms, the basis of their economies, can be eased by the existence of a competition regime in full force between the Party States that can be triggered immediately after any anticompetitive practice is detected. This will add a very important factor to the investors, both local and international: juridical certainty.

⁴⁷ González, Carlos Alberto: "Ante la crisis brasileña, qué papel podría haber jugado el Protocolo de Defensa de la Competencia del Mercosur", Boletín Latinoamericano de Competencia, N.9, February 2000, pp. 6-7.

The "market democratization" that derives from this, if properly exercised, will derive in the narrowing of the gap between rich and poor, between underdeveloped and industrialized, between stronger and weaker countries.

7. Conclusions:

In many Latin American countries, two realities coexist: on the one hand, after decades of dictatorial governments, we finally enjoy democracy. But the inequalities created by centuries of injustice, corruption and plain old bad policies have created an underlying reality where these freedoms are sometimes a dead letter. Freedom and equality cannot exist independently one from the other. This duality is often described ironically by politicians as "democracy, but a democracy of a fox inside a henhouse".

For smaller economies like Paraguay and Uruguay, coexisting within a broader integration project such as MERCOSUR, competition policies should be an "equalizing" factor of differences in size, market power and any distortion created by private or public policies. The further free-trade agreements to come, such as the creation of the Free Trade Area of the Americas, a Biregional agreement between MERCOSUR and the European Union, among others, only increase the importance of having a competition regime in full effect.

Having a competition law. This is not a final goal, but a means towards a larger one: achieving competition freedom in the internal market, and in the whole regional market. Competition policies should be a dynamic tool, always capable of adjusting themselves to the ever-changing needs of an economy in development. Flexible enough to balance the different objectives behind them: industrialization, economic efficiency, consumer and social welfare, and modernization.

The fact that we are the smallest players among bigger contenders should not by any means lead us to believe that we are weaker. By promoting competitive freedom, we will be preparing our businesses to counterbalance with creativity what they lack in size or market power, to make better use of our unique resources, natural and human, to be smarter, and thus, more efficient.

It is time for the hens to let the fox know who calls the shots inside the henhouse.

EN BREVE

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IS THERE A BASIS FOR A CO-OPERATION BETWEEN THE EU AND THE MERCOSUR IN THE FIELD OF RESTRICTIVE BUSINESS PRACTICES?

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SUMMARY

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I. Introduction

Inside the European Union an increasing convergence between the national competition laws of the Member States as well as between these and the Community provisions can be detected¹. It is a favourable factor for the European Commission's intent to modernise the application of articles 81 and 82 EC-Treaty². In contrast, the convergence of competition rules in the international context is still a pending issue. Several scholars have made proposals for global antitrust provisions³ and the EU advocates talks on competition rules during the next WTO round. But there is still a long way ahead before substantive common rules can be agreed on. For the time being, co-operation will be the name of the game. The EC, so far, has concluded specific co-operation agreements with the USA and Canada. Also several comprehensive trade agreements include provisions regarding the co-operation with respect to the application of the contracting parties' competition laws. The EU-Mexico partnership and co-operation agreement is a recent example of this policy⁴. Due to the traditionally close and rich cultural and economic relationship between Europe and South America, an interregional co-operation with the Mercosur as the most important integration project in Latin America⁵ should be most appealing. The aim of this paper is to analyse the existence of sufficient basis for such co-operation as well to define the issues that should be tackled.

1. Some facts about the Mercosur

During its 10 years of existence, starting with the signing of the Treaty of Asunción establishing a Common Market between Argentina, Brazil, Paraguay and Uruguay⁶, the Mercosur has made a considerable progress⁷.

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¹ See M. DREHER, Gemeineuropäisches Kartellrecht, in: KÖBLER/HEINZE/HROMADKA (eds.), Europas universale rechtsordnungspolitische Aufgabe im Recht des 3. Jahrtausends, Beck, München, 2000, pp. 217-237; M. DREHER, Kartellrechtsvielfalt oder Kartellrechtseinheit in Europa?, in: Die Aktiengesellschaft (AG) 1993, pp. 437-448.

² White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999 C 132/1.

³ See esp. the *Draft International Antitrust Code* submitted by an international experts' working group in 1993, published in: 64 BNA Antitrust & Trade Regulation Report No. 1628, Special supplement (19 August 1993), pp. 1-22. For a comprehensive study on global antitrust rules see e.g. J. BASEDOW, Weltkartellrecht, Mohr Siebeck, Tübingen, 1998 and E. M. FOX, Competition Law and the Millennium Round, in: 2 J. of Int'l Econ. Law 665-679 (1999).

⁴ The EU-Mexico Agreement entered into force on 1 October 2000, OJ 2000 L 276/45; see for the other co-operation agreements <<http://europa.eu.int/comm/competition/international/bilateral>>.

⁵ As such described by H. SANGMEISTER, Der Mercosur als Wirtschaftsraum, in: BASEDOW/SAMTLEBEN (eds.), Wirtschaftsrecht des Mercosur – Horizont 2000, Nomos, Baden-Baden, 2001, p. 95.

⁶ Tratado de Asunción, 26 March 1991, Boletín Oficial del Mercosur No. 1 (1997) 13. This and the other Mercosur treaties as well as most of the organs' decisions referred to in this article are also published in the Spanish original with a German translation in MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT (ed.), Rechtsquellen des Mercosur, Vol. I and II, Nomos, Baden-Baden, 2000. For an English version of some of the texts see M. HAINES FERRARI (ed.), The Mercosur Codes, The British Institute of International and Comparative Law, 2000.

⁷ For the relevant data referred to in the following lines, see CENTRO DE ECONOMÍA INTERNACIONAL (CEI), Mercosur – 2001, available under <<http://cei.mrecic.gov.ar>>.

With a GDP of almost 1,1 trillion USD it accounts for 54% of the entire Latin American GDP. Since 1991, total Mercosur exportations doubled and the intra-regional trade increased by some 350%. Once the 1999 ‘Samba’ crisis was over, the exchange of goods among the Member States recovered by 16%; however, the actual Argentine ‘Tango’ recession still has serious retarding effects. During the last few years, several trade differences have arisen between the Member States; some of which could indeed be solved through the Mercosur’s own dispute settlement regime⁸. In one recent dispute Brazil challenged the application of anti-dumping measures by Argentina against Brazilian chicken exporters. At the last stage, an *ad hoc* Arbitration Tribunal had to decide. It held that, in theory, intra-regional anti-dumping measures constituted a violation of the principle of the free movement of goods and should be replaced by common antitrust rules. But the Tribunal also held that there did not exist in the Mercosur any rules or organs which effectively protected the competition against unfair trade on the regional level⁹. Consequently for the time being, Argentina was not barred from applying its anti-dumping laws also against undertakings of other Member States.

2. The Mercosur and the world

The arbitration award just mentioned drew a quite sobering picture of the status quo in regional competition matters. Maybe new input could come from outside. Within the “Atlantic Triangle”¹⁰ which includes NAFTA, Mercosur and EU, only the two latter ones show a similar approach as far as common competition rules are concerned. From the perspective of the European ‘business facilitation initiative’, reliable antitrust norms and their enforcement play an important role in order to ensure effective market access in the Mercosur countries and Chile. Market access, at the same time, will attract higher foreign investments. It is therefore in the mutual interest to bring new dynamism to the integration process of the Southern Cone. Departing from the Interregional Framework Agreement of 1995¹¹ and the Joint Communiqué of Rio de Janeiro¹², concrete negotiations take place since early 2000 aiming at the conclusion of an Interregional Association Agreement establishing a free trade zone between the two blocks (including Chile via a separate agreement)¹³. Co-operation in competition matters is therefore one topic among the negotiated trade issues¹⁴. These talks are crucial for the future relations between the European and South American countries. It is important for the EU not to lose huge emerging markets as it did with Mexico’s accession to the NAFTA. Such scenario could occur if Brazil gave up its reluctance to the US-initiative for a FTAA¹⁵. Until now, the Mercosur, under the leadership of Brazil, is sceptical about such a free trade area from Alaska to Tierra del Fuego and instead has expressed its preference for closer relations with the EU¹⁶. This expression of the political will is an important commitment.

II. Prevalence of a competition order

The Mercosur countries finally switched to a free market economy after a prolonged “period of economic experiments”¹⁷ and years known as the “lost decade”. Freedom of commercial initiative and free competition are today explicitly guaranteed in the constitutions of Argentina, Brazil and Paraguay¹⁸. The *Menem* administration started privatising and deregulating the Argentine economy by 1990. In Brazil, market reforms were introduced in the context of the *Plano Real* in the mid-90-ies. Uruguay and Paraguay only recently started reforming their political and economic order. In this context, Brazil and Argentina modernised their competition laws in 1994 and 1999 respectively, while Uruguay enacted competition rules for the first time in 2000 and Paraguay has recently elaborated a project of a genuine competition law. The Mercosur itself adopted a Protocol for the defence of competition in 1996, which however has not yet entered into force between all Member States¹⁹. Before we will analyse this Protocol, the intergovernmental approach of the Mercosur integration justifies a preceding look at the national competition orders.

⁸ Direct negotiations, consultations within the Mercosur organs, arbitration before an *ad hoc* Tribunal, see Protocolo de Brasilia para la Solución de Controversias, Boletín Oficial del Mercosur No. 1 (1997) 49.

⁹ 4th Award of the Ad-hoc-Tribunal issued on 21 May 2001 at § 153, Boletín Oficial del Mercosur No. 17 (2001) 205.

¹⁰ See GRABENDORFF/ROETT (eds.), Lateinamerika – Westeuropa – Vereinigte Staaten: Ein Atlantisches Dreieck?, Nomos, Baden-Baden, 1985.

¹¹ OJ 1999 L 112/66.

¹² On the occasion of the 1st EU-LAC summit on 28th June 1999, see C/99/207 (Doc-Nr. 9410/99).

¹³ The 1st meeting of the EU-Mercosur biregional negotiations committee took place on 6-7 April 2000. Meanwhile the 5th meeting has taken place on 2-6 July 2001.

¹⁴ Dealt with in Technical Group 3: government procurement, competition and dispute settlement.

¹⁵ Free Trade Area of the Americas, launched in the 1994 Miami Summit of the Americas and to be completed by 2005.

¹⁶ See art. 1 CMC/Dec. 8/01 of 22 June 2001 on negotiations with third countries: „Acelerar los procesos de negociación bilaterales en que el Mercosur ha decidido ser parte, en particular la negociación Mercosur-Unión Europea.“

¹⁷ This term is based on W. EUCKEN, Grundzüge der Wirtschaftspolitik, 6. Aufl., Mohr, Tübingen, 1990, p. 55-58.

¹⁸ See art. 42 of the Argentine Constitution, art. 173 § 4 of the Brazilian Constitution and Art. 105 of the Paraguayan Constitution.

¹⁹ Protocolo de Defensa de la Competencia of 17 December 1996, Boletín Oficial del Mercosur No. 2 (1997) 15. See below under III.

1. Brazil and Argentina

In both countries the substantive antitrust rules broadly state the prohibition of anticompetitive individual acts, agreements and concerted practices as well as of the abuse of a dominant position. While there are two separate provisions in the EC Treaty (art. 81, 82), the Argentine and Brazilian laws, respectively, use one uniform statutory definition of an antitrust offence. In substance, there is much resemblance with the EC rules, e.g. that the restraint may be either the ‘object’ or the ‘effect’ of a conduct as well as that the law does not differentiate between horizontal and vertical restraints. Nevertheless there are also remarkable differences.

a) *Ex ante* vs. *ex post* control

In Brazil, an overall reform of the existing competition rules dates back to 1994. The enactment of the “Law for the Protection of the Economic Order”²⁰, commonly known as *lei antitruste*, is a milestone. Not only the enforcement agency CADE was fitted with independence from the political decision making process, but also the antitrust system as such was changed completely, apparently according to EC model. Art. 54 of the Brazilian law provides a notification and authorisation system for “acts of any kind that can limit or otherwise prejudice the free competition or result in the dominance of the relevant market”. In practice, however, this provision applies only to concentrations (*atos de concentração*) that are explicitly mentioned as a sub-case of the acts subject to notification. It seems that this tacit derogation of the law was intended by the practice from the very beginning, since the notification files pursuant to Art. 54 have ever been registered only as *A.C.* (= *atos de concentração*). Other restrictive practice are subject only to a subsequent control that applies a *rule of reason* approach. Therefore, it is consequent that the draft modification bill actually under discussion will restrict the scope of the notification system also “on the books” to acts of concentration.

The Argentine competition law of 1999²¹ has explicitly opted for an *ex post* control as far as conducts and a half-hearted *ex ante* control as far as concentrations are concerned. In the course of the legislative procedure, however, several projects had foreseen an individual authorisation regime for agreements and concerted practices, too²². But the final statute only introduced an obligatory notification system for concentrations and left the built-in *rule of reason* regime unchanged insofar as only those acts and agreements that cause a prejudice to the “general economic interest” are prohibited. New, however, is the merger control that concerns all transactions with an operational value of \$ 20 million or more, in which enterprises with a joint turnover of \$ 200 million inside Argentina are involved²³. A second innovation is the transformation of the enforcement authority into an independent entity of the Ministry of Economy to which it still belongs. But two years after the entry into force of the new law, the institutional reform has not been accomplished, yet.

b) Action against restrictive business practices

The lack of a coherent *ex ante* control in both countries should suggest that administrative and private antitrust enforcement are strong enough to equalise the missing preventive measures. But this is not the case. The reason for this does not lie not in the substantive law, because the practice generally regards horizontal core restrictions (prix fixing, bid rigging, output restrictions or market division) as well as minimum resale price maintenance as unlawful as such. In Brazil, the draft bill even provides for a statutory *per se* rule, while in Argentina similar projects have not succeeded²⁴. The reason for the low enforcement record is rather the lack of capacities. Due to the low thresholds for notification of concentrations in Brazil²⁵, the scarce human and financial resources of CADE are primarily occupied with the examination and authorisation, subject to time limits, of undertakings which effects on the competition are almost or absolutely inexistent. The same was true for Argentina during the first one and a half years of the new merger control until so-called “Superminister” *Domingo Cavallo* changed the threshold figures as an investment promoting measure in order to exempt the majority of undertakings from the pre-merger notification obligation²⁶.

Few and bound resources is one important reason, why enforcement is weak. Another one is the lack of enquiry powers. Only in 2000, the SDE, the Brazilian antitrust investigation body inside the Ministry of Justice, has been vested with basic powers²⁷. Now, the SDE may perform inspections in the undertakings’ business premises and

²⁰ Lei 8.884 of 11 June 1994.

²¹ Ley 25.156 of 20 August 1999.

²² Proyectos “Gabrielli” and “Cambareri”, Antecedentes Parlamentarios 2000-A, pp. 59, 75.

²³ Art. 8 Ley 25.156 as modified by Decreto 396 of 1 April 2001 (B.O. 5 April 2001).

²⁴ See *supra* note 22.

²⁵ Joint global turnover of R\$ 400,000,000 (appr. EUR 155,000,000) or resulting in a 20% market share.

²⁶ Decreto 396, *supra* note 23; according to unofficial information, the number of notified cases might drop by 90%.

²⁷ Medida Provisória 2.055 of 11 August 2000, transposed into Lei 10.149 of 21 December 2000.

apply for a judge's search and seizure warrant²⁸. This is similar in Argentina. It is therefore not surprising that despite the general ban on horizontal price fixing, it was only in 1999 when the first 'classical' price cartel of national importance was fined in Brazil. However, this did not happen due to investigation measures, but due to the enterprises' communication of a presumably concerted price increase to the Ministry of Finance²⁹. In Argentina, no conviction of a significant price conspiracy has been reported, yet.

As far as horizontal anticompetitive practices are concerned, enforcement in both countries has focused on publicly known decisions or practices of professional or entrepreneurial associations aimed at uniforming prices or business conditions. Though, Brazilian SDE recently has intensified its action against cartels including several of international dimension³⁰. This highlights the importance of international co-operation laid down in the OECD recommendation concerning effective action against hard core cartels³¹, to which Brazil has adhered as the first non-OECD member state³². The USA already concluded a co-operation agreement with Brazil³³.

A consequence of the more rigorous posture of the agencies vis-a-vis restrictive business practices might be a greater secrecy on the side of the parties of a conspiracy. In Brazil, a new legislation has put forward a leniency program with similar, but stricter requirements than the EC program³⁴. It will depend on the SDE or the future single agency³⁵ to develop transparent rules which reduce the uncertainty for the applicants for leniency making it thereby more attractive. Nevertheless hints from the inside of a conspiracy can only be a supporting measure. Own permanent market studies and sector inquiries aimed at detecting anticompetitive practices must also be broadened. Both, the Argentine and the Brazilian law convey such powers to the respective agencies.

c) Private law enforcement

In a system without *ex ante* control, pleas of nullity by affected parties to a restrictive agreement as well as complaints by injured third parties are of great importance³⁶. The Argentine and Brazilian statutes are apt to foster private law enforcement as they concede claims for injunction and compensation independently of the administrative proceedings³⁷. In Brazil, there are plans to introduce treble damages in order to incentive private law suits. Also consumers are entitled to claim damages, because they are explicitly included into the scope of protected persons. Hitherto, however, the private parties' role in practice is limited to initiate the administrative investigations by denunciation; though in Brazil without further procedural rights. This is different in Argentina, where the proceeding before the competition authority is subject to legal time limits³⁸ and shaped like a controversial litigation. The complainant, for example, has the right to challenge in court the rejection of his complaint by the Competition Tribunal³⁹.

The question of direct applicability of the competition rules is crucial for private antitrust enforcement is. This depends on whether a decision by the competition authority is needed for the determination of an infringement or not. In Europe, the main obstacle to effectively allege EC competition rules in national courts is their lack of jurisdiction to apply the exemption provisions. This problem does not arise in the Argentine and Brazilian systems based on the rule of reason, since no regime for individual exemption exists, except for concentrations. The Brazilian law explicitly states the independence of a civil law claim from the administrative proceeding.

²⁸ Art. 35 § 2 and art. 35-A Lei 8.884.

²⁹ CADE 27 October 1999 (P.A. 08000.015337/97-48 – CSN, Cosipa, Usiminas). Until 1996 steel companies were obliged to communicate intended price raises to the SEAE (Ministry of Finance).

³⁰ For example the Vitamin- and the Lysin-cartel, see P.A. 08012.004599/99-18 (BASF, Hoffmann-LaRoche et al.) and P.A. 08012.004897/00-23 (ADM et al.).

³¹ C(98)35/Final of 27-28 April 1998.

³² Exchange of letters between the Brazilian Ambassador to France and the General-Secretary of the OECD of 27 June 2000.

³³ Agreement between the Government of the United States and the Government of the Federative Republic of Brazil regarding the Co-operation between their Competition Authorities in the Enforcement of their Competition Laws, signed on 26 October 1999.

³⁴ Art. 35-B Lei 8.884, introduced by Medida Provisória 2.055 of 11 August 2000. Only the first enterprise who qualifies for the leniency program may obtain amnesty, when the agencies do not have sufficient proof.

³⁵ The draft modification bill foresees an institutional reform with the creation of a single *Agência Nacional de Defesa do Consumidor e da Concorrência* instead of three concurring authorities.

³⁶ See for instance the Explanatory Memorandum of the European Commission concerning the Proposal for a new Council Regulation implementing art. 81, 82 EC-Treaty, COM(2000) 582 final, at C.1.a. The ECJ, Case C-453/99 (*Courage Ltd/Crehan*) judgment of 20 September 2001, emphasised the importance of the right to claim damages for loss caused by an anticompetitive agreement in order to maintain effective competition and ruled that art. 81 EC-Treaty precludes a national provision that excludes such right on the sole ground that the claimant is party to such an agreement.

³⁷ Art. 51 Ley 25.156, art. 28 Lei 8.884.

³⁸ See Decreto 89 of 25 January 2001 (B.O. 30 January 2001).

³⁹ Art. 52 lit. c) Ley 25.156.

Affected parties can therefore allege nullity in the courts at any time. The draft reform bill makes this even clearer, distinguishing between ‘absolute restrictions’, that are void *per se* (i.e. ‘hard core’ cartels), and ‘relative restrictions’, that require concrete proof of harmful effects.

Neither the Argentine law does concede exclusive jurisdiction to the Competition Tribunal. The nullity of an anticompetitive act that prejudices the general economic interest derives from the statutory definition itself which declares that these acts “are prohibited” (*están prohibidos*). According to art. 18 of the Civil Code all acts prohibited by law are void. Notwithstanding the direct applicability of the antitrust provisions, private litigation in this matter is extremely rare in both countries. The reasons are presumably the novelty of competition rules governing economic transactions in these countries, the burden of proof, the slow administration of justice especially in Brazil, and the significance of economic factors to be taken into account while applying the competition rules, underlined by both the Argentine and Brazilian competition authorities⁴⁰, which reduces the foreseeability of courts’ decisions⁴¹.

2. Uruguay and Paraguay

a) Uruguay’s first cautious steps

In Uruguay, the first specific competition rules were enacted in mid-2000. They consist in three provisions out of a multi-topic ‘urgency law’ put forward by the then newly elected government⁴². Since these provisions are only of substantive nature, the necessary administrative sanctions were introduced later by the Budget Act 2001⁴³. Nevertheless doubts about the effective applicability of the antitrust rules remain. First of all, the wording of the substantive provisions narrows the scope of application considerably. An act only constitutes a violation of the law when it actually causes anticompetitive effects – the mere intent does not suffice – and moreover generates “serious prejudice to the general interest”. The non-exhaustive examples of restrictions establish additional requirements not fully coherent with the basic prohibition. Furthermore, the regulatory decree⁴⁴, that designates the *Dirección General de Comercio* (DGC) within the Ministry of Economy and Finance as competent application body, provides an unnecessarily generous judicial relief against decisions of the administration. The suspected person may already challenge the DGC’s decision to continue with the investigation, which may only proceed once this decision becomes final. If, due to this obstacle, the administrative procedure should prove to be ineffective, the burden of enforcement would remain with the private parties as originally intended by the drafters of the antitrust rules in Law 17.243⁴⁵.

b) Paraguay: last but not least?

Paraguay, the smallest economy in the Mercosur, still lacks general competition rules, although the Constitution of 1992 guarantees free competition. After several bills had been vainly introduced into Parliament during the 90-ies, a new project has been completed in June 2001. It was drafted with the support of the Inter-American Development Bank and is most similar to the EC system. It distinguishes between concerted restrictions and individual abusive practices, puts ‘hard core’ cartels under a statutory *per se* rule, provides for individual and block as well as for *de minimis* exemptions, permits the prohibition of a concentration when it creates or strengthens a dominant position, and even conveys power to the independent competition authority to detect anticompetitive state aids. This short enumeration shows that Community law has considerably influenced the Paraguayan bill. Yet, no parliamentary dealing with this matter has been reported.

III. Rules for the Common Market

1. Free movement of goods and services as basic principle of the Common Market

The Treaty of Asunción guarantees the freedom of movement of goods, services and factors of production among the Member States. From the end of the transition period on December 31, 1999⁴⁶, all custom duties and

⁴⁰ See the working paper of the Argentine CNDC “Breve Análisis Económico de la Ley Argentina de Defensa de la Competencia” (August 1997) and the Brazilian CADE resolution No. 20 of 9 June 1999.

⁴¹ The phenomenon of weak private law enforcement in competition matters exists also in Europe, see the survey and recommendation of J. BASEDOW, Who will Protect Competition in Europe?, in: European Business Organization Law Review (EBOR) 2 (2001) 443 at 459-466.

⁴² Art. 13-15 Ley 17.243 of 29 June 2000 (D.O. 6 July 2000, 21-A).

⁴³ Art. 157-158 Ley de Presupuesto of 16 February 2001 (D.O. 23 February 2001, 914-A).

⁴⁴ Decreto 86 of 28 February 2001 (D.O. 20 March 2001, 1087-A).

⁴⁵ See FALCO, Informe en Mayoría, Diario de Sesiones de la Cámara de Representantes 2879, p. 114.

⁴⁶ Originally, the transition period was scheduled for 31 December 1994 (Art. 3 of the Treaty of Asunción and Annex I). It was prolonged for four years for Argentina and Brazil and for five years for Paraguay and Uruguay (CMC/Dec. 24/94).

non-tariff restrictions should be prohibited. The free movement of goods is the basic principle of the almost accomplished free trade zone⁴⁷. It has been put into practice by a trade liberalisation program⁴⁸ and an adjustment regime⁴⁹. A Common External Tariff has already been established⁵⁰, but the once agreed Mercosur Customs Code⁵¹ has been withdrawn so that in practice the imposition of a single tariff does not function, yet⁵². Though the objective set out in the Treaty establishing the Mercosur is more ambitious. Despite some contrary comments from Argentina⁵³, the purpose is to establish a common market regime within the customs territory. Like in the EU, the free exchange of goods has to be seen as a basic instrument for the promotion of competition among Mercosur undertakings. But this is not sufficient in order to guarantee undistorted competition. The freedom has to be protected against the anticompetitive use of it and against other measures – of private or public origin – that favour or disadvantage certain undertakings.

2. Co-ordination of macroeconomic policies

The Treaty of Asunción therefore obliges the Member States to co-ordinate their macroeconomic and sectoral policies “in order to ensure adequate conditions of competition” (art. 1). It is inherent to a common market that integration does not stop at mere trade liberalisation, but also requires co-ordination of the different economic policies⁵⁴. Several instruments in this respect have already been approved. Among others, the intergovernmental Council of the Common Market (CMC), the highest Mercosur organ consisting of the Ministers for Foreign Affairs and of the Economy, has acted in the fields of investment protection, international jurisdiction for contractual matters, judicial co-operation and assistance, interim measures, commercial arbitration, consumer protection, social security, capital markets, intellectual and industrial property rights and last but not least protection of competition⁵⁵.

a) The law “on the books” vs. the law in practice: an excursion into the Mercosur legal order

The quite impressive enumeration of legislative activity shall not obscure the fact that only a part of the more than 1.200 provisions adopted so far are in force⁵⁶. Since the legal framework is intergovernmental instead of supranational, direct effect of Mercosur norms in the Member States has explicitly been ruled out. The procedure for incorporation depends on whether a text has been adopted as an international treaty or as a decision, resolution or directive of one of the three law-making organs. Treaties are subject to ratification and mainly enter into force after the deposit of the second instrument of ratification. Most of the more important issues are adopted this way. Provisions adopted as binding measures by a Mercosur organ become effective after their incorporation into national law in all Member States⁵⁷. This system called ‘simultaneous validity’ (*vigencia simultánea*) has two fundamental defects: (i) The Member States get a second chance to impede the entry into force of an agreed provision. (ii) With the incorporation into national law the internal provision applies to the citizens of the respective country, while on the level of the Mercosur the underlying norm lacks validity until implementation by every Member State.

b) Mercosur competition rules

Competition policy is not explicitly mentioned among the macroeconomic policies which should be co-ordinated according to art. 1 of the Treaty of Asunción in order to ensure adequate conditions of competition between the Member States. Nevertheless, the Group of the Common Market (GMC) entrusted its Working Group for the co-ordination of macroeconomic policies already at an early stage with the regulation of the protection of

⁴⁷ Sugar and automobiles are still exempted, see CMC/Dec. 19/94 and 29/94.

⁴⁸ Annex I to the Treaty of Asunción.

⁴⁹ CMC/Dec. 5/94 and 24/94.

⁵⁰ CMC/Dec. 22/94.

⁵¹ CMC/Dec. 25/94.

⁵² Negotiations have been resumed in 2001, see *Gazeta Mercantil Latino-Americana* 5-11 March 2001, p. 23.

⁵³ D. CAVALLO, Minister of Economy, has expressed his preference for a mere free trade association, see *Frankfurter Allgemeine Zeitung* 23 March 2001, p. 13 and *Gazeta Mercantil Latino-Americana* 2-8 April 2001, p. 25.

⁵⁴ For the different levels of integration see P. BEHRENS, *Integrationstheorie*, in: *Rabels Zeitschrift* 45 (1981) pp. 30-35.

⁵⁵ For an extensive, although not exhaustive compilation of the relevant legal texts in Spanish with German translation and explanatory notes see MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT (ed.), *Rechtsquellen des Mercosur*, Vol. I and II, Nomos, Baden-Baden, 2000. For an English version of some of these texts see M. HAINES FERRARI (ed.), *The Mercosur Codes*, The British Institute of International and Comparative Law, 2000.

⁵⁶ For the norms adopted between 1991 and 2000 see the statistic elaborated by R. PÉREZ ANTÓN, *Proceso de toma de decisiones en el Mercosur*, in: BENECKE/LOSCHKY (eds.), *Mercosur: desafío político*, Konrad-Adenauer-Stiftung/CIEDLA, Bs. Aires, 2001, pp. 175-191.

⁵⁷ Theoretically, the procedure is more complex: each Member State must notify the incorporation to the Administrative Secretariat in Montevideo. After receiving the fourth notification, the Secretariat informs all Member States and 30 days after the date of this information, the decision enters into force simultaneously in all Member States, art. 40 of the Protocol of Ouro Preto on the Institutional Structure of the Mercosur signed on 17 December 1994, *Boletín Oficial del Mercosur* No. 1 (1997) 33.

competition and state monopolies⁵⁸. Furthermore, art. 4 of the Treaty of Asunción obliges the State Parties to coordinate their domestic policies concerning subsidies, dumping and other unfair practices in order to establish common rules for trade competition. This provision refers to the intra-regional trade and can be understood as a mandate to guarantee that the market players can compete under free and fair conditions.

In 1994, the CMC adopted the first genuine competition provisions. Decision 21/94 sets out “harmonisation principles for the protection of competition”. But this title is misleading. Although the decision mentions the acts that are deemed anticompetitive, it does not oblige the Member States to incorporate these rules into their national laws. Instead, the principles had the function to serve as guidelines for a later comprehensive Mercosur regulation which could be either a decision of an organ aiming at harmonising the national laws or an international treaty to be implemented as such into national law. The second option was chosen, when the four countries signed the Protocol for the Defence of Competition in the Mercosur on December 17, 1996 in Fortaleza, approved by the Council as Decision 18/96⁵⁹.

3. The Protocol for the Defence of Competition in the Mercosur (PDC)

The PDC has entered into force between Paraguay and Brazil in September 2000⁶⁰. Ratification is under way in Uruguay, but somehow stalled in Argentina. The elaboration of a regulatory regime for the application of the PDC has started in 1997, but differences especially concerning the definition of the Protocol’s scope of application have hindered the approval of this additional text so far.

a) Scope of application

The PDC applies to all, public or private, natural and juridical persons as well as to other entities independently of their legal personality and nationality. This is equivalent to ‘undertakings’ covered by the EC-Treaty, although the Spanish synonym ‘*empresa*’ is not explicitly used in the Protocol, which instead speaks of ‘*agente económico*’ in art. 5 PDC. State monopolies are also expressly included to the extent that – similar to art. 86 (2) EC-treaty – the performance of the legal responsibilities is not prevented by the PDC. As far as the scope of application *ratione materiae* is concerned, all sectors⁶¹ are subject to the competition rules provided that trade between the Member States is affected. Unlike the EC rules, the mere possibility of affecting trade between Member States is not sufficient. The question is, how intensive the impairment of trade must be. Argentina and Brazil favour a restrictive interpretation in the sense of a ‘significant’ injury to cross-border trade, an interpretation that is bearable for the two smaller State parties only when the market significance is measured for each State concerned⁶².

In accordance with the international practice and with the Argentine and Brazilian laws, the Mercosur Protocol adopts the effects doctrine claiming extraterritorial jurisdiction over anticompetitive conducts taking place abroad but producing effects inside the Mercosur. Overlapping jurisdiction may therefore occur not only between common and national laws inside the Mercosur (see under b), but also in relation to competition rules around the world and especially of the EC-Treaty considering the close inter-regional trade relations.

b) Relation with the national laws

Since the applicability of the PDC depends on the condition that trade between Member States be affected, it remains room for intervention of the national competition laws. Undoubtedly, only the Member States’ rules apply when an agreement or practice does not have a Mercosur dimension (art. 3 PDC). But the PDC is silent to the question whether the applicability of the Protocol excludes the application of national laws. The Mercosur therefore faces the same controversy that existed during the first years of EC competition rules: does a ‘single’ or a ‘double barrier’ apply to restrictive business practices affecting more than one Member State?⁶³ In other words: can the PDC and national antitrust laws be applied alternatively or cumulatively? Departing from the (still) prevailing legal opinion in Europe⁶⁴, the different objectives pursued by common and national competition

⁵⁸ See procès-verbaux of the V. and VI. meeting of the GMC, in: Boletim de Integração Latino-Americana, Special Ed. March 1993, pp. 85, 89.

⁵⁹ See *supra* note 19.

⁶⁰ According to art. 33 of the PDC, the Protocol enters into force, with regard to the two first State Parties, 30 days after the deposit of the second instrument of ratification. Paraguay ratified through Ley N° 1143 of 15 October 1997, deposited on 31 October 1997; Brazil ratified through Decreto legislativo 6/2000 of 15 February 2000, deposited on 9 August 2000. The necessary domestic promulgation took place through Decreto 3.602 of 18 September 2000.

⁶¹ This should also be true for sugar and automobiles, the two sectors still exempted from the trade liberalisation program.

⁶² See procès-verbal 2/00 of the CT-5 Meeting held in Brasilia on 19-20 September 2000.

⁶³ For an overview see M. WAELBROECK/A. FRIGNANI, European Competition Law, Transnational Publ., Ardsley, 1999, §§ 108-114.

⁶⁴ Continuous holding by the ECJ since judgment 13 February 1969 (*Walt Wilhelm*), ECR 1969, I. But see now the European Commission’s proposal for a new implementation regulation (art. 3), COM(2000) 582 final.

rules – on the one hand the elimination of trade barriers, on the other the protection of the competition order in the respective country – PDC and national law, where it exists, should form a ‘double barrier’. In fact, for practical reasons, this seems to be the only feasible solution for the Mercosur for the time being. In case of eventual conflict, the PDC would prevail, though not due to a non-existing principle of primacy of Mercosur law, but due to the primacy of international treaties according to the law of each Member State⁶⁵.

c) Rules of substance

There are not many further comments to be made about the substantive rules of the Protocol. Like in the Argentine and Brazilian competition laws, all anticompetitive individual acts, agreements and concerted practices as well as the abuse of a dominant position are broadly prohibited. This prohibition is not subject to any condition and can therefore be applied directly. This means that – once ratified and entered into force – being part of the domestic law, the substantive rules can be applied by the national judges. There is no notification or authorisation requirement for agreements or other anticompetitive acts⁶⁶, so that a rule of reason approach will prevail. Yet, ‘hard core’ cartels should be deemed illegal *per se* in accordance with the practice in Argentina and Brazil. In the context of the regional integration, export cartels, de facto exempted from domestic antitrust enforcement, must be prohibited under the PDC rule.

As far as market dominance is concerned, the PDC makes clear that only the abuse and not the very existence of a dominant position is deemed anticompetitive (art. 5). Joint action against dominant undertakings is especially useful when the abuse consists of vertical restraints that have the effect of market foreclosure, e.g. exclusionary distribution agreements, impeding competitors from another Member State to do business across the border. Unfortunately, the PDC contains no further explanation of what shall be understood by a dominant position. Given the differences between Argentina (‘not exposed to substantial competition’ or ‘power to determine the viability of other market participants’) and Brazil (‘control of substantial market share’, presumed from 20% onwards), this may lead to an inconsistent application. This is especially true with regard to the intergovernmental procedural regime established by the Protocol and analysed later.

The PDC contains various lacunae, one of them being a main reason for Argentina not to ratify: state aids. Although in 1994 the Member States agreed on a package deal consisting of common rules for restrictive business practices, subsidies and anti-dumping⁶⁷, the problem of state aids is still not substantially tackled. Art. 32 of the PDC only obliges the State Parties to incorporate provisions in order to discipline state aids within two years of its entry into force⁶⁸. As far as anti-dumping inside the region is concerned, the Council Decision No. 18/96 expresses the parties’ will to bar Member States from applying their national anti-dumping laws against undertakings of another Member State by December 31, 2000. Unfortunately, in the opinion of the previously mentioned *ad hoc* Arbitration Tribunal, this Decision requires implementation into all four jurisdictions to become effect⁶⁹. This holding is questionable, because the obligation to renounce intra-regional anti-dumping only binds only the agreeing State Parties and therefore cannot be regarded as requiring necessarily incorporation into domestic law according to art. 42 of the Protocol of Ouro Preto⁷⁰. Another omission has also been mentioned before: the postponement to agree on a common merger control.

⁶⁵ In Argentina and Paraguay the higher rank of international treaties is recognised in the Constitution; in Brazil and Uruguay treaties and ordinary laws have the same rank applying the principles of *lex posterior* and *lex specialis* in the case of conflicts. The Brazilian competition law (Lei 8.884, art. 2), however, defines its scope of application ‘without prejudice to the conventions and treaties signed by Brazil’. In any case, the PDC should be regarded as a *lex specialis* as far as a Mercosur case is given.

⁶⁶ Following the Brazilian example, art. 7 of the PDC provides that a notification system for all anticompetitive acts, inclusively concentrations, shall be established in 2 years. It does not say when the time begins to run, but probably it is meant the entry into force like in art. 32 PDC. If entry into force between *all* Member States or only between the two first ones shall be decisive, is still another open question.

⁶⁷ See CMC/Dec. 10/94 concerning export subsidies, CMC/Dec. 20/94 concerning distortions of competition caused by state measures, CMC/Dec. 21/94 concerning principles for the protection of competition and GMC/Res. 129/94 concerning anti-dumping in intra-regional trade. For the Argentine position see PEÑA, Una política común de competencia en el Mercosur, in: BENECKE/LOSCHKY (eds.), Mercosur: desafío político, Konrad-Adenauer-Stiftung/CIEDLA, Buenos Aires, 2001, pp. 241, 254 and Argentine allegations in the 4th arbitration proceeding at § 62, Boletín Oficial del Mercosur No. 17 (2001) 205.

⁶⁸ For the question when this time period begins to run, see *supra* note 66.

⁶⁹ 4th Award (*supra* note 9) at §§ 120-125.

⁷⁰ See *supra* note 57.

d) Rules of procedure

aa) Competent organs and decision-making

The (administrative) application of the PDC is conferred on the Mercosur Commission of Trade (CCM) and the Committee for the Defence of Competition (CDC) in co-operation with the domestically designated organs of enforcement. The decisions are taken on the level of the Mercosur, applying the principles valid for the whole integration process: the organs are intergovernmental, they are not permanent and decisions require consensus. The CCM, established already in 1994 and composed of representatives of the Ministries for Foreign Affairs, is responsible for the application of the common trade instruments and related matters⁷¹. The CDC, that has not been constituted yet, is a technical auxiliary organ composed of the national enforcement authorities that, according to the draft regulatory rules, shall hold regular meetings every three months. It must submit all its decisions to the CCM for approval, which shall decide by means of a directive. The CDC will not have any technical staff of its own. It therefore depends entirely on the national authorities. These have the right to initiate proceedings and – after being mandated by the CDC/CCM – the power to investigate the facts and execute the sanctions determined by the Mercosur organs.

bb) Sanctions and judicial protection

As mentioned above, the principle of direct applicability of the organs' decisions was generally ruled out in Mercosur law. Nevertheless, the PDC is the first instrument conferring power on a Mercosur organ to impose sanctions on private undertakings. Beside provisional measures, CDC/CCM can order the termination of an infringement, consisting either of a prohibition or of a positive injunction, and impose fines⁷². Further supplementary sanctions, copied from Brazilian antitrust law, are the prohibition to take part in public tenders, to make contracts with public financial institutions or the recommendation to the State Parties that incentives or tax payment facilities to be withdrawn or not granted any more. Consequently, the question of judicial protection against such sanctions arises. In the existing legal framework, the intergovernmental Mercosur organs are 'immune' from judicial review. The dispute settlement regime regulates only controversies among Member States. The denial of legal protection against decisions of the Mercosur organs, until today, was coherent with the chosen integration model. The Member States could renounce to it due to the consensus rule governing the decision-making process, whereby individuals generally are not directly affected by the Mercosur legal acts. But the PDC, maybe unconsciously, has changed this situation.

In case of an infringement of the Protocol, the CDC/CCM must impose the adequate sanction to be enforced without further examination by the corresponding national authorities. That means that – like in the EC – the Mercosur decision directly affects the presumably infringing party. As all Mercosur States recognise the rule of law and hence the right to appeal against administrative acts, it should be beyond question that the parties affected will have the possibility to challenge the decision establishing a sanction. Without an individual's right of action on the Mercosur level, the undertakings' last resort will be the national judge. This way, the uniform interpretation and application of the PDC is not guaranteed. Supposing a sanctioning decision affects several undertakings in different Member States, the respective national judges might come to contrary solutions for the very same case. This makes clear that the dispute settlement regime must be modified in order to grant individuals the right to challenge organs' decisions with direct and individual concern to them. For the time being, the jurisdiction of the *ad hoc* Arbitration Tribunal established by the Protocol of Brasilia could be extended to private claims against the Mercosur organs. Sooner or later, especially in case the competences conferred on the Mercosur are increased, the creation of a permanent judicial instance with jurisdiction to annul acts adopted by the organs will be necessary.

e) Proposals for an alternative approach

From the preceding paragraphs some fundamental shortcomings of the PDC can be concluded. Firstly, the intergovernmental composition will amplify the already inherent political implications in the antitrust decision-making process and submit them to opposite national interests; secondly, the consensus rule provides States with a veto right making blockades probable; thirdly, the lack of a permanent organ makes the procedure slow and complex; fourthly, on the level of the Mercosur undertakings lack right of action against sanctioning decisions affecting them, which puts into question the right to effective legal protection as well as the uniform application.

⁷¹ See CMC/Dec. 9/94 and art. 16-21 of the Protocol of Ouro Preto on the Institutional Structure of the Mercosur.

⁷² The fines can be assessed to a maximum of 150% of the benefits obtained by means of the infringement, or 100% of the involved assets, or 30% of the total turnover in the preceding business year. See Annex to the Protocol for the Defence of Competition, adopted by CMC/Dec. 2/97, Boletín Oficial del Mercosur No. 2 (1997) 26.

A possible remedy would be the reform of the PDC and its adaptation to the needs of the economic processes. Another possibility would be to withdraw the application of the PDC from the Mercosur organs and entrust it to the national authorities.

aa) Transition to supranational structures

Supranationality is commonly referred to as a red rag to politicians in the Mercosur, especially in Brazil. By adopting the PDC, however, the Member States have committed themselves to conform their decisions in the field of the protection of competition only to the established rules. As an act of *application* of law, in contrast to the making of law, the enforcement of the common competition rules shall by definition follow the rule of law and be exempted from political influence. This can only be done by an authority that is independent of the government. The granting of autonomy to the national competition authorities in Brazil and Argentina, CADE and TNDC, evidences the existence of this conviction. A consequent sequel would be to transfer jurisdiction to apply the PDC to a supranational competition authority. This transition could take place gradually beginning with the creation of a permanent staff of the CDC. It should be composed of lawyers and economists directing the investigations and drafting the decisions⁷³. The existing Administrative Secretariat of Mercosur shows that the creation of such a permanent body would not be unfamiliar to the system. Later on, the permanent staff should be vested with own decision powers and substitute the CDC.

bb) Decentralisation of application

If the creation of a supranational organ responsible for the application of the PDC were politically not feasible, the complete delegation of powers to the national authorities would be preferable to the situation as it is; the national organs are already responsible for the initiation, the investigation and the enforcement. On cross-border facts, they ought to apply the PDC as part of their national law. In order to guarantee its effective and undiscriminatory application, an independent Mercosur Competition Agency should be established having the right to ask for proceedings to be initiated by the national authorities when an undertaking has violated the PDC⁷⁴. If the national authority should fail to take appropriate measures, the Mercosur Agency should have the powers to bring actions against it or to sue the undertaking itself, both in national courts. Moreover, if the authorities of a Member State should refuse to enforce the PDC, another Member State could have recourse to the arbitration proceeding established by the Protocol of Brasilia. This right should also be granted to the Mercosur Competition Agency. In order to neutralise the enforcement deficits caused by the mere national application procedure, a mechanism for the exchange of information, co-operation and assistance ought to be institutionalised according to art. 30 PDC.

IV. Co-operation between the EU and the Mercosur

Bearing in mind the particularities of the Mercosur competition rules, some suggestions for the co-operation in this area can be deduced. The need for closer co-operation between states and regions regarding the implementation of their respective antitrust legislation is generally recognised. The prevailing 'international opinion' can be resumed quoting the 11th consideration of the relevant OECD recommendation of 1995⁷⁵: "*closer co-operation between Member countries in the form of notification, exchange of information, co-ordination of action, consultation and conciliation, on a fully voluntary basis, should be encouraged, it being understood that such co-operation should not, in any way, be construed to affect legal positions of Member countries with regard to questions of sovereignty, and in particular, the extra-territorial application of laws concerning anticompetitive practices, as may arise*".

It has already been drafted a framework for co-operation agreements between national antitrust authorities which is especially valid for the European Commission⁷⁶. This framework shall serve as a basis with regard to some proposals for the Interregional Association Agreement between the EU and the Mercosur actually being negotiated.

1. Scope of application

The definition of matters to be covered by the co-operation is the first and maybe most important task. The question is, which competition rules and authorities shall be included. Only the EC and the Mercosur rules and

⁷³ F. PEÑA (*supra* note 67 at p. 273) proposes a "gerencia técnica" for the CDC.

⁷⁴ This proposal is based on the *Draft International Antitrust Code*, submitted by an international experts' working group in 1993, see 64 BNA Antitrust & Trade Regulation Report No. 1628, Special supplement (19 August 1993), pp. 1-22.

⁷⁵ Council Revised Recommendation C(95)130/Final Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, 35 ILM 1313 (1996).

⁷⁶ See C. VAIRA/J.A. RIVIÈRE MARTÍ, *Reflexiones sobre los acuerdos de cooperación entre autoridades nacionales de competencia*, in: Boletín Latinoamericano de Competencia No. 4 (1998), pp. 65-70.

organs or the national laws and agencies as well? In the co-operation agreements with the USA, Canada and Mexico, the EC identified, for the Community, basically art. 81, 82, 85 and 86 of the EC-Treaty and Council Regulation 4064/89 as the applicable competition laws as well as the European Commission as the competent competition authority. The same will be true for the Agreement with the Mercosur. But on the side of the Mercosur, the identification of the relevant laws and authorities will be more difficult. To identify only the PDC inclusive additional texts as the applicable competition laws and the CDC and the CCM as the competent competition authority does not seem sufficient. As previously seen, the main enforcement activities (initiative, investigation, execution) lie with the national authorities, which will proceed on a large scale according to their own national laws⁷⁷. A co-operation would only make sense, when it comprises the competition laws of the Mercosur State parties as well as the national authorities. Additionally, a permanent contact institution for the reception of the requests should be identified on the level of the Mercosur.

Secondly, it should be determined, if co-operation shall be restricted to mere antitrust, i.e. anticompetitive practices, or embrace also merger control. As said before, the Mercosur is not provided, yet, with any preventive control mechanism concerning concentrations, but only Argentina and Brazil. Though namely the control of cross-border or international merger calls for a co-ordination as the differences between European Commission and the FTC in the *Boeing/McDonnell Douglas* and *General Electric/Honeywell* merger cases show. Particularly with regard to the strong presence of European undertakings in the Mercosur countries, a parallel notification according to EC-Regulation 4064/89, Lei 8.884 and Ley 25.156 is frequent. This merger control must necessarily be submitted to the co-operation agreement. The positive experiences with the 'one-shop-stop' system in Europe might contribute to a quicker realisation of a similar single notification and authorisation regime in the Mercosur.

2. Issues to be dealt with

The substances that give life to the co-operation and put it on a reliable basis is already mentioned in the above-quoted OECD recommendation: notification, exchange of information, co-ordination of action, consultation and avoidance of conflicts. A technical co-operation should be added, consisting of mutual training and internships, joint seminars and studies, and the development of the public access to information concerning the respective competition enforcement activity and competition policy such as a case-law database. A EU-Mercosur agreement would not require variations. In particular, the consultation stage should be governed by the principles of 'negative' and especially 'positive comity'⁷⁸.

a) The 'comity' principles

'Negative comity' means that a state refrains from enforcement action to comply with another state's request for such inaction. 'Positive comity', on the other hand, can be described as the principle "*that a country should (1) give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests, and (2) take whatever remedial action it deems appropriate on a voluntary basis and in considering its legitimate interests*"⁷⁹. It is therefore a commitment to co-operate rather than seeking to apply own antitrust laws extraterritorially. The functioning of the 'positive comity' principle requires a certain confidence into the territorial party's enforcement will and abilities. In fact, based on voluntariness, trust is more important than the legal text; a good reason to promote especially the confident-building mutual technical co-operation. As far as Argentina and Brazil are concerned, these two countries have made considerable progress during the last years and might already or soon qualify for 'positive comity'⁸⁰. In Uruguay, the enforcement practice still must prove the effectiveness of the first domestic competition rules. It is however doubtful that the Mercosur rules might be effectively enforced at all.

b) Confidential information

The last point to be mentioned concerns the question of the extent to which confidential information may be exchanged. The transmission of confidential data would surely contribute to the effectiveness of co-operation, but at the same time it can constitute a violation of the undertakings' fundamental right to business secrets and

⁷⁷ The draft regulatory rules explicitly provide the application of the respective national laws as far as the proceeding is concerned.

⁷⁸ C. VAIRA/J.A. RIVIÈRE MARTÍ, (*supra* note 76, p. 68) prefer not to introduce 'positive comity' at an early stage of a co-operation agreement.

⁷⁹ See OECD, Report by the Committee on Competition Law and Policy, in: 1 OECD J. of Competition Law and Policy No. 3, p. 58 (1999).

⁸⁰ The US-Brazil Agreement Regarding Co-operation Between their Competition Authorities in the Enforcement of their Competition Laws of 26 October 1999 includes 'positive comity' provisions.

impair their willingness to collaborate with the domestic enforcement agencies, e.g. in leniency programs. The main worries in the business community are that received information may 'leak' to competitors abroad or be used against them in other proceedings, for example in private legal claims especially when treble damages are at stake as proposed in Brazil. The basic precondition for the sharing of confidential information is therefore the existence of convincing evidence that the requesting jurisdiction is able to protect the confidentiality under its own laws. While the Brazilian antitrust law regularly refers to the constitutional right to secrecy⁸¹, confidentiality is to be granted in Argentina and Uruguay on a case-by-case basis⁸², though also the Uruguayan statute establishing the procedure and sanctions regime provides that the obtained information may only be used for the objectives of this law only⁸³. The Mercosur Protocol and the draft regulatory rules do not deal with this topic at all.

In the EU, on the other hand, the opinion prevails that art. 20 par. 2 of the Council Regulation 17/62 impedes the European Commission to pass on confidential information without a waiver given by the affected party. The European Court of Justice understands this disposition as 'general principle' valid for all administrative proceedings of the Community⁸⁴. Nevertheless, this does not seem to be an insuperable obstacle in the future, because the exchange of information within the framework of co-operation with the EFTA States is not restricted by professional secrecy rules⁸⁵. At least as far as 'hard core' cartel investigations are concerned, which in contrast to pre-merger control generally do not focus on sensitive trade and business secrets, the disclosure of information to the other jurisdiction should be considered in the EU-Mercosur co-operation agreement as well.

IV. Conclusion

Since the second half of the 90-ies, EC-compatible competition laws have been enacted in Brazil and Argentina. The new Uruguayan provisions leave doubts with regard to the effectiveness of their enforceability. If the Paraguayan draft bill should be approved, it would be the most sophisticated competition statute in the Mercosur region. The rules for the Common Market of the South themselves are almost identical to Argentina and Brazil as far as the substantial rules are concerned, but the provided rules of procedure make them hardly applicable (intergovernmental, non-permanent, consensus, pendulum-proceeding between Mercosur and national organs). The uncertainty of judicial protection against eventual sanctioning decisions by a Mercosur organ raises worries with regard to the affected undertakings and doubts concerning the effective application. The gradual creation of a permanent and supranational competition authority accompanied by the introduction of individual claims against Mercosur organs' decisions will be the best remedy. As second best, the application of the Mercosur competition rules could be conferred on the national authorities accompanied by the creation of a supervising Mercosur competition agency having 'standing' in the local administrative and judicial proceedings.

After all, there is already enough basis to start a serious co-operation between the European Commission and its Mercosur counterparts in competition matters to be regulated in the future Interregional Association Agreement

⁸¹ See art. 5 XII of the Constitution (1988), art. 7 IX, 9 III, 14 II, 35 Lei 8.884 and art. 2 V lei 9.784 on administrative proceedings.

⁸² See art 12 of the regulatory provisions of Decreto 89/01 (Argentina); art. 80 of the Decreto 500/1991 on administrative proceedings and a circular of the Dirección General de Comercio called "Manual de Procedimiento para Denuncias de Conductas Anticompetitivas" (Uruguay).

⁸³ Art. 158 lit. g) of Ley 17.296.

⁸⁴ ECJ 24 June 1986 (*AKZO*), ECR 1986, p. 1992 note 28.

⁸⁵ See Agreement on the European Economic Area, art. 9 par. 3 of the Protocol 23 concerning the Co-operation between the Surveillance Authorities (article 58 EEA Agreement).

as long as the national laws and enforcement authorities are included. Co-operation should focus on mutual technical assistance, communication and consultation concerning restrictive business practices affecting both regions. 'Positive comity', despite probable shortcomings in practice, should be promoted. It may prove to be a suitable remedy at least in cases of market access violation.

COMPETITION LAW AND CROSS-BORDER MERGERS AND ACQUISITIONS European Community and French experience

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<p>SUMMARY: I. - Jurisdictional issues II. – Procedural issues 1) Notification III. – Substantive issues 1) Definition of the relevant market 2) Competition test</p>
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We are publishing here a speech delivered by Dr Pierre Arhel of the University of La Sorbonne in Paris at the Seminary organized on 17-18 December 2001 by UNCTAD and MOFTEC (Ministry of Foreign Trade and Economic Cooperation in Guangzhou, China)

Distinguished delegates and experts, ladies and gentlemen, I wish to thank UNCTAD and MOFTEC for giving me the privilege of addressing such a distinguished and large assembly here in Guangzhou. I am particularly honoured to share with you the experience I have acquired in the field of competition law applicable to mergers and acquisitions (M&As). This experience has mainly been acquired both when I worked for the European Commission, a few years ago, and now in my capacity of case handler with the French competition authority, within the Conseil de la Concurrence ⁽²⁾. In other words, my presentation will be mainly based upon European and French legislation and case law.

The question I will develop is “what could the Chinese authorities do to make sure that cross-border M&As do not harm competition in the Chinese market?”. For this I would like to suggest that China adopt a regulation that deals with three main issues: jurisdictional, procedural and substantive issues.

I. - Jurisdictional issues

A merger regulation need not apply to all mergers. It will be enough for it to apply to mergers of a significant dimension. But should the scope of application of a merger regulation be restricted to mergers between national companies?

In other words, the question is whether or not a competition authority can challenge a merger between two companies that are located abroad. There is no doubt today that the answer is positively - yes! But only a few years ago, this answer was not so obvious.

For instance, in 1997 the Boeing/MDD case, involving two American companies, caused a lot of tension in the relationship between the American and European competition authorities. This happened because the European Commission not only considered that it had jurisdiction to assess this merger, but also announced its intention to challenge it, just a few days after the US DOJ announced its decision not to oppose it. The European Commission eventually accepted the merger but only under a series of conditions.

More recently the European Commission went even further and actually opposed the General Electric/Honeywell merger, involving two American companies, after it had been cleared by the US authorities.

Conversely, last year, the US authorities decided to challenge the Air Liquide/BOC merger involving a French company just after the European Commission had cleared the transaction.

I could multiply such examples but I think it would not be necessary. All these cases are in line with the so-called effect doctrine according to which a competition authority has jurisdiction to challenge a concentration

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² The views expressed are entirely personal and do not necessarily represent those of the Conseil de la concurrence

between two or more companies located abroad as long as this concentration produces substantial effects on its territory.

These jurisdictional rules raise an important question. Should a country like China adopt a competition regulation that includes rules on merger ?

There is no doubt in my mind that the answer to this is – yes. It is in the interest of a major country like China to adopt this kind of regulation. China for instance cannot wholly depend on other countries to assess cross-border M&As that affect its territory. It is enough to know that these countries have no jurisdiction to address the anti-competitive effects of a particular merger in China ... even if this merger involves firms located in their territories.

Let us take, for instance, the Boeing/MDD case that I have already mentioned. The US decided that they could accept it. The European Commission felt that the merger had important negative effects, but, since Boeing had accepted various undertakings, Europe could also accept it. But are major countries like China sure that their own national interests have been properly addressed?

This question is even more important when the affected markets are not global, as in the Boeing/MDD case, but national or local. Indeed, a certain merger could produce no substantial effects in one particular country, and yet, produce these effects in others.

Now, let us imagine, for the sake of argument, that China wishes to adopt a competition law, but not merger regulations. In other words, this competition law would be confined to antitrust. Such an approach, of course, is not original. After all, most developed countries have, in the past, done the same. For instance, although antitrust law in the European community dates back to the late fifties, the merger regulation was adopted only in 1989. In the same way, France has prohibited abuses of dominance since 1963 and has adopted a merger control system only since 1977.

However, if this approach could be justified only a decade ago it is not the case anymore. One just need to think of the sharp increase these last years, of cross-border mergers, and especially mega mergers, affecting most countries in the world. Other speakers have already addressed this issue, or are going to do it. So, there is no need for me to insist upon it.

I will only add that today, China would greatly benefit from the recent experience of many other countries, whereas only one or two decades ago such an experience was largely unavailable.

Of course adopting a merger regulation is not enough in itself. A competition authority must also be set up to implement this regulation. In many countries, this competition authority is independent from the Government. However, I must add that this is not always the case. For instance, in France the merger decisions are adopted by the Government. The competition authority only gives its opinion, and in some cases, this opinion has not been taken into consideration.

The competition authority should also be provided with appropriate resources. I think in particular of human resources. It might be of interest for the Chinese authorities to learn that it has been assessed that under the new French regulation, 300 merger cases will have to be assessed every year, with four or five high level civil servants working full time in order to deal with this workload. These civil servants usually have a good experience in law and economics. I will come back to this later.

II. – Procedural issues

Procedural issues are important in a merger regulation and I have chosen to address two topics : 1) notification; 2) cooperation.

1) Notification

To notify a merger means to inform the competition authorities that a merger will take place or has taken place.

Notification can be obligatory, as in most legal systems, the European Community law, for example. Such an obligation is important for the undertakings, because after a certain delay, their transaction cannot be challenged anymore. In other words, notification guarantees legal certainty. Notification is important also for the competition authorities because it is a major source of information. So much so, that the French system of notification, which is presently non-obligatory, will become obligatory within a few weeks.

Normally, the merging companies must notify their merger within a certain delay. For example, under the European Community merger regulation, concentrations must be notified not more than one week after the conclusion of the concentration.

Useless to say that the notification must be done in the language of the country where this procedure is taking place. However, in some countries, like France, the competition authorities are flexible and allow for some of the documents to be provided in English. Undertakings usually appreciate this flexibility, especially in cases of multiple notification.

Most competition authorities also encourage the undertakings concerned to pre-notify their project of transaction. This informal procedure has proved to be very valuable for undertakings because it provides them with a preliminary opinion of the competition authorities even before the companies have entered into binding contracts to complete their operation.

Coming back to the notification, another question is, “should all acquisitions be notified”?

An obvious answer is, “no”. A competition authority cannot control all the mergers taking place in a particular country. A competition authority would never have the means to face such a task. Besides, such a systematic control is not desirable. It is obvious, for instance, that a merger between two local firms is normally harmless.

The question therefore is how to define the dimension of a merger which should be assessed. Up until today, the French legislation provides for two criteria : action can be taken against mergers that meet a turnover threshold or a market share threshold. The turnover threshold is met when all the parties have an annual turnover in France of more than 1 billion American dollars and at least two of the parties have an annual turnover of more than 300 million dollars. The market share threshold is met when all the parties possess more than 25 % of a relevant market.

The market share threshold was considered too complicated and was therefore abandoned by the Parliament this year. As in most merger regulations in the world, only the turnover threshold remains.

2) Cooperation

I will now address the question concerning which competition law model China could consider adopting and what steps have to be taken to avoid conflicting decisions.

On the first point: should China adopt the so-called “substantial lessening of competition test”, as in the USA, since 1914, and more recently in Australia, New Zealand and very soon in the United Kingdom and Ireland, or should it adopt the so-called “dominance test” as in the European Commission and most of the member States of the European Community? Personally, I have no preference. My reason being that I am not convinced that there is a substantial difference between the two tests. Nobody, for instance, has proved that two competition authorities have come to divergent conclusions on the same merger because they have not used the same test.

Surely enough, there are examples of cases that have resulted in conflicting decisions. I have already given a few examples and the most famous one is the GE/Honeywell case. But both the US and the EU have acknowledged that this conflict does not result from the differences between the tests used by the two authorities.

My opinion is that it is impossible to expect that two different competition authorities will always come to the same conclusion. There will often be cases of conflicting decisions. The question is what to do to avoid these conflicts.

The obvious answer is cooperation. As Mr Hassan Qaqaya will address this issue later, I need not go into detail about it at this point. But allow me to say a few words now, and, if necessary, I will come back to this topic later.

What does cooperation mean when we are thinking of mergers. Mainly, consultation. This means that the authorities in charge of the case communicate between themselves. With the authorization of the parties, which I have to say, is always granted, the two authorities exchange the evidence they have in their respective file, and they exchange their different views about the various points of analysis of a particular case : definition of the market; barriers to access; efficiency gains, remedies etc; and in most cases, the competent competition authorities manage to overcome their differences.

III. – Substantive issues

Now, let us imagine that the Chinese authorities have already adopted a merger regulation and set up a competition authority to assess mergers that affect the Chinese market and let us ask ourselves what type of work this competition authority would have to carry out. My purpose here is to show the type of expertise that the staff of this competition authority will need in order to assess merger cases. As I have already mentioned, both legal and economic expertise is very useful. The first task is to determine the relevant market or markets (many markets could be affected). Then it is necessary to assess whether or not these markets are affected negatively by the concentration.

1) Definition of the relevant market

The definition of the relevant market is not substantially different from the definition adopted when assessing abuses of dominance. This means that the competition authority has to define a product market and a geographical market. The product market comprises all those products that the consumer considers as interchangeable or substitutable, by reason of the products' characteristics, their prices and their intended use. One considers that two products are interchangeable if the consumer can use either to fulfil the same need. For example, if the Chinese consumer considers that an ordinary pen and a more expensive pen are interchangeable, then the undertakings which produce one of these two products, or both, are on the same market. On the other hand the consumer might consider that a pencil and a pen are not interchangeable. Therefore, their respective producers would not be on the same product markets.

The geographical market corresponds to the area in which the undertakings concerned are involved in the supply and demand of the products or services and where the conditions of competition are sufficiently homogeneous. This area can be distinguished from neighbouring areas owing to the conditions of competition that are appreciably different in those areas. For example the market for large jets is global because whether you are in Japan or in Germany, if you want to buy such an aircraft, you will do so in more or less the same conditions. On the other hand, in France, it has been considered that the geographical market for car tyres is national. This is because of the differences in prices between France and its neighbouring countries, and because of its low level of imports and exports.

This analysis is important because a market definition adopted in one country is not necessarily the same as in another country, if only because the tastes of the consumers in these two countries might differ. We also need to be aware that a definition of the market can be subject to changes over a period of time. China, for example, might not be able to simply adapt a market definition that was adopted by another competition authority several years ago.

2) Competition test

The competition authorities always assess whether the merger is likely to result in horizontal overlaps that would create or strengthen a dominant position, as a result of which effective competition would be significantly impeded.

Neither the European Community, nor the French regulation, provides for a definition of dominance. Both authorities, in Brussels and in Paris therefore refer to the European Court of Justice case law : a dominant undertaking is an undertaking which has an appreciable influence on the conditions under which competition develops. In other words, it is not necessary for this undertaking to have a monopoly or quasi monopoly. For

example, an undertaking with 40 or 50 % of the market could be considered to have a dominant position if all its competitors are much smaller firms.

Interestingly enough, a dominant position can be held, not only by a single undertaking, but also jointly by a group of undertakings. This will be the case, for example, under certain conditions, on oligopolistic markets, where only a few undertakings account for most of the supply.

The competition test implies taking into consideration various factors such as the dimension of the competitors and the existence or absence of barriers to access the relevant market. For example, a competition authority would certainly oppose a merger, or accept it under certain conditions, if it results in the creation of a strong position on the market, and if this market is protected by high barriers to entry.

To summarize, I believe it would be good if China were to adopt a merger regulation that would enable it to examine mergers of a significant dimension which have a negative impact on the Chinese market. I would also like to add that if China were to adopt such a legislation, then it would be good if it cooperates with other major trading partners in order to avoid conflicting decisions.

Thank you for your attention.

GENERAL LESSONS FROM THE EU ANTI-TRUST EXPERIENCE FOR THE LATIN-AMERICAN ANTI-TRUST EMERGING SYSTEMS

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I believe that the best practical co-operation is to learn from others past experiences. Therefore, first I will try to give a brief general overview of the state of play of anti-trust in the EU in order to see if we can infer any useful conclusions for the Latin-American developing experience either on terms of procedure or on terms of substantive assessment. I will give a number of suggestions derived from our experience.

I will not address the state aids issue which is a specific field which goes beyond today's discussion and which raises special issues given the involvement of public authorities in the distortion of the market. I would rather focus in pure anti-trust control, which directly stems from the agreements between undertakings either of co-operative or structural nature.

Let me point out a couple of issues on the trends we perceive in the substantive assessment of agreements, concerted practices and decisions of undertakings that may restrict competition:

As you know the system works with a prohibition rule defined in the first paragraph of article 81 of the treaty and an exemption to the prohibition defined in the third paragraph. There has been some hesitations from the court and even from the Commission practice on the application of this scheme of separation (prohibition/exception) very in particular arising from the very welcome and beneficial increased application of economic assessment to the agreements notified. There has been a temptation to apply a rule of reason from scratch in the first subparagraph, which defines the existence of a restriction. The European Court of First Instance in a recent ruling « TPS »² insists on the separation and the specific role of each section of the article. In sum the Court accepts a flexible reading of the first paragraph of article 81 which deals with the concept of restriction. In this first paragraph the Commission can apply with flexibility the notion of restriction of competition taking into account the legal and economic context, the structure of the market and the characteristics of the product but it cannot go as far as balancing the pro-competitive and anti-competitive aspects of the agreement. The latter is to be done under the third paragraph of article 81. I am not saying nothing new if I recall that economic input in antitrust is very important in improving the quality of the decision, however some degree of formal legal discipline is needed to keep a satisfactory degree of legal certainty and uniformity. We can draw some lessons from the years of interpretation and application of the interplay between the first and third subparagraphs of article 81.

It is becoming increasingly important the jurisdictional separation concept of effect on trade between Member States and this in the light of the on-going decentralisation process I will briefly refer later. So far the case law allowed an easy and far reaching application of the concept (« any direct/indirect/actual/potential effect on trade ») which also paid special attention to avoid the partitioning of the common market in addressing apparently pure national situations³. From now on the application of the concept will not be that easy and will require further levels of sophistication in the interpretation for the case allocation between the European Commission and the Member States. I mention this point to stress how important is to have a workable, sufficiently precise, but flexible jurisdictional criterion for the allocation of competencies between the different control bodies.

In the fight against cartels the hot issue right now is how to become more effective in the control and the deterrence effects through a pragmatic approach in the application of the leniency commission policy. In short, the Commission considers that the punishment of certain participants in the cartel is out-weighted by the interests

¹ The views expressed in this paper are strictly personal and cannot be understood as representing the position of the European Commission. This paper reflects the presentation of the author in the Cancun 2001 IBA Conference.

² Case IV/36.237-TPS. Ruling of the Court of First Instance on 18-09-2001 in case T-112/99-Metropole Television-M6, Suez-Lyonnaise des Eaux, France Telecom, Television France 1-TF1 v Commission.

³ See as the exception to the rule, the Judgment of the Court on 21 January 1999 in joined cases C-215/96 and C-216/96, Carlos Bagnasco and others/Banco Popolare di Novara/Cassa di Risparmio di Genova e Imperia .

of the market and consumers to see the cartel terminated as soon as possible. From here originates the leniency policy for companies that co-operate with the Commission's investigation. The latest developments in this area include a draft leniency notice published in July that significantly improves the certainty of the first competitor to approach the Commission with regard to a cartel. The granting of the immunity from a fine it's designed to make the policy more effective and more attractive. For the first time the Commission guarantees a full immunity from fines to a company that enables it to start an investigation against a cartel. The draft notice also clarifies the conditions under which a reduction of a fine is available to other companies that come in at a later stage. The aim is to exploit the inherent instability between cartel members, making the detection and prosecution of those that do exist more likely and prevent new cartels from being established. The new leniency notice is expected to be formally adopted by early 2002.

Articles 81 of the EU treaty which deals with restrictive agreements in a broad sense is embarked in a procedural revolution which affects its implementing Regulation, Regulation n° 17. The Commission will drop the compulsory notification of possible restrictions of competition by the parties participating in the agreement and will abandon its monopoly to exempt restrictive agreements pursuant to the third paragraph of article 81, sharing this burden with the member states. In sum, a less interventionist system *vis a vis* the business community and decentralisation *vis a vis* the Member States that will increasingly share the burden of responsibility. This approach should not necessarily be appropriate or at least not yet for the Latin-American anti-trust systems. Setting aside the different reality of supranational integration in the respective regions, it is true that the legal obligation to notify subject to heavy consequences for the companies in case of failure to notify can be a very powerful weapon in an emerging or relatively young system of anti-trust control to build a culture of awareness and respect to the obligations arising from the need to defend a healthy competitive scenario. It is also worth noting that Latin-American countries are starting from a situation of fragmentation of the control waiting for further degrees of regional integration. It could be said that it would be better to go through the painstaking process of centralisation in quest of a uniformity in the concepts and in the effectiveness of the control before embarking, in this theoretical scenario, in a devolution of enforcement rights to the member states of a given supranational body. Subsidiarity of course plays both ways. In some occasions and historic periods the best-placed authority to deal with a matter is not necessarily the smallest or closest to the citizen instance.

With regard to the abuses of dominant positions addressed by article 82 of the treaty. The case law of the European Court of Justice in Luxembourg and the Commission's practice have enshrined a stable and solid application of the rule. The test of dominance has been effectively applied with the starting point of the market share indications and the classical analysis of barriers to entry and actual and potential competition. The notion of abuse has allowed an extensive application of the article to companies which because have strong market power they also have special responsibilities to keep competition on the merits. The loopholes of the system in preventing future abuses were filled in an impressive way by the 1989 Community Merger Regulation.

In merger control one cannot but acknowledge the huge success of the community approach regardless understandable discrepancies by some affected companies in the actual assessment of a specific concentration. The success is basically a procedural one. Fast motivated decisions, a pragmatic approach, and the most important thing: legally binding deadlines on the administration to decide. Another key feature is the continued revision of the system to improve it learning from past experience. The Merger Review 2000 will soon materialise in new rules. Some can amount to decisive changes. Even the substantive test, i.e. dominance, will be debated. Let me just point out how right is the approach of having flexible instruments of revision of the existing legal instruments and more important a culture of not being afraid of putting into question the applied legal and economic concepts for the sake of improving the system.

There is another lesson from the merger practice. Once there is a central instance of control, the bilateral efforts to co-ordinate procedures between different States do not seem to work. Either a national jurisdiction deals with the matter or the supranational jurisdiction takes the lead alone or in co-operation with the States. It is worth recalling the apparently unsuccessful application of the common notification form for mergers between France, the United Kingdom and Germany. It is also worth noting the lack of application of article 22 of the community merger control Regulation with regard to the joint referrals by Member States to the Commission when a concentration without a community dimension falls under the jurisdiction of more than one Member State.

After giving this general overview I would put forward some considerations on the evolution of anti-trust control in Central and South-America:

1. I will say the obvious. The task to be undertaken in developing credible and sound systems of antitrust control in the area depends mainly on the States concerned. The consolidation of the anti-trust policies comes hand in hand with a situation in which the control is a perceived economic and social necessity. Let's not forget that in Europe the negotiations to adopt a merger regulation took 16 years and succeeded only when it became apparent that not only the industry expected a one-stop-shop and a level playing field but that the internal market integration and the economy needed a powerful instrument to avoid damaging structural concentrations of market power and also to clear quickly the good concentrations that reduce costs and increase productivity. The priorities in this field are often imposed by the market and the economic reality makes them work.
2. In many fields and, also in the anti-trust matters, the European Union offers a unique example of how to deal with the difficulties implicit in a supranational market integration process. The jurisdictional case allocation criteria, an on-going debate in Europe, can provide very useful lessons for other regions.
3. It does not seem that very sophisticated formal legal regimes and substantive tests are needed from the beginning in a developing antitrust system. Once again the market reality will impose itself. I understand that a theory of the effects in a given market as the triggering event for the intervention can do the job in the beginning without entering into complex legal assessments of the object or effects of the agreement or transaction in other geographical markets. The competition policy should be adapted to the needs of the region in question.
4. It is often more important the implementing instruments or the interpretative guidelines in the application of the law than the main legal instruments themselves. These implementing legal instruments should not be disregarded.
5. The interplay between competition authorities and regulatory authorities must be clear and workable. If the tasks of each kind of control are clear and the areas of friction are minimised, both instruments can play in a fruitful complementary way.
6. The Court of Justice and the Court of First Instance of the European Communities have played a decisive role in ensuring the effectiveness, coherence and uniformity of anti-trust control in Europe. They have a quasi-constitutional role in the interpretation of the relevant provisions of the Treaty and in the control to the Commission's decisions. The South American countries are far, I guess, from having such a central judiciary instance. Whether that key role can be played by the national Court case law is not evident.
7. It is obviously very important the creation of a competition culture through continued information of the core goals of antitrust to the business community and the consumers. This is more a question of political will and imaginative action than of economic resources.
8. Beyond formal institutional co-operation it is very important to keep an informal network for the diffusion of knowledge between more developed antitrust jurisdictions and emerging control systems. The new jurisdictions are led to assess operations in sectors which have been given already a lot of attention in the past in more mature agencies, they will address similar legal and economic questions. The IBA forum is one of those opportunities. The on line edition of the *Boletín Latinoamericano de Competencia* is another good example. The educational role of Universities and Business schools (in the absence of specialised institutes of the kind we have in Europe; college of Europe, etc) in spreading this culture is also important. A significant involvement of South American relevant individuals involved in antitrust control in the shaping International Competition Network forum will also help. In fact besides the need to adapt the system of control and the sophistication of the system to the specific characteristics of each region, I think we are sharing at global level some common basic antitrust concepts. The adaptation of the Central and South-American jurisdictions to this basic policy concepts should not be *a priori* a particularly difficult task. The adaptation of the procedures will normally raise more difficult issues but those are not insurmountable. However, it is only the continued and serious enforcement of the rules that will bring credibility and will consolidate the antitrust control system in Southamerica.

EL DEFENSOR DEL PUEBLO EUROPEO¹

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La institución del Defensor del Pueblo Europeo fue creada por el Tratado de Maastricht en 1992. El primer Defensor del Pueblo Europeo, Sr. Jacob Söderman, antiguo Defensor del Pueblo y Ministro de Justicia en Finlandia, fue elegido por el Parlamento Europeo en 1995, siendo reelegido por un nuevo mandato de cinco años en octubre de 1999.

La creación de la institución está estrechamente ligada a la introducción del concepto de ciudadanía europea. La misión del Defensor del Pueblo Europeo es la investigación de reclamaciones de los ciudadanos en posibles casos de mala administración resultantes de las actividades de las instituciones y órganos de la Comunidad³. Todo ciudadano de la Unión o toda persona jurídica que resida o tenga su sede en el territorio de un Estado miembro puede presentar una reclamación. Las actividades judiciales de los tribunales comunitarios quedaron, naturalmente, excluidas del mandato⁴. Es importante subrayar que el Defensor del Pueblo Europeo carece de mandato respecto de las autoridades públicas en los Estados miembros. Sólo se ocupa del nivel europeo⁵. Si bien sus investigaciones se realizan habitualmente sobre la base de las reclamaciones presentadas por los ciudadanos, el Defensor del Pueblo Europeo puede también realizar investigaciones de oficio.

Desde el 1 de septiembre de 1995, la institución ha recibido más de 7000 reclamaciones, habiéndose instruido más de 1000 investigaciones para estudiar supuestos casos de mala administración⁶. La mayor parte de las reclamaciones admitidas a trámite afectan a la Comisión Europea, cosa poco sorprendente dado que se trata de la administración con la que los ciudadanos tienen más contactos diarios. Las reclamaciones se refieren a retrasos administrativos, demora en pagos, falta de transparencia (por ejemplo, falta de información, información incorrecta, denegación del acceso a documentos y omisión de respuesta), descontento en relación con las acciones de la Comisión en su papel de guardiana de los Tratados, contenciosos sobre procedimientos de licitación o contratos, y numerosas quejas relativas a los procedimientos de selección de personal de las instituciones y órganos comunitarios.

El Defensor del Pueblo Europeo tiene amplios poderes de investigación. Toda institución u órgano comunitario tiene la obligación de facilitarle toda información que haya sido solicitada, así como darle acceso a los expedientes en cuestión. Los Estados miembros deben también comunicarle las informaciones que pudieran ayudarle a clarificar los casos de mala administración de las instituciones y órganos comunitarios. Si el asunto no puede solucionarse satisfactoriamente durante la investigación, el Defensor del Pueblo Europeo intenta encontrar una solución de mutuo acuerdo que permita remediar la mala administración y satisfacer al demandante. Si la tentativa de conciliación falla, el Defensor del Pueblo puede formular recomendaciones a la institución para solucionar el problema. En el caso de que la institución no tenga en cuenta las recomendaciones, el Defensor del Pueblo tiene la facultad de presentar un informe especial sobre la cuestión al Parlamento Europeo.

El modelo del Defensor del Pueblo Europeo se basa en el llamado Defensor del Pueblo "moderno" existente en algunos países europeos, principalmente en Dinamarca. Si bien la primera propuesta fue realizada por el Gobierno español, fue el Gobierno danés el que presentó la propuesta de Defensor del Pueblo Europeo que acabó por aceptarse⁷. El Defensor del Pueblo puede argumentar, elaborar informes especiales y presentar recomendaciones, pero es la propia administración la que debe reconsiderar el asunto y corregir su actuación. No tiene derecho, por tanto, a impartir órdenes a la institución ni a interponer recurso ante los tribunales.

¹ La página en Internet del Defensor del Pueblo Europeo recoge una amplia información sobre la institución. La dirección de la misma es la siguiente: <http://www.euro-ombudsman.eu.int>

Pueden encontrarse en esta página información sobre cómo presentar una reclamación al Defensor del Pueblo Europeo, los formularios correspondientes, así como todas las publicaciones realizadas hasta el día de hoy por la Secretaría de la institución.

² Consejero Jurídico Principal - Secretaria del Defensor del Pueblo.

³ Artículo 195 del Tratado CE (antiguo Art. 138e)

⁴ Art. 2 § 1 de la Decisión 94/262 del Parlamento Europeo, de 9 de marzo de 1994, sobre el Estatuto del Defensor del Pueblo y sobre las condiciones generales del ejercicio de sus funciones, DOCE L 113, de 4.05.1994, p.15 (Estatuto del Defensor del Pueblo Europeo).

⁵ Idem. Art. 2 § 2.

⁶ Informe Anual del Defensor del Pueblo Europeo del año 2000, Anexo A, Estadísticas; p.259.

⁷ Carlos J. Moreiro González, El Defensor del Pueblo en el Tratado de la Unión Europea, *Gaceta Jurídica de la Unión Europea y de la Competencia*, D-19, enero 1993, p.167.

La institución francesa del "Médiateur de la République" también fue otra fuente de inspiración para su homónimo europeo⁸. En este sentido, el Defensor del Pueblo Europeo debe buscar siempre que sea posible una solución amistosa con la institución u órgano afectado que permita eliminar los casos de mala administración y satisfacer la reclamación del demandante⁹.

En su resolución al Informe Anual del Defensor del Pueblo Europeo correspondiente al año 1996, el Parlamento Europeo requirió que el Defensor del Pueblo definiera el concepto de "mala administración", con la idea de facilitar el cumplimiento del mandato¹⁰. Tanto el Parlamento como la Comisión aceptaron la definición que propuse en mi Informe Anual de 1997:

*"La mala administración se produce cuando una entidad pública no actúa de acuerdo con una norma o principio vinculante para ella."*¹¹

Esto incluye, desde luego, la conculcación de los derechos humanos.

La actitud de las instituciones y órganos comunitarios, en particular, la Comisión Europea, ha sido muy cooperativa. En más de 200 asuntos, el Defensor del Pueblo Europeo decidió archivar el tema tras constatar que la Comisión había modificado su posición, dando satisfacción al demandante. También se han alcanzado soluciones amistosas y la mayor parte de los proyectos de recomendaciones presentados han sido adoptados. En un número reducido de casos ha sido preciso presentar un informe especial al Parlamento Europeo, cuando no se conseguía alcanzar un resultado satisfactorio para el demandante.

Es curioso observar que las instituciones y órganos de la Unión Europea han resultado ser mucho mejores de lo que hacía pensar su reputación en los Estados miembros. Pese a ello, los ciudadanos tienen todavía una visión negativa de las instituciones de la UE¹².

⁸ O. Bardiaux, "Le modèle continental" (French Ombudsman), en la obra de AM EPAMINONDAS, *The European Ombudsman*, EIPA (1994).

⁹ Art. 3 §§ 6,7 Estatuto del Defensor del Pueblo Europeo.

¹⁰ Resolución del Parlamento Europeo sobre el Informe Anual de Actividades de 1996 del Defensor del Pueblo Europeo (C4-0293/97); DOCE C 286, 22.09.1997, p.41.

¹¹ Informe Anual del Defensor del Pueblo Europeo del año 1997, p. 25.

¹² Informe 54 Eurobarómetro, abril 2001

POLÍTICA SANCIONADORA DE LA COMISIÓN EUROPEA EN EL ÁMBITO DE COMPETENCIA DESDE LA SEGUNDA MITAD DE LA DÉCADA DE LOS AÑOS 90

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1. Introducción

La Comisión Europea (en adelante, la Comisión), responsable única de la aplicación de la legislación comunitaria en materia de competencia, dispone de la posibilidad de imponer multas para corregir e impedir infracciones de las mismas tanto en lo que se refiere al procedimiento como a la substancia. En ambos casos, y a diferencia de otras jurisdicciones como la norteamericana o la inglesa, las sanciones tienen únicamente un carácter administrativo, no penal².

El debate sobre la posible "criminalización" de las reglas de competencia comunitarias tiene un carácter recurrente; aunque, por el momento, nunca ha llevado a una conclusión definitiva. En todo caso, tal debate queda fuera del ámbito de este artículo.

Como en muchos otros ámbitos de la legislación comunitaria de competencia, la segunda mitad de la década de los 90 ha supuesto un tiempo de cambio considerable en el área de la política sancionadora de la Comisión. Los cambios han consistido en la adopción de las *Directrices para el cálculo de las multas impuestas en aplicación del apartado 2 del artículo 15 del Reglamento n° 17 y del apartado 5 del artículo 65 del Tratado CEEA*³ y de la *Comunicación de 1996 relativa a la no-imposición de multas o a la reducción de su importe en los asuntos relacionados con acuerdos entre empresas*⁴.

¹ Las opiniones expresadas en el presente artículo son personales y no constituyen, por tanto, posiciones oficiales de la Comisión Europea.

² Apartado 4 del artículo 15 del Reglamento 17/62.

³ DOCE n° C9/3 de 14.01.1998.

⁴ DOCE n° C207/4 de 18.7.1996

Las primeras representan un intento de alcanzar un equilibrio entre una mayor transparencia y objetividad en el cálculo de multas, demandada tanto por las empresas como por el Tribunal de Justicia europeo, y el mantenimiento del margen discrecional que el legislador dejó a la Comisión a la hora de fijar las multas dentro del límite del 10% del volumen de negocios global de las empresas.

La segunda responde a la necesidad irrefutable, aunque nunca deseada, de mejorar las capacidades y las posibilidades de las autoridades de competencia en la persecución de los cárteles. Los cárteles constituyen la peor infracción posible de las reglas de competencia. Por ello, el interés de detectarlos, combatirlos y, aún de impedir su formación, es máximo y prioritario.

Distintas condiciones estructurales, como la existencia o no de sustitutivos, el grado de homogeneidad de los productos, el grado de concentración de la oferta y de la demanda, la elasticidad precio de la demanda, las diferencias de tamaño, de costes y de tecnología son otros tantos factores que inciden tanto en la posibilidad de que se forme un cártel como en su estabilidad y viabilidad futuras.

El seguimiento por las autoridades de competencia de aquellos sectores donde la formación de un cártel pudiera ser factible, constituye un elemento importante de toda política de competencia. Sin embargo, la evidencia irrefutable es que ciertas empresas tratan, en algunos casos reiteradamente de sustituir el juego de la competencia por comportamientos colusorios.

Es evidente que las empresas implicadas en prácticas de cártel son crecientemente conscientes del riesgo de detección por parte de las autoridades de competencia y de lo elevado de las multas a las que se arriesgan (por no hablar de otros tipos de sanciones). Por ello, muchas de ellas han alcanzado un elevado grado de sofisticación tanto en la ocultación de pruebas aprovechables por las autoridades de competencia como en la coordinación de sus actividades. Ello tiende a limitar la eficacia de los poderes habituales de obtención de información de las autoridades de competencia (inspecciones *in situ* y solicitudes de información) en la detección de cárteles.

Ante la disyuntiva interés público frente a dificultad creciente de detección, un número creciente de autoridades de competencia coincide en concluir –si bien a regañadientes- que para combatir eficazmente los cárteles es necesario ir mas allá de los planteamientos tradicionales.

Afortunadamente, la teoría económica muestra que, en muchas ocasiones, los cárteles son intrínsecamente inestables. La estabilidad de un cártel depende no sólo de factores estructurales, como los citados anteriormente, sino también de la capacidad de sus miembros de poner en marcha mecanismos de control y represalia ante posibles comportamientos oportunistas por parte de algunos de aquellos.

Las autoridades de competencia tratan lógicamente de explotar y maximizar dicha inestabilidad ofreciendo un tratamiento favorable a aquellas empresas que decidan denunciar la existencia de un cártel del que son partícipes. Dicho tratamiento favorable consiste en la dispensa del pago de multas y, en su caso, en la inmunidad frente a sanciones de índole penal a una empresa por cártel (en general, la primera) y en la reducción del importe de las multas de otro modo impuestas a algunas otras empresas cooperantes con la autoridad de competencia.

En la adopción de su programa propio, la Comisión se inspiró, y quiso emular, el éxito del programa norteamericano de 1993. Como se verá más adelante, tras adquirir una notable experiencia en la aplicación de su propio programa, la Comisión ha llegado a la conclusión de que es necesario mejorar una serie de aspectos del mismo. Por ello, hacia febrero de 2002, entrará en vigor un programa nuevo, completamente revisado y mucho más en consonancia con el programa norteamericano.

El contenido del presente artículo es el siguiente. A continuación describiré el contenido de las directrices y de la comunicación de 1996. A continuación, mostraré cómo están siendo aplicadas unas y otra en la práctica. En la sección final se realiza un esbozo del borrador del nuevo programa de clemencia comunitario.

2. Instrumentos sancionadores de la Comisión

2.1. Las directrices sobre multas de 1998

2.1.1 El poder sancionador de la Comisión

El apartado 2 del artículo 15 del R17/62 determina que *“la Comisión podrá, mediante decisión, imponer a las empresas y asociaciones de empresas multas que vayan de un mínimo de mil unidades de cuenta a un máximo*

de un millón de unidades de cuenta, pudiéndose elevar este importe máximo hasta el diez por ciento del volumen de negocios alcanzado durante el ejercicio económico precedente por cada empresa que hubiere tomado parte en la infracción cuando, deliberadamente o por negligencia:

a) cometan una infracción a las disposiciones del apartado 1 del artículo 85 (ahora, artículo 81), o del artículo 86 [ahora, artículo 82] del Tratado,

Para establecer la cuantía de la multa, se tomará en consideración, además de la gravedad de la infracción, la duración de ésta”.

A pesar de que la posibilidad de imponer multas existía, pues, desde la entrada en vigor del R17/62, la Comisión no impuso multas durante varios años. La novedad de las reglas de competencia invitaba a una cierta transigencia en el ámbito sancionador. Hubo que esperar hasta 1969 para ver las primeras multas, en los asuntos Quinine y Dyestuffs.

Desde entonces, la Comisión, y aún con altibajos, ha ido endureciendo progresivamente su política de multas. En la actualidad, y por el momento, la Comisión ha impuesto multas en un centenar largo de asuntos.

El método tradicionalmente utilizado para determinar el importe de una multa consistía en decidir un porcentaje “razonable” de las ventas de cada empresa que se aplicaba a continuación a una cifra de ventas, también “razonable”, normalmente la de ventas en el mercado afectado.

Sin embargo, las decisiones de la Comisión no solían detallar el método utilizado para calcular cada multa.

La definición de multas era, pues, un puro ejercicio de discrecionalidad en el que se tenían en cuenta elementos de todo tipo, relevantes a la vista de las circunstancias de cada caso. La única limitación era el respeto del umbral máximo del 10% de la cifra de ventas totales.

2.1.2. Estructura de las líneas directrices

La determinación del importe de una multa consta de varias etapas sucesivas:

2.1.2.1. Gravedad

En primer lugar, es preciso determinar un importe inicial que resultará de la categoría de gravedad de la infracción. La gravedad total depende de los tres factores siguientes: la naturaleza de la infracción, su impacto sobre el mercado afectado y el ámbito geográfico de este último.

Las directrices definen tres intervalos no solapados de importes iniciales probables en función de la gravedad: entre 1.000 € y 1 millón de € para infracciones leves, de 1 a 20 millones de € para infracciones graves y de al menos 20 millones de € para infracciones muy graves. En infracciones colectivas, cuando existe una gran diversidad de tamaños entre las empresas implicadas, es posible ponderar el importe inicial en función de los diferentes tamaños relativos⁵.

Cuando es necesario asegurar un nivel de disuasión suficiente, en particular en relación con empresas grandes de naturaleza multinacional o multiproducto, se puede incrementar el importe inicial dentro de los límites de la categoría de gravedad⁶.

2.1.2.2. Duración

La segunda etapa consiste en incrementar el importe inicial resultante de la gravedad mediante un porcentaje que refleja la duración de la infracción. A tal fin, las directrices establecen tres categorías de duración (corta, mediana y larga).

⁵ Ello se consigue mediante el reparto de las empresas infractoras en un número variable de grupos definidos en función de la distribución de tamaños. El importe inicial correspondiente a la gravedad se define para el grupo que incluye a las mayores empresas y se adapta a la baja para los demás grupos.

⁶ En la práctica, se aplica un multiplicador al importe inicial calculado para algunas empresas.

En las infracciones cortas (de duración inferior al año) no se aplica incremento alguno. Para las medianas (de hasta 5 años), se establece un incremento máximo del 50%. Para las largas, el aumento podrá ser de hasta un 10% anual.

La práctica decisional es más simple, al menos por el momento. En general, en las infracciones de al menos mediana duración, lo normal es que se añada un 10% por cada año completo y un 5% para periodos inferiores a un año pero superiores a 6 meses.

2.1.2.3. Importe de base

El importe de base de la multa se obtiene sumando al importe inicial el resultado de aplicar al mismo el porcentaje de incremento definido al considerar la duración.

Con la excepción de la consideración de la distribución de tamaños de las empresas infractoras en infracciones colectivas. El importe de base responde a la infracción y no a las circunstancias individuales de cada empresa infractora,

2.1.2.4. Circunstancias agravantes y atenuantes

En las siguientes etapas se consideran una serie de circunstancias específicas de cada empresa referentes, en general, a su papel dentro de la infracción. Existen, por un lado, circunstancias agravantes, que aumentarán el importe de base, y, por otro lado, circunstancias atenuantes, que lo disminuirán.

Las circunstancias agravantes mencionadas en las directrices son las siguientes:

- Reincidencia en una infracción del mismo tipo
- Tentativa de obstrucción de la investigación
- Función de líder o instigador de la infracción
- Medidas de represalia
- Otras

Por su parte, las directrices contemplan las siguientes circunstancias atenuantes:

- *Función exclusivamente pasiva*
- *No aplicación efectiva*
- *Interrupción de las infracciones desde las primeras intervenciones de la Comisión*
- *Existencia de dudas razonables en cuanto al carácter ilícito del comportamiento restrictivo*
- *Colaboración efectiva de la empresa en el procedimiento, fuera del ámbito de aplicación de la Comunicación de 1996 sobre cooperación*
- *Otras*

A la hora de calcular las multas, al importe de base se añade en primer lugar el resultado de aplicar al mismo el porcentaje de incremento resultante de la valoración por la Comisión de las circunstancias agravantes que existan en relación con cada una de las empresas infractoras.

De este importe de base aumentado se deduce, en su caso, el resultado de aplicar al mismo el porcentaje de reducción resultante de la valoración por la Comisión de las circunstancias atenuantes que existan en relación con cada una de las empresas infractoras.

La cantidad resultante constituye el importe final preliminar de la multa para cada empresa. Dicho importe, no es todavía, sin embargo, definitivo. De hecho, es necesario tener en cuenta otros dos elementos, de carácter bastante objetivo, que pueden reducir el importe de la multa: el umbral máximo del 10% de la cifra de ventas y la duración excesiva de la instrucción de un caso por parte de la Comisión.

2.1.2.5. Comparación con el 10% de la cifra total de ventas

En algunos ocasiones, el importe final preliminar de una multa puede exceder el tope máximo del 10% de la cifra de ventas total en el último año establecido en el apartado 2 del artículo 15 del R17/62. En tal caso, el importe de la multa es automáticamente reducido hasta igualar dicho 10%.

2.1.2.6. La duración excesiva de la instrucción de la Comisión.

Aunque tal reducción no aparece en las directrices, en dos de las decisiones adoptadas desde 1998 se ha otorgado una reducción adicional de, por el momento, 100.000 € por empresa, a la vista de que la duración de la instrucción de los asuntos por la Comisión había excedido un periodo considerado “razonable”. Dicha reducción es posible cuando la responsabilidad de la duración excesiva es únicamente atribuible a la Comisión.

2.1.2.7. Multas simbólicas

Por último, la Comisión se reserva la facultad de imponer una multa simbólica de 1.000 € en circunstancias a determinar en cada asunto. En la práctica, se han impuesto tales multas, en primer lugar, en relación con infracciones con respecto a las cuales o bien no había jurisprudencia comunitaria o bien ésta entraba en contradicción con jurisprudencia nacional o incluso internacional (como por ejemplo la definición de determinados tipos de envíos postales), y, en segundo lugar, en sectores (como la organización de un Mundial de fútbol) en los que la aplicación de las reglas de competencia constituía una novedad, para poner de manifiesto la voluntad de la Comisión de aplicarlas en el futuro con todas las consecuencias.

2.1.2.8. La estructura de la comunicación de 1996 relativa a la no-imposición de multas o a la reducción de su importe en los asuntos relacionados con los acuerdos entre empresas

La Comunicación de 1996 relativa a la no-imposición de multas o a la reducción de su importe en los asuntos relacionados con los acuerdos entre empresas (en adelante la comunicación de 1996) responde a la necesidad, anteriormente mencionada, de incitar a las empresas participantes en un cártel a que lo denuncien ante la Comisión o, al menos, a que cooperen con ella misma en su persecución, a cambio ya de la dispensa del pago de la multa a la que se habrían hecho acreedoras de no haber cooperado, ya de una reducción significativa de su importe⁷.

La Comunicación de 1996 consta de una introducción y 4 secciones. Las tres secciones B, C, D establecen otros tantos intervalos decrecientes de reducción y detallan las condiciones a satisfacer para obtener una reducción en aplicación de cada uno de ellos.

La sección E se ocupa de varias cuestiones adicionales de procedimiento.

2.2.1. Sección B: desde un 75% de reducción a la dispensa total

Para que una empresa pueda invocar la aplicación de la Sección B, ha de cumplir cada una de las condiciones siguientes:

- (a) tendrá que haber denunciado el acuerdo secreto a la Comisión antes de que ésta haya realizado una inspección en los locales de las empresas que participan en el cártel y sin que disponga todavía de suficiente información que le permita probar la existencia del cártel denunciado;
- (b) será la primera en facilitar elementos determinantes para probar la existencia del cártel;
- (c) deberá poner fin a su participación en la actividad ilícita, a más tardar, en el momento de denunciar el acuerdo;
- (d) deberá facilitar a la Comisión toda información que considere útil, así como todos los documentos y elementos de prueba de que disponga en relación con dicho cártel y deberá mantener una cooperación permanente y total mientras dure la investigación; y
- (e) no habrá obligado a otra a participar en el cártel, ni habrá sido la instigadora o habrá desempeñado un papel determinante en la actividad ilícita.

2.2.2. Sección C: desde un 50% a un 75% de reducción.

Podrá beneficiarse de la sección C toda empresa que reúna las condiciones previstas en las letras b) a e) de la sección B y que denuncie el acuerdo secreto después de que la Comisión haya realizado una inspección, sin que la misma haya aportado elementos suficientes para justificar la incoación del procedimiento con vistas a la adopción de una decisión.

⁷ Fuera del ámbito de los cárteles, la Comisión también puede recompensar la cooperación por parte de empresas infractoras, mediante el uso de la circunstancia atenuante que trata de la misma.

2.2.3. Sección D: desde un 10% a un 50% de reducción.

Esta sección se aplica por defecto a aquellas empresas que decidan cooperar pero que no reúnan todas y cada una de las condiciones establecidas en las secciones B o C.

La Comunicación de 1996 prevé aplicar la sección D en dos situaciones distintas:

- antes del envío del pliego de cargos, cuando una empresa facilite a la Comisión información, documentos u otros elementos de prueba que contribuyan a confirmar la existencia de la infracción;
- tras recibir el pliego de cargos, cuando una empresa informe a la Comisión de que no pone en duda la veracidad de los hechos sobre los que la Comisión funda sus acusaciones⁸.

2.2.4. Sección E

La sección E se ocupa de cuestiones generales y de procedimiento. En lo que a estas últimas se refiere, realiza un esbozo de procedimiento. Simplemente se dice, en primer lugar, que las empresas –a través de una persona habilitada al respecto- deberán ponerse en contacto con la Dirección General de Competencia de la Comisión. En segundo lugar, deja claro que las empresas sólo conocerán la reducción que se les aplica en la decisión final y no antes, aunque se compromete a reducir las multas o a dispensar de su pago a aquellas empresas que reúnan las condiciones requeridas.

3. Aplicación de los instrumentos sancionadores

3.1. El funcionamiento en la práctica de las directrices sobre multas. De 1998 a octubre de 2001.

3.1.1. Las grandes cifras

Desde su entrada en vigor en enero de 1998 hasta el final de 2001, las directrices sobre multas han sido aplicadas en 32 asuntos para castigar 43 infracciones de las reglas de competencia comunitarias.

De esas 43, 34 fueron infracciones del artículo 81, de las cuales:

- 26 fueron infracciones colectivas de tipo horizontal (es decir, entre competidores). 23 de las 26 fueron definidas explícitamente como cárteles (17 de ámbito superior al territorio de un Estado Miembro, 5 de ámbito nacional y en el restante se definieron 3 rutas marítimas afectadas entre dos Estados Miembros). Hubo también un caso de prácticas concertadas y en los dos restantes no se hizo una catalogación más detallada.
- Las 8 infracciones restantes fueron de tipo vertical (es decir, entre empresas situadas en planos distintos de la cadena productiva o de distribución). 4 de ellas fueron medidas individuales tendentes a erigir obstáculos al comercio paralelo, mediante la atribución de territorios de venta exclusivos, a los suministros cruzados entre miembros de una red de distribución y a la fijación de precios de reventa. 3 de las 4 infracciones fueron cometidas por otros tantos fabricantes de coches y la cuarta por un fabricante de retroexcavadoras. Hubo, además, otras 3 infracciones consistentes únicamente en la fijación de precios de reventa (2 de las cuales de nuevo fueron protagonizadas por fabricantes o importadores de coches). La última infracción, también en el sector de la producción de coches, consistió en la limitación de ventas a una categoría concreta de clientes.

Además de las infracciones del artículo 81, hubo también 9 abusos de posición dominante bajo el artículo 82, incluyendo 2 abusos colectivos en el sector del transporte marítimo.

El total de multas impuesto asciende a 2.846,667 millones de €. La multa media por asunto se sitúa en 88,96 millones de €. La multa media por infracción se queda en 66,2 millones de €.

La decisión en el asunto *Vitamins* de 21 de noviembre de 2001 tuvo un gran impacto en dichas cifras. El importe total de la multa en dicho asunto ascendió a 855,22 millones de €⁹

Los dos cuadros siguientes detallan los importes totales impuestos por año y por asunto de las multas impuestas desde enero de 1998:

⁸ Si una empresa que se ha beneficiado de una reducción de la multa por no haber puesto en duda la veracidad de los hechos, la impugna en un recurso de anulación ante el Tribunal de Primera Instancia, la Comisión solicitará en principio a éste que aumente el importe de la multa que ha impuesto a dicha empresa.

⁹ A pesar de que 4 de los 12 cárteles constatados habían prescrito a los efectos de la imposición de multas.

Cuadro 1 – Totales anuales de multas

Año	Nº de asuntos	Total (Millones €)
1998	7	547,85
1999	4	112,351
2000	5	199,597
2001	16	1.986,869

Cuadro 2 - importe total de las multas impuestas por asunto

Año	Caso	Importe total (millones de Ecu/€)
1998	Alloy Surcharge ¹⁰	27,380
	VW (tras la sentencia del TPI) ¹¹	90
	AAMS ¹²	6
	TACA ¹³	272,94
	British Sugar ¹⁴	50,2
1999	Pre-insulated Pipes ¹⁵	92,21
	Greek ferries ¹⁶	9,12
	1998 Football World Cup ¹⁷	0,001
	Virgin-BA ¹⁸	6,8
	FEG-TU ¹⁹	6,55
2000	Seamless Steel Tubes ²⁰	99
	FETTCSA ²¹	6,932
	Aminoacids ²²	109,99
	Nathan-Bricolux ²³	0,061
	Opel Nederland ²⁴	43
2001	JCB ²⁵	39,614
	Deutsche Post AG ²⁶	24
	Volkswagen (2001) ²⁷	30,96
	Michelin ²⁸	19,76
	Graphite electrodes ²⁹	218,8

¹⁰ *Alloy Surcharge*. Decisión de la Comisión de 21.1.98 relativa a un procedimiento en aplicación del artículo 65 del tratado CECA. DOCE n° L100/55 de 1.4.98.

¹¹ *Volkswagen*. Decisión de la Comisión de 28.1.98 relativa a un procedimiento en aplicación del artículo 81 (ex artículo 85) del tratado CE. DOCE n° L124/60 de 25.4.98.

¹² *AAMS*. Decisión de la Comisión de 17.6.98 relativa a un procedimiento en aplicación del artículo 82 (ex artículo 86) del tratado CE. DOCE n° L252/47 de 12.9.98.

¹³ *TACA*. Decisión de la Comisión de 16.9.98 relativa a un procedimiento en aplicación de los artículos 81 y 82 del tratado CE. DOCE n° L95/1 de 9.4.99.

¹⁴ *British Sugar*. Decisión de la Comisión de 14.10.98 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE. DOCE n° 76/1 de 22.3.99.

¹⁵ *Pre-insulated Pipes*. Decisión de la Comisión de 21.10.98 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE. DOCE n° L24 de 30.1.99.

¹⁶ *Greek ferries*. Decisión de la Comisión de 9.12.98 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE. DOCE n° L109/24 de 27.4.98.

¹⁷ *1998 Football World Cup*. Decisión de la Comisión de 20.7.99 relativa a un procedimiento en aplicación del artículo 82 del Tratado CE. DOCE n° L5/55 de 8.1.2000

¹⁸ *Virgin-BA*. Decisión de la Comisión de 14.7.99 relativa a un procedimiento en aplicación del artículo 82 del Tratado CE. DOCE n° L30/1 de 4.2.2000.

¹⁹ *FEG-TU*. Decisión de la Comisión de 26.10.99 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE. DOCE n° L39/1 de 14.2.2000.

²⁰ *Seamless Steel Tubes*. Decisión de la Comisión de 8.12.99 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE.

²¹ *FETTCSA*. Decisión de la Comisión de 16.5.2000 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE. DOCE n° L268/1 de 20.10.2000.

²² *Aminoacids*. Decisión de la Comisión de 7.6.2000 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE. DOCE n° L152/24 de 7.6.2001.

²³ *Nathan – Bricolux*. Decisión de la Comisión de 5.7.2000 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE. DOCE n° L54/1 de 23.02.2001.

²⁴ *Opel Nederland*. Decisión de la Comisión de 20.09.2000 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE. DOCE n° L59/1 de 28.02.2001.

²⁵ *JCB*. Decisión de la Comisión de 21.12.2000 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE.

²⁶ *Deutsche Post AG*. Decisión de la Comisión de 20.03.2001 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE. DOCE n° L125/27 de 5.5.2001.

²⁷ *Volkswagen*. Decisión de la Comisión de 30.05.2001 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE. DOCE n° L262/14 de 2.10.2001.

²⁸ *Michelin*. Decisión de la Comisión de 20.05.2001 relativa a un procedimiento en aplicación del artículo 82 del Tratado CE.

	SAS/Maersk Air ³⁰	52,5
	Deutsche Post-II ³¹	0,001
	Sodium Gluconate ³²	57,53
	Mercedes-Benz ³³	71,825
	Vitamins ³⁴	855,22
	Hays-La Poste ³⁵	2,5
	Citric Acid ³⁶	135,22
	Cerveceros de Luxemburgo ³⁷	0,448
	Interbrew - Alken-Maes/Danone ³⁸	91,655
	Zinc Phosphate ³⁹	11,95
	German Banks ⁴⁰	100,8
	Carbonless Paper ⁴¹	313,7

Los sucesivos cuadros y explicaciones detallan los diferentes elementos presentes en cada una de las decisiones adoptadas desde 1998. El orden sigue el de las directrices.

3.1.2. Gravedad y duración

Los dos cuadros siguientes resumen los elementos determinantes de la gravedad y los porcentajes de incremento aplicados por duración en cada uno de los asuntos decididos desde 1998.

Cuadro 3 – Gravedad e importes iniciales

Asunto	Naturaleza	Tamaño del mercado	Impacto	Gravedad total	Importe inicial ⁴²
Alloy Surcharge	Grave (práctica concertada)	Europa del Oeste	Considerable, aunque no especificado	Grave	4
VW	Particularmente grave (obstrucción del comercio paralelo y de los suministros cruzados entre distribuidores)	Italia, Alemania y Austria	Probable. No calculado	Muy grave	50
AAMS	Muy grave (abuso)	Grave (Italia)	Grave	Grave	3
TACA-contratos de servicios	Grave	Muy grave	Grave	Grave	0,5 – 1 – 1,5 – 2
TACA-competencia potencial	Muy grave (abuso)	Muy grave	Muy grave	Muy grave	5 – 10 – 15 -20
British Sugar	Muy grave (cártel de precios)	Grave (UK)	Grave. La Comisión no probó un impacto muy grave.	Grave	1,5 – 10 - 18
Pre-insulated Pipes	Muy grave (cártel)	Parte substancial de la UE	Evidencia de la existencia de listas de precios. También de	Muy grave	1 – 5 – 10 - 20

²⁹ Graphite electrodes. Decisión de la Comisión de 18.07.2001 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE.

³⁰ SAS/Maersk Air. Decisión de la Comisión de 18.07.2001 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE. DOCE n° L265/15 de 5.10.2001.

³¹ Deutsche Post AG II. Decisión de la Comisión de 25.07.2001 relativa a un procedimiento en aplicación del artículo 82 del Tratado CE.

³² Sodium Gluconate. Decisión de la Comisión de 2.10.2001 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE.

³³ Mercedes-Benz. Decisión de la Comisión de 10.10.2001 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE.

³⁴ Vitamins. Decisión de la Comisión de 21.11.2001 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE.

³⁵ Hays-La Poste. Decisión de la Comisión de 5.12.2001 relativa a un procedimiento en aplicación del artículo 82 del Tratado CE.

³⁶ Citric Acid. Decisión de la Comisión de 5.12.2001 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE y del artículo 53 del Tratado EEE.

³⁷ Cerveceros de Luxemburgo. Decisión de la Comisión de 5.12.2001 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE.

³⁸ Interbrew – Alken-Maes/Danone. Decisión de la Comisión de 5.12.2001 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE.

³⁹ Zinc Phosphate. Decisión de la Comisión de 11.12.2001 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE.

⁴⁰ German Banks. Decisión de la Comisión de 11.12.2001 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE.

⁴¹ Carbonless Paper. Decisión de la Comisión de 20.12.2001 relativa a un procedimiento en aplicación del artículo 81 del Tratado CE.

⁴² Por empresa, en infracciones individuales, y por grupo, en infracciones colectivas. En millones de €/ECU.

			descuentos individuales.		
Greek ferries	Muy grave (cártel de precios)	Parte muy pequeña de la UE	Limitado	Grave	0,4 – 1,3 - 2
1998 Football World Cup	Abuso			Multa simbólica	0,001
Virgin – BA	Grave. Abuso (fidelización de agencias de viaje mediante escalas de descuento no proporcionales)	Reino Unido	Efectos sobre la economía del RU sin especificar. Mantenimiento por de BA de una parte de mercado considerable	Grave	4
FEG-TU	Acuerdo horizontal de precios. Acuerdo de compra exclusiva.	Holanda o menor	No medido con precisión. Aumentar las barreras a la entrada.	Grave	1,25 – 2,5
Seamless Steel Tubes	Muy grave (cártel tendente a impedir el funcionamiento adecuado del mercado único)	Muy grave (4 Estados miembros)	Limitado	Muy grave	10
FETTCSA	Grave (acuerdo horizontal prohibiendo descuentos)	Rutas marítimas entre Europa del Norte y el lejano Oriente	Limitado: acuerdo de muy corta duración. No evidencia de impacto sobre precios practicados.	Grave	0,325 – 0,65 – 1 – 1,3
Aminoacids	Muy grave (cártel de precios y de reparto de cuotas)	EEE	No medido	Muy grave	15 - 30
Nathan-Bricolux	Grave (fijación de precios de reventa y de condiciones de distribución)	Francia y Bélgica francófona	No medido. Aplicación esporádica de los acuerdos	Leve	0,001 – 0,06
Opel Nederland	Muy grave (obstrucción del comercio paralelo y de los suministros cruzados entre distribuidores)	Medidas no limitadas a un territorio concreto. Toda la UE	Efecto directo en las ventas en Holanda. Distribuidores en otros Estados Miembros se vieron protegidos de la competencia en precios.	Muy grave	40
JCB	Muy grave: acuerdos de distribución tendentes a dividir el mercado único. Protección territorial absoluta. Restricción del comercio paralelo y de las fuentes de aprovisionamiento de distribuidores autorizados. Fijación de precios de reventa y de descuentos.	4 Estados miembros	Gran número de distribuidores afectados	Muy grave	25
Deutsche Post AG	Grave. Abuso (escala de descuentos no proporcionales tendentes a excluir competidores del mercado)	Grave (Alemania)	Efecto negativo sobre la competencia en los servicios de correo urgente	Grave	12
Volkswagen	Muy Grave (prohibición de conceder descuentos en la venta de un modelo concreto de coche)	Grave (Alemania y posiblemente el RU)	Intención restrictiva. Efecto significativo en Alemania	Grave	20

Michelin	Grave. Abuso (fidelización de agencias de viaje mediante escalas de descuento no proporcionales y ventas ligadas)	Francia	Intención restrictiva. Efecto significativo en Francia	Grave	8
Graphite electrodes	Muy grave. Cártel de fijación de precios y reparto de mercados	Mundial	Evidencia de aplicación	Muy grave	8 - 16 - 40
SAS/Maersk Air	Muy grave (acuerdo de reparto de mercados)	Internacional (rutas aéreas de y hacia Dinamarca)	Evidencia de aumento de parte de mercado y de ingresos resultante de la aplicación del acuerdo.	Muy grave	14 - 35
Deutsche Post	Abuso	Alemania		Multa simbólica	0,001
Sodium Gluconate	Muy grave. (Cártel de fijación de precios y reparto de mercados)	Mundial	Acuerdos puestos en práctica.	Muy grave	5 - 10
Mercedes-Benz 3 infracciones separadas	1) muy grave Restricciones a la exportación 2) prohibición de ventas a una categoría concreta de clientes 3) muy grave fijación de precios de reventa	1) Alemania 2) Alemania y España 3) Bélgica	1-3) Eliminación de la competencia 2) apreciable	1) Muy grave 2) grave 3) grave	33 10 7
Vitamins 8 infracciones separadas ⁴³	Muy grave. Cártel de fijación de precios, reparto de mercados y de clientes	Mundial	Acuerdos puestos en práctica. Caída de precios tras el fin de los distintos cárteles	Muy grave	Según vitaminas: 18 - 30 (A) 7.5 - 30 (C) 10.5-35 (E) 10-20 (B2) 14-20 (B5) 4 - 10 (D3) 20 (Beta Caroteno, carotínicos)
Hays-La Poste	Abuso: ventas ligadas. Grave	Bélgica	Grave: eliminación de un competidor privado del mercado	Grave	2
Citric Acid	Muy grave. Cártel de fijación de precios, reparto de mercados y clientes.	Mundial	Muy grave: Acuerdos puestos en práctica	Muy grave	3,5 - 21 - 35
Cerveceros de Luxemburgo	Muy grave. Cártel para dividir el mercado único y a repartir mercados.	Luxemburgo	Puesta en práctica parcial. No evidencia de impacto negativo	Grave	0,015 - 0,25 - 0,5
Interbrew - Alken-Maes/Danone 1) cártel bilateral 2) cártel marcas blancas	1) Muy grave. Cártel de fijación de precios, reparto de clientes, coordinación de promociones, publicidad, etc. 2) Muy grave. Cártel de fijación de precios y reparto de mercados.	1) y 2) Bélgica	1) Pruebas documentales de aplicación exitosa. 2) Ausencia de evidencia acerca del posible impacto negativo	1) Muy grave. 2) Grave	1) 25 - 45 2) 0,25 - 0,35
Zinc Phosphate	Muy grave. Cártel de fijación de precios, reparto de mercados y clientes.	Toda la UE	Muy grave. Acuerdos puestos en práctica	Muy grave	0,75 - 3
German banks	Muy grave. Acuerdo de fijación de comisión.	Alemania y zona fronteriza de Holanda	Muy grave. Acuerdos puestos en práctica	Grave	2 - 10
Carbonless Paper	Muy grave. Cártel de fijación de precios y de	ElEEE	Muy grave. Acuerdos puestos	Muy grave	1,4 - 5,6 - 10,5 - 24,5 - 70

⁴³ Más otras 4 prescritas.

	fijación de cuotas de ventas		en práctica		
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Cuadro 4 – multiplicadores aplicados al importe inicial

Caso	Empresa	Multiplicadores
Pre-insulated Pipes	ABB	x 2,5
Graphite electrodes	VAW SDK	x 1,25 x 2,5
Sodium Gluconate	ADM Akzo Nobel	x 2,5 x 2,5
Vitamins	Hoffman La Roche BASF Aventis	x 2 (las 8 vitaminas) x 2 (las 8 vitaminas) x 2 (vit. A, E, D3)
Citric Acid	Haarmann & Reimer ADM Hoffman La Roche	x 2,5 x 2 x 2
Cerveceros de Luxemburgo	Brasserie de Luxembourg	x 3
Interbrew – Alken-Maes Marcas Blancas	Interbrew Alken-Maes	x 5 x 2
German Banks	Commerz Bank Dresdner Bank Bayer Hypo	x 2 x 2 x 2
Carbonless paper	Awa Bolloré Sappi	x 2 x 2 x 2

Cuadro 5: Incrementos aplicados por duración

Caso	Duración	Incremento del importe de base
Alloy Surcharge	De 2 a 4 años, según las empresas.	De +10% a +40%
VW	Superior a 10 años.	+70%
AAMS	7 y 13 años, según las infracciones.	+100%
TACA	2 y 3 años, según las infracciones.	+25%
British Sugar	De 3½ a 4 años, según las empresas.	De +33% a +40%
Pre-insulated Pipes	De 15 meses a 5 años, según las empresas.	De +10% a +40%
Greek Ferries	Hasta 7 años, según las empresas.	De +20% a +70%
Virgin-BA	7 años.	+70%
FEG-TU	4, 6, 8, 9 y 15 años, según los elementos de la infracción.	+80%
Seamless Steel Tubes	De 4 a 5 años, según las empresas.	De +40% a +50%
FETTCSA	3 meses.	0%
Aminoacids	Hasta 5 años, según las empresas.	+30%, +32% ó +40%
Nathan-Bricolux	3 años.	+20%
Opel Nederland	17 meses. Intensidad variable durante el periodo.	+7.5%
JCB	11 años.	+55%
Deutsche Post AG	26 años.	+100%
Volkswagen	35 meses.	+29%
Michelin	9 años.	+90%
Graphite electrodes	Entre 46 y 70 meses, según las empresas.	+35%, +45%, +55%
SAS/Maersk Air	29 meses.	+25%
Sodium Gluconate	Entre 3 años y 11 meses y 8 años y 2 meses.	+35%, +70%, +80%
Mercedes-Benz Infracción 1	De 40 meses a 16 años, según los elementos de la infracción.	+42%
Mercedes-Benz Infracción 2	5 años.	+50%
Mercedes-Benz Infracción 3	50 meses	+40%

Vitamins:		
A	9 años y 6 meses	+90%
E	De 8 años a 9 años y 6 meses	+80%, + 90%
B2	De 3 años y 9 meses a 4 años y 3 meses	+35%, +40%
	8 años	
B5	4 años y 8 meses	+80%
C	4 años y 6 meses	+45%
D3	6 años y 4 meses	+40%
Beta caroteno	5 años y 8 meses	+60%
Carotínicos		+55%
Hays – La Poste	2 años y algo más de 6 meses	+25%
Citric Acid	3 – 4 años	+30% - +40%
Cerveceros de Luxemburgo	14 años	+100%
Interbrew – Alken-Maes Bilateral		
Marcas blancas	5 años y 1 día 9 meses	+45% 0
Zinc Phosphate	Entre 13, 35 y 49 meses	+10% - +25% - +40%
German Banks	4 años y 1 mes	+40%
Carbonless Paper	Entre 16 y 45 meses, según las empresas	+10% - +25% - +30% - +35%

3.1.3. Circunstancias agravantes y atenuantes

Esta sección describe cómo se han aplicado en la práctica las circunstancias agravantes y atenuantes previstas en las directrices, desde enero de 1998 hasta finales de noviembre de 2001.

Se han aplicado circunstancias agravantes al menos a una empresa en los 15 asuntos siguientes: *Alloy Surcharge*, *Volkswagen*, *British Sugar*, *Pre-insulated Pipes*, *Greek ferries*, *Aminoacids*, *JCB*, *Volkswagen-2*, *Michelin*, *Graphite Electrodes*, *Sodium Gluconate*, *Vitamins*, *Citric Acid*, *Interbrew – Alken-Maes/Danone (cártel bilateral y de las marcas blancas)* y *Carbonless Paper*.

Se han considerado circunstancias atenuantes en favor de al menos una empresa en los 13 asuntos siguientes: *Alloy Surcharge*, *British Sugar*, *Pre-insulated Pipes*, *Greek ferries*, *Seamless Steel Tubes*, *FETTCSA*, *Aminoacids*, *Nathan-Bricolux*, *Michelin*, *Graphite Electrodes*, *Vitamins*, *Cerveceros de Luxemburgo* e *Interbrew – Alken-Maes/Danone (cártel bilateral)*.

En los restantes asuntos, no se dieron las condiciones para aplicar ni unas ni otras.

3.1.3.1. Detalle de circunstancias agravantes

De las contempladas en las Directrices, se han aplicado las siguientes circunstancias agravantes:

Reincidencia en una infracción del mismo tipo

Fue aplicada por vez primera en el asunto *Michelin*. Dicha empresa ya había sido condenada en 1981 por incurrir en prácticas abusivas de fidelización mediante escalas de descuentos no proporcionales.

En la decisión, la reincidencia de Michelin supuso un incremento del 50% del importe de base de la multa.

La segunda ocasión en que se aplicó fue a Alken-Maes/Danone en el cártel bilateral con Interbrew. Danone (llamada entonces BSN) había infringido el artículo 81 ya en dos ocasiones anteriores. Aunque el sector de actividad (vidrio plano) era completamente ajeno al de las cervezas, como se trató del mismo tipo de infracción, la Comisión consideró probada la reincidencia y le castigó con un incremento que, junto con el referente a las amenazas, totalizó un 50%. Un factor que ayudó a la reincidencia fue el que el presidente de Danone en el momento de la última infracción y el de BSN durante las dos primeras fuesen la misma persona.

Tentativa de obstrucción de la investigación

Por el momento, se ha aplicado en 3 asuntos.

La primera vez fue en el asunto *Pre-insulated Pipes*, en relación con la empresa Henss. La suma de todas las circunstancias agravantes aplicadas a dicha empresa supuso un aumento del 30% del importe de base de su multa.

En el asunto *Greek Ferries*, el importe de base de la multa de Minoan fue aumentado en un 10% por la misma causa.

Finalmente, esta circunstancia agravante fue una de las que concurren en la empresa SGL, en el asunto *Graphite Electrodes*, y que le supusieron un aumento del 85% del importe de base de su multa.

Función de líder o instigador de la infracción

Esta circunstancia agravante ha sido aplicada en 6 asuntos desde 1998, en general en relación con infracciones colectivas de naturaleza horizontal. De hecho, es la que se ha aplicado con más frecuencia desde la entrada en vigor de las líneas directrices.

Su valor, en aquellos casos en que aparece individualizada, oscila con frecuencia entre un 25% (Usinor en *Alloy Surcharge* y Minoan en *Greek Ferries*) y un 50% (ADM y Ajinomoto en *Aminoacids*, Jungbunzlauer en *Sodium Gluconate*, Hoffman La Roche –HLR– en *Vitamins* y AWA en *Carbonless Paper*) de incremento del importe de base.

También en *Vitamins*, BASF recibió un 35% de incremento del importe de base de su multa por su función de lugarteniente de Hoffman La Roche. El mismo incremento fue aplicado a ADM y a HLR en el asunto *Citric Acid* por actuar como líderes conjuntamente en dicho cártel. La misma circunstancia fue valorada con un incremento del 30% para Interbrew y Alken-Maes en *Interbrew – Alken-Maes/Danone* en lo referente al cártel de las marcas blancas.

En otros asuntos no es posible darle un valor concreto, aunque sí se puede reconocer una variabilidad significativa del mismo. En el asunto *British Sugar*, fue una de las tres circunstancias agravantes que se aplicaron a la empresa British Sugar y que supusieron en conjunto un incremento del 75% del importe de base de su multa. También se aplicó, junto con otras dos circunstancias agravantes, en el asunto *Preinsulated Pipes* a la empresa ABB. El incremento total fue del 50% de su importe de base. Por último, una parte de los incrementos del 85% y del 60%, impuestos a SGL y a UCAR, respectivamente, en el asunto *Graphite Electrodes* fue debida a su liderazgo compartido de dicho cártel.

Medidas de represalia

Se ha aplicado, por el momento, en 4 asuntos:

En el asunto *Volkswagen-1*, dicha empresa recibió un aumento del 20% como consecuencia del ejercicio de diversas medidas de presión sobre sus distribuidores. En concreto, Volkswagen terminó contratos de distribución y amenazó con hacer lo propio en otros muchos casos, para impedir las ventas de coches de su marca a ciudadanos de otros Estados miembros. En el asunto *Volkswagen-2*, la Comisión volvió a encontrar comportamientos similares por parte de la empresa y, por ello, aplicó de nuevo un incremento del 20% al importe de base de la multa.

En el asunto *Pre-insulated Pipes* la Comisión concluyó que la mayor parte de las empresas partícipes habían colaborado en el boicoteo a otra empresa que se negó a participar en el cártel. Por ello, la Comisión aumentó en un 10% el importe de base de la multa de la mayoría de ellas.

En el asunto *JCB*, la Comisión aumentó en cerca de 900.000 € el importe de base de la multa impuesta a JCB, para penalizar las sanciones impuestas por dicha empresa a un distribuidor que se resistió a conformarse al acuerdo.

Por último, en el cártel bilateral incluido en el asunto *Interbrew – Alken-Maes/Danone*, *Alken-Maes/Danone* amenazó a Interbrew con hacerle difícil su situación en el mercado francés si no transfería un volumen de cerveza determinado. Aunque la amenaza no llegó a cumplirse, pese a que Interbrew no transfirió volumen alguno, la Comisión constató que la cooperación entre ambas empresas se intensificó a partir de ese momento. Por ello, la actitud de Alken-Maes/Danone fue castigada con un incremento incluido en el 50% total.

Otras

Este tipo de circunstancia agravante ha sido invocado por el momento para tres comportamientos distintos.

- La continuación de la infracción tras el inicio del procedimiento por la Comisión. En los asuntos *Volkswagen*, *Preinsulated Pipes* y *Graphite Electrodes*, la Comisión aumentó el importe de la multa, de la totalidad o la mayor parte de las empresas implicadas en cada asunto, porque no pusieron fin inmediatamente a la infracción tras el inicio de procedimiento por la Comisión. El porcentaje de aumento suele ser del 10%.
- En *British Sugar*, el que British Sugar hubiese infringido sucesivamente los artículos 82 y 81 en el mismo mercado fue considerado circunstancia agravante, aunque la decisión no especifica el porcentaje concreto de aumento practicado.
- En el mismo asunto, el hecho que British Sugar se comportase de una manera contraria al espíritu y a la letra del programa de conformidad con las reglas de competencia, adoptado en el marco del asunto previo en que British Sugar fue declarado culpable de infringir el artículo 82, fue considerado circunstancia agravante. La Comisión tuvo en cuenta en particular que la adopción de dicho programa fue considerada circunstancia atenuante en aquel asunto.

La anterior descripción queda resumida en el siguiente cuadro recapitulativo.

Cuadro 6– Recapitulativo de circunstancias agravantes

Caso/tipo	Tentativa de obstrucción	Instigador / líder	Represalias	Reincidencia	Infracciones sucesivas	No respeto de programa de conformidad	Continuación De la infracción
Alloy Surchage		+25% (Usinor)					
VW			+20%(total)				20 % (total)
British Sugar		+75% (total a British Sugar)			Parte del +75% a British Sugar	Parte del +75% total a British Sugar	
Pre-insulated Pipes	+30% (total)	+50% (total a ABB)	+10% (para algunas empresas. Incluido en el total a ABB)				+20% (para algunas empresas. Incluido en el total a ABB))
Greek Ferries	+10%	+25% (Minoan)					
Aminoacids		+50% (ADM, Ajinomoto)					
JCB			+€ 864,000 a JCB				
VW (2001)			+20%				
Michelin				50%			
Graphite electrodes	Incluido en el +85% impuesto a SGL	Incluido en el +85% de SGL y en el +60% de UCAR					Incluido en el +85% de SGL y en el +60% de UCAR) +10% a Tokai, SEC, Nippon)
Sodium Gluconate		+50% (Jungbunzlauer)					
Vitamins		+50% (HLR) +35% (BASF)					
Citric Acid		+35% (ADM, HLR)					
Interbrew-Alken-Maes/Danone Bilateral			+50% (total a Alken-Maes)	+50% (total a Alken-Maes)			

Marcas blancas		+30% (Interbrew y Alken-Maes)					
Carbonless Paper		+50% (Awa)					

3.1.3.2. Detalle de circunstancias atenuantes

Función exclusivamente pasiva

Esta circunstancia atenuante ha sido tenida en cuenta en 5 asuntos. Se aplicó por primera vez en *Pre-insulated Pipes*, a dos empresas pequeñas (Ke-Kelit y Sigma), activas únicamente en sus respectivos países. Cada una de ellas pudo beneficiarse de una reducción del 66% por su papel marginal en el cártel.

En el asunto *Greek Ferries*, todas las empresas partícipes, con la excepción del instigador y de otras dos empresas especialmente activas en el cártel, se beneficiaron de una reducción del 15% por su comportamiento meramente pasivo.

En el asunto *Aminoacids*, la empresa Sewon se benefició de una reducción del 20% del importe correspondiente a la duración de su participación en el cártel, porque la Comisión aceptó que, a partir de determinado momento, la empresa en cuestión modificó su comportamiento en el cártel, pasando de ser un miembro activo del mismo a un mero seguidor.

En *Graphite Electrodes*, la empresa C/G se benefició de esta circunstancia atenuante. El porcentaje de reducción quedó incluido en el 40% total concedido a dicha empresa.

Por último, en el asunto *Vitamins*, la empresa Aventis (la antigua Rhône Poulenc) obtuvo un 50% de reducción de la multa en lo referente al cártel de la vitamina D3. Este importante descuento fue justificado por haber sido Aventis la empresa cuya cooperación permitió a la Comisión descubrir los cárteles de las vitaminas A y E, colaboración que valió a dicha empresa sendas exenciones de multas en relación con los mismos.

No aplicación efectiva

Esta circunstancia atenuante ha sido aplicada únicamente dos veces. La primera en el asunto *Pre-insulated Pipes*, en el que la empresa KWH se benefició de una reducción del 20% al no participar en el boicoteo emprendido contra otra empresa que se negó a participar en el cártel.

La segunda, en el asunto *Graphite Electrodes*. La Comisión consideró que la aplicación parcial de los acuerdos por parte de la empresa C/G se hizo merecedora de una reducción, incluida en el 40% total concedido a dicha empresa.

Interrupción de las infracciones desde las primeras intervenciones de la Comisión

Esta circunstancia atenuante fue utilizada en el asunto *FETTCSA* por primera vez. Todas las navieras implicadas obtuvieron una reducción del 20%, al haber puesto fin a la infracción inmediatamente después de que la Comisión les enviara una carta de advertencia.

Asimismo, todas las empresas participantes en el cártel de la lisina (*Aminoacids*) se obtuvieron una reducción del 10% por la prontitud con que pusieron fin a la infracción.

En el asunto *Nathan-Bricolux*, Nathan obtuvo una reducción (incluida en el 40% total concedido a la empresa) al haber modificado sus acuerdos de distribución inmediatamente después de haber recibido el pliego de cargos de la Comisión.

Michelin recibió una reducción del 20%, en el asunto de igual nombre, por terminar la infracción antes de recibir el pliego de cargos.

Por último, Alken-Maes/Danone recibió una reducción del 10% por poner fin al intercambio de información con Interbrew inmediatamente después de la inspección.

Existencia de dudas razonables en cuanto al carácter ilícito del comportamiento restrictivo

Todas las empresas infractoras en el asunto *Greek Ferries*, recibieron una reducción del 15% al haber aceptado la Comisión que la actitud del Gobierno griego de fomentar los acuerdos de precios para rutas marítimas internas griegas, pudo crear confusión en las empresas participantes en el cártel acerca de la legitimidad de los acuerdos de precios en rutas marítimas con Italia.

Lo mismo ocurrió en el asunto de los *Cerveceros de Luxemburgo*. A la vista de la existencia de jurisprudencia nacional previa en favor de las cláusulas de exclusividad, la Comisión redujo en un 20% la multa de las empresas participantes en dicho cártel, por las dudas que dicha jurisprudencia hubiese podido crear acerca del carácter restrictivo del acuerdo.

Colaboración efectiva de la empresa en el procedimiento, fuera del ámbito de aplicación de la Comunicación de 1996 sobre cooperación

El resto de la reducción recibida por la empresa Nathan en el asunto *Nathan-Bricolux* fue debido a la cooperación de Nathan con la Comisión. En concreto, Nathan puso en manos de la Comisión piezas de convicción que resultaron fundamentales para probar la infracción. Un nivel de cooperación semejante, fue considerado, en lo que a la empresa Bricolux se refiere, como uno de los elementos en los que la Comisión basó su decisión de imponerle únicamente una multa simbólica.

Otras

Esta categoría ha sido utilizada por el momento ante dos tipos de comportamiento diferentes.

En primer lugar, la multa impuesta a ABB fue reducida en 5 millones de € para reflejar la compensación económica (muy superior) pagada en concepto de daños y perjuicios por dicha empresa a la víctima del boicot.

En segundo lugar, en dos asuntos –relacionados ambos con el acero- la Comisión ha reflejado la situación de seria crisis en que se encontraba dicho sector, mediante sendas reducciones del 10%. Dichos asuntos fueron *Alloy Surcharge* y *Seamless Steel Tubes*.

La descripción anterior queda resumida en el siguiente cuadro recapitulativo:

Cuadro 7-recapitulativo de circunstancias atenuantes

Caso / tipo	Función pasiva	Interrupción de las infracciones	No aplicación efectiva	Dudas razonables	Colaboración efectiva	Otras	Situación de crisis
Alloy Surcharge							-10% (todas las empresas)
British Sugar							
Pre-insulated Pipes	-66% (dos empresas pequeñas)		-20% (una empresa)			-5 millones de € a ABB	
Greek ferries	-15% (la mayoría de las empresas)			-15% (todas las empresas)			
Seamless Steel							-10% (todas las empresas)
FETTCSA		-20% (todas las empresas)					
Aminoácidos	Reducción del 20% del importe por duración (Sewon)	-10% (todas las empresas)					
Nathan Bricolux		-40% (total a Nathan)			-40% (total a Nathan)		
Michelin		-20%					

Graphite electrodes	Parte del -40% a C/G		Parte del -40% a C/G				
Vitamins	-50% (Aventis, vit. D3)						
Cerveceros Luxemburgo				-20% (todas las empresas)			
Interbrew-Alken-Maes (marcas blancas)		-10% (Alken-Maes)					

3.1.4. La duración excesivamente larga de la instrucción de un asunto por la Comisión

La duración excesiva de la instrucción de un asunto por la Comisión no es razón suficiente para impedir la imposición de una multa, siempre que el tiempo transcurrido no exceda el período de prescripción de 5 años previsto en el Reglamento del Consejo n° 1988/74⁴⁴, en relación con las infracciones de los artículos 81 y 82. El plazo de prescripción comienza a contar a partir del día en que se cometió la infracción, o, en el caso de infracciones reiteradas o continuas, a partir del día en que terminó. El plazo puede interrumpirse, en especial, ante medidas de instrucción de la Comisión como, por ejemplo, el envío de una solicitud formal de información.

Hay que señalar, sin embargo, que la excesiva duración de un procedimiento puede dar lugar a una reducción del importe de una multa. Para ello es necesario que la responsabilidad de dicha duración excesiva recaiga única y exclusivamente en la Comisión. Así ocurrió en el asunto *FEFC* de 1994, primera decisión de aplicación del Reglamento 1017/68 adoptada en relación con una conferencia marítima. La excesiva duración de la instrucción fue uno de los elementos que la Comisión tuvo en cuenta a la hora de decidir la imposición de multas, definidas como simbólicas⁴⁵, de sólo 10.000 ECU por participante; y ello a pesar de la naturaleza muy grave y de la larga duración de la infracción.

Con posterioridad, tanto el Tribunal de Primera Instancia como el Tribunal de Justicia de las Comunidades han sentenciado que la Comisión debe adoptar una decisión en materia de competencia en un plazo razonable⁴⁶.

Desde la entrada en vigor de las directrices, la Comisión ha concedido reducciones para compensar la excesiva duración de su instrucción en los asuntos *FEG-TU* y *FETTCSA*. El importe de la reducción aplicada por el momento ha ascendido a 100.000 € por empresa.

3.2. Aplicación de la comunicación sobre cooperación de 1996

Desde su entrada en vigor en julio de 1996 hasta el fin de 2001, la Comunicación de 1996 ha sido aplicada en 17 ocasiones en los 16 asuntos que se mencionan a continuación: *Alloy surcharge*, *British Sugar*, *Pre-insulated Pipes*, *Greek Ferries*, *Seamless Steel Tubes*, *FETTCSA*, *Aminoacids*, *SAS-Maersk*, *Graphite Electrodes*, *Sodium Gluconate*, *Vitamins*, *Citric Acid*, *Interbrew – Alken-Maes/Danone*, *cerveceros de Luxemburgo*, *Zinc Phosphate* y *Carbonless Paper*.

El Tribunal de Primera Instancia se pronunció por vez primera sobre la Comunicación de 1996, en su sentencia de 12 de julio de 2001 sobre el recurso interpuesto por *British Sugar*. En ella, el Tribunal revisó el análisis hecho por la Comisión de la importancia de la cooperación de la empresa *Tate & Lyle* y aumentó en 10 puntos porcentuales (hasta el 50%) el porcentaje de reducción aplicado a dicha empresa. Sin embargo, la sentencia no puso en cuestión los principios de la Comunicación de 1996. Lo mismo ocurrió en la sentencia de 13 de diciembre de 2001 en el asunto *Alloy Surcharge*. El Tribunal aumentó al 20% la reducción del 10% inicialmente concedida a *Acerinox* por la Comisión.

3.3. Sección B

Sodium Gluconate

⁴⁴ DOCE n° L319, 19.11.1974, p.1.

⁴⁵ Este importe no puede considerarse simbólico en virtud de las directrices sobre multas. En ellas, cómo ya se expuso, el importe de una multa simbólica asciende a 1.000 €.

⁴⁶ Véase la sentencia del Tribunal de Justicia en el asunto C-185/95 P *Baustahlgewebe* [1998] ECR I-8485 y la del Tribunal de Primera Instancia en los asuntos acumulados T-213/95 y T-18/96 *SCK y FNK* [1997] ECR II-1739, punto 56.

La Sección B fue aplicada por primera vez en el asunto *Sodium Gluconate*. La reducción concedida a la empresa Fujisawa se quedó, sin embargo, en el 80% del importe de la multa. Ello se debió a que la Comisión consideró que Fujisawa se resistió a cooperar espontáneamente. De hecho, sólo se puso en contacto con la Comisión tras recibir una solicitud formal de información.

Vitamins

En *Vitamins*, la Comisión concedió por primera vez la reducción máxima. La empresa Aventis informó a la Comisión de la existencia de los cárteles referentes a las vitaminas A y E, en los que estaba implicada, antes de que la Comisión hubiese tenido noticia de su existencia. Por ello, al cumplir el resto de los requisitos de la sección B, pudo obtener la exención de las elevadas multas que le hubiesen correspondido por su participación en dichos cárteles. La multa final de Aventis no fue cero, sin embargo, al no poder obtener la misma reducción en el cártel de la vitamina D3, tercero y último en el que participó.

Cerveceros de Luxemburgo

La primera multa cero llegó en el asunto de los *cerveceros de Luxemburgo*. La empresa Brasserie de Luxembourg, filial del grupo cervecero Interbrew, puso en manos de la Comisión elementos determinantes de la existencia de un cártel cuya existencia ignoraba. De hecho, la empresa dio a la Comisión el propio texto del acuerdo constitutivo de la infracción.

Además, Interbrew ordenó por escrito a su filial que pusiese fin inmediatamente a su participación en el cártel. Tras verificar que los demás requisitos de la Sección B se cumplieran, la Comisión concedió la exención de la multa.

Hay que señalar que Brasserie de Luxembourg es con diferencia la mayor empresa cervecera luxemburguesa. Sin embargo, la Comisión no encontró indicios de que dicha empresa hubiese actuado como líder del cártel.

Citric Acid

La Sección B se aplicó por quinta vez en dicho asunto. La Comisión premió con una reducción del 90% la cooperación de la empresa Cerestar.

Cerestar fue la primera empresa en comunicar elementos determinantes para probar la existencia del cártel. Al igual que lo ocurrido con Fujisawa en el asunto *Sodium Gluconate*, la reducción del 100% no fue posible puesto que la cooperación de Cerestar comenzó tras recibir de la Comisión una solicitud formal de información.

Carbonless Paper

La empresa Sappi obtuvo la reducción máxima al contactar a la Comisión antes de que aquella hubiese tenido conocimiento del cártel en el sector del papel autocopiativo. Además, la Comisión constató que dicha empresa cumplía el resto de requisitos de la Sección B.

3.4. Sección C

La Sección C solamente se ha aplicado en el asunto *Graphite Electrodes*.

La empresa Showa Denko se benefició de la aplicación de dicha sección, al ser la primera empresa en proporcionar elementos determinantes acerca del cártel, después de que la Comisión hubiese realizado una inspección no excesivamente fructífera.

La Sección B no fue posible porque la empresa sólo ofreció su cooperación después de la inspección.

La reducción concedida (70%) quedó por debajo del máximo posible en la Sección C. Ello fue debido a que la Comisión estimó que la empresa fue parsimoniosa en proporcionar la totalidad de la información de la que disponía a la Comisión.

3.5. Sección D

La Sección D ha sido aplicada en 14 de las 15 ocasiones en que la Comisión ha concedido reducciones de las multas en virtud de la Comunicación de 1996.

La cooperación que se ha recompensado ha sido de dos tipos.

El apartado 1 y el primer guión del apartado 2 de dicha sección hacen referencia a lo que se puede considerar cooperación activa por parte de las empresas, quienes proporcionan a la Comisión información relevante acerca del cártel.

El segundo guión de dicho apartado; es decir, la aceptación de los hechos descritos en el pliego de cargos, hace referencia a una pasiva aunque importante, no tanto para el esclarecimiento de la infracción, que a esas alturas de la instrucción debe de estar ya concluido, como para el fluido desarrollo de las últimas fases del procedimiento administrativo tendente a la adopción de la decisión final.

3.5.1. Cooperación previa al envío del pliego de cargos por la Comisión

British Sugar

En el asunto *British Sugar*, la empresa Tate & Lyle puso en conocimiento de la Comisión la existencia de la infracción antes de que ésta hubiese llevado a cabo inspección alguna. Ahora bien, dicha cooperación no fue, en opinión de la Comisión, ni continua ni completa, por lo que no aplicó la sección B. Con todo y con eso, la Comisión otorgó a la empresa una reducción del 40% en virtud del apartado 1 de la sección D. Dicha reducción fue aumentada al 50% por el Tribunal de Primera Instancia en su sentencia sobre el asunto de 12 de julio de 2001, ya mencionada. El Tribunal estimó que la Comisión erró al valorar el alcance de la cooperación prestada por Tate & Lyle.

Pre-insulated Pipes

Un total de 5 de las empresas implicadas en el asunto *Pre-insulated Pipes*, incluida la definida como líder (ABB), recibieron sendas reducciones del 40% como recompensa por haber cooperado de manera substancial con la Comisión con anterioridad al envío del pliego de cargos, pero no antes de que la Comisión les hubiese enviado diversas solicitudes formales de información muy detalladas.

Un segundo grupo de empresas implicadas en el mismo asunto (a saber Pan-Isovit y Starpipe) pudo beneficiarse de un 33% de reducción al estimar la Comisión que el alcance de su cooperación se había situado en el límite entre la cooperación activa y la pasiva.

Seamless Steel Tubes

Una reducción, también del 40%, fue concedida a la empresa Vallourec en dicho asunto. La empresa en cuestión proporcionó a la Comisión información sobre el cártel muy útil para establecer la existencia de la infracción. Con posterioridad la empresa también aceptó la descripción de los hechos contenida en el pliego de cargos.

Aminoacids

En dicho asunto, la empresa Ajinomoto pidió acogerse a la sección B. La Comisión concluyó que ello no era posible por dos razones. En primer lugar, por ser dicha empresa uno de los líderes del cártel y, en segundo lugar, porque ocultó a la Comisión la existencia de un cártel anterior del que formaban parte los 3 productores asiáticos implicados en el asunto en cuestión –entre ellos la propia Ajinomoto-. Con todo, la reducción concedida fue la máxima prevista en la Sección D (50%).

El mismo descuento fue concedido a la empresa Sewon por haber proporcionado a la Comisión información tanto acerca del primer cártel asiático como del posterior europeo.

Por último, otras dos empresas (Cheil y Kyowa) recibieron sendas reducciones del 30 %, como recompensa por la información substancial que proporcionaron a la Comisión que le permitió confirmar la existencia de la infracción.

Graphite Electrodes

Además de la ya mencionada Showa Denko, empresa que como ya se dijo obtuvo una reducción en aplicación de la Sección C, UCAR, SGL, VAW y Carbide pusieron en poder de la Comisión información muy útil a la hora de probar la existencia de la infracción.

UCAR, al ser la segunda (tras Showa Denko) en proporcionar a la Comisión pruebas documentales y declaraciones escritas acerca de las actividades del cártel en el seno del EEE, se hizo merecedora de una reducción del 40%.

Una reducción del 30% fue concedida a SGL. Aunque dicha empresa se puso en contacto con la Comisión tempranamente, una cooperación real y útil no comenzó sino tras el envío por la Comisión de una solicitud formal de información muy detallada.

VAW y Carbide enviaron a la Comisión sendas declaraciones en las que reconocieron y explicaron su participación. Ello les valió sendas reducciones del 20%.

SAS - Maersk

Al final de la inspección llevada a cabo en dicho asunto, cuando los inspectores estaban todavía presentes, Maersk ofreció e hizo posible un contacto entre la Comisión y un antiguo empleado suyo, conocedor del verdadero alcance de los acuerdos entre las dos empresas. Además, reveló la existencia de ciertos documentos probatorios que no habían sido encontrados en el transcurso de la inspección. Todo ello le valió una reducción del 15%, a la que se añadió otro 10%, por haber aceptado la empresa los hechos contenidos en el pliego de cargos.

Sodium Gluconate

La sección D de la Comunicación de 1996 también se aplicó en *Sodium Gluconate*.

En ella, las empresas Roquette y Archer Daniels (ADM) recibieron sendas reducciones del 40% por haber puesto en manos de la Comisión información acerca del cártel de la que ésta no disponía.

Otras tres empresas (Akzo, Avebe y Jungbunzlauer) recibieron sendas reducciones de sólo el 20% porque la Comisión ya tenía en su poder la información que las empresas le proporcionaron. La Comisión estimó, sin embargo, que la confirmación de la veracidad de la información de la que ya disponía merecía también una cierta reducción.

Vitamins

En *Vitamins*, Hoffman La Roche (HLR) y BASF fueron los primeros en proporcionar elementos determinantes a la Comisión en relación con los cárteles de las vitaminas B2, B5, C, D3, Beta Caroteno y carotenoides. Sin embargo, al ser los líderes de todos los cárteles, su cooperación quedó relegada automáticamente a la sección D. Con todo, la Comisión concedió a ambos la máxima reducción posible (50%). Dicha reducción se extendió también a las vitaminas A y E, para recompensar la substancial cooperación de dichas empresas en lo referente a esas otras dos vitaminas, en los que Aventis se les adelantó a la hora de cooperar con la Comisión.

La cooperación de Daiichi (vitamina B5), Solvay (vitamina D3) y Takeda (vitaminas B2 y C) fue suficientemente importante como para ser recompensada con sendas reducciones del 35%. Eisai (vitamina C) empezó a cooperar después de que otras tres empresas lo hubiesen hecho en relación con dicha vitamina. Pese a ello, recibió una reducción del 30%, algo menor que la de las anteriores, pero aún bastante significativa.

Interbrew – Alken-Maes/Danone

El siguiente asunto en el que se aplicó la sección D fue el del doble cártel de empresas cerveceras belgas.

En el cártel binario entre Interbrew y Alken-Maes, ambas empresas empezaron a cooperar sólo tras recibir sendas solicitudes formales de información muy detalladas. Por ello, la Comisión valoró con reducciones de sólo el 30% y 10% respectivamente la información proporcionada por cada una de ellas.

En relación con Alken-Maes, hay que destacar que por primera vez la Comisión aplicó el mínimo previsto en la Sección D en el caso de una cooperación anterior al pliego de cargos.

Interbrew reveló a la Comisión la existencia del segundo cártel, referido a las marcas blancas de cerveza. Sin embargo, como dicha empresa actuó como líder del mismo, no fue posible aplicar la Sección B.

La empresa Martens obtuvo un 10% de reducción por haber ayudado a acelerar la instrucción del segundo cártel.

Citric Acid

ADM puso en manos de la Comisión información y documentos que contribuyeron en gran medida al establecimiento de la infracción.

Ahora bien, ADM sólo fue la segunda empresa en colaborar y además actuó como líder compartido del cártel junto con Jungbunzlauer. Estos dos elementos impidieron que se le aplicase la Sección B. Con todo, la Comisión le otorgó el máximo previsto en la Sección D (50%).

Jungbunzlauer también cooperó y obtuvo por ello una reducción significativa (40%), si bien menor a la de ADM por ser su cooperación más tardía y su información menos determinante.

Las mismas consideraciones hicieron que la reducción otorgada a Haarmann & Reimer se limitase al 30%. Por último, Hoffmann La Roche recibió una reducción del 20% al haber reconocido su participación en el cártel antes de recibir el pliego de cargos.

Zinc Phosphate

La empresa Waardals contactó a la Comisión justo después de la inspección por sorpresa y le proporcionó evidencia acerca del cártel y, en particular, una lista de las reuniones del cártel. Dicha documentación permitió elaborar solicitudes formales de información muy detalladas que desencadenaron la cooperación de algunas otras empresas. La cooperación de Waardals fue recompensada con una reducción del 50%, la máxima contemplada en la Sección D.

Tras recibir la solicitud formal de información, la empresa Trident puso en manos de la Comisión documentos varios y un escrito en el que se describía el funcionamiento del cártel. Ello le valió una reducción del 40%.

Carbonless Paper

Tras Sappi, varias de las empresas implicadas en el cártel (Mougeot, AWA y Bolloré) cooperaron con la Comisión, poniendo en sus manos informaciones varias que completaron el conocimiento que la Comisión tenía del cártel. Ello les valió reducciones del 50, 35 y 20% respectivamente.

3.5.2. Cooperación después del envío del pliego de cargos

En la práctica totalidad de las ocasiones en que se ha aplicado la Comunicación de 1996 al menos una empresa ha obtenido una reducción, en general modesta, por haber cooperado pasivamente con la Comisión al reconocer los hechos que se le imputaban en el pliego de cargos.

La cooperación de Usinor y Avesta en el asunto *Alloy Surcharges*, pese a que comenzó después de la recepción del pliego de cargos por las empresas, fue extensa y valorada como importante por la Comisión, quien otorgó sendas reducciones del 40%.

En *Vitamins*, la Comisión recompensó con un 15% de reducción la cooperación de Merck tras el pliego de cargos en relación con el cártel de la vitamina C.

En el resto de los asuntos, el segundo guión del apartado 2 de la sección D ha beneficiado a empresas que aceptaron la descripción de los hechos contenida en los respectivos pliegos de cargos que recibieron.

Los porcentajes de reducción concedidos han oscilado entre el 33% concedido a Ke-Kelit en el asunto *Pre-insulated Pipes* y el 10%, al que parece tender la Comisión en la mayoría de los asuntos más recientes (como *SAS Maersk*, *Graphite Electrodes*, *Vitamins*⁴⁷ y el cártel de las marcas blancas⁴⁸, *Zinc Phosphate* y *Carbonless Paper*), pasando por el 20% concedido a todas (*Greek Ferries*) o a algunas empresas implicadas (*Dalmine* en *Seamless steel tubes*).

El asunto *FETTCSA* merece una mención más detallada. Las empresas implicadas abandonaron el acuerdo restrictivo al recibir el pliego de cargos. Al mismo tiempo, se comprometieron formalmente con la Comisión a no volver a concebir ni a aplicar acuerdo alguno semejante al que dio origen al asunto, sin notificarlo previamente a la Comisión. A pesar de todo lo anterior, la Comisión se limitó a conceder una reducción del 10% a cada una de las empresas en la decisión final. Para ello, la Comisión se basó en que únicamente tuvo

⁴⁷ En lo que se refiere a la cooperación de Aventis en relación con la vitamina D3.

⁴⁸ Incluido en el asunto Interbrew – Alken-Maes/Danone.

conocimiento de la infracción (en concreto del acuerdo de no otorgar descuentos) al analizar las respuestas recibidas a una solicitud formal de información enviada previamente para conocer el alcance del acuerdo FETTCSA.

El cuadro siguiente resume la descripción anterior.

Cuadro 8– Reducciones concedidas en virtud de la Comunicación sobre cooperación de 1996⁴⁹

Caso / Sección	Sec. D Cooperación antes del PC	Sec D No objeciones al PC	Sec. C	Sec. B
Alloy surcharge		-40% (Usinor y Avesta) -10% (el resto)		
British Sugar	-50% (Tate & Lyle)	-10% (todas)		
Pre-insulated Pipes	De -33% a -40% (5 empresas)	-33% (Ke-Kelit)		
Greek Ferries		-20% (todas)		
Seamless steel	-40% (total para Vallourec)	-20% (incluido en el -40% concedido a Vallourec) -20% (Dalmine)		
FETTCSA		-10% (todas)		
Aminoacids	-50% (Ajinomoto y Sewon). -30% (para Cheil y Kyowa)	-10% (ADM)		
Graphite electrodes	-30% (SGL) -40% (UCAR) -20 (VAW y C/G)	-10% (Tokai, SEC y Nippon)	-70% (SDK)	
SAS/Maersk Air	-25% (total para Maersk Air)	-10% (SAS) (incluido en el -25% para Maersk Air)		
Sodium Gluconate	-40% (Roquette y ADM). -20% (Akzo, Avebe y Jungbunzlauer)			-80% (Fujisawa)
Vitamins	-50% (HLR y BASF, todas las vitaminas), -35% (Daiichi –Vit. B5-, Solvay –vit. D3- y Takeda –vits. B2 y C) -30% (Eisai, vit. E)	15% (Merck, vit. C). -10% (Aventis, vit. D3)		-100% (Aventis, vitaminas A y E)
Cerv.Luxemburgo				-100% (Brasserie de Luxembourg –Interbrew-)
Interbrew-Alken-Maes (bilateral)	-30% (Interbrew) -10% (Alken-Maes)			
Interbrew-Alken-Maes (marcas blancas)	-50% (Interbrew) -10% (Martens)	-10% (Alken-Maes y Haacht)		
Citric Acid	-50% (ADM) -40% (Jungbunzlauer) -30% (Haarmann & Reimer) -20% (HLR)	-		-90% (Cerestar)
Zinc Phosphate	-50% (Waardals) -40% (Trident)	-10% (Brittania, James Brown, Heubach y SNCZ)		
Carbonless Paper	-50% (Mougeot) -35% (AWA) -20% (Bolloré)	-10% (Carrs, MHTP y Zanders)		-100% (Sappi)

4. El nuevo proyecto de comunicación sobre la dispensa del pago de las multas y a la reducción de su importe en casos de cártel

El 21 de julio pasado, se publicó en el Diario Oficial de las Comunidades Europeas⁵⁰, un *proyecto de comunicación de la Comisión relativa a la dispensa del pago de las multas y a la reducción de su importe en casos de cártel* (en adelante el borrador de 2001). Al mismo tiempo, la Comisión abrió un periodo de consulta pública que concluyó el pasado 21 de septiembre.

⁴⁹ En negrita las empresas implicadas en más de un cártel.

⁵⁰ DOCE n° C205/18 de 21 de julio de 2001.

El borrador de 2001 supone un cambio muy importante respecto a la comunicación de 1996 y, de hecho, aproxima el programa comunitario al norteamericano.

Sus novedades principales son las siguientes:

La principal novedad es la distinción que se hace entre la dispensa del pago de la multa y la reducción de su importe.

- La dispensa del pago se concederá a la empresa primera en revelar a la Comisión un cártel desconocido por ella hasta ese momento. A diferencia de la comunicación de 1996, en el borrador no se requiere que la empresa ponga en manos de la Comisión elementos determinantes para probar la existencia del cártel, sino que basta con que aporte pruebas e información que, en opinión de la Comisión, le permitan adoptar una decisión de verificación por sorpresa en virtud del apartado 3 del artículo 14 del Reglamento nº 17/62. En la inmensa mayoría de los casos, ello ha de suponer una reducción substancial del umbral de prueba requerido.
- La política de concesión de reducciones se va a modificar para establecer una relación más clara entre la reducción concedida, el momento del tiempo en que la cooperación se produce y el valor añadido por dicha información al conocimiento que la Comisión tenía de los hechos en ese momento preciso. En la práctica, la relación anterior se traduce por la existencia en el borrador de tres bandas decrecientes de reducción (50-30%, 30-20% y hasta el 20%). Las dos primeras se concederán a otras tantas empresas en función de la fecha en que proporcionaron el valor añadido. La tercera banda podrá ser concedida a más de una empresa, siempre que se cumpla el criterio del valor añadido.

El sistema ideado hace que sea progresivamente más difícil cumplir el criterio del valor añadido, puesto que el conocimiento de la Comisión irá aumentando a medida que progresa la instrucción. Además de una mayor dificultad, la recompensa será progresivamente menor.

Parece, por lo tanto, que la Comisión endurece en cierta medida su política de concesión de reducciones. Ello muestra una apuesta clara en favor de obtener la información necesaria para construir el asunto de la empresa a la que se haya concedido la dispensa y gracias a los esfuerzos investigadores propios de la Comisión.

Al igual que en la comunicación de 1996, tanto la dispensa del pago como las reducciones sólo serán confirmadas en la decisión final. De hecho, algunos de los requisitos a cumplimentar para la obtención de la dispensa sólo podrán ser verificados al final del procedimiento. Este es el caso de la obligación de poner fin a la participación en la infracción y de no haber actuado como instigador.

Sin embargo, el borrador de 2001 contempla garantías provisionales tanto en el área de la dispensa del pago como en el de las reducciones. En el primer caso, la empresa recibirá, inicialmente un acuse de recibo en la que se confirmará la fecha del primer contacto con la Comisión y, caso de que la empresa candidata a la dispensa haya preferido diferir la entrega física de las pruebas en su posesión a la Comisión, se incluirá una lista con la información prometida. Posteriormente, una vez que la Comisión haya verificado que la empresa cumple los requisitos, la empresa recibirá de la Comisión una dispensa condicional por escrito. Además, la Comisión se compromete a guardar el sitio a la primera empresa hasta tanto haya decidido si la información suministrada merece la dispensa del pago.

Del mismo modo, las empresas que pretendan una reducción recibirán primero un acuse de recibo con la fecha en que pusieron en manos de la Comisión los documentos pertinentes y, posteriormente, y sólo si dicha información constituye valor añadido, un escrito en el que la Comisión manifestará la banda de reducción que, en principio, aplicará a la empresa. Este escrito será enviado no más tarde de la fecha en la que se notifique el pliego de cargos.

Se redefine también la noción de líder para no excluir innecesariamente a empresas que podrían facilitar la tarea de la Comisión. La nueva definición es bastante más limitada que la actual y únicamente excluye de la posibilidad de obtener la dispensa del pago de las multas a aquellas empresas que hayan forzado activamente a otras a participar en el cártel. Hay que precisar que las empresas que resulten afectadas por la nueva definición podrán todavía obtener una reducción de la multa.

Por último, el borrador incluye procedimientos bastante detallados para la concesión tanto de la dispensa del pago de las multas como de reducciones del importe de las mismas.

La consulta pública iniciada con la publicación en el DOCE del borrador se cerró a finales de septiembre de 2001. El número y contenido de los comentarios recibidos muestra que despertó un notable interés tanto por empresas como por bufetes de abogados especializados en competencia. A la vista de los comentarios recibidos, el texto final va a sufrir muy probablemente cambios que deberían incrementar su utilidad para las empresas y, por supuesto, para la Comisión.

En particular, la Comisión está considerando la posibilidad de que la dispensa del pago sea también posible cuando no disponga de información suficiente para probar la existencia de una infracción, incluso después de haber llevado a cabo una inspección por sorpresa, siempre y cuando la empresa proporcione la evidencia necesaria a tal fin y no se haya concedido ya la dispensa condicional.

Otras áreas donde es posible que haya cambios son la protección frente a terceros de la información recibida por la Comisión en aplicación de la futura comunicación, la posibilidad de que las empresas retiren la información suministrada a la Comisión, caso de que su solicitud de dispensa no haya sido aceptada, y mejoras puntuales en los procedimientos de aplicación previstos inicialmente.

MERCADO Y DESARROLLO: LA RESPUESTA DE LA COMPETENCIA

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0.- Deseo agradecer a los organizadores de estos seminarios su invitación. Siento no haber podido acompañarles estos días y espero que estas jornadas resulten positivas para la política de competencia en Ecuador.

1.- La política de competencia es una disciplina necesaria para preservar la libertad de los actores en los mercados de las economías emergentes donde además garantiza la protección del consumidor. Es un factor de desarrollo. Esta disciplina evoluciona al mismo ritmo que el crecimiento económico y la consolidación institucional y administrativa del Estado. Es también un factor de buen gobierno.

2.- Para controlar los efectos de las restricciones de competencia en el mercado que pueden aparecer como consecuencia de operaciones o acuerdos entre empresas, los gobiernos se han dotado de un marco reglamentario y de una institución administrativa que aplica la ley de competencia. El campo de aplicación de estas reglamentaciones puede variar de un país a otro, pero la visión más completa pretende tomar en consideración los acuerdos entre empresas competidoras, las concentraciones, la liberalización de sectores económicos y las intervenciones del Estado en la medida en que se trata de ayudas públicas. El control de estas operaciones se hace para garantizar que no darán lugar a una restricción de competencia. Este control es competencia de las agencias o autoridades de competencia que deberán responder de la independencia y el profesionalismo de sus decisiones.

3.- El reciente proyecto de ley de competencia de Ecuador que está a examen del Congreso es muy completo. La creación de la autoridad de competencia Consejo Ecuatoriano de Competencia con sus servicios descentralizados de las Intendencias Regionales de Competencia necesitará de un esfuerzo de formación de profesionales en esta disciplina de forma que quede garantizada su aplicación eficaz y no se vea condicionada por otros factores. Ecuador figura también como beneficiario del programa de cooperación en materia de competencia que la Comisión Europea y la Secretaría General del CAN pretenden desarrollar en los próximos años. El hecho de que se relance la integración en el CAN para consolidar una zona de libre comercio que lleve a un mercado común hacia el 2005 son signos esperanzadores.

4.- Es también altamente positivo que las autoridades de competencia iberoamericanas hayan tomado recientemente en Madrid la iniciativa para reforzar las relaciones profesionales en un Foro Iberoamericano de Competencia y en llevar adelante un proyecto de escuela de competencia. Sin duda se comparten grandes objetivos por consolidar la política de competencia a pesar de las múltiples dificultades de su aplicación. Conviene saludar los grandes logros obtenidos por la mayoría de los países de América latina en la apertura de sus economías y la implantación de la política de competencia o en el desarrollo de proyectos de legislación. A estas acciones se unen los acuerdos de integración regional que desarrollan también la política de Competencia como en el CAN y el MERCOSUR. En cierta medida es más difícil implantar esta disciplina en economías emergentes en evolución de las estructuras de su mercado que en una economía madura, por lo que tiene mayor mérito abrir el camino para la aplicación de la normativa.

5.- Existe un interés específico en acompañar otros países en la aplicación de esta disciplina. La Unión Europea tiene posibilidades de transmitir su experiencia a través de la cooperación técnica en tres grandes acciones: a) la formación individual o colectiva de funcionarios de los servicios de competencia, b) el seguimiento y mejora del marco reglamentario, c) la difusión de sus conocimientos al público y a las empresas. Nuestra experiencia de política de competencia no es necesariamente transmisible de forma idéntica, pero puede ser útil a algunos como orientación, para evitar posibles errores, reflexionar sobre la complejidad que comporta esta disciplina a medida que se va evolucionando económicamente, constatar que una vez aprobada la ley de competencia y establecida una autoridad de competencia, es la aplicación correcta la que da credibilidad a la agencia de competencia. La formación de profesionales es de gran trascendencia para el logro de los objetivos de esta política.

6.- La Política de competencia se ha convertido, debido a la economía global, en un elemento indispensable de la política de las relaciones económicas internacionales. No se trata solo de vigilar la evolución del comercio exterior sino que la problemática que encierra la disciplina de la defensa de la competencia va desde la

prevención de las intervenciones de los Estados en favor de determinadas empresas hasta la cooperación frente a los cárteles mundiales, las concentraciones globales y la regulación de los sectores de servicios cuya apertura a la competencia es fuente de inversiones directas extranjeras. Esta situación ha fomentado la proliferación de acuerdos comerciales entre países donde se incluyen cláusulas de respeto de las reglas de competencia o mecanismos de cooperación, la firma de acuerdos exclusivamente de cooperación en materia de competencia, la multiplicación de acciones de cooperación técnica y el desarrollo de las discusiones multilaterales en organizaciones como la OMC, la UNCTAD o la OCDE. Ha este dialogo se ha sumado ahora la iniciativa de la Red Internacional de Competencia que pretende definir las orientaciones de esta disciplina a nivel internacional en colaboración con las autoridades de competencia, las organizaciones multilaterales, los profesionales y el mundo académico especializado.

7.- En la generación actual de acuerdos comerciales de la Unión Europea con Terceros países, está previsto un capítulo de competencia que pide a las partes la aplicación de sus leyes de competencia con el objetivo de evitar que las restricciones de competencia afecten el comercio entre ellas. Entre los últimos avances podemos citar el mecanismo de cooperación en competencia del acuerdo comercial entre México y la UE y las propuestas semejantes que se están negociando con MERCOSUR y Chile. La disciplina de competencia es por ello también un factor de prevención de conflictos comerciales ya que añade transparencia y seguridad jurídica a las relaciones económicas entre las empresas de las partes.

Muchas gracias por su atención,

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MODELLI DI TUTELA DELLA CONCORRENZA NELLE ECONOMIE EMERGENTI: IL CASO DELL'AMERICA LATINA¹

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“L’obiettivo delle leggi per la concorrenza è promuovere l’allocazione efficiente delle risorse. A tal fine queste leggi vietano l’abuso di posizione dominante e impediscono accordi tra imprese che possono restringere la concorrenza”³

Il ruolo dei modelli di promozione e tutela della concorrenza, o modelli antitrust secondo la denominazione nata negli Stati Uniti, ha assunto sempre maggior rilievo con il diffondersi di un’economia globalizzata, all’insegna della liberalizzazione, dell’apertura dei mercati e del commercio, dell’abbattimento delle barriere doganali. Ciò si deve in parte al fatto che la crescita e la salvaguardia del commercio internazionale, così come il finanziamento dei mercati nazionali, necessitano della prevenzione e repressione delle pratiche anticoncorrenziali. Infatti, pratiche quali la fissazione dei prezzi o la suddivisione dei mercati tramite cartelli e restrizioni verticali che impediscono l’accesso a nuovi mercati, sia a livello nazionale che internazionale, hanno l’effetto negativo di ridurre, se non cancellare del tutto, i benefici prodotti dal libero commercio, e di limitare il benessere economico nella sfera nazionale.

È questo uno dei motivi per i quali la politica per la concorrenza è stata definita da Banca Mondiale e OCSE come “la quarta pietra angolare nel quadro delle politiche economiche di un governo, insieme alle politiche monetarie, fiscali e commerciali”.

Nelle economie avanzate un tale modello è stato adottato e si sta sviluppando da tempo, essendo sorta la necessità di regolare e proteggere i mercati tramite leggi e politiche per promuovere la concorrenza e per eliminare pratiche che la pregiudicano.

L’antitrust è anzi considerato come esempio paradigmatico di un modello la cui circolazione si è compiuta, pur essendo i suoi vari istituti (i micromodelli) ancora in fase di evoluzione. Ciò è senz’altro vero per i paesi più avanzati, in primo luogo Stati Uniti e paesi della Comunità Europea, dove l’analisi del modello antitrust sviluppato e della sua circolazione è oggetto di approfonditi studi comparativi, sia economici che giuridici.

¹ Resumen de la tesis presentada en abril 2002. El Índice de la tesis es el siguiente:

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² Graduated in Economics at the University Luiss in Rome, under supervision of Professor Roberto Pardolesi, Professor of Comparative Private Law.

³ Citazione di José Tavares de Araujo, Presidente della Commissione Tecnica per la Difesa della Concorrenza dell’Università Notarile Argentina (UNA) e della Federazione Argentina del Collegio di Avvocati (FACA).

È scorretto, però, pensare che lo sviluppo di un modello concorrenziale sia una questione circoscritta solo alle grandi potenze economiche. Questo poteva essere credibile fino allo scorso decennio, in cui l'antitrust era un tema nazionale limitato ai paesi avanzati. Ora non è più così. Oggi più che mai la politica della concorrenza è diventata argomento di dibattito nell'agenda internazionale e la circolazione del modello ha raggiunto paesi e regioni in via di sviluppo, le cui economie emergenti hanno ruolo sempre più influente e si trovano a competere sul mercato mondiale con sempre maggiore energia; si è diffuso il sentore che anche qui è necessario un modello concorrenziale, non meno di quanto lo sia nei paesi più sviluppati.

Due sono le ragioni principali che hanno dato vita a questa esigenza; in primo luogo, un numero sempre crescente di paesi, tra cui soprattutto quelli che ancora si definiscono 'in transizione', ha sperimentato negli ultimi anni un chiaro movimento verso un sistema economico basato sul mercato, dopo decenni caratterizzati da politiche economiche restrittive, dando origine ad un'ondata di riforme negli ultimi due decenni del secolo scorso. La libertà dei mercati è tradizionalmente considerata dagli economisti come uno dei principali fattori di sviluppo economico, in quanto permette agli operatori di sfruttare al meglio i loro vantaggi economici e all'intero paese di utilizzare meglio le proprie risorse; la concorrenza è proprio il modo in cui le imprese rivali sono spinte a sfruttare ogni opportunità per imporsi. Ecco perché la teoria economica, principalmente quella classica, identifica il mercato con la concorrenza, e soprattutto quando sostiene che l'economia di mercato è la migliore organizzazione per lo sviluppo di un'economia, di certo si riferisce ad un mercato concorrenziale, in cui si tende a conseguire non solo l'efficienza produttiva, consistente nella minimizzazione dei costi, ma anche l'efficienza allocativa, che minimizza la differenza tra prezzi e costi. Lo stretto legame che sussiste tra mercato e concorrenza non ha lasciato modo a questi paesi di prescindere da politiche che promuovono e tutelano quest'ultima.

In secondo luogo, un'altra importante tendenza che l'intera economia mondiale sta attraversando ha reso necessaria la previsione di norme di tutela della concorrenza in tutti i paesi, più o meno sviluppati: la tendenza alla globalizzazione e all'integrazione dei mercati internazionali. È stato percepito che la globalizzazione scatena delle forze competitive in grado di aumentare l'efficienza, ma in assenza di una tutela efficace della concorrenza, essa potrebbe aggravare le discrepanze dei mercati e fare sì che interi settori dell'economia mondiale vengano monopolizzati in seguito alla creazione di cartelli e fusioni internazionali. In mercati sempre più integrati diventano particolarmente rilevanti le distorsioni alla concorrenza a livello internazionale determinate da comportamenti privati, che possono creare barriere all'accesso che si sostituiscono a quelle pubbliche, faticosamente rimosse. Inoltre, questa tendenza fa sì che i comportamenti restrittivi riguardino più paesi: gli accordi di cartello sono spesso internazionali e le concentrazioni riguardano, ormai di frequente, grandi imprese che operano in più paesi. Tutto ciò pone il problema di tutelare la concorrenza in un'ottica di integrazione internazionale.

Questi due punti, ed il contesto particolare dei paesi dell'America Latina, sono le ragioni alla base del presente lavoro studio, il cui intento è quello di analizzare come il modello di tutela della concorrenza può essere adottato nei paesi in via di sviluppo e quale ruolo decisivo gioca nella crescita di queste economie emergenti. Il caso dell'America Latina è particolarmente interessante perché fornisce il modello di lettura di paesi che hanno 'improvvisamente' aperto i propri mercati, dando vita ad un rapido processo di riforme economiche, che si basano su liberalizzazione, privatizzazione e deregolamentazione, volte a migliorare, nel complesso, il funzionamento dei mercati. Questi cambiamenti, inoltre, sono seguiti ad un lungo periodo di economie chiuse, caratterizzate da interventismo statale, protezionismo e clientelismo, che hanno costituito la culla di condotte monopolistiche e anticoncorrenziali, diventate comuni tra gli operatori e, per così dire, ben accette nella società. Con un passato così gravoso, sembra difficile poter parlare di politica antitrust nell'America Latina; ma il cambiamento verso un sistema economico completamente diverso e rinnovato (in parte stimolato da un'integrazione mondiale sempre più travolgente e dalla necessità di apertura al commercio estero) ha reso questi paesi consapevoli dell'esigenza di adottare un sistema di tutela della concorrenza.

La disciplina antitrust e i meccanismi per la sua effettiva applicazione si inseriscono qui in un processo di riorganizzazione economica generale; si tratta, quindi, di un modello in un certo senso allargato e di certo ancora in via di definizione, di cui è interessante analizzare l'evoluzione.

Inoltre, l'interesse verso questa regione del globo scaturisce anche dalla intensa crescita economica che questi paesi hanno vissuto proprio in seguito alle riforme, soprattutto negli scambi commerciali, rendendoli degni di attenzione per gli investitori di tutto il mondo. La stessa Unione Europea ha enfatizzato la rilevanza e il

dinamismo dell'economia latino-americana; nel corso degli anni novanta, gli Stati dell'Unione hanno stretto relazioni commerciali sempre più intense con i paesi della regione. Ciò spiega l'impegno dell'UE nel sostenere lo sviluppo economico della regione attraverso una stretta cooperazione finanziaria e tecnica. In considerazione del fatto che la libera concorrenza un elemento fondamentale per tale sviluppo, sono stati stipulati accordi di cooperazione tra Commissione Europea ed Autorità antitrust latino-americane, sia nazionali che regionali, per promuovere un sistema di tutela efficiente e affidabile.

Emerge quindi l'importanza della relazione tra concorrenza e sviluppo, alla base di uno studio sul ruolo dei modelli di tutela di concorrenza nei paesi in via di sviluppo. È difficile stabilire una relazione diretta; tuttavia, studi empirici hanno dimostrato che si creano economie inefficienti in sistemi in cui la concorrenza è ristretta. Il processo di sviluppo è un processo delicato che si deve conciliare con due realtà contraddittorie. Da una parte è necessario un contesto concorrenziale la cui pressione spinge all'efficienza e all'autosufficienza delle imprese affinché raggiungano livelli di competitività nazionale ed internazionale; dall'altro, le economie di scala richiedono imprese di grandi dimensioni capaci di operare in mercati mondiali. I paesi in via di sviluppo, i cui mercati interni hanno scarso potere di acquisizione, non sono i più propizi per la creazione di economie di scala. Questa posizione ha fatto sì che in molti paesi emergenti, tra cui spiccano appunto quelli dell'America Latina, venissero favorite politiche di protezionismo, che hanno avuto l'effetto di creare imprese inefficienti, incapaci di mantenere la concorrenza e desiderose invece di beneficiare delle rendite monopolistiche. Ciò è particolarmente grave quando si impedisce che le risorse naturali delle economie emergenti siano assegnate in forma ottimale alle esigenze dello sviluppo. I settori protetti, infatti, sono proprio le infrastrutture alla base dell'economia, quelli che dovrebbero essere i più efficienti per gli effetti di propagazione sullo sviluppo del resto dell'economia.

Inoltre, quattro ragioni economiche sono evidenziate da Scherer per spiegare l'efficienza di un modello antitrust anche nelle economie ancora in transizione. In primo luogo, la concorrenza permette una migliore allocazione delle risorse attraverso il raggiungimento di un efficiente livello di prezzi. In secondo luogo, i monopoli conducono ad ineguaglianze sociali, concentrando il capitale nelle mani di pochi. Terza ragione è la creazione di barriere all'accesso ai mercati, a causa dei monopoli. Infine, si realizzano inefficienze perché i monopoli non sono incentivati a migliorare, in assenza di concorrenza. Questo punto è particolarmente rilevante nei paesi dell'America Latina, dove, come gli studi comparativi mostrano, la produttività è inferiore alla media dei paesi industrializzati nel mondo. Inoltre, studi empirici e modelli economici dimostrano che un sistema di tutela della concorrenza produce benefici nei paesi in via di sviluppo tanto quanto nei paesi più industrializzati, nonostante si sia contestato sulla convenienza di un tale sistema nei primi, dati i costi che comporta. Tali studi dimostrano, infatti, che la perdita di benessere economico che può essere ridotta da un sistema di tutela della concorrenza non è inferiore nei paesi meno avanzati.

Alla luce delle condizioni e del contesto della regione, l'America Latina deve concentrarsi sul controllo dei monopoli e sviluppare politiche e normative pro-concorrenza che abbiano specificatamente il ruolo di promuovere l'efficienza e la competitività delle imprese a livello internazionale, migliorando così anche il progresso tecnologico e attraendo gli investimenti esteri, obiettivo fondamentale per lo sviluppo economico di questi paesi, come del resto di tutte le economie in transizione.

Inserendosi, poi, in un processo generale di ristrutturazione economica, una politica di concorrenza deve garantire che liberalizzazione e privatizzazione aprano effettivamente i mercati a nuovi operatori, migliorandone il funzionamento.

A tal fine è utile lo studio comparativo della nascita e dell'evoluzione del modello antitrust nei paesi più avanzati, dove è stato già adottato da tempo. È naturale che nell'affacciarsi su un orizzonte economico, politico e sociale ormai globalizzato, le economie emergenti abbiano preso come esempio i sistemi dei paesi più sviluppati, primi fra tutti Stati Uniti ed Unione Europea. Non è detto che il modello di concorrenza latino-americano debba necessariamente ricalcare i modelli suddetti, al contrario, essendo economie apertesì solo recentemente, è forse auspicabile lo sviluppo di un modello 'proprio', adatto alla realtà economica del luogo e del momento. Tuttavia è utile studiare le radici dell'antitrust nei paesi in cui ha avuto maggior sviluppo, considerando appunto come i due maggiori modelli antitrust, nordamericano ed europeo, nonostante alcuni elementi comuni, siano tra loro differenti. Attraverso questo confronto, si potranno individuare i fattori che hanno influenzato le politiche della concorrenza nell'America Latina e quali elementi possano essere utilizzati per sostenere la creazione e l'attuazione delle leggi antitrust nella regione. In tal modo si potrà comprendere se si

è avuto un 'trapianto' dei modelli statunitense e comunitario, oppure se si possa parlare di nuovi modelli in circolazione, visto il particolare contesto in esame.

Lo studio dell'evoluzione di un modello già definito è importante perchè l'antitrust cambia in risposta alle esigenze economiche e sociali che un paese attraversa; perciò, osservare le varie fasi in paesi dove il modello esiste da tempo è utile per quei paesi che si sono aperti al mercato e hanno deciso di introdurre leggi antitrust più tardi.

La normativa antitrust è stata introdotta per la prima volta, più di un secolo fa, negli Stati Uniti, non a caso, considerato che la tutela dell'iniziativa economica rappresenta un valore su cui è basata la stessa costituzione federale. L'incredibile espansione economica dell'età industriale è stata accompagnata dalla crescita del potere di mercato delle grandi imprese, dando luogo ad una struttura dei mercati che si è rilevata pericolosa per la libertà economica. È nata così, nel 1890, la prima legge antitrust, lo Sherman Act. Nei primi ottanta anni dalla sua nascita, lo scopo principale della disciplina americana è stato quello di minimizzare l'esercizio del potere di mercato, per cui le linee fondamentali si sono basate nel divieto posto alla collusione, alle pratiche restrittive, alle fusioni anticoncorrenziali. Gli obiettivi economici si sono intrecciati con altri, di natura diversa, al fine di proteggere i consumatori e la società dagli effetti negativi del potere economico privato. Gradualmente però, con il cambiare dell'economia, l'efficienza è diventata l'obiettivo più importante da perseguire per l'amministrazione dell'antitrust nordamericano; il raggiungimento dell'efficienza allocativa, che sta alla base della teoria della Chicago School, è diventata la visione prevalentemente condivisa.

Nella Comunità Europea, invece, la legge sulla concorrenza si è sviluppata per ragioni differenti, dando vita ad una propria politica per la concorrenza che ha molteplici scopi, economici e non. Qui, l'enfasi maggiore è posta sull'obiettivo dell'integrazione economica dei mercati europei, che di certo viene ostacolata dalle pratiche restrittive e dagli abusi delle imprese che tentano di dividere i mercati. Inoltre, viene data grande importanza al principio della correttezza e al benessere dei consumatori, oltre che all'obiettivo di proteggere le piccole e medie imprese, sottolineando il loro potenziale concorrenziale.

Il contenuto delle norme antitrust comunitarie è abbastanza simile a quello delle corrispondenti norme statunitensi, essendo ormai riconosciuto il potenziale danno alla concorrenza che certe pratiche possono creare, ma vi sono anche differenze cruciali tra i due sistemi. Queste consistono soprattutto nei criteri di applicazione, oltre che negli obiettivi; nell'antitrust comunitario si mira soprattutto a correggere la condotta delle imprese e l'obiettivo prioritario dell'integrazione fa sì che l'efficienza economica passi in secondo piano nella valutazione della liceità di certe pratiche. Ciò è evidente, per esempio, in relazione alle restrizioni verticali, a cui viene applicata la *rule of reason* nell'antitrust statunitense, mentre nella disciplina comunitaria sono vietate *per se*, salvo esenzione, individuale o per categoria, concessa dalla Commissione sotto certe condizioni.

I paesi dell'America Latina stanno considerando quale sistema di protezione della concorrenza favorire, sia per quanto riguarda l'applicazione che la base filosofica. Le norme e i criteri di analisi di entrambi i sistemi sono stati presi come modello e a volte incorporati in blocco nelle legislazioni antitrust latino-americane.

In realtà, l'adozione e applicazione di una politica di tutela della concorrenza in questi paesi ha una storia abbastanza giovane; attualmente, sono sette i paesi della regione che dispongono di una legge sulla concorrenza e se si prende in considerazione l'importanza economica, il 90% del Prodotto Interno Lordo di tutto il Sud America viene prodotto proprio in questi paesi.

Quasi tutte le legislazioni di questi paesi prevedono norme che disciplinano le quattro principali aree di azione dell'antitrust: accordi orizzontali, accordi verticali, abusi di posizione dominante e concentrazioni. Inoltre, in tutti i paesi è istituita un'autorità speciale con la funzione di applicare la legge e tutelare gli interessi della concorrenza, vigilando ed intervenendo ogni volta che una certa pratica (nelle categorie suddette) possa pregiudicare la libera concorrenza in un certo mercato.

Ovviamente, ogni singola legge e autorità nazionale inquadra e applica le norme antitrust in modo diverso e peculiare, anche in base alla propria giurisprudenza, ma vi sono aspetti che accomunano le leggi latino-americane tra loro e con quelle diffuse in campo internazionale. Per esempio, accordi orizzontali, quali fissazione di prezzi o divisione dei mercati, sono ritenuti quasi ovunque dannosi, anche se non tutti le leggi nazionali pongono un divieto *per se*. L'ampio consenso sugli effetti anticoncorrenziali di questi accordi, però,

induce le autorità a reprimerli e in molti paesi i progetti di riforma della legge prevedono norme per proibire tali pratiche a priori.

Gli accordi verticali, invece, sulla cui disciplina c'è tanta divergenza tra modello comunitario e modello statunitense, non sono considerati in modo particolare nelle legislazioni latino-americane; generalmente si applica la *rule of reason*, ma un modello più definito esiste solo in Messico, dove la legge prevede una disciplina specifica.

L'abuso di posizione dominante è quasi sempre proibito tramite una clausola generale, anche se nella valutazione dei singoli casi si applica la *rule of reason*. I criteri di analisi, per esempio nella definizione del mercato rilevante e della posizione dominante, sono spesso modellati sui principi nordamericani, soprattutto in Brasile e Messico.

Infine, in tutti i paesi (ad eccezione del Perù) è previsto il controllo delle concentrazioni tra imprese, al fine di evitare un aumento continuo del numero di imprese dominanti nei vari mercati; invece di intervenire nei casi di abuso di potere di mercato, si ritiene più appropriato impedire che tale potere venga creato attraverso operazioni di concentrazione. Affinchè tale controllo possa essere efficace, sarebbe necessario imporre un obbligo di notifica preventiva dell'operazione all'Autorità, come avviene in Europa e Stati Uniti, ma in America Latina tale obbligo è previsto solo in pochi paesi; tuttavia, anche in relazione a questo elemento si è diffuso un certo consenso, rendendolo uno dei prossimi oggetti di riforma previsti nella maggior parte dei paesi.

La seguente tabella riassume lo stato delle discipline antitrust nei sette paesi latino-americani che l'hanno adottata:

	Accordi Orizzontali	Accordi Verticali	Abuso di posizione dominante	Operazioni di Concentrazioni
Argentina	Divieto	Applicazione <i>Rule of Reason</i>	Clausola Generale di Divieto	Controllo tramite Notifica <i>ex-ante</i>
Brasile	Divieto	Applicazione <i>Rule of Reason</i>	Clausola Generale di Divieto	Controllo tramite Notifica <i>ex-post</i>
Cile	Divieto	Applicazione <i>Rule of Reason</i>	Clausola Generale di Divieto	Controllo tramite Notifica <i>ex-post</i>
Colombia	Divieto <i>Per Se</i>	Applicazione <i>Rule of Reason</i>	Clausola Generale di Divieto	Controllo tramite Notifica <i>ex-ante</i>
Messico	Divieto <i>Per Se</i>	Applicazione <i>Rule of Reason</i>	Clausola Generale di Divieto	Controllo tramite Notifica <i>ex-ante</i>
Perù	Divieto	Applicazione <i>Rule of Reason</i>	Clausola Generale di Divieto	Non c'è controllo (solo nel settore elettrico è prevista notifica <i>ex-ante</i>)
Venezuela	Divieto <i>Per Se</i>	Applicazione <i>Rule of Reason</i>	Clausola Generale di Divieto	Controllo tramite Notifica <i>ex-ante</i> , ma volontaria

Tra questi, un paese ritenuto particolarmente interessante per la politica antitrust sviluppata, per la peculiarità dei suoi meccanismi di *enforcement*, nonché per le rilevanti dimensioni della sua economia a livello regionale e mondiale, è il Brasile. Lo sviluppo dell'antitrust in questo paese rappresenta in un certo senso come un tale modello si sia introdotto rapidamente in un'economia storicamente chiusa (aspetto comune di tutte le economie della regione), che ha solo recentemente sovvertito le proprie basi in favore dell'apertura e del mercato. La legislazione e l'*enforcement* dell'antitrust da parte dell'autorità (CADE) hanno avuto in questi anni una notevole evoluzione, per esempio nella valutazione di casi di concentrazione, prima considerati molto raramente, o nel rafforzamento delle funzioni dell'autorità anche in altri settori governamentali. Ciò ha mostrato come, nonostante una volontà politica di migliorare il funzionamento dei mercati e il livello della concorrenza nell'ambito dei programmi di ristrutturazione e privatizzazione, è necessario anche un disegno istituzionale appropriato per una applicazione effettiva di una legislazione che promuova la concorrenza.

Inoltre, è di grande importanza il processo di integrazione nella regione latino-americana attraverso meccanismi di unificazione fra vari stati e l'istituzione di organismi subregionali che mirano all'armonizzazione, alla cooperazione economica e favoriscono il libero commercio. Il ruolo di una politica per promuovere la

concorrenza, e di una legislazione che possa prevenire ed eliminare le pratiche restrittive nella regione, è di considerevole rilievo in un simile processo. I più importanti movimenti di integrazione creatisi, ovvero il MERCOSUR, il Patto Andino e il NAFTA (anche se questo comprende un solo paese latino-americano, il Messico), negli ultimi anni hanno incluso nei loro provvedimenti delle norme per promuovere la concorrenza a livello più ampio.

È stato osservato che proprio il processo di integrazione e il rafforzamento degli organismi regionali, in particolare in ambito Mercosur, potrebbero essere il motore centrale per l'affermazione di un efficiente modello di tutela della concorrenza nel futuro.

Lo studio qui condotto dimostra l'indubbia importanza di sviluppare politiche e legislazioni per la tutela della concorrenza nell'America Latina, ma anche la necessità che queste vengano comprese a livello sia regionale che nazionale. Come sottolineano molti studiosi di politica della concorrenza nel contesto latino-americano, vi sono due fattori di fondamentale rilievo per lo sviluppo di un modello efficiente in questo particolare contesto. Il primo consiste nell'importanza di sollecitare l'introduzione del concetto di concorrenza nella cultura economica e commerciale, rendendo la società, in primo luogo quella imprenditoriale, consapevole che l'obiettivo è quello di sviluppare un'economia di mercato e che a tal fine è necessaria una legislazione antitrust. Regole ed Autorità solide, benché essenziali, non daranno frutti senza una tale cultura di mercato.

Secondo fattore è lo sviluppo della c.d. '*Competition Advocacy*'; con questo termine si fa riferimento al ruolo delle autorità antitrust nel rimuovere le barriere che distorcono il commercio e danneggiano l'economia. Fondamentalmente è l'istituto che focalizza nell'identificazione di politiche pubbliche promosse da altre autorità del governo, da una parte, e dall'altra di attività con scopo di lucro promosse da gruppi di interesse che cercano di realizzare profitti a danno del benessere sociale generale e dell'efficienza economica, scopi invece perseguiti dalla liberalizzazione e dalle politiche per la concorrenza. L'esperienza latino-americana ha dimostrato che spesso il problema maggiore che le autorità antitrust si trovano ad affrontare non è tanto la disciplina del settore privato, quanto le distorsioni indotte da azioni governative. A questo punto la *Competition Advocacy* diventa l'unico strumento in grado di promuovere la trasparenza e, di conseguenza, le condizioni politiche per abolire azioni incoerenti. Questo ruolo è fondamentale sia a livello nazionale che regionale, nell'ambito del Mercosur.

In conclusione, emerge la necessità che i paesi dell'America Latina diano vita a modelli propri di tutela della concorrenza, benché l'analisi dell'esperienza degli Stati Uniti e della Comunità Europea possano fornire esempi utili. Sono stati suggeriti modelli alternativi all'antitrust tradizionale al fine di rispondere più adeguatamente alle esigenze di queste economie emergenti e non ancora pienamente industrializzate, dove spesso mancano governi democratici stabili, o che stanno ancora combattendo contro l'accentramento statale da un lato e la corruzione e la criminalità privata dall'altro.

Nonostante emergano molte somiglianze tra i paesi del subcontinente, l'America Latina come regione unica non ha l'unità e la stabilità economica degli Stati Uniti o dell'Unione Europea.

Costruire politiche antitrust nazionali solide, in cui l'importanza della *Competition Advocacy* e della cultura di mercato siano sempre più comprese, sarà certo il primo passo importante verso un'integrazione e un'efficienza tali da permettere alle imprese latino-americane di competere a livello globale, qualsiasi modello si decida di adottare.

“Senza un sistema di tutela della concorrenza, l'innovazione è soffocata, il cambiamento tecnologico arrestato, i diritti dei consumatori calpestati ed il benessere pubblico una meta sempre più difficile da raggiungere. La disciplina della concorrenza è un requisito necessario, seppur non sufficiente, per un capitalismo sano in una società democratica”.⁴

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⁵The bibliography concerns the main work in the thesis (not this summary).

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SITI AUTORITÀ ANTITRUST NAZIONALI E REGIONALI

Brasile: www.cade.gov.br
Argentina: www.mecon.gov.ar/cndc/home.htm
Messico: cfc.gob.mx
Colombia: www.sic.gov.co/Delepromo.htm
Perù: www.indecopi.gob.pe
Venezuela: www.procompetencia.gov.ve
Comunità Andina: www.comunidadandina.org
Mercosur: www.mercosur.org

ARGENTINA

FORUM DE COMPETENCIA: foroCompetencia@yahoogroups.com - Responsable: Julián Peña (e-mail: julianpenia@yahoo.com.ar)

BRASIL

BRAZIL E-ALERT : Bulletin on Competition from Baker & McKenzie - Editors: Luiz A.D. Vergueiro and Carla Lobão - e-mail: Ligia.Coelho@BakerNet.com

COMPETITION LAW AT A GLANCE : Bulletin on Competition from Pinheiro Neto Advogados - Homepage: <http://pinheironeto.com.br> - e-mail: pga@pinheironeto.com.br

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X ENCONTRO DE ESTUDANTES DE DIREITO DO MERCOSUL "OS NOVOS DESAFIOS E PARADIGMAS DO DIREITO, COMÉRCIO E RELAÇÕES INTERNACIONAIS NO SÉCULO XXI"

Em homenagem ao Dr. Luiz Otávio Pimentel
Londrina, PR, Brasil, 18 a 20 de julho de 2002

Local: Teatro Filadélfia (UNIFIL). Londrina -PR

Público esperado: estudantes, pesquisadores, docentes e profissionais de Direito, Comércio Exterior, Relações Internacionais, Economia e Ciência Política dos continentes americano e europeu.

- A Lista dos Palestrantes Nacionais e Internacionais Convidados estará disponível no site do evento com atualização constante.

PROGRAMAÇÃO:

18 de julho:

13:00 às 18:00 - Inscrições e credenciamentos.

20:00 - Abertura

22:00 - Confraternização

19 de julho:

14:00 às 16:00 - Conferências de profissionais

17:00 às 19:30 - Apresentação de trabalhos de acadêmicos

20:00 - Apresentação cultural

22:00 - Confraternização

20 de julho:

14:00 às 16:00 - Conferências de profissionais

17:00 às 19:30 - Apresentação de trabalhos de acadêmicos

20:00 - Encerramento - Homenagem ao Prof. Dr. Luiz Otávio Pimentel (UFSC)

22:00 - Confraternização

- Durante a realização do evento ocorrerão apresentações culturais.
- Valor das inscrições até dia 14 de julho: R\$ 50,00 (US\$25,00)
- Valor das inscrições do dia 15 ao dia 18 de julho: R\$ 70,00 (US\$ 35,00)
O pagamento da inscrição confere direito a certificado de participação, crachá, material para anotações e pasta do Evento.
- OBS: EM VIRE DA GRANDE PROCURA, AS VAGAS SERÃO LIMITADAS

APRESENTAÇÃO DE TRABALHOS:

O envio de trabalhos para apresentação durante o evento deverá ser feito até o dia 8 de junho de 2002, impreterivelmente, de acordo com o regulamento disponível no site do evento.

Os trabalhos enviados de acordo com os padrões técnicos pré-estabelecidos no regulamento e aprovados para apresentação serão publicados nos Anais do Evento, os quais estarão expostos para aquisição durante o mesmo.

INFORMAÇÕES:

Universidade Filadélfia - Departamento de Direito (Rua Alagoas, 2050 - CEP 86.020-360 - Fone: (43) 324-6112 - Ramal 148 (das 14:00 às 18:00 com Verônica Toyoda) - Londrina-PR

E-mail: encontroestudantes2002@hotmail.com / encontrodeestudantes2002@hotmail.com

Home page: www.unifil.br

Após efetuadas, as inscrições não serão, em hipótese alguma, canceladas.

ORGANIZAÇÃO:

Acadêmicos de Direito da Universidade Estadual de Londrina (UEL) e da UNIFIL.

REALIZAÇÃO:

Universidade Filadélfia - Departamento de Direito

MEXICO

Título: **DERECHO DE LA COMPETENCIA ECONÓMICA**

Autores : **Leonel Perezniето Castro & Renato Guerrero Serreau**

e-mail: leal@club-internet.fr

Prólogo de Frédéric Jenny, Presidente del Comité de Legislación y Política de la Competencia de la OCDE, Vicepresidente del Consejo de Competencia de Francia.

Editorial : Oxford University Press
Col. Textos Jurídicos Universitarios
México D.F. (México, marzo 2002), 340 pp.
ISBN 970-613-659-2

La Ley Federal de Competencia Económica (LFCE) mexicana entró en vigor el 22 de junio de 1993. Con esta ley se creó una Comisión Federal de Competencia (CFC) a cargo de prevenir, investigar y combatir los monopolios, las prácticas monopólicas y las concentraciones en los términos de la LFCE.

Considerando los antecedentes internacionales inmediatos a la adopción de la legislación en materia de competencia, fue el compromiso que México asumió de promover condiciones de competencia leal en la zona de libre comercio, el que dio origen al nuevo sistema de derecho actualmente en vigor en ese país. Considerando por otra parte la dimensión del comercio existente con los Estados Unidos y Canadá, pareció a los autores elaborar un estudio desde una perspectiva de la integración subregional de América del Norte, en particular porque existen pocas diferencias entre los regímenes de competencia en la zona de libre comercio.

Finalmente, al tomar como base un método comparativo para el estudio del derecho de la competencia, se podía obviar la dificultad que representa para los lectores abordar conceptos de competencia económica en un libro de texto en el que hay continuas referencias a derechos extranjeros. De ahí que los autores optaron por un método expositivo lo más sencillo posible, tratándose cada uno de los derechos que nos ocupan de manera separada, según una misma secuencia, que permitiera al lector abocarse al estudio de un régimen jurídico en particular, pero también encontrar fácilmente las referencias y la exposición de los conceptos análogos en los demás derechos de competencia que el presente libro aborda.

1. Antecedentes a la legislación Mexicana de la competencia.

Consiguiente al principio de la libertad de comercio e industria, México adoptó su primera “disposición antimonopolios” en 1857 como una reacción en contra de las antiguas corporaciones o gremios y el poder real, quienes restringían severamente el ejercicio de actividades comerciales y artesanales. La Constitución de 1917 mantuvo el dispositivo original, aunque sujetaba la libre competencia a la “presunción de regularidad” de los actos de las autoridades, fueran éstos encaminados a regular la competencia entre comerciantes con miras a asegurar los salarios y contrarrestar los aumentos a expensas de los consumidores (cf. ley reglamentaria del artículo 28 constitucional de 1934). Bajo este supuesto, se hacía de la fijación de los precios sobre el mercado, uno de los pilares de la estabilidad económica; la libre competencia se reducía por su parte a la sola libertad de concurrir a una profesión, industria, comercio o trabajo en el sentido del artículo 5° de la Constitución Política, habiéndose de cierta manera declarado “ilícito” el hecho de competir.

La crisis económica que enfrentó el país en 1982 demostró los límites del modelo que hizo de la actividad del Estado el centro del desarrollo económico. Por lo anterior, cayó sobre los particulares la responsabilidad de producir más y mejor, por lo que se tuvieron que reevaluar los costos de la regulación económica y de los monopolios. Con la nueva Ley Federal de Competencia Económica (1993) se establece la protección del proceso de competencia y libre concurrencia como fundamento de la “eficiencia económica” que postula su artículo segundo, esto es mediante la prevención y la eliminación de las restricciones al funcionamiento eficiente de los mercados de bienes y de servicios.

2. Antecedentes internacionales a la zona de libre comercio.

En materia de política comercial y de competencia, México, Estados Unidos y Canadá habían ya acordado, junto con otros países, sobre lo que debiera ser una política general en materia de prácticas comerciales restrictivas al comercio internacional, y que constituye una primera referencia para el derecho de la competencia en la zona (1946). Sin embargo, la Carta de la Habana nunca entró en vigor (cf. art. 46).

Posteriormente, los tres países suscribieron el “Conjunto de Principios y Normas Equitativos Convenidos Multilateralmente para el Control de las Prácticas Comerciales Restrictivas” (UNCTAD – 1980), y México adhirió por su parte a las diferentes Recomendaciones de la OCDE en materia de competencia al momento de su ingreso a dicha organización (1994).

Con la entrada en vigor, el 1 de enero de 1994, del Tratado de Libre Comercio de América del Norte (TLCAN), México, Estados Unidos y Canadá se comprometieron a adoptar o mantener medidas que prohiban prácticas de negocios contrarias a la competencia, así como a cooperar y a coordinarse para impulsar una aplicación efectiva de las legislaciones de competencia en la zona de libre comercio. El Grupo de Trabajo en materia de comercio y competencia del TLCAN concluyó (1999) que los regímenes de competencia en la zona de libre comercio son congruentes con los objetivos que persigue el tratado, aunque insta a los tres países adoptar formas de cooperación más desarrolladas a semejanza del Acuerdo de Cooperación (1995) suscrita entre los Estados Unidos y Canadá en materia de competencia.

PAGINAS WEB:**- AMERICA LATINA:**

- Comisión Nacional de Defensa de la Competencia (ARGENTINA): <http://www.mecon.gov.ar/cndc/home.htm>
- Conselho Administrativo de Defesa Econômica (CADE-BRASIL): <http://www.cade.gov.br/>
- Superintendencia de Industria y Comercio (COLOMBIA): <http://www.sic.gov.co/Delepromo.htm>
- Comisión para Promover la Competencia (COSTA RICA): <http://www.meic.go.cr/coprocom.htm>
- Comisión Federal de Competencia (MEXICO): <http://cfc.gob.mx/>
- Instituto Nacional de Defensa de la Competencia y la Propiedad Intelectual (INDECOPI - PERÚ): <http://www.indecopi.gob.pe/>
- MERCOSUR: <http://www.mercosur.org.uy/>
- OEA/OAS-Organización de los Estados Americanos/Organization of American States: <http://www.oas.org/>
- Pro-Competencia – Superintendencia para la Promoción y Protección de la Libre Competencia (VENEZUELA): <http://www.procompetencia.gov.ve/>
- Secretaria General Comunidad Andina: <http://www.comunidadandina.org>
- SELA-Sistema Economico Latinoamericano: <http://www.sela.org>
- IRELA-Instituto de Relaciones Euro-Latinoamericanas: <http://www.irela.org>

- UNION EUROPEA:

- Parlamento Europeo: <http://www.europarl.eu.int>
- Comisión Europea –DG COMPETENCIA: <http://europa.eu.int/comm/competition/>
- Tribunal de Justicia Europeo: <http://www.curia.eu.int/>
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- Germany. Bundeskartellamt: <http://www.bundeskartellamt.de/>
- Ireland. Competition Authority: <http://www.irlgov.ie/compauth/home.htm>
- Italy. Autorità Garante de la Concorrenza e del Mercato: <http://www.agcm.it/>
- Netherlands. Nederlandse Mededingings Autoriteit: <http://NMa-org.nl/>
- Netherlands. Ministerie van Economische Zaken: <http://info.minez.nl/>
- Portugal. Direcção-Geral do Comércio e da Concorrência: <http://www.dgcc.pt/>
- Spain. Direccion General de Política Economica y Defensa de la Competencia: <http://www.meh.es/comun/dgpedc.htm>
- Spain. Tribunal de Defensa de la Competencia: <http://www.meh.es/TDC/tdc.htm>
- Sweden. Konkurrensverket (Competition Authority): <http://www.kkv.se/>
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- United Kingdom. Office of Fair Trading: <http://www.offt.gov.uk/>

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