ISSN 1745-638X (Online)

THE COMPETITION LAW REVIEW

Volume 5 Issue 2 pp 147-151 **July 2009**

Editorial - Globalisation, International Enforcement and Extraterritoriality

*Chris Noonan**

International competition law is not so much a discrete subject but a site where a number of different laws come together, sometimes abruptly. Competition law jurisdictions not infrequently reach different conclusions on the legality of a transaction or some other conduct that has economic effects in more than one jurisdiction; the *GE/Honeywell* merger being perhaps the most often cited example.[1] Understanding the many differences between jurisdictions, and the conflicts to which they occasionally give rise, requires appreciating that competition laws are not merely sets of substantive rules, but have procedural, institutional and jurisdictional dimensions. The enforcement of competition law in one country might also directly conflict with a variety of laws, industry specific regulations and policies of other jurisdictions. The study of international competition law therefore needs to not just take a holistic view of the scope of competition law, but also embrace the various exceptions and exemptions from general competition law rules, enforcement policies and practices, and other government measures and laws, including international agreements, that impact on the same variables as competition law.

The experience of the last half-century has generated a fair degree of understanding of the types of national (or regional) interests that are pursued in international competition law cases and of the circumstances when national and regional interests might come into conflict. While the problems may have been identified, the solutions to the problems have proved more elusive.

The conflicts arising from the extraterritorial application of the type that characterised international competition law in the second half of the twentieth century have now decreased in intensity, but have not totally disappeared. The need to protect, and the difficulties of protecting, local consumers from anticompetitive conduct abroad, whether through cartels, mergers or abuses of dominant positions, has become broadly accepted as a legitimate policy goal in most countries. Concerns about loss of national sovereignty and policy autonomy and the protection of the interests of local firms are still present, but do not dominate. This reflects both a greater acceptance of the value of competition laws, as well as a growing recognition of the need to meet the challenges that globalisation poses for economic regulation.

* Associate Professor, Department of Commercial Law, University of Auckland.

[1] See COMP/M.2220, *General Electric/Honeywell*, OJ 2004, L48/1; US Department of Justice Press Release, 'Statement by Assistant Attorney General Charles A. James on the EU's Decision regarding the GE/Honeywell acquisition', 3 July 2001.

The somewhat different concern that anticompetitive conduct may create barriers to the access of foreign markets, as the exclusionary practices in the distribution of photographic film and paper were alleged to have done in the well-known *Kodak/Fuji* dispute, remains legally problematic.[2] Like the cases where the effects of anticompetitive conduct are felt abroad, where anticompetitive conduct restricts market access, the issue has become not so much whether competition law should be applied, but which competition law should be applied and whether there needs to be an international agreement setting out minimum standards or principles for competition laws. The emerging consensus appears to be that a country may apply its laws extraterritorially to protect consumers within its territory, but generally not to assist its competitors penetrate a foreign market. In the latter case, the local jurisdiction is in the best position to apply its own laws.

Many practical obstacles lie in the way of a jurisdiction successfully applying its competition law extraterritorially or ensuring that foreign competition laws are applied in cases where foreign anticompetitive conduct closes markets. However, all of the jurisdictions concerned have legitimate interests to protect. In the case of the extraterritorial application of competition law, the interests of foreign firms will be directly affected as might their competitiveness and efficiency. Similarly, in market access cases, a country applying its competition laws might have little interest in protecting local consumers and access by foreign suppliers, but will have an interest in not harming the competitiveness of local firms and the efficiency of its economy.

In all areas of international competition law, firms and most governments have been concerned about the costs of multiple overlapping competition laws. There is also a fear that one jurisdiction could derail a major international transaction or business practice that would enhance global welfare. These concerns are perhaps the greatest in the case of mergers, which are frequently reviewed in multiple jurisdictions.

Competition law is by nature a set of general rules that must be applied in a wide range of cases, both domestic and international. When the situations briefly described above are examined closely, it becomes apparent that the task of drafting a set of *rules* that will maximise the interest of any one, let alone all, jurisdictions, in every case would be difficult if not impossible. One consequence is that each jurisdiction must balance competing national or regional interests when designing national laws or negotiating international rules in this field. This internal balancing is probably as important and difficult as the task of reconciling competing interests among jurisdictions.

Chapters on competition laws are now commonplace in bilateral and regional trade agreements. While the World Trade Organization does not impose any requirement to adopt a general competition law, it contains a few sector-specific competition rules and some general trade rules, like national treatment, that might have a bearing on the application of the competition laws of its Members. There has also been a proliferation of enforcement cooperation agreements between competition authorities, as well as

[2] *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998.

increasing efforts to apply broad agreements on international judicial assistance enforcement cooperation agreements to competition law, including mutual legal assistance treaties, extradition treaties, and agreements and conventions on judgments and jurisdiction. The International Competition Network, the Organisation for Economic Cooperation and Development and other international organisations have provided forums for the discussion of best practices and the proselytisation of competition law. These initiatives all have some value and contribute to the solution of some international competition law problems. They have also become established features of the competition law landscape. Understanding the solutions and their relationship with competition laws and other international initiatives has therefore become part of understanding the problem.

International competition law is likely to remain an amalgam of laws and international rules in the foreseeable future. A binding global competition law code with a supranational enforcement agency is very unlikely. There is also a growing recognition that, while competition law enforcement will remain the responsibility of national and regional authorities, the agreements mentioned in the previous paragraph all have a role to play as part of a practical approach to reducing international competition law problems. However, as yet, success in envisaging how all of the dimensions of the international competition law problems and all of the elements of the solution fit together has been more limited.[3]

The importance of international competition law has grown with the increasing integration of national economies and the proliferation of national and regional competition laws. The number of major players is set to rise. All of the contributions to this issue of the *Competition Law Review* discuss developing countries in more or less detail, in particular the consequences of the adoption and modernisation of competition law in China and India. Marco Botta's article focuses on an element of developing country competition law that has not been addressed in the literature in any detail, namely the actual operation of competition law cooperation agreements between developing countries.

After providing an overview of the competition law agencies and enforcement systems in Argentina and Brazil, Marco Botta examines the agreement to establish a regional competition law in Mercusor as well as the arrangements for bilateral cooperation between the competition authorities in Argentina and Brazil. Competition law cooperation has not been successful. A number of lessons for developing countries are drawn from this case study. Cooperation is unlikely to be effective where there is a lack of trust between the agencies in question and one or more agency suffers from the institutional problems that many new competition agencies face, such as the lack of financial and human resources and limited independence from the executive branch. Many of these issues are likely to be resolved as the competition agencies mature.

---

[3] This idea is pursued at length in Chris Noonan, *The Emerging Principles of International Competition Law* (Oxford: Oxford University Press, 2008).

The increasing prominence of developing country competition law regimes may have a broader significance for international competition law. First, that international competition law cooperation should not be seen as a North-Atlantic phenomenon and is likely to become increasing complex in the future. The struggle to conclude the Doha Round of Trade Negotiations in the World Trade Organization illustrates the difficulty of reaching agreement as the diversity and number of the major powers increases. Scholars and policy-makers might need to re-imagine international competition law as a more global phenomenon and explore how to cope with diversity. Secondly, international competition law cooperation should perhaps not be seen as a state of affairs, but as an iterative process whereby countries progress into deeper forms of cooperation over time as trust is built up, institutional arrangements are put in place and, mostly importantly, as the need arises.

The second article by Dr Jonathan Galloway discusses the international efforts to facilitate the convergence of procedures governing the review of mergers. While concluding that the promotion of best practices can lead to the clarification of rules and the reduction of unnecessary costs for the merging parties, the article demonstrates that there are limits to the extent to which cooperation and coordination are likely to take place and alleviate the burden of multiple reviews.

The article provides an important reminder of the difference between convergence of substantive and procedural rules, on the one hand, and coordination of laws and enforcement efforts, on the other hand. While differences between competition laws may occasionally give rise to conflict, the elimination of differences would neither eliminate conflict nor minimise the transaction costs involved with multi-jurisdictional merger review. The examination of multi-jurisdictional merger review also suggests that there are clear limits on what states could be reasonably expected to agree given the international system of states. Without states being able to agree to subordinate local interests to the pursuit of global welfare, ignoring the effect on the welfare of individual jurisdictions, divergent treatment of the same business activity and multiple reviews are inevitable. The improbability of states agreeing to a system of merger review that would minimise transaction costs through a one-stop, or even two-stop, shop is the price that must be paid for national and regional autonomy and experimentation. The optimal arrangement, whether from a national or a global point of view, is a complex problem, which involves several competing objectives.

In the third article in this issue, Professor Sock-Yong Phang discusses the exemption of international liner shipping and international airline sectors from competition law. The gradual liberalisation of the antitrust exemptions in these sectors in the EU and the US are documented.

International transportation industries have generated a significant amount of competition law litigation over the last century,[4] and have been the site of a number of

[4] See, for example, *United States v Pacific & Arctic Railway & Navigation Company*, 228 US 87 (1913); *Thomsen v Cayser*, 243 US 66 (1917); *United States v Hamburg-Amerikanisihie Packetfahrt-Actien Gesellschaft*, 200 Fed Rep 806 (1911), 239 US 466 (1916).

international disputes over the last half-century.[5] Trans-border operation inevitably meant that these industries would be in the forefront of international competition law. Nonetheless, many of the conflicts have arisen because one jurisdiction sought to apply its competition law to conduct in an international transportation sector that another jurisdiction believed should be exempt from competition law. As Professor Sock-Yong Phang's article shows the justifications for exemption of these sectors, or at least some conduct within these sectors, has been long contested.

Throughout the world a number of other industries or actions are exempt from general competition law rules. Sometimes the industry or conduct is subject to another regulatory regime. However, genuine disagreements about whether the conduct should be exempt from competition law rules continue to arise. The management of the international competition law system may therefore require not simply the coming to terms with the differences in competition law rules, but also exceptions from competition law rules. If agreement on the scope of exemptions cannot be reached, an international agreement that required countries or regions to adopt competition laws might need to contain general principles governing when exemptions are legitimate.

The three papers in this issue of the *Competition Law Review* address three different aspects of international competition law. They also suggest that the subject will retain a certain degree of messiness in the foreseeable future. It is perhaps desirable for the international competition law system to have some play at the joints. While it remains flexible, it remains open to new ideas.

Addendum

The Editors are delighted to include the first book review article in this issue of the Competition Law Review, by Matteo P Negrinotti of E.S. Rockefeller, *The Antitrust Religion*, and we would encourage the submission of similar review articles for future issues of the Review.

[5] See, for example, *Laker Airways v Sabena, Belgian World Airlines*, 568 F Supp 811 (DDC 1983), 731 F 2d 909 (DC Cir 1984); *British Airways Board v Laker Airways Ltd* [1984] QB 142 (CA), reversed, [1985] 1 AC 58 (HL).

ISSN 1745-638X (Online)

THE COMPETITION LAW REVIEW

Volume 5 Issue 2 pp 153-178 **July 2009**

The Cooperation between the Competition Authorities of the Developing Countries: Why does it not Work? Case Study on Argentina and Brazil

*Marco Botta**

The last fifteen years have recorded a proliferation of multi-jurisdictional competition law cases. Moreover, a number of bilateral agreements have been concluded between different National Competition Authorities (NCAs). However, the degree of bilateral cooperation between the NCAs of different developing countries is still quite limited. The article analyzes these issues taking Brazil and Argentina as case study. These countries have enforced a competition law since 1994 and 1999 respectively. However, while Brazil has improved the quality of its enforcement action during the last years, in Argentina little progress has been recorded. The NCAs of the two countries have adopted a number of initiatives at the Mercosur and bilateral level in order to increase the degree of coordination. Nevertheless, to date these initiatives have not been successful. This article argues that the lack of cooperation has been caused by the different stages of development of the competition law in the two countries, and due to the lack of personal contacts between the officers of the NCAs. In its conclusions the article identifies a number of lessons applicable to the NCAs of other developing countries which aim at strengthening their bilateral cooperation.

1. INTRODUCTION

During the last fifteen years, new competition law regimes have 'bloomed' around the world.[1] In particular, several emerging economies in Latin and Central America, Eastern Europe, South East Asia and in a number of African States have recently adopted a competition law. The latter was perceived as one of those policies necessary to establish a market oriented economy.[2] Moreover, a number of countries in different areas of the world are currently in the process of introducing competition legislation. The well known example is the Republic of China, which has adopted its first Anti-Monopoly Law last year, which entered into force on 1st August 2008.[3] However,

* PhD candidate, European University Institute, Law Department <Marco.botta@eui.eu>. The author would like to thank Rozeta Karova, PhD candidate at the European University Institute, for her useful comments on previous drafts of this paper and for her support during his research mission in Latin America. Moreover, the author would like to thank Nadine El-Enany, PhD candidate at the European University Institute, for the control of the English spelling and grammar of the article.

1 Lipsky, 'The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?' (2002) 26, Summer-Fall, Fletcher Forum of World Affairs 59-68. Whish confirms that 'more than 100 countries now have competition law', Whish, *Competition Law*, 5th edition, London, Oxford University Press (2003), p 782.

2 Lande, 'Creating Competition Policy for Transition Economies' (1997-1998) 23 Brooklyn Journal of International Law 341.

3 Anti-monopoly Law of the People's Republic of China. Adopted at the 29th meeting of the Standing Committee of the 10th National People's Congress of the People's Republic of China on 30th August 2007.

during the last year there have been other cases of introduction or reform of national competition law in smaller developing countries. For instance, in Latin America, Uruguay adopted its first competition law in July 2007.[4] Likewise, following the example of its neighbour, the Paraguayan Chamber of Representatives passed the text of a competition law in June 2008, which is now pending before the Senate.[5]

Another well known phenomenon is the proliferation of the multi-jurisdictional cases in the area of competition law. The expression multi-jurisdictional cases refers to the competition law cases which have to be dealt at the same time by a number of competition authorities of different countries. For instance, in the area of merger control, multi-jurisdictional mergers are the concentrations which have to be notified to a number of different competition authorities due to the fact that the merging parties own subsidiary in a number of different countries, and thus one concentration has an impact on a number of different geographic markets placed under the jurisdiction of different competition authorities. As a consequence of the globalization of the economy, a growing number of mergers & acquisitions (M&As) needs to be reviewed by a number of different competition authorities, where the concentration satisfies the local threshold of notifications.[6] Moreover, some studies have shown that as a consequence of the trade liberalization the number of international cartels has increased during the last twenty years. In particular, developing countries are usually more likely to suffer harm from international cartels, due to the weakness of their internal system of protection of competition.[7] Finally, a number of corporations, which have become dominant in the same product segment in different geographical markets, have committed abuses of dominance on a global level. However, these forms of abuses of dominance are still investigated at a national level.[8]

An English translation of the legislation is available at <www.leggicinesi.it/view_doc.asp?docID=344> (09.08.2008).

4 Hargain, 'Nueva Ley de la Competencia en Uruguay', (2007) 23, Boletin Latinoamericano de Competencia, 100-109. The Boletin Latinoamericano de Competencia is an online pubblication sponsored by the European Commission about the development of competition law in Latin American countries. It is available at <http://ec.europa.eu/comm/competition/publications/blc/index.html> (14.8.2008).

5 News circulated on the Yahoo Group Foro Competencia on 7.7.2008, provided by Carlos Cazaña Portella, in house lawyer of Petrobras Paraguay Distribución Limited in Asunción, Paraguay. Foro Comeptencia is an open forum of Internet discussion among lawyers and economists dealing with competition law in the Latin American countries. For further information see <http://www.forocompetencia.com/home.html> (9.8.2008).

6 One case study concerning the effects of a multi-jurisdictional transaction in different competition law jurisdictions can be found in Botta, 'Multi-Jurisdictional Mergers and Acquisitions in an Era of Globalization: the Telecom Italia-Telefónica Case' (2008) 1 Global Antitrust Review 97-116.

7 Jenny, 'Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence', (2006) 29(1), World Competition, 109-137. Levenstein, Suslow, 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy' (2004) 71 Antitrust Law Journal 801-852.

8 For instance, it is well known the decision of the European Commission in the Microsoft case, which was upheld last years by the European Court of First Instance. However, it is less known that a similar decision was issued in December 2005 by the South Korea Fair Trade Commission (KFTC). The KFTC also

The clash between the increasing number of competition law jurisdictions and the multi-jurisdictional cases could be solved only through a more effective system of cooperation among the national authorities. If a supranational system of enforcement of competition law is still far from becoming a reality,[9] effective systems of bilateral cooperation seem at the moment to be the more realistic alternative. In recent years a number of bilateral agreements between different competition authorities have been concluded on the basis of the OECD guidelines of 1995.[10] The principles of positive and negative comity, mutual notification of the beginning of competition law proceedings involving companies based in different countries, consultation and exchange of non-confidential information when both authorities investigate the same anti-competitive conduct or they review the same multi-jurisdictional merger have become the cornerstones of these agreements. So far, the majority of the bilateral agreements have been concluded between the competition authorities of the OECD Member States. In fact, few bilateral agreements exist between the competition authorities of the developed and the developing countries.[11] The latter usually include systems of technical assistance, but they seldom include provisions concerning mutual notification and exchange of information. Even more striking is the lack of bilateral agreements concluded between the competition authorities of different developing countries. This is surprising, taking into consideration the economic integration achieved by some emerging economies lasting recent years, following the establishment of regional free trade areas and customs unions.

OBJECTIVES AND STRUCTURE OF THE PAPER

The goal of this paper is to investigate the reasons of the lack of cooperation between the competition authorities of different developing countries. The research will be based on a case study on Brazil and Argentina. These countries have been selected for the case study because they both have had competition law in force for a sufficiently

condemned Microsoft for abuse of dominant position to have bundled Messenger and Media Player to the version of the Windows operating system in South Korea. An English summary of the content of the KFTC's decision in the Microsoft case can be found at <http://ftc.go.kr/data/hwp/micorsoft_case.pdf> (9.8.2008).

9 Gifford, 'The Draft International Antitrust Code Proposed at Munich: Good Intention Gone Awry', (1997), 6, Minnesota Journal of Global Trade, 1-66.

10 Organization for the Economic Cooperation and Development, Revised Recommendation of the Council Concerning Cooperation between Member Countries on Anti-Competitive Practices Affecting International Trade. Adopted by the OECD Council on 27th-28th July 1995. The text of the recommendation is available at <http://www.oecd.org/dataoecd/60/42/21570317.pdf> (9.8.2008).

11 This conclusion can be achieved looking at the list of bilateral agreements concluded by the European Commission and by the US Department of Justice (DOJ)/Federal Trade Commission (FTC) with the competition authorities of third countries. The European Commission has cooperation agreements with the US DOJ/FTC, Canada and Japan <http://ec.europa.eu/comm/competition/international/bilateral/> (26.08.2008). The US Federal Trade Commission and the US Department of Justice have cooperation agreements with the competition agencies of following countries: Australia, Brazil, Germany, European Communities, Germany, Japan, and Mexico. Further information is available at: <http://www.ftc.gov/oia/agreements.shtm> (24.08.2008).

long period of time. In fact, Brazil adopted its current competition legislation in 1994[12] and Argentina in 1999.[13] Both acts include a system of merger control. Another reason behind this choice is the economic integration that the two countries have undertaken after the signature of the Treaty of Asunción in 1991, which established the Mercosur.[14] This allowed the liberalization of the bilateral trade between the two countries as from 1st January 1995.[15]

Mercosur has often been criticized because the process of establishment of common external tariffs and the abolition of intra-block anti-dumping duties has never been completed.[16] Moreover, the process of positive integration of the standards of production and marketing of goods, necessary to avoid the creation of invisible trade barriers, has been slowed down by the requirement that each secondary act of the Mercosur needs implementation at the domestic level by each Member State.[17] Torres talks about *hipertrofia normativa* (legislative hypertrophy) to indicate the number of secondary legislative acts adopted within Mercosur which have never entered into force, due to the lack of implementation at the state level.[18] Nevertheless, economic data shows that Argentina and Brazil today are two connected economies. According to the 2007 Yearbook on Brazil International Trade, Argentina is the second main trading partner of Brazil, after the USA and before China.[19] On the other hand, in 2007 Brazil

---

[12] Brazilian competition law, Law n.8884/94, adopted on 6th June 1994. A translation in English of the law is available at <http://www.globalcompetitionforum.org/regions/s_america/Brazil/Legisla%E7%E3o%20Antitruste%20em%20ingl%EAs.PDF> (03.04.2007).

[13] Ley 25.156 de Defensa de la Competencia, adopted on 25th August 1999 and promulgated on 16th September 1999. The text of the Law is available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/60000-64999/60016/texact.htm> (04.04.2007).

[14] Tratado para la Constitución de un Mercado Común entre la Republica Argentina, la Republica Federativa del Brasil, la Republica del Paraguay y la Republica Oriental del Uruguay. The text of the treaty is available at: <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (11.08.2008). For a description of the steps which led to the negotiation of the Mercosur agreement see: Meza, Mendoza, Poget., Linares, *Política, Integración y Comercio Internacional en el Cono Sur Latinoamericano*. Facultad de Sciencas Políticas y Sociales, Universidad de Mendoza, 1989.

[15] According to Art.1 of the treaty of Asunción, the liberalization of trade should be completed by 31st December 1994.

[16] Torrent, *15 Años de Mercosur. Comercio, Macroeconomía y Inversiones Extranjeras. Anatomia del Mercosur Real.* Zonalibro, Buenos Aires, 2006, p 39.

[17] According to Art.40 of the Protocol of Ouro Preto, the secondary legislations adopted by the bodies of the Mercosur will enter into force 30 days after that the *Secretaria Administrativa del Mercosur* has received communication by all Member States that the act has been implemented at the internal level. There are no sanctions for Member States which do not implement the Mercosur acts. As a consequence, each Member State obtains a *de facto* double right of veto: it can veto the adoption of the Mercosur act during the negotiations, where the rule of consensus is followed, and afterwards it can avoid implementing the act at the internal level. Protocolo Adicional al Tratado de Asunción sobre la Estructura Institucional del Mercosur. Protocol signed in Ouro Preto in 1994. Art. 40. The text of the Protocol is available at: <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (12.8.2008).

[18] *Supra,* Torrent, p 37.

[19] Yearbook 2007 on Brazil International Trade, p 146. <http://www.analisecomercioexterior.com.br/?from=An%E1lise+Editorial&from=An%E1lise+Editorial> (11.8.2008).

was the main trading partner of Argentina, both in terms of exports and imports.[20] Moreover, after the 2001 financial crisis in Argentina, a number of Western corporations which had invested in the country during the privatizations of the public utilities during the 1990s withdrew their investments.[21] On the other hand, the number of Argentinean companies acquired by Brazilian investors has increased since then.[22] Close economic links between the two countries justify the need of coordination in the enforcement of competition law, due to the likeliness of cross-border cases. For instance, it is not surprising that during the last years some of the most controversial of concentrations in Argentina involved the acquisitions of local companies by Brazilian investors which were already present in the Argentinean market. The latter aimed at strengthening their position in the market through the acquisition (e.g. case Quilmes-Brahma and Pérez Companc-Petrobras). Nevertheless, as will become apparent in the following discussion, there is currently no effective cooperation between Brazil and Argentina in the field of competition law.

In relation to the structure of the paper, after an overview of the functioning and the development of the competition law systems of Brazil and Argentina during the last two decades, an analysis of the attempts to improve the forms of cooperation between the Brazilian and the Argentinean competition authorities will be undertaken. In the final part of the paper, some explanations concerning the reasons for the lack of cooperation will be provided in the light of the opinions of the officers and Commissioners of the Brazilian and Argentinean competition authorities that the author recently interviewed in Buenos Aires, Brasilia and São Paulo. Those views will be systematically presented and compared in the paper. The objective of the research is to explain the current problems and the steps which have to be taken to improve cooperation in the future. The lessons drawn from the experience of Brazil and Argentina might be useful for other developing countries which are in the process of introducing competition law rules and which have close economic links with their neighbours.

OVERVIEW OF THE EVOLUTION OF THE BRAZILIAN COMPETITION LAW SYSTEM

Brazil adopted its first competition law in 1962. The law established a *Conselho Administrativo de Defensa Econômica* (CADE, Administrative Council of Economic Law)[23] under the Ministry of Justice, in charge of investigating cases of cartels and abuses of

[20] *Ibid,* 15.8% of Argentinean exports had Brazil as destination and 37% of the imports had Brazil as origin.

[21] Secretariat of the United Nations Conference on Trade and Development (UNCTAD), FDI in Brief: Argentina. Country Data concerning 2002. The document is available at <http://www.unctad.org/sections/dite_fdistat/docs/wid_ib_ar_en.pdf> (11.8.2008).

[22] Navarro, 'M&A in Argentina in the Last Decade: Boom, Crisis and Resurgence', (2006), 19(1), International Law Practicum, 74 – 79. La Nación, Liderazgo de firmas de Brasil y México. Article published on 14.8.2008. The text of the article is available at <http://www.lanacion.com.ar/nota.asp?nota_id=1039544> (14.8.2008).

[23] Law 4.137, adopted on 10th September 1962. Art. 8 The text of the law is available at <http://www.cade.gov.br/legislacao/4137lei.asp> (02.04.2007).

dominant position. In practice, this institution was not active until the beginning of the 1990s. This was due to the fact that Brazil was characterized by a system of import substitution. Furthermore, the price of the majority of goods was agreed by the local producers with the Commission of Provision and Prices, rather than through free competition among the entrepreneurs.[24]

Within the broad programme of liberalization of the economy undertaken by Brazil at the beginning of the 1990s, a new competition act, the Law 8884/94, was passed.[25] With the new legislation CADE became a federal independent agency (*autarquia federal*),[26] composed of a President and six Board Members. CADE Commissioners were appointed for a period of two years, with the possibility of reappointment by the President of the Republic with the approval of the Senate.[27] They could only be dismissed by a decision of the Senate if they were convicted by a non appealable criminal judgement.[28] Despite the fact that the Law 8884/94 underlined the concept of *autarquia federal*, some features of this legislation undermined the independence of CADE. For instance, the period in office of CADE Commissioners was relatively short, only two years, which encouraged them to look for the necessary political support in order to get another re-appointment. Moreover, CADE was assisted by an Economic Law Office (SDE),[29] part of the Ministry of Justice, and by a Secretariat of Economic Surveillance (SEAE), part of the Ministry of Finance.

Another important reform introduced by the Law 8884/94 was provision for a merger control system, absent in the previous legislation.[30] According to Art. 54(3), 'any form of economic concentration' had to be notified to the SDE at least fifteen days after the completion of the transaction (post-merger notification). The SDE and SEAE presented their opinion concerning the effect of the transaction to CADE, which was in charge of taking the final decision.[31]

The Law 8884/94 was criticized by a number of authors,[32] due to the triangular structure established by the Law 8884/94. The latter could slow down the speed of the proceedings in particular in the area of merger control, and it could undermine the

[24] In relation to the role of competition law in Brazil before the reforms of the 1990s see: Monteiro, Considera, Correa, 'The Political Economy of Antitrust in Brazil: From Price Control to Competition Policy', (2001) International Antitrust Law and Policy 533-568.

[25] *Supra,* Law n.8884/94. For a comment of the Law 8884/94 see, Dallas, 'Competition Law in Brazil' (2005) 16 European Competition Law Review 255-261.

[26] *Supra,* Law n.8884/94, Art.3.

[27] *Supra,* Law n.8884/94, Art. 4(1),(2).

[28] *Supra,* Law n.8884/94, Art. 5.

[29] *Supra,* Law n.8884/94, Art. 13.

[30] For a detailed analysis of the Brazilian system of merger control see: Andrade, *Controle de Concentrações de Empresas. Estudo da Experiência Comunitária e a Aplicação do Artigo 54 da Lei n.8884/94*. Editora Singular, São Paulo, 2002.

[31] *Supra,* Law n.8884/94, Art. 54(4).

[32] Page, 'Antitrust Review of Mergers in Transition Economies: A Comment, with some Lessons from Brazil' (1997-1998) 66 University of Cincinnati Law Review 1124.

independence of CADE. Though a detailed analysis of the evolution of the Brazilian competition law system goes beyond the scope of this paper, it is worthwhile mentioning that the two fears indicated above have gradually faded. In a number of sensitive merger cases not only CADE, but also SDE and SEAE, resisted the political pressures which demanded the clearance of concentrations due to reasons of industrial policy.[33] Today, both the officers which work in these institutions[34] and the lawyers who work in the field of competition law in São Paulo recognize that CADE/SDE/SEAE are fully independent institutions from the Government.[35]

During the second half of the 1990s, CADE was criticized due to the long period of time needed to review the notified concentrations, even those ones which did not raise any competition concern. Article 54(6) of the Law 8884/94 provides that the total time of review should not last longer than 120 days from the time of the notification.[36] However, the time of review was usually extended due to the fact that each institution asked the parties for additional documents. Such documents were often not essential for the review, they were requested with the objective of extending the time of review as the Brazilian competition authorities usually could not comply with the 120 days time limit.[37] Moreover, the thresholds of notification were initially interpreted in a

[33] The two most controversial cases in this regard are the Ambev case of 1999 and the Nestlé-Garoto case of 2004. Ambev was a new company, resulting from the merger of the two main beer producers in Brazil, Brahma and Antartica. SDE and SEAE expressed their intention to block the merger, while the Government, through a recommendation submitted to CADE by the Ministry of Industry, Trade and Development, pleaded in favour of a clearance of the merger without any remedy imposed. Several politicians argued that Ambev would become a national champion, which would be able to increase its exports towards other Latin American markets. Finally, CADE authorized the concentration, but it imposed a number of structural commitments. A summary of the Ambev case can be found at: OECD Secretariat, Competition Policy and Regulatory Reform in Brazil. A Progress Report, Published on 30.3.2000, pp 16-17. The document can be downloaded at: <http://www.mj.gov.br/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID=%7BC7F3270D-81D4-4FBF-BED2-5652F45F330D%7D&ServiceInstUID=%7B2E2554E0-F695-4B62-40E-4B56390F180A%7D> (10.8.2008). The second case concerned the acquisition by Nestlé of the Brazilian chocolate producer Garoto. Due to the fact that Nestlé was already present in the Brazilian market before the acquisition of Garoto, the horizontal merger would have granted to Nestlé a market share of 63.10% in the Brazilian market for chocolate bars and 88.50% market share for solid chocolate toppings. CADE decided to block the acquisition, in spite of the political pressures received. Several politicians argued that following the acquisition of Garoto, Nestlé would have opened new factories in Brazil and, thus, it would have created new possibilities for employment for Brazilian workers. Following the decision of CADE, the Brazilian Senate refused to re-appoint one of the CADE Commissioners who had voted to block the acquisition. *Supra*, OECD Peer Review of the Brazilian Competition Law 2005, pp 33-34.

[34] Meeting of the author with Ana Paula Martinez, head of the competition law division of the SDE, on 2.6.2008 in Brasilia. According to Ms. Martinez, the Minister of Justice has never interfered personally in the work of the SDE, even in the most controversial cases.

[35] Meeting of the author with José Ignacio Franceschini, founding partner in the law firm Franceschini & Miranda Adbogados, in São Paulo on 13.6.2008.

[36] SDE and SEAE have 30 days each one to submit their reports. Afterwards, CADE has 60 days to adopt a final decision.

[37] Between 1995 and 1998 the average time to review a notified concentration by CADE/SDE/SEAE was of 605 effective days, against the 120 days provided by the Law 8884/94. Source: Oliveira, 'Competition Policy in Brazil and Mercosur: Aspects of Recent Experience' (1999) 3 Boletín Latinoamericano de Competencia 14.

broad manner, in order to increase the number of transactions subject to review.[38] The huge number of notifications overloaded CADE, broadened the time of review and impeded CADE/SDE/SEAE from conducting any investigation on anti-competitive practices. However, recent years have seen a better system of coordination between the SDE and SEAE[39] and a more restrictive interpretation of the thresholds of merger notifications[40] allowing for a reduction of the time of merger review.[41] According to Camila Safatle, senior officer of the merger review unit of the SDE, SEAE and SDE have achieved an effective division of their tasks: SEAE mainly deals with projects of competition advocacy towards other regulatory agencies of the Brazilian public administration and it draws the opinion for CADE concerning the notified concentrations. On the other hand, SDE has focussed its resources on the investigations of anti-competitive conducts.[42]

In 2000, the Law 10.149 amended the Law 8884/94, by introducing a system of leniency for cartels.[43] The simplification of the proceedings of merger review and the introduction of a leniency system allowed the SDE to dedicate more human resources to the detection of cartels. For instance, the number of dawn raids conducted by SDE

---

[38] In 1994 only six concentrations were notified. This number increased to 16 in 1996 and to 226 in 1999. This increase was due to the fact that CADE interpreted that the turnover threshold of 400 million Reals provided by Art. 54 of the Law 8884/94 should be calculated on the basis of the world-wide turnover, rather than on the basis of the Brazilian one. The huge number of notifications overloaded CADE and broadened the time of review.

[39] On 18.2.2003, the SEAE/SDE adopted a fast-track procedure for categories of mergers which usually do not represent particular competition concerns (e.g. conglomerate mergers; acquisition of Brazilian companies by foreign investors not present yet in the Brazilian market; joint ventures). Portaria Conjunta SDE/Seae nº 01, 18.2.2003, available at: <http://www.mj.gov.br/sde/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID={0076B8D7-06BB-43C7-9566-B6C1A26EF277}&ServiceInstUID={2E2554E0-F695-4B62-A40E-4B56390F180A}> (9.8.2008). On 4.1.2006 SDE/SEAE adopted a new procedure for merger review which allows for the delivery of a joint opinion to CADE. The opinion is drawn by SEAE and it is reviewed by SDE. When SDE's opinion is convergent with SEAE, its opinion to CADE is limited to a note stating that it agrees with SEAE's opinion. Portaria Conjunta SDE/Seae nº 33, 4.1.2006, available at <http://www.mj.gov.br/sde/data/Pages/MJ5C394253ITEMID827D7C2F4E7C4BF8ABEF6E45CC39F971PTBRNN.htm> (9.8.2008).

[40] On 19th January 2005, in the decision concerning the concentration ADC Telecommunications and Krone International Holding Inc, CADE changed its understanding of the notification thresholds: the turnover could be calculated only in relation to the sales within the Brazilian market. Dutra, CADE Votes to Use National Turnover for Merger Calculation, International Law Office (ILO) Newsletter, 10.3.2005. Available at <http://www.internationallawoffice.com/> (9.8.2008).

[41] According to the 2007 CADE *Relatório Anual* (CADE's Annual Report), in 2006 the average time to review the cases was of 51 days for CADE. Only two cases took over 2 years to be decided (page 23). The text of the document can be downloaded in Portuguese at <http://www.cade.gov.br/publicacoes/relaanual.asp> (9.8.2008).

[42] Meeting of the author with Camila Safatle, senior officer in the merger control unit of the SDE, in Brasilia on 2.6.2008.

[43] Law n. 10.149, adopted on 21st December 2000, which amended the text of the Law 8884/94. The text of the law is available at <http://www.cade.gov.br/legislacao/10149lei.asp> (9.8.2008).

increased from 11 in 2003 to 84 in 2007.[44] Finally, in September 2007 CADE adopted the Resolution 46/2007 which introduced the possibility to negotiate settlements with the companies involved in a cartel case, in order to decrease the time of investigations concerning a single investigation.[45]

The evolution of the Brazilian system of competition law is still ongoing. The last phase of this process of transition started in September 2005, when the Government submitted the text of new competition legislation to the Brazilian Congress. The latter should replace the Law 8884/94.[46] The new bill will provide a full institutional reform: CADE will have exclusive jurisdiction in the field of competition law enforcement, while the competition law division of the SDE will be abolished. The new CADE will be composed of three bodies:[47] the *Tribunal Administrativo de Defensa Econômica* (with adjudication tasks similar to the current CADE), the *Superintendência-Geral* (in charge of conducting the investigations; the current staff of the SDE will probably move to this body) and a *Departamento de Estudos Econômicos* (headed by a chief economist, in charge of providing opinions when requested by one of the Commissioners of the *Tribunal Administrativo* or by the *Superintendente-Geral*). The SEAE will manly play the role of competition advocacy and it will deliver opinions concerning mergers only if so required by CADE.[48] Finally, the mandate of CADE Commissioners will be extended to four years.[49] Furthermore, the merger review will be sped up through a pre-screening system of all the notifications by the *Superintendência-Geral.* The latter will be able to directly approve them without restrictions.[50] The concentrations that the *Superintendência-Geral* would like to block or to impose remedies will be reviewed by the *Tribunal Administrativo.*[51] Another innovation brought by the draft bill is the abolition of the post-merger notification time-frame, replaced by a pre-merger system.[52] The objectives of these reforms are to strengthen CADE independence from the executive branch and to speed up the process of merger review. These modifications are relevant,

---

[44] SDE's press release of 29.8.2007, SDE Carries out the Largest Dawn Raid in Latin America and Fourteen Exectives Were Arrested on Charges of Conspiring to Fix Prices. The press release is available at <http://www.mj.gov.br/main.asp?View={AE70F431-442E-44D0-9303-65BF6C217A48}> (9.8.2008).

[45] CADE, Resolução n.46 of 4.9.2007. The text of the resolution is available in Portuguese at <http://www.cade.gov.br/legislacao/resolucoes/Resolucao46.pdf> (9.8.2008).

[46] Projecto de Lei, Estrutura o Sistema Brasileiro de Defesa da Concorrência e dispõe sobre a prevenção e repressão às infrações contra a ordem econômica e dá outras providências. Presented by the Government to the Brazilian Congress on 12.9.2005. Proposal n.P-5877/2005. The next of the draft bill is available at: <http://www2.camara.gov.br/proposicoes> (9.8.2008). An analysis of the draft bill is available in: Garcia, Todorov, 'New Brazilian Draft Competition Law Sent to Congress' (2006) 27(2) European Competition Law Review 64-73.

[47] *Supra,* draft law P-5877/2005, Art. 5.

[48] *Supra,* draft law P-5877/2005, Art. 19.

[49] *Supra,* draft law P-5877/2005, Art. 6 (1).

[50] *Supra,* draft law P-5877/2005, Art. 49 (1).

[51] *Supra,* draft law P-5877/2005, Art. 51 (1).

[52] *Supra,* draft law P-5877/2005, Art. 89 (2) (3).

but they are not unexpected: they are the result of the process of transition previously described.

OVERVIEW OF THE EVOLUTION OF THE ARGENTINEAN COMPETITION LAW SYSTEM

If the case of Brazil shows the positive evolution of a competition law system in a developing country, the case of Argentina shows what can go wrong in such process of transition. Argentina adopted its first competition law in 1980.[53] The law had the same scope of application as the Brazilian law of 1962: both legislations sanctioned anticompetitive agreements and abuse of dominant position, but they did not provide any mechanism of merger control.[54] Moreover, they both established competition law authorities dependent on the executive branch. In the case of Argentina, the *Comisión Nacional de Defensa de la Competencia* (CNDC, National Commission of Protection of Competition) was established *en el ambito* (within) of the State Secretary for Trade and International Economic Negotiations.[55] Finally, the CNDC, like CADE before 1994, did not actively enforce Law 22.262/80.

On 25th August 1999, the Argentinean Congress passed the Law 25.156, which replaced the previous bill.[56] The new legislation introduced two main innovations: a system of merger control and an independent competition law authority, the *Tribunal Nacional de Defensa de la Competencia*[57] (National Tribunal of Protection of Competition). According to the Law 25.156/99, the Competition Tribunal would be an *organismo autarquico* (autarchic body). Reading the text of the legislation, this autarchy seems *prima facie* substantial. In fact, unlike CADE, the Competition Tribunal does not receive any opinions from any other institution related to the Government: it is the only authority responsible for the enforcement of the Argentinean competition law.[58] Moreover, the seven Members of the Tribunal are not politically appointed, but they are selected through a public competition.[59] Finally, the appointed Members remain in office for a

---

[53] Law 22.262, Ley de Defensa de la Competencia, adopted in 1980. The text of the law is available at <http://www.poderdelconsumidor.com.ar/legislacion/ley22262.htm> (02.08.2008). For an analysis of the Law 22.262/80 see: Cabanellas de las Cuevas G, *Derecho Antimonopolico y de Defensa de la Competencia,* Editorial Heliasta, Buenos Aires, 1983.

[54] *Supra,* Law 22.262/80, Art. 1.

[55] *Supra,* Law 22.262/80, Art. 6.

[56] Ley 25.156 de Defensa de la Competencia, adopted on 25th August 1999 and promulgated on 16th September 1999. The text of the Law is available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/60000-64999/60016/texact.htm> (04.08.2008). For a detailed analysis of the Law 25.156/99 see: Cabanellas De Las Cuevas G, *Derecho,* Antimonopolico y de Defensa de la Competencia, Segunda Edición, Editorial Heliasta (Buenos Aires), 2005.

[57] *Supra,* Law 25.156/99, Art. 17.

[58] *Supra,* Law 25.156/99, Art. 13.

[59] The seven Members of the Tribunal are not politically appointed, but they are selected by a panel (*Jurado)* through a public competition (*'previo concurso público de antecedents'*). The *Jurado* would be composed of the Attorney General of the State Treasury (*Procurador del Tesoro de la Nación*), the State Secretary for the Internal Trade, the Presidents of the Trade Commissions of both Chambers of the Argentinean Parliament, the

period of six years, rather than the two years of the CADE Board Members. A key factor of the CADE's success was its independence from the Government, an independence which was strengthened over the years. By contrast, in Argentina the *Tribunal Nacional de Defensa de la Competencia* has never been established. Nine years after the approval of the competition law of 1999, the public competition through which the seven Members of the Tribunal should be selected has not taken place yet.[60] Since 1999 Law 25.156/99 has been administered by the CNDC. The latter has still to report the results of its investigations both in the area of conduct cases and in the field of merger control to the *Secretaria del Comercio Interior* (Secretariat for the Internal Trade).[61] As a result, the final decision concerning the clearance of a notified concentration or the sanction against an anti-competitive conduct is not taken by an independent authority, as in Brazil, but by a branch of the Government. This solution was justified under Art. 58 of the Law 25.156/99, which provides that until the establishment of the Competition Tribunal, the new act will be enforced by the institutions of the Law 22.262/80. The lack of establishment of the Competition Tribunal has opened a legal battle concerning the legitimacy of the CNDC/Secretary for the Internal Trade to enforce the Law 25.156/99. In fact, during the past years a number of federal courts have denied the authority of the Secretariat to adopt administrative decisions under the Law 25.156/99. For instance, in 2004 the Secretariat's decision which authorized the merger between two supermarket chains, Jumbo and Disco, was challenged by a competitor before a federal court in the city of San Rafael, located in the Mendoza province.[62] Among the grounds presented, the plaintiff argued that the decision was not valid, due to the fact that under Law 25.156/99 the Secretariat does not have any competence.[63] Only on 16th April 2008 this legal battle ended through a judgement of the Argentinean Supreme Court, which recognized that according to Art. 58 of the Law 25.156/99 the CNDC/Secretariat are the two institutions in charge of temporarily enforcing the Law until the establishment of the Competition Tribunal.[64]

The current institutional system has also affected the enforcement of merger control. According to Art. 13 of the Law 25.156/99, merger review cannot last longer than 45 days from the time of the notification. When that time limit expires, the concentration

President of the National Court of Civil Appeals and the Presidents of the National Academy of Law and the National Academy of Economics, s*upra,* Law 25.156/99, Art. 19.

60 Colomo Ibáñez, 'The Revival of Antitrust Law in Argentina: Policy or Politics?' (2006) 27 European Competition Law Review 319.

61 Today it is the called Secretaría de Comercio Interior.

62 Diario Judicial, La Fusión Jumbo-Disco Pasa por el Ministerio. Article published on 17.4.2008. The text of the article is available at <http://www.diariojudicial.com/nota.asp?IDNoticia=35128#> (10.8.2008).

63 Den Toom., *Argentina-Competition Law Update,* article published on 17th July 2006 in <www.bomchil.com> (05.08.2008).

64 Fallo de la Suprema Corte Argentina, Belmonte, Manuel y Asociación Ruralista General Alvear c/ Estado Nacional Poder Ejecutivo Nacional Ministerio de Economía y Producción Secretaría de Coordinación Técnica Comisión Nacional de Defensa de la Competencia. Judgement of 16.4.2008. The text of the judgement is available at <http://www.diariojudicial.com/nota.asp?IDNoticia=35128#> (10.8.2008).

is considered implicitly authorized.[65] Depending on the complexity of the case, the CNDC may require the parties to submit the information required in three different notifications forms.[66] The time limit of 45 days can be stopped when the merging parties do not provide all the information required in the notification form[67]. In addition, the CNDC may once ask additional information.[68] The final result, according to the practitioners of competition law in Buenos Aires, is that the CNDC relies on these expedients in order to postpone for months and months the final opinion addressed to the Secretary.[69] A brief analysis of the decisions of the CNDC/Secretariat confirms the lawyers' opinion. For instance, the acquisition of Multicanal by Cable Televisión was notified to the CNDC on 4th October 2006, but the opinion of the CNDC was released only on 7th December 2007, more than one year after the date of the notification.[70] Due to the slowness of the CNDC/Secretariat to clear the notified concentrations, in most of the cases the merging parties implement the concentration before receiving the authorization from the Secretariat.[71] Another consequence of this practice is that the CNDC finds it difficult to impose any structural remedy when the notified concentration has already been implemented. The CNDC would rather opt for behavioural remedies, in spite of the difficulty checking their implementation. As it was shown above the Brazilian competition system was previously affected by the same deficiencies. However, over the years the time of merger review has been shortened and the effective time of review now complies with the 120 days time limit provided by the law. This is not the case in Argentina. The reasons for these delays are the insufficient human resources of the CNDC and the fact that each decision has to be approved by the Secretary for Internal Trade.

---

65 *Supra,* Law 25.156/99, Art. 14.

66 The three forms are contained in: Secretario de Defensa de la Competencia y del Consumidor, Resolución 40/01, Guía para la Notificación de Operaciones de Concentración Económica, published on 22.2.2001. A copy of the Resolution 40/01 is available in: Nazar Espeche, *Defensa de la Competencia,* Ediciones Depalma, Buenos Aires, 2001, pp 155-168.

67 Presidente de la Nación Argentina, Decreto 89/2001. Apruébase la Reglamentación de la Ley N° 25.156. Adopted in Buenos Aires on 25.1.2001. Art. 14. The text of the Decree is available at: <http://infoleg.mecon.gov.ar/infolegInternet/anexos/65000-69999/65959/norma.htm> (10.8.2008).

68 Poder Ejecutivo Nacional, Decreto 396/2001, Modifícase la Ley 25.156, derogando el carácter potencial de la restricción o distorsión de la competencia en los mercados respecto de la autorización de las concentraciones económicas. Adopted in Buenos Aires on 1.4.2001. Art. 4. The text of the Decree is available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/65000-69999/66610/norma.htm> (10.8.2008).

69 Views expressed on 11.7.2008 by a number of competition lawyers at a meeting at the Colegio de los Abogados in Buenos Aires. The author participated to the meeting as observer.

70 Dictamen of the CNDC n.637, Grupo Clarin S.A., Vistone LLC, Fintech Advisory Inc, Fintech Media LLC, VLG Argentina LLG y Cablevión SA S/ Notificación Articulo 8 Ley 25.156. Adopted on 7.12.2007. Para. 45. The document is available at: <http://www.mecon.gov.ar/cndc/dictamenes/dictamen_cablevision _multicanal.pdf> (10.8.2008).

71 Legally speaking the notified concentrations cannot produce any legal effect up to the moment when the concentration is authorized by the Secretariat. However, according to Cabanellas de las Cuevas, 'nothing in the Law 25.156/99 prohibits the merging parties from implementing a concentration through the transfer of the shares after having complied with their duty of notification'. *Supra,* Cabanellas de las Cuevas, 2nd Edition, p 130, volume II.

The failure to establish the Competition Law Tribunal has had an impact not only on speed, but also on the quality of the enforcement. In fact, enforcement was dependant upon which politician was appointed as Secretary for the Internal Trade. Until the financial crisis of 2001, the Secretary approved the majority of CNDC's decisions without interfering in the CNDC's investigations. From 2003 Kirchner's administration, following a more interventionist approach in the economy, has started to influence the activities of the CNDC in order to pursue a number of different economic goals. For instance, the Secretary started to negotiate fixed prices with a number of distributors of consumers' products and with the supermarket chains. The companies which did not follow the negotiated prices were warned that the CNDC would have been encouraged to start investigations against them on the basis of alleged anti-competitive conducts.[72] On 30th May 2008, a decision of the Secretary for the Internal Trade concerning the existence of an anti-competitive practice consisting in the refusal to supply some distributors of GPL in the Province of Missiones by Shell Gaz and Totalgaz Argentina was annulled by the federal court of the city of Posadas. [73] The court held that the decision was arbitrary due to the fact that the CNDC/Secretary based its decision only on the testimony of the complainant, who was not supplied by Shell Gaz and Totalgaz Argentina, rather than on further evidence.

Similarly, this institutional structure also had implications for the content of some merger decisions when the concentration involved political concerns. One of the most controversial cases in this regard is the above mentioned acquisition of Multicanal and Teledigital Cable by Cablevisión. Cablevisión was a subsidiary of the group Clarín, one of the main media groups in Argentina.[74] Multicanal and Cablevisión are the main cable operators in Argentina, accounting for a joint market share of between 78% and 94% in some provinces outside of the metropolitan area of Buenos Aires.[75] The analysis of the CNDC has been criticized by a number of competition lawyers,[76] due to the fact that the CNDC departed from its previous case law, in order to find grounds to justify the approval of the concentration.[77] In spite of the impact of the acquisition on the level of

---

[72] *Supra,* Colomo Ibáñez, p 320.

[73] Camera Federal de la Provincia de Missiones, Expte. N° 9986107 -SHELL GAS S.A. Y TOTALGAZ ARGENTINA S.A. Sf Ley 25.156 Ministerio de Economia y Producci6n Sec. de Comercio Interior Comisi6n Nacional de De/ensa de la Competencia. Judgement of 30.5.2008.

[74] *Supra,* CNDC's Dictamen 637/2007, para. 14.

[75] *Supra,* CNDC's Dictamen 637/2007, table n.18.

[76] Den Toom, Demarie, 'Approval of the Cablevision - Multicanal - Teledigital Merger. Adequate Understanding of Competitive Dynamics or Wrong Decision?' Article published on 3.1.2008. The article is available at <http://www.bomchil.com/publicacion.aspx?PublicacionID=205> (11.8.2008).

[77] For instance, the CNDC considered the cable TV market approximate to the substitution with the Triple Play services provided by the telecom companies in several countries. As a consequence, it argued that Telecom and Telefónica Argentina, the main telecom operators in Argentina, were ready (though any precise date was planned) to invest in the field of Triple Play. However, the CNDC did not take in consideration the regulatory barriers which impede the providers of fixed telephone services to broadcast any television content in Argentina. Furthermore, the CNDC, for the first time in its case law, accepted all the efficiencies alleged by the parties, without any critical analysis of their effective materialization.

competition in a number of relevant markets, the CNDC advised the Secretary to clear the transaction subject to the behavioural commitments offered by the merging parties on 6th December 2007, the day before the adoption of the CNDC's opinion.[78] The open question is whether the CNDC will manage to check the compliance of the commitments offered by the parties. This decision seemed more justified by the wish of the CNDC to appease the group Clarín, supporter of the Government, rather than on the basis of a critical competition law analysis. The case Cablevisión-Multicanal is interesting because it shows clearly how the lack of independence of the CNDC from the executive may have consequences on the objective enforcement of the competition law. When such a poor institutional framework is in force, alleged potential entrants in the market and unlikely efficiency gains claimed by the merging parties may be accepted by the competition authority to counterbalance real competition concerns, masking the real political concerns behind the approval of the concentration.

To the untrained eye, the Argentinean law of 25.156799 may look more in line with international standards than the Brazilian Law 8884/94. However, the lack of enforcement of the institutional system provided by the Law 25156/99 led to these unexpected developments. This section had the objective of providing the reader with an overview of the current system of enforcement of competition law in Brazil and Argentina. A more detailed analysis would go beyond the scope of this paper. However, as it will be shown in the following section, the differences in the evolution of these competition law systems has had an impact in the level of cooperation between the competition authorities of these countries.

ATTEMPTS AND FAILURES IN THE COOPERATION BETWEEN THE ARGENTINEAN AND THE BRAZILIAN COMPETITION AUTHORITIES

In 1994, when the process of transition for the establishment of the free trade area within Mercosur was almost completed, it was decided that a number of technical committees should be established in order to negotiate a positive harmonization of the rules which could create invisible barriers to the free trade. In February 1995, the *Comité Tecnico n.5* (Technical Committee n.5, CT5), concerning the *Defensa de la Competencia* (Protection of Competition) was established.[79] This Committee had the task of drawing up a report for the *Comisión de Comercio del Mercosur*[80] (Mercosur Trade Commission,

[78] *Supra,* CNDC's Dictamen 637/2007, para 335. The merging parties offered not to discriminate other content providers in their grid of broadcasting and to offer the cable connection services in the cities of the provinces at the same price of Buenos Aires during the next two years.

[79] Diretiva de la Comisión de Comercio del Mercosur n.1/95, Cración Comites Técnicos. Directive adopted on 15.2.1995. Art.1. The text of the Directive is available at <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (13.8.2008).

[80] The Comisión de Comercio is one of the institutions introduced by the Protocol of Ouro Preto in 1994 (*supra*). The three most important institutions introduced by this Protocol are: the Consejo del Mercado Común (CMC, the meeting of the Ministries or the Presidents of the four Member States), the Grupo Mercado Común (GMC, the meeting of the senior officers of the national Ministries), the Comisión del Comercio del Mercosur (CCM, meeting of the younger officers of the national Ministries). Every institution decides on the basis of the rule of consensus. For a description of the functioning of the Mercosur

CCM) on the functioning of the competition law in the four Member States. At a later stage it was required to negotiate a *Estatuto de Defensa de la Competencia* (Statute about the Protection of Competition).[81] Moreover, in December 1994 the Presidents of the four Member States fixed the guidelines which would be followed in the project of introduction of competition law at the Mercosur level.[82] The Annex attached to the Decision 21/94 of the *Consejo del Mercado Común* (Council of the Common Market, CMC) listed a number of agreements and concerted practices and forms of abuse of dominance which should be prohibited by the new rules when they had an impact at the Mercosur level.[83] Moreover, it stated that every agreement or concentration among enterprises should be subject to merger control when the transaction implied a control of at least 20% of the relevant market, when defined at the Mercosur level.[84] These guidelines were very similar to the Brazilian competition law 8884/94 in relation to the list of anti-competitive practices, the mergers notification threshold of 20% market share and the need to notify all the agreements, not only economic concentrations.[85] This is not surprising, taking in consideration that at that time Brazil had just passed the new competition law in 1994. In Argentina, in spite of a number of proposals pending in the Congress, the old Law 22.262/80 was still in force, despite its lack of enforcement. Finally, as mentioned in the introduction, Paraguay and Uruguay are only now in the process of introducing competition law at the internal level.

Two years after the Decision 21/94, the *Protocolo de Defensa de la Competencia del Mercosur* (Protocol on the Protection of Competition in the Mercosur) was signed in Fortaleza.[86] The Protocol established a supra-national system of competition law, applicable when anticompetitive behaviour had an impact on intra-block trade.[87] However, each Member States had exclusive competence in applying its own competition law regime when the anticompetitive behaviour affected only its territory.[88] Therefore, the

institutions see: Moavro H, Orietta PW, Parera RG, 'Las Instituciones del Mercosur', Working paper 3/1997, Centro Interdisciplinario de Estudios sobre el Desarrollo Latinoamericano (CIEDLA), Buenos Aires.

81 *Supra,* Directive 1/95, Art. 1.

82 Decisión del Consejo Mercado Común n.21, Defensa de la Competencia. Decision adopted in Ouro Preto on 17.12.1994. The text of the decision is available at: <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (13.8.2008).

83 *Supra,* Decision 21/94, Art.3-4.

84 *Supra,* Decision 21/94, Art.5.

85 *Supra,* Brazilian Law 8884/94, Art. 21, 54.

86 Decisión del Consejo del Mercado Común n.18, Protocolo de Defensa de la Competencia del Mercosur, signed in Fortaleza on 17th December 1996. The document is available at <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (13.8.2008). A description of the Fortaleza Protocol is provided in: Oliveira, 'Aspects of Competition Policy in Mercosur' (2000) 11 Boletín Latinoamericano de Competencia 37-41. Andrade, 'Competition Law in Mercosur: Recent Developments' (2003) 17 Boletín Latinoamericano de Competencia 11-14. Bischoff-Everding, 'Is There a Basis for a Cooperation Between the EU and the Mercosur in the Field of Restrictive Business Practices?' (2002) 14 Boletin Latinoamericano de Competencia 113-125.

87 *Supra,* Fortaleza Protocol, Art. 2.

88 *Supra,* Fortaleza Protocol„Art. 3.

Fortaleza Protocol did not aim at harmonizing the Member States' legislations, but rather to establish a parallel system of competition law rules applicable when the intra-Mercosur trade was affected. This system was quite similar to the relationship between national and Community competition rules. Nevertheless, the underlining difference with the European Community model was that the Fortaleza Protocol was based on an inter-governmental framework.[89] The two institutions in charge of enforcing the Protocol rules were, in fact, the CCM and the *Comité de Defensa de la Competencia* (Committee of Protection of Competition, CDC), the evolution of the Technical Committee n.5. The latter was composed of the representatives of the national competition authorities or of the Ministries of Economy, when the national competition authority was not yet established.[90] The proceedings for the infringement of the Protocol were initiated by the competition authority of the country where the anticompetitive behaviour took place. The latter informed the CDC,[91] which adopted the basic rules for the conduct of the investigations (e.g. the definition of the relevant market and the criteria of analysis of the anticompetitive conduct).[92] However, the investigations were carried out by the competition authority of the country where the company that infringed the Protocol rules was based, not by the Committee itself.[93] The competition authority would refer the result of its investigation to the CDC,[94] which would deliver an opinion to the CCM. The latter was the only institution in charge of imposing fines, through the adoption of a directive which would later be enforced by the national competition authority.[95] Within this complex mechanism, all the decisions were adopted by consensus.

The substantive rules introduced by the Protocol were similar to those contained in the Decision 21/94, with the only exception that the Protocol did not introduce a system of merger control. In fact, according to Art.7, the Member States should adopt common rules in the field of merger control within two years after the entry into force of the Protocol. The same period of time was chosen to start negotiations concerning the introduction of a system of State aids control.[96] Nevertheless, twelve years after its signature these negotiations have never started. The Protocol itself has been formally in force since September 2000. In fact, according to Art.33, the Protocol would enter into force thirty days after the deposit of the second ratification. However, at the moment

[89] In fact, the Fortaleza Protocol did not provide for the establishment of any supranational competition authority in charge of the enforcement of the Protocol. The Protocol would be enforced by the committees composed by the representatives of the national competition authorities and Trade Ministries.

[90] *Supra,* Fortaleza Protocol, Art.8.

[91] *Supra,* Fortaleza Protocol, Art. 10.

[92] *Supra,* Fortaleza Protocol, Art. 14.

[93] *Supra,* Fortaleza Protocol, Art. 15.

[94] *Supra,* Fortaleza Protocol, Art. 19.

[95] *Supra,* Fortaleza Protocol, Art. 20.

[96] *Supra,* Fortaleza Protocol, Art. 32.

the ratifications of Argentina and Uruguay are still pending.[97] Although Paraguay has ratified the Protocol, the country still lacks national competition law. Therefore, in the lack of the Argentinean ratification the Protocol, though it is formally in force, de facto does not work. In order for the system of cooperation to function the Protocol needs to be ratified by two Mercosur Member States which have also adopted a national competition law at the internal level.[98] The Fortaleza Protocol is another example of the *hipertrofia normativa* which characterizes Mercosur, where several acts have been adopted during the years, but few of them have entered into force.

In spite of the lack of ratification by Argentina of the Fortaleza Protocol, the CDC continued to hold periodical meetings during the subsequent years. In 2002, the Committee adopted a Regulation concerning the functioning of the Fortaleza Protocol, where a number of details concerning the proceedings to enforce the Protocol were defined. [99] Nevertheless, the adoption of this Regulation did not modify the situation of non-enforcement.

After the failure of Fortaleza, a new approach was attempted between the two main trading partners within the Mercosur, Brazil and Argentina. In October 2003, a bilateral agreement of cooperation was signed with the objective '… de promover la cooperación entre las autoridades de las Partes en el area de denfesa de la competencia, incluyendo tanto la cooperación en la aplicación de las leyes de defensa de la competencia, como la cooperación técnica' ('... to promote the cooperation between the competition authorities of the Parties in the area of competition law, including both the cooperation in the enforcement of the competition laws, as the technical cooperation').[100] Therefore, the scope of the agreement was relatively broad: it concerned both a system of bilateral cooperation following the example of the OECD guidelines of 1995 and a system of technical assistance. Moreover, the bilateral cooperation also concerned the area of merger control.[101] The contracting parties of the agreement were CADE/SDE/SEAE for Brazil and the CNDC/Secretariat for Internal Trade for Argentina.[102] However, the CNDC/Secretariat for Internal Trade would be in charge of enforcing the agreement until the establishment of the Competition Tribunal.[103] According to the Agreement, each party had 15 days to notify to the

---

[97] Lubambo de Melo, 'Defesa da Concorrência no Mercosul: Entraves e Soluções Normativas' (2007) 23 Boletin Latinoamericano de Competencia 19-36. See the Annex at p 35.

[98] *Ibid,* Annex. The Fortaleza Protocol entered into force on 8.9.2000. Brazil ratified the agreement on 19.9.2000, while Paraguay on 21.10.1997.

[99] Acuerdo sobre el Regolamento del Protocollo de Defensa de la Competencia del Mercosur. The text of the agreement is available at: Vol. 16 Boletín Latinoamericano de Competencia 191-195 (2003).

[100] Acordo de Cooperação entre a República Federativa do Brasil e a República Argentina Relativo á Cooperação entre suas Autoridades de Defensa da Concorrência na Aplicação de suas Leis de Concorrência. Agreement signed on 16.10.2003 in Buenos Aires. Art.1. The text of the agreement is available at: <http://www.cade.gov.br/internacional/Acordo_Cooperacao_Brasil_Argentina.pdf> (13.8.2008).

[101] *Ibid,* Art. I (d).

[102] *Ibid,* Art. I (b).

[103] *Ibid.*

partner authority of the opening of proceedings against anti-competitive practices or the notification of a concentration which was relevant for the competition law of the other country.[104] The agreement allowed the exchange of non confidential information between the parties[105] and the application of the principles of positive and negative comity.[106] Moreover, the officers of the authorities would meet at least twice per year.[107] The activities related to technical cooperation were contained in Article VIII, which provided for the possibility to organize joint conferences and training courses and exchange of officers. The Agreement needed the ratification by both States in order to enter into force.[108] However, so far neither Argentina nor Brazil have accomplished with this duty.[109]

The model identified by the agreement of 2003 has been extended later at the Mercosur level, in order to overcome the lack of ratification of the Fortaleza Protocol. In 2004 the CCM adopted the Decision 04/04, concerning a system of cooperation among the competition authorities of the Mercosur countries in the area of anti-competitive practices.[110] Similarly, two years later the Decision 15/05 established a system of exchange of information and consultation in the field of merger control.[111] These two Decisions were supported by the Argentinean delegation in a document concerning the revision of the Fortaleza Protocol. The document was presented in 2006 to the CCM.[112] According to the Argentinean delegation, the intergovernmental structure identified by the Fortaleza Protocol was one of the factors which created an obstacle to its ratification, due to the veto right granted to each Member State within the CDC.[113] The Member States were required to implement the Decision 04/04 by 1st October 2004 and the Decision 15/05 by 1st January 2007.[114] However, so far only Argentina

[104] *Ibid,* Art. II (4).

[105] *Ibid,* Art. III, X.

[106] *Ibid,* Art. V

[107] *Ibid,* Art. III (2).

[108] *Ibid,* Art. XIII

[109] *Supra,* Lubambo de Melo 2007, Annex

[110] Consejo del Mercado Común, Decision n.04/04, Entendimiento sobre Cooperación entre las Autoridades de Defensa de la Competencia de los Estados Partes del Mercosur para la Aplicación de sus Leyes Nacionales de Competencia. Decision adopted in Puerto Iguazú on 7.7.2004. The text of the Decision is available at: <http://siteresources.worldbank.org/INTCOMPLEGALDB/Resources/Decision0404.pdf> (14.8.2008).

[111] Consejo del Mercado Común, Decision n. 15/05, Entendimiento sobre Cooperación entre ls Autoridades de Defensa de la Competencia de los Estados Partes del Mercosur para el Control de Concentraciones Económics de Ambito Regional. Decision adopted in Córdoba on 20.7.2006. The text of the Decision is available at: <http://www.mecon.gov.ar/cndc/control_concentraciones%20_esp.pdf> (14.8.2008).

[112] Comisión de Comercio del Mercosur, document n. 34/06. Revisión del Protocolo de Defensa de la Competencia. Propuesta Argentina. The text of the document is available at: <http://www.mercosur.int/msweb//SM/Actas%20TEMPORARIAS/CCM/ATA_08_06/Anexo%20VIII%20%20DI%2034-06%20situaci%F3n%20revisi%F3n%20PDC%20_arg.pdf> (14.8.2008).

[113] *Ibid,* point n.4.

[114] *Supra,* Art. 2, Decision 04/04 and 15/05.

and Uruguay have implemented the Decision 04/04, while no country has transposed the Decision of 15/05.[115]

REASONS BEHIND THE FAILURES - NEED FOR A *DE MINIMIS* AGENDA

The previous part of the paper aimed at providing the readers with an overview concerning the functioning of the competition law system in Brazil and Argentina and the attempts concerning the introduction of a system of cooperation between the competition authorities of these two countries.

A number of articles have already discussed the reasons why the Fortaleza Protocol was not ratified by Argentina and which steps should be taken to overcome the current situation. For instance, Peña pointed out that the Protocol could not be effective without the negotiation of a regime of State aids rules. Art. 32 of the Protocol provided that such negotiations would start two years after its entry into force. However, there was no binding commitment to ensure that such negotiations would be concluded successfully.[116] Moreover, common competition rules should be followed by the abolition of intra-block anti-dumping duties, replaced by the rules against predatory pricing contained in the Protocol.[117] Finally, Peña showed his dissatisfaction in relation to the institutional system negotiated in Fortaleza, which granted veto power to each Member State. The latter risked nullifying the effective application of the Protocol when national concerns of industrial policy were at stake.[118] The criticisms expressed by Peña reflect the official position of Argentina expressed in the proposal for review of the Fortaleza Protocol submitted by the Argentinean delegation to the Committee n.5.[119] The latter suggested that the CMC's Decisions 15/05 and 04/04 could be the necessary steps of transitions before the full entry into force of the Protocol.[120]

Brazilian authors have provided alternative explanations to the failure of the Fortaleza Protocol. For instance, Oliveira, former President of CADE in the second half of the 1990s, identified five factors which constituted an obstacle for entry into force of the Protocol:[121] the lack of competition culture among the enterprises operating within Mercosur; the slow decision-making process provided by the Protocol; the strong asymmetries existing in the development of competition law at the national level among the Mercosur Member States; the lack of a supra-national system of merger control; and finally, the existence of inter-governmental institutions in charge of enforcing the

---

[115] Argentina implemented the Decision 04/04 at the internal level on 18.8.2004, while Uruguay on 7.10.2005. On the other hand, so far no country has transposed the Decision 15/05. *Supra,* Lubambo de Melo 2007, Annex.

[116] Peña, 'Una Política de Competencia Económica en el Mercosur' (2001) 12 Boletin Latinoamericano de Competencia 3-26.

[117] Meeting of the author with Prof. Felix Peña on 1.7.2008 in Buenos Aires.

[118] *Supra,* Peña.

[119] *Supra,* CCM 36/06.

[120] *Ibid.*

[121] Oliveira, *Concorência. Panorama no Brásil e no Mundo*, Saraiva, São Paulo, 2001, pp 43-49.

Protocol.[122] In 2001, another Brazilian author, Tavares de Araujo, argued for the establishment of an *agenda minima* in this area. He asserted that the far-reaching supra-national competition rules provided by the Fortaleza Protocol should be replaced by a more modest bilateral cooperation agreement between Argentina and Brazil, following the example of the OECD Guidelines of 1995.[123] Finally, more recently Lubambo de Melo has followed a similar approach, proposing the introduction of competition law rules at the Mercosur level within three steps in the short, medium and long term.[124]

In conclusion, there is a shared consensus both in Brazil and in Argentina that the Fortaleza Protocol went too far. The CMC's Decisions 04/04 and 15/05 and the bilateral agreement between Brazil and Argentina constituted an answer to this claim. Nevertheless, this conclusion leads to another question: why have these mechanisms of cooperation proven to be unsuccessful for the moment? Why has the *agenda mínima* mentioned by Tavares de Araujo been unsuccessful? Why have neither Argentina nor Brazil ratified the bilateral agreement of 2003, while Argentina only implemented the CMC's Decision 04/04? These questions can be reconstituted into the more general question mentioned in the title of the paper: why does the bilateral cooperation between the competition authorities of the developing countries not work? This paper will try to answer this question by comparing the views expressed by the officers and the Commissioners of the Argentinean and of the Brazilian competition authorities interviewed by the author during the previous months.

In Brasilia, the general feeling is that the main obstacle to the cooperation with Argentina is the lack of independence of the CNDC from the Government. According to Patricia Agra, adviser of CADE President for the OECD and the Mercosur relations, 'each decision (of the Argentinean authorities) seems a governmental rather than a State decision'.[125] According to Agra, a bilateral cooperation between competition authorities can work only when there is a certain degree of 'confidence', which at the moment is lacking between Brazil and Argentina. The abovementioned authors emphasized that the cooperation between the competition authorities of Brazil and Argentina did not work because the objectives of the Fortaleza Protocol had been too ambitious and thus, an *agenda minima* was required. However, as emphasized in the previous sections, during the last years the difference in the development of the Argentinean and the Brazilian system of competition law has broadened. While the Brazilian competition authorities speeded up the time of merger review in order to focus its human resources on cartel investigations and showed independence from the executive branch in a number of sensitive cases, Argentina followed an opposite road.

---

[122] *Ibid.*

[123] Tavares de Araujo, 'Política de Concorrência no Mercosul: uma Agenda Mínima', in Chudnousky, Fanelli, *El Desafion de Integrarse para Crecer. Balances y Perspectivas del Mercosur en su primera Década,* Siglo Veintiuno de Argentina Editores, Buenos Aires, 2001, pp 145-160.

[124] *Supra,* Lubambo de Melo 2007.

[125] Meeting of the author with Patricia Agra, adviser of CADE President for the OECD and Mercosur relations, in Brasilia on 4.6.2008.

According to Ana Paula Martinez, head of the competition law division of the SDE, a cooperation agreement should serve as 'recognition of a cooperation which already exists'.[126] The existence of a cooperation agreement is an additional asset, which may smooth the cooperation thanks to a number of institutional arrangements (e.g. requiring the parties to meet a minimum number of times per year), but it cannot work if the Commissioners and the officers of the two authorities do not know each other and if there is no mutual confidence.[127] For instance, during the last year the SDE has provided technical assistance to *Fiscalía Nacional Económica* (FNE), the Chilean competition authority, in the field of cartels investigations.[128] In particular, the SDE organized a number of seminars in Santiago during 2007, in order to explain to the local authority the functioning of the Brazilian system of leniency for cartels. A training session was also organized by the SDE in July 2008 for a number of officers of the FNE. However, only in November 2008 the SDE signed a formal agreement of cooperation with the FNE.[129]

The paradox is that SDE provided technical assistance to the FNE before signing any cooperation agreement the authorities of Chile. At the same time, Article VIII of the bilateral agreement with the Argentinean authorities states that the Parties should provide technical assistance to each other, but as we know that provision has never been enforced. In conclusion, a bilateral agreement comes as a medium term step, rather than at the beginning of a partnership between two competition authorities. From this point of view, the agreement of 2003 and the CMC Decisions 04/04 and 15/05 seem to have been concluded before the establishment of any informal cooperation between the two authorities. This is why the *agenda minima* mentioned by Tavares Araujo has not been successful.

The Commissioners of the CNDC did not openly admit that the cooperation with Brazil does not work because there is no mutual confidence. They recognize the existence of informal contacts established with Brazilian colleagues during some events within international *fora*, such as the periodical meetings organized by OECD[130] and the

---

[126] Meeting of the author with Ana Paula Martinez, head of the competition law division of the SDE, in Brasilia on 2.6.2008.

[127] *Ibid*

[128] SDE's press release, Governo Brasileiro Capacita Agentes para Combate A Cartéis no Chile. Published on 8.8.2008. The text of the press release is available at: <http://www.mj.gov.br/sde/main.asp?View=%7BDF282882%2DD0CB%2D4D38%2D98C8%2D0EA6B037E370%7D&Team=&params=itemID=%7B16F13690%2DAE3D%2D4F73%2D95F7%2DD084FC969AB4%7D%3B&UIPartUID=%7B2218FAF9%2D5230%2D431C%2DA9E3%2DE780D3E67DFE%7D> (17.8.2008).

[129] *Ibid.*

[130] The OECD Committee for Competition Law and Policy organizes every year a Latin America Competition Forum and a Global Forum on Competition, where the representatives of the competition authorities of the non OECD Member States are invited to join. For further information see: <http://www.oecd.org/document/7/0,3343,en_2649_34535_31586695_1_1_1_37463,00.html> (17.8.2008) <http://www.oecd.org/document/28/0,3343,en_40382599_40393118_40424028_1_1_1_1,00.html> (17.8.2008).

ICN.[131] According to Povolo, one of the current CNDC Commissioners, the relationship with the Brazilian institutions 'es quasi una relación personal, más que institucional' ('it is almost a personal, rather than an institutional relation').[132] However, Mauricio Butera, former CNDC Commissioner, recognized that these contacts have never been crucial for solving a case investigated both in Brazil and in Argentina.[133] He did not remember any case when he picked up the phone to call an officer of one of the Brazilian competition authorities in order to discuss a case.

The meetings within the international conferences concerning competition law are often the only opportunity for the Commissioners of the authorities of the developing countries to establish contacts with their colleagues from other authorities. A shared opinion both in Brasilia and Buenos Aires was that the work of these international organizations should be evaluated more in terms of the personal contacts that these occasions allow to be established, rather than in terms of the harmonization of the national competition laws and regulations. However, these events may be useful to create mutual confidence only when a sufficient number of officers and Commissioners participate in these events, which is not always the case of Brazil and Argentina. In the case of Brazil, both CADE, SDE and SEAE participate in these *fora*, each one representing Brazil where a topic related to its field of activities is discussed.[134] For instance, the SDE and SEAE are now members of the ICN working group on cartels investigations.[135] On the other hand, CADE usually represents the three authorities in the *fora* where issues of general competition policy are discussed.[136] According to Art. 8 of the Law 8884/94, the external representation of CADE is assured by the President. As a consequence, it is always the President and some of the officers part of his/her Cabinet to participate in the meetings of the CT5 and in the majority of the events organized by the ICN and the OECD. As a consequence, the other Commissioners have fewer occasions to establish contacts with colleagues of foreign competition authorities.[137] For instance, at a meeting in Brasilia with Mr Furquim, one of the current CADE Commissioners, the latter recognized that 'as Commissioner, I do not have the same international experience as the President'.[138] If the CADE *Conselheiro-Relator* in charge of investigating an international cartel which was sanctioned in other jurisdictions wanted to ask for information from the foreign authority, he should ask

---

[131] Meeting of the author with Mauricio Butera, former CNDC Commissioner, in Buenos Aires on 8.5.2008.

[132] Meeting of the author with Diego Povolo, CNDC Commissioner, in Buenos Aires on 30.4.2008.

[133] *Supra,* meeting with Butera.

[134] Meeting of the author with Emmanuel Joppert Ragazzo, head of the competition law division of the SEAE, in Brasilia on 6.6.2008.

[135] http://www.internationalcompetitionnetwork.org/media/library/Cartels/ICN%20SG2%20Contact%20List.pdf (17.8.2008).

[136] For instance, Elisabeth Farina, CADE President until August 2008, has been part of the ICN Steering Group for the last year. <http://www.internationalcompetitionnetwork.org/index.php/en/about-icn/steering-group/members> (17.8.2008).

[137] Meeting of the author with Paulo Azevedo Furquim, CADE Commissioner, in Brasilia 5.6.2008.

[138] *Ibid.*

the Cabinet of the President for getting a contact with an officer of the foreign authority.[139] However, especially in the area of merger control that is often not the case, due to the time constraints.[140] CADE Commissioners often look at a copy of the decision on the web-site of the foreign authority, but they seldom contact personally the foreign officer who conducted the investigations.[141] This is true especially in the area of merger control, due to the time constraints that CADE/SDE/SEAE self-imposed during the last years to respect the time of review provided by the Law 8884/94.[142] In the case of SDE and SEAE, the heads of the competition law units usually establish international contacts during the OECD/ICN events that they attended. In the past, the latter have been exploited to coordinate their enforcement activities with other competition authorities in a number of investigations concerning international cartels.[143]

Similarly, in Argentina it is the President of the CNDC who is to represent the institution within the Committee n.5, while one of the Commissioners has usually followed the work of the OECD and ICN. Moreover, in the case of the CNDC the problem of the lack of international contacts is also increased by the lack of an officer with the competence to keep international relations with other authorities, due to the small size of the authority.[144] On the other hand, in CADE two officers in the Cabinet of the President are responsible for the ICN and for the OECD/Mercosur relations, though they also have to work on the cases of enforcement assigned to the President when he/she performs the task of *Conselheiro-Relator.*[145]

The conclusion reached after interviewing the officers and the Commissioners of the Argentinean and of the Brazilian competition authorities is that their bilateral cooperation does not work due to the lack of confidence from the Brazilian side in the objectiveness of the functioning of the Argentinean system. The previous pages showed that such fears are justified. Another reason which creates obstacles to the development of this partnership is the lack of personal contacts between the officers and Commissioners of the two authorities. This problem is not only caused by the lack of mutual confidence, but also by the fact that only a limited number of Commissioners participate in the events organized by international *fora*. The latter are recognized as the best place to establish international contacts, the first step to establishing confidence between different competition authorities and thus, the background condition for the

[139] *Supra,* meeting with Agra.

[140] *Supra,* meeting with Furquim.

[141] Meeting of the author with Murilo Otávio Lubambo de Melo, officer in the Cabinet of Commissioner Furlan, in Brasilia on 4.6.2008.

[142] Meeting of the author with Camila Safatle, senior officer in the merger control unit of the SDE, in Brasilia on 2.6.2008.

[143] *Supra,* meeting with Ana Paula Martinez

[144] The CNDC counts today on around 60 employees: 19 economists, 11 lawyers and 30 administrative officers. *Supra,* meeting with Povolo.

[145] *Supra,* meeting with Agra.

conclusion of a bilateral agreement of cooperation. In view of these conclusions, probably a *de minimis agenda* of cooperation, even less ambitious and more cautious than the *agenda minima* proposed by Tavares de Araujo, should be advised in the case of Brazil and Argentina. A bilateral agreement which provides for consultation, exchange of information and cooperation will never be enforced if the two authorities are at different levels of development, as in the case of Brazil and Argentina at the moment. As a consequence, a more realistic solution would probably be a shorter agreement, establishing the institutional framework necessary to organize joint seminars/workshops and for the exchange of officers between the Brazilian and the Argentinean institutions. In practice, an agreement is limited for the moment to providing technical assistance to the Argentinean authorities. Obviously, it is more difficult for a competition authority of a developing country, like the Brazilian ones, to provide technical assistance to a partner authority, due to the limited internal resources. However, the previous pages showed that at the moment Brazil has a great deal of knowledge to share with Argentina, such as in the field of the leniency and settlements for cartels. In particular, the competition authority of an emerging economy can show to a partner authority of another developing country how it overcame the hostile environment which usually characterizes the fight against cartels in these countries, where the judiciary, other bodies of the State administration and the entrepreneurs are often hostile to an effective enforcement of competition law. Moreover, SDE and the SEAE could show to the CNDC how to work autonomously in spite of their position within two Ministries. As mentioned above, the SDE is already providing technical assistance to the Chilean authorities, why not replicate the same experience with Argentina. Finally, the exchange of officers, at the moment non- existent, should be the cornerstone on which building that 'epistemic community' mentioned by Lubambo de Melo in his article as one of the short terms objectives before introducing competition law at the Mercosur level.[146] However, as we all know, technical assistance is not the solution to all the problems; without an internal development of the Argentinean system of competition law, cooperation with Brazil will not been possible.

CONCLUSIONS: LESSONS FOR OTHER DEVELOPING COUNTRIES

The case study focussed on two emerging economies which have two closely connected economies in terms of bilateral trade and cross-border acquisitions of companies. Moreover, like the majority of the developing countries, they have been enforcing a modern competition law for more than ten years. However, the competition authorities of Argentina and Brazil, in spite of a number of attempts at the Mercosur and at the bilateral level, still fail to cooperate with each other. The lessons drawn from this research may be of interest for the competition authorities of other emerging economies:

1) It is well known that the competition authorities of the developed countries are not used to cooperating with those ones of the developing countries, due to the fact

[146] *Supra,* LUBAMBO DE MELO M.O. 2007.

they do not trust them. However, the same is true between the competition authorities of different developing countries, which are at different stages of development of their national competition law.

2) One way to build such confidence is to encourage the personal contacts between the officers of the different authorities. International *fora*, such as the meetings organized by ICN and the OECD, are often the only opportunities for the officers of the authorities of the developing countries to meet their foreign colleagues. Participation in these meetings should be encouraged as much as possible, even if only from an observer point of view. However, a certain degree of turnover should be achieved, in relation to who attends these meetings. All the Commissioners should be encouraged to periodically participate to these meetings, in order to allow them to establish contacts with foreign colleagues. These contacts will be useful for solving multi-jurisdictional cases in the future.

3) Although one of the key problems of the competition authorities of the developing countries is the lack of human resources, one permanent officer should be in charge of dealing with international cooperation issues. The latter could become the reference point when foreign authorities try to establish a contact with that authority. In order to solve the problem of lack of human resources, the selected officer could split its working time between enforcement cases and international cooperation issues.

4) The technical cooperation between the competition authorities of developing countries is possible and it should be encouraged. Institutional problems related to the lack of independence from the executive, bad functioning of the judicial system, lack of human and financial resources are shared by all the competition authorities of the developing countries during the early stages of activity. The authorities which are at a more advanced level of development could show their experience to their partner authorities, taking into consideration these institutional problems, unknown by the authorities of the western countries.

5) The final conclusion is that any bilateral agreement between the competition authorities of the developing countries should be anticipated by a *de minimis* agenda with the objective of organizing workshops, conferences and exchange of officers. Only after a certain number of years, when the confidence and the personal links mentioned above are established and when the two authorities are at a comparable level of development, the two authorities will also be able to begin exchanging information. The national competition authority needs to meet some basic standards before significant international cooperation is likely to be acceptable to other countries. The body administering the competition rules will need to be impartial and free from external political pressures and corruption. It must also have the legal, human and financial resources to be able to effectively implement national competition law and fulfil its international obligations. The law must be applied promptly and without unnecessary expense. Complainants must be able to inexpensively make a complaint, feel that the complaint actually will be investigated.

Procedures must be fair and allow defendants to respond to all allegations and appeal against adverse decisions. The decision of courts and regulators must be transparent and reasoned and outcomes of cases must be reasonably predictable. The organization of workshops and conferences could strengthen the capabilities of the weakest competition authority in the partnership relationship. When the conditions mentioned above are met by both authorities, a bilateral agreement based on the OECD guidelines of 1995 will be concluded to institutionalize such partnership. Finally, the establishment of regional competition rules, such as the Fortaleza Protocol, should be a long term objective, once the bilateral cooperation has been consolidated.

ISSN 1745-638X (Online)

THE COMPETITION LAW REVIEW

Volume 5 Issue 2 pp 179-192 **July 2009**

Convergence in International Merger Control

*Jonathan Galloway**

A key consequence of the lack of any meaningful system of international competition law is that international mergers and acquisitions must comply with a plethora of national merger control regimes. In the absence of an international equivalent to the EU one-stop-shop, and in the context of globalised markets, merging parties must either notify the proposed transaction to each and every jurisdiction where the thresholds are satisfied, or engage in a risk assessment and only notify those jurisdictions that are most closely associated with the merger, and/or where the merging parties have 'assets on the ground'. Some sources suggest in excess of 70 jurisdictions have ex ante notification requirements, and most of those impose mandatory suspension pending review. Crucially, the triggering thresholds for notification vary and it is possible for merging parties to be legally obliged to notify the transaction even in the objective absence of a substantial nexus to the reviewing jurisdiction. There have been efforts to agree common principles in this area by the ICN and other international bodies, yet key points of divergence remain, which exacerbates the burden of compliance experienced by the merging parties. This article identifies some of the key 'unnecessary costs' that can be experienced by merging parties subject to multi-jurisdictional merger review and explores the extent to which international convergence efforts and case cooperation can benefit merging parties. In discussing international convergence, the article focuses more on procedural rather than substantive matters and also looks to the recently enacted merger control laws in China and India to determine whether internationally agreed best practices have been adhered to. The article also calls for a transparent debate between regulators, practitioners and academics as to the merits and demerits of multilateral cooperation in specific and appropriate cases, which does not take place at present in spite of the ever-increasing number of merger control regimes.

INTRODUCTION

Mergers and acquisitions have been diminishing in number and value since the height of the last merger wave,[1] but will likely be stimulated by consolidations in the wake of recent economic turmoil. Nonetheless, international M&A remain an important feature of global trade and they are phenomena that are presumptively viewed as beneficial and encouraged in market economies.[2] While inconsistent enforcement or conflict between

* Lecturer in Law, Newcastle University. Email: jonathan.galloway@newcastle.ac.uk.

1 According to figures sourced from Dealogic the value of global M&A in the first half of 2008 dropped by one third of the comparative figures from 2007, to $1,860 billion, see 'Value of M&A tumbles as buy-out boom ends', by Julie MacIntosh, *Financial Times*, June 26, 2008. Additionally analysts are now speaking of a 'material decline' in global M&A over the next 12 months, see 'M&A falls victim to sombre look', by Liba Saigol, *Financial Times*, July 13, 2008.

2 Former US Assistant Attorney General Thomas Barnett has stated that 'multijurisdictional mergers are an important part of global commerce.' May 31, 2007, at the Sixth Annual ICN Conference, Moscow.

competition authorities is infrequent (the 2001 *GE/Honeywell* case[3] remains the most-oft cited example), Barnett notes that 'as more and more jurisdictions become more deeply involved in merger review, however, the risk of divergence increases dramatically.'[4] There appears to be renewed concern about conflicting decisions among some practitioners in light of the new Chinese anti-monopoly law and the revised competition laws in India, that both regimes 'could delay or thwart high-profile cross-border mergers and acquisitions.'[5] The concern arises for many reasons including the cumulative effect of multi-jurisdictional review and the level of expertise and experience of administrative and judicial personnel,[6] but a more specific concern relates to the thresholds set by the new laws in both developing economic powerhouses. A recent Financial Times editorial has succinctly stated that 'if every country looks at every deal, then not only will the increased bureaucracy mean cost and delay, but the country with the toughest antitrust interpretation of a particular transaction will make a de facto decision for everybody else'.[7] There are at least 80 jurisdictions with some form of merger control,[8] and successful advocacy and training is gradually equipping these jurisdictions with the tools necessary for effective enforcement. Whilst high profile conflicts may seem unlikely, this article will highlight ongoing convergence and cooperation efforts that are necessary in order to minimise the burden on merging firms, with a particular focus on the benefit to be gained from procedural convergence. The success of procedural convergence can be quickly gauged by assessing the impact of best practice recommendations on the drafting of recent laws introduced in China and India, and for that reason both jurisdictions will also be discussed within this article.

A key concern of the business community regarding China and India relates to aspects of the mandatory *ex ante* review mechanism in both jurisdictions, *ex ante* review has

---

3 See Commission Decision in *General Electric/Honeywell*, Case No COMP/M.2220 [2004] O.J. L48/1. Discussion in E.M. Fox, 'Mergers in Global Markets: GE/Honeywell and the Future of Merger Control' (2002) 23 *University of Pennsylvania Law Review* 457; A. Burnside, 'GE, Honey, I Sunk The Merger' (2002) 23 *ECLR* 107. See also discussion in a speech by M. Delrahim, Deputy Assistant Attorney General, DOJ, 'Facing The Challenge of Globalization: Coordination and Cooperation Between Antitrust Enforcement Agencies of The US and EU', ABA Fall Meeting. Washington DC, October 22, 2004.

4 Op cit, n 2.

5 'Asian antitrust laws "threaten deals"' by Sundeep Tucker and Patti Waldmeir, *Financial Times*, July 27, 2008.

6 These concerns have increased in light the recent decision by China's Ministry of Commerce (Mofcom) to prohibit Coca Cola's $2.4 bn takeover of Huiyuan Juice, which some fear will result in strengthening protectionist tendencies. See 'Lawyers criticise Beijing bar of takeover', *Financial Times*, March 20, 2009 and 'Beijing's retort to Coke stirs fears of retaliation', *Financial Times*, March 26, 2009.

7 'Editorial: Antitrust explosion', *Financial Times*, July 28, 2008.

8 See R. Whish, *Competition Law*, (6th Ed, Oxford, OUP, 2009) at p 801. Other sources have comparable figures; the ICN suggested there were 75 merger control regimes in 2004, *Report on the Costs and Burdens of Multijurisdictional Merger Review* prepared by the ICN Mergers Working Group, Notification and Procedures Subgroup, November 2004 at p 4. Available from: <http://www.internationalcompetitionnetwork.org/media/archive0611/costburd.pdf>.

been adopted in at least 73 of the jurisdictions with merger control laws.[9] Specifically, the 'low' notification thresholds adopted in both countries have been controversial,[10] as well as the lengthy review period in India; the transaction is suspended for the 210 day review period expires or the Competition Commission of India (CCI) clears the deal.[11] These new laws could subject global M&A to further, unnecessary competition law scrutiny and delay, which is not a new concern for competition law practitioners, but is likely to exacerbate any undue burden or 'unnecessary costs' imposed on merging parties as a result of multi-jurisdictional merger review.

UNNECESSARY COSTS

Merging parties experience particular costs as a result of multi-jurisdictional merger review in terms of: working time devoted to gaining competition law approval; direct pecuniary costs incurred; and, the implications of the delay and legal uncertainty arising from the review process (i.e. costs resulting from lost merger synergies arising as a result of the delay, particularly relevant when jurisdictions prohibit 'closing' pending a completed merger review).[12] Costs associated with each of these will vary depending upon the stage of the merger review process. Costs tend to heighten at particular points in the process, such as at the actual point of submitting pre-merger notification, and, if a second phase merger investigation is initiated, requiring further information and market analysis from the parties by the competition authorities. The seminal Pricewaterhouse Coopers survey on the costs involved in multi-jurisdictional merger review ('the PWC survey'), suggested that the burden imposed upon firms represents 'a relatively small, [0.11%] regressive tax on mergers', and noted that 'while merger review costs do represent a substantial proportion of the overall costs of a merger, they do not amount to a significant tax on the overall value of deals.'[13] Nonetheless, as Rowley and Campbell have argued:

---

[9] Figure sourced from *Merger Notification Filing Fees: A Report of the International Competition Network* (April 2005) at p 2, available from <http://www.internationalcompetitionnetwork.org>.

[10] See Financial Times articles, op cit, n 5. Also see M. Lorenz, 'Legislative Comment: The new Chinese Competition Act' [2008] ECLR 257, and Freshfields Bruckhaus Deringer Briefing 'China publishes merger control notification thresholds' August 4, 2008, available at <http://www.freshfields.com/publications/pdfs/2008/aug05/23614.pdf>.

[11] Section 31(11) of the Indian Competition Law 2002, as amended. Note that the 210 day period vastly exceeds the ICN best practices guidance for a 30 day limit for the first stage of a merger review, with which many jurisdictions including China comply with. See 'Linklaters snaps up India's antitrust expert' by Sundeep Tucker, *Financial Times*, August 31, 2008. Also see the discussion in A. Bhattacharjea 'India's New Competition Law: A Comparative Assessment' (2008) 4/3 Journal of Competition Law and Economics 609, particularly at pp 634–635.

[12] See the Pricewaterhouse Coopers survey (commissioned by the International and American Bar Associations), *A tax on mergers? Surveying the time and costs to business of multi-jurisdictional merger reviews*, June 2003. PWC survey available at: <http://www.globalcompetitionforum.org/gcfpaper.htm>. Also see the ICN report on the costs and burdens of multi-jurisdictional merger review, op cit, n 8.

[13] Ibid, at p 42.

> 'Some officials and [practitioners] have focused on survey responses which indicated that merger review costs were a small fraction of deal value and that they have not deterred subsequent transactions. This misses the point: unnecessary inefficiency is a serious policy concern precisely because the costs are borne by businesses that have no alternative to avoid such regulatory processes.'[14]

The degree to which unduly interventionist merger control regimes deter M&A activity is debateable but leading competition law authorities, practitioners and academics have long recognised the need to reduce the undue burden, or 'unnecessary costs', that are associated with multi-jurisdictional merger review. In its November 2004 report, the ICN sought to build upon the PWC survey by identifying four categories of 'unnecessary costs' that merging firms encounter in multi-jurisdictional merger review:

> 'i) ascertaining notification and filing requirements;
>
> ii) complying with notification requirements for transactions lacking an appreciable nexus to the notified jurisdiction;
>
> iii) complying with unduly burdensome filing requirements; and
>
> iv) unnecessary delays in the merger filing and review process.'[15]

Competition authorities, practitioners and various international fora have sought to minimise unnecessary costs by working towards procedural convergence in merger control. The EC-US joint merger working group,[16] the OECD, the International Chamber of Commerce (ICC),[17] the so-called 'Merger Streamlining Group',[18] and, more recently, the ICN have all been active in seeking to facilitate greater convergence in merger control.[19] Their efforts have focused on identifying the potential for procedural over substantive convergence, due to the greater difficulty with the latter, which is often far more entrenched in policy choices and concerns regarding sovereignty. Procedural convergence is likely easier to facilitate and it can reduce the

---

[14] J.W. Rowley and A.N. Campbell, 'A Comment on the Estimated Costs of Multi-Jurisdictional Merger Reviews' (2003) September *The Antitrust Source* at p 3.

[15] ICN report on the costs and burdens of multi-jurisdictional merger review, op cit, n 8.

[16] The joint working group involving the EC Commission, the US Department of Justice and FTC has produced a set of best practices on cooperation in merger investigations, available at <http://www.usdoj.gov/atr/public/international/docs/200405.htm>.

[17] The business and industry advisory committee to the OECD (BIAC) and the International Chamber of Commerce (ICC) produced a Recommended Framework for Best Practices in International Merger Control Procedures on October 4, 2001, available at <http://www.biac.org/statements/comp/BIAC-ICCMergerPaper.pdf>.

[18] The group was funded by leading international companies and consisting of leading antitrust practitioners, produced a set of best practices for the review of international mergers in October 2001. See J.L. McDavid, P.A. Proger, M.J. Reynolds, J.W. Rowley & A.N. Campbell, 'Best practices for the review of international mergers', October 2001, available at <http://www.globalcompetitionforum.org/regions/n_america/canada/MergerSep21.pdf?id=323>.

[19] See discussion in J.J. Parisi, 'International Regulation of Mergers: More Convergence, Less Conflict' (2005-2006) 61 NYU Ann. Surv. Am. L. 509

number of jurisdictions scrutinising a merger as well as the delays and other compliance costs experienced by merging firms.

CONVERGENCE

Reducing the number of jurisdictions reviewing a proposed transaction to a level where fewer notifications are required is an obvious and particularly effective means of reducing the burden upon merging firms. As Hawk has stated:

> 'there is a proliferation of merger controls throughout the world. What is the problem? The problem is volume … The solution is volume control … the trick is minimizing all this volume of merger control and all these costs or somehow try to reduce the volume so that transactions that have little or no antitrust importance are screened out.'[20]

The means by which the international community has sought to reduce the 'problem of volume' is by seeking convergence on various elements of the merger notification procedure. The ICN appears to have consolidated and clarified the previous best practice recommendations as to: what is an appropriate jurisdictional nexus as a basis for notification; the clarity and transparency required of notification thresholds; timing requirements for notification; and, the amount of information required in initial notifications.[21] This work is aimed at addressing most of the 'unnecessary costs' previously identified by the ICN.

JURISDICTIONAL NEXUS

While there has been no attempt to provide a precise template for determining when a merger has a sufficiently proximate or 'material' nexus to the reviewing jurisdiction, the consensus is clearly that notification thresholds should require that mergers have a minimum 'local nexus' to the reviewing jurisdiction. A minimum level of sales or assets within the jurisdiction could establish such a local nexus, and the ICN recommendations suggest that the test should require at least two of the entities involved to satisfy a local nexus test. Regarding implementation, it is noteworthy that in a 2005 survey of 53 ICN member jurisdictions only 35 had a local nexus requirement within their notification thresholds.[22] Interestingly, both alternative notification thresholds set by the Chinese State Council for the Chinese Anti-monopoly Law require a local nexus, in the form of a turnover threshold, of at least two of the parties

[20] Barry E. Hawk, in an oral statement to the ICPAC Hearings, Washington DC, November 3, 1998. Transcripts of Committee Hearings are available from <http://www.usdoj.gov/atr/icpac/transcripts.htm>.

[21] See the ICN recommended practices for merger notification procedures, available at <http://www.internationalcompetitionnetwork.org>.

[22] ICN Report, 'Implementation of the ICN recommended practices for merger notification and review procedures', April 2005, at Annex B: Compliance with recommended practices, RP I: Nexus. Report available at: <http://www.internationalcompetitionnetwork.org>.

to the transaction.[23] While the amendments to the Indian Competition Law and the new mandatory notification thresholds do require a local nexus, based on either assets or turnover in India, the Act itself does not require a minimum local nexus of at least two parties to the transaction,[24] although apparently this has been addressed by the draft implementing regulations.[25]

CLARITY OF NOTIFICATION THRESHOLDS

Clarity and transparency of notification thresholds has often been highlighted as an issue that can reduce unnecessary costs, which can be achieved by avoiding opaque and subjective thresholds. The Merger Streamlining Group was at the forefront in stating 'market share (or other judgement-based) tests should not be used as the basis for pre-merger notification thresholds because they require up-front analyses of product and geographic markets which are time-consuming and uncertain.'[26] The ICN best practices and others have endorsed this position, although the majority of ICN members surveyed in 2005 responded that their merger notification thresholds used subjective criteria contrary to the ICN recommended practices, with 18 jurisdictions adopting a variant of a market share test.[27] Another consequence of recommending objective thresholds, is that local assets and/or sales thresholds, should be expressed in currency values and not other economic measures such as wage multiples.[28] Both Chinese and Indian notification requirements appear to be expressed in relatively clear, objective thresholds. Perhaps proving that the best practices and competition advocacy can influence the drafting of new competition laws, Freshfields notes of the new Chinese merger notification thresholds, 'as expected, the market share threshold that had previously been proposed as a third alternative test is not included in the final merger

---

[23] The first threshold is satisfied if the worldwide turnover of all parties exceeds c.$1.32 billion, as well as the turnover within China of each of at least two parties exceeds c.$52.6m in the previous financial year. The second threshold is satisfied if the combined turnover in China of all parties exceeds c.$263m, as well as the turnover of each of at least two parties exceeds c.$52.6m. Data sourced from Freshfields Briefing paper, op cit, n 10.

[24] See section 5 of the Indian Competition Act 2002, as amended. Available at: <http://www.cci.gov.in/images/media/competition_act/act2002.pdf>.

[25] See presentation to the ICN Annual Conference by V. Dhall, former Chairman of the CCI, April 13, 2008 available at <http://www.icn-kyoto.org/documents/materials2/Dhall/16Apr08.ppt#257>. The draft regulations state that each of at least two parties have c.$50m of assets in India, or c.$150m of turnover in India, as well as satisfying the other thresholds, before notification is required.

[26] Part I(4) of the MSG best practices, op cit, n 18.

[27] Op cit, n 22, at RP II: Notification thresholds/pre-notification guidance.

[28] The oft-cited example of a jurisdiction with merger notification thresholds that are partially expressed in terms of monthly wage multiples is Russia. Pre-merger notification is currently required to the Russian Federal Antimonopoly Service (FAS), when, inter alia, the total amount of assets involved in the merger exceeds 30 million times the Russian Federal monthly minimum wage (currently Rb100). For further information see the Global Competition Review Publication, 'Getting the Deal Through: Merger Control 2006' at chapter 39: Russia, as well as the ICN Russian merger notification and procedures template (July 2006), available at: <http://www.internationalcompetitionnetwork.org>.

control thresholds, in recognition that market share thresholds are, by nature, difficult to apply and as a result tend to create legal uncertainty.'[29]

TIMING

The issue of timing is crucial throughout the whole merger review process, particularly for the merging parties themselves, and this also applies at the pre-merger notification stage. Notifications tend to require the coordination of legal and commercial strategies designed to 'get the deal through.' Hence for merging firms and their counsel, the issue of notification timing, including notification triggers and any associated deadlines, is crucial and easily complicated by the burden of multiple notifications. There is a tension regarding notification triggers for while they ostensibly establish a point in the commercial M&A process from which merging firms must notify within a set time period, the triggers often act to prevent premature notifications. In essence, notification triggers balance the interests of legal certainty (which is furthered by early notification) with the need to ensure efficient and effective use of resources (flexible triggers may encourage notifications that are at very early stages of the commercial negotiation stage, with the obvious risk that a merger review is initiated while the deal collapses for commercial reasons). The ICN recommended practices suggest that parties 'should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction.'[30] A secondary issue regarding notification timing, is whether jurisdictions should impose deadlines for notification after the trigger point has occurred. Whilst there is the general and obvious point that deadlines should allow merging parties a 'reasonable time' for compiling the relevant information and submitting the notification, there is a consensus against the imposition of notification deadlines in jurisdictions that suspend the merger transaction pending merger review.[31] The ICN implementation survey highlights a wide divergence between the 53 respondents with regard to triggering events, with 10 jurisdictions requiring the parties to conclude a definitive agreement pre-notification. 12 jurisdictions allow notification upon evidence of a good faith intent to consummate the merger, and 13 jurisdictions have very flexible notification triggers.[32] While the Chinese AML is vague on the issue of notification triggers, India is likely to allow notifications on the basis of certification of a bona fide intent to merger/acquire control, but contrary to the best practices there is a 30 day filing deadline after stated notification triggers.[33]

---

[29] Op cit, n 8.

[30] ICN recommended practices, op cit, n 21, at III.A.

[31] Ibid, at III.B. The rationale is that in such situations there are sufficient incentives to ensure timely notifications and prevent parties from prolonging the review.

[32] Op cit, n 22, at RP III: Timing of Notification.

[33] See the Draft CCI (Combinations) Regulations, available at <http://www.cci.gov.in/images/media/Regulations/combination_0107008.pdf>. Also see presentation by V. Dhall, op cit, n 25.

REQUISITE FILING INFORMATION

The information requirements, or so-called 'form filing requirements', in a notification have been the subject of harmonisation efforts for many years, with various attempts to achieve consensus on the type and amount of information required by jurisdictions. There have been ambitious attempts to produce a common filing form, spurred on by recommendations in the influential OECD Whish/Wood Report in 1994.[34] Whilst recommending the creation of 'one or two model filing forms, which request common information in a single format, and which use different country annexes as appropriate',[35] the Whish/Wood Report highlighted some of the difficulties of such a task by stating 'the notification form and the timetable in themselves are a reflection of the substantive criteria by reference to which mergers are judged.'[36] Hence the implication is that harmonising procedural requirements, such as the information required in pre-merger notification, is often very difficult without accompanying harmonisation, or at least convergence of the substantive legal tests involved. The United Kingdom, France and Germany produced a voluntary common filing form in September 1997, to be used when a merger would be subject to review in two or more of the jurisdictions.[37] The OECD also produced a somewhat vague template notification form in February 1999,[38] although it failed to be implemented by its relatively homogenous membership. In spite of these apparent developments, common notification forms appear destined to failure unless they are built upon substantive convergence, and also receive the support of merging firms and their legal counsel, in the form of common usage. In the absence of substantive convergence, common filing forms are likely to require a level of information so as to satisfy the most onerous jurisdiction among the signatories. Furthermore, a common form may simply necessitate supplemental information to be provided to particular jurisdictions at the notification stage, following the submission of the common form. In the absence of substantive convergence, a common filing form simply masks diverging legal tests and requirements, and the incentive remains for merging parties to notify jurisdictions individually where less information may be required, and direct contact is more efficient.[39] A key objective of the best practices in this area is to minimise the notification burden for merging firms; jurisdictions should only require information in a

---

[34] R. Whish & D. Wood, *Merger cases in the real world – a study of merger control procedures* (Paris, OECD, 1994).

[35] Ibid, at p 108.

[36] Ibid, at p 109.

[37] See discussion in J.W. Rowley & A.N. Campbell 'Multi-jurisdictional merger review – is it time for a common form filing treaty?' at VI, in *Policy Directions for Global Merger Review, a Special Report by the Global Forum for Competition and Trade Policy*, published by the *Global Competition Review*, 1999. Also see the UK Office of Fair Trading guidance document, *Mergers: Procedural Guidance* (OFT 526), at paragraphs 3.26 and 4.30.

[38] *OECD Report on notification of transnational mergers* (DAFFE/CLP(99)2/FINAL), 24 February 1999, specifically the appendix which provides a 'framework for a notification and report form for concentrations'.

[39] In spite of apparent support among practitioners for a common notification filing form, many others have expressed strong concern about such a form in the absence of substantive convergence. See J.W. Rowley & A.N. Campbell, op cit, n 37. There is also a question over the efficacy of a common form if the proposed merger gives rise to different competition concerns in the different jurisdictions involved.

notification that is necessary to determine whether the proposed merger would pose serious competition concerns meriting a more detailed review. The ICN recommended practices also suggest alternative notification formats, depending on whether the transaction appears to represent 'material competition concerns',[40] this is a means of significantly minimising the notification burden for merging parties. Indeed the Form CO and Short Form used by DG Comp at the European Commission[41] exemplifies such an approach, although at least 17 ICN jurisdictions do not provide for such flexibility in notifications depending upon the anticipated level of competition law concern.[42] India has adopted Long and Short Form notifications,[43] but China's position is currently unclear as the AML or subsequent rules make no mention of the expedited/simplified procedure included in earlier drafts.

The value of these convergence efforts is surely beyond doubt, as former US Assistant Attorney General Barnett has stated:

> 'On merger enforcement, the adoption by multilateral organizations such as the OECD and the International Competition Network of best practices for merger notification regimes has helped convince many governments and agencies to reduce procedural burdens.'[44]

Beyond advocating convergence around key principles and procedural issues, the most obvious means for competition authorities to minimise the unnecessary costs borne by merging parties is to cooperate during concurrent merger reviews.

CASE COOPERATION

There are many examples of close cooperation between the EC Commission and the US Federal Trade Commission (FTC) or Department of Justice during concurrent merger review. Cases regularly involve cooperation on procedural matters such as synchronising the timing of the review and facilitating observers in each other's key hearings with the merging parties. Cooperation can even extend to substantive matters such as discussion of market definition and remedies, although the line between procedural and substantive cooperation is difficult to delineate and is less relevant in the context of practical cooperation relating to a particular case. The *Bayer/Aventis CropScience* case[45] is often cited by the FTC, where the European Commission and FTC had to closely cooperate on the remedies required to satisfy competition concerns, so as

---

[40] Op cit, n 21, V.B: Comment 2.

[41] See Annex I and II of Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No. 139/2004, OJ 2004, L133/1.

[42] ICN Implementation Report, op cit, n 22, at RP V: Requirements for Initial Notification.

[43] Op cit, n 33.

[44] Remarks by Thomas O. Barnett, former Assistant Attorney General, US Department of Justice, on February 29, 2008, Washington DC.

[45] See European Commission Press Release IP/02/570 'Commission clears Bayer's acquisition of Aventis Crop Science, subject to substantial divestitures', 17 April 2003. Commission Decision *Bayer/Aventis Crop Science* Case No.COMP/M.2547, OJ 2004, L107/1.

to avoid conflicting obligations being imposed upon the merging firms.[46] The *Sanofi-Synthélabo/Aventis* case[47] is a further example of very close cooperation between the European Commission and FTC involving multiple pharmaceutical markets with regional variations, ongoing clinical trials, complex intellectual property rights, and third party interests in the US. The merger was cleared by both authorities, but only after extensive investigations and cooperation on market definition and coordinated remedies. Both authorities had particular concerns regarding medicines used in the treatment of colorectal cancer and insomnia, although the investigations highlighted significant differences in the market for these medicines between the EC and US. In order to address competition concerns, Sanofi agreed to a number of divestitures to competitors, but the Commission and FTC had to work closely to ensure that the timing and substance of the divestitures were 'compatible'.[48] Cooperating on remedies is important for a variety of reasons. From a practical standpoint compatibility is crucial so that merging parties can satisfy the concerns of both jurisdictions at the same time. Equally, cooperation can lessen the burden of multiple divestitures on merging firms and can also facilitate an efficient approach to any post-merger monitoring by the respective authorities. The cooperation that regularly takes place between EC and US authorities sets a model for bilateral cooperation in international merger control that has few comparators, setting aside the cooperation possible within the European Competition Network (ECN) and EFTA due to the overarching political framework existing in Europe. Lesser degrees of cooperation have taken place between EC/US authorities and their Canadian counterparts, and there have also been occasional references to cooperation with Japanese, Australian and Mexican competition authorities. Mergers that prompt multi-jurisdictional merger review, resulting in concurrent investigations concerning the same or related markets do not automatically result in cooperation between competition authorities, neither does the existence of a bilateral cooperation agreement guarantee effective or detailed cooperation will take place. In order for cooperation between reviewing authorities, it appears necessary for the authorities to have confidence in each others' practices, to have built up a strong working relationship, and for cooperation in a particular case to be 'mutually beneficial.' The question of whether to engage in cooperation, and to what extent, appears to involve many subjective factors and is therefore difficult to precisely define or predict.

---

[46] See discussion in US submission to the OECD Working Party No.3 on Co-operation and Enforcement, entitled 'Roundtable discussion on cross-border remedies in merger review', 9 February 2005 (DAF/COMP/WP3/WD(2005)7), available at: <http://www.ftc.gov/bc/international/docs/compcomm/2005--Roundtable%20Discussion%20on%20Cross-Border.pdf>.

[47] European Commission Decision *Sanofi-Synthélabo/Aventis*, Case No.COMP/M.3354 (decision is in French). Commission Press Release 'Commission approves planned acquisition of Aventis by Sanofi-Synthélabo subject to conditions' (IP/04/545). *Sanofi-Synthélabo/Aventis*, FTC Press Release 'Resolving Anticompetitive Concerns, FTC Clears Sanofi-Synthélabo's Acquisition of Aventis', 28 July 2004, available at <http://www.ftc.gov/os/caselist/0410031/0410031.htm>. FTC Consent Order, Docket No.0410031, July 2004.

[48] See discussion in US submission to the OECD Working Party No.3, *op. cit.* note 45. Also see commentary in R. Tritell and E. Kraus, 'The Federal Trade Commission's International Antitrust Program' at p.4. FTC paper to the ABA Section of Antitrust Law Spring Meeting. Washington D.C., 18 April 2007.

Prima facie, multilateral cooperation in merger investigations is also possible (with the greatest likelihood being trilateral cooperation between the European Commission, US and Canadian authorities), and there are supporting statements, particularly from the FTC,[49] indicating cooperation with multiple international counterparts in particular cases. Nonetheless, extensive multilateral cooperation is perhaps unlikely to take place due to the lack of 'mutual benefit' in such situations. The additional market data and constructive comments received from the third, fourth and fifth (etc) counterpart authority involved in a concurrent merger review will be gradually less likely to justify the resources and effort required to achieve a good degree of multilateral cooperation. There may also be heightened risk of incurring delays and losing focus on the key competition concerns within a particular jurisdiction with multilateral cooperation. For these reasons, what may initially appear to be an example of multilateral cooperation might be more accurately described as a case involving multiple examples of bilateral cooperation.

The *Alcan/Pechiney II*[50] case has been highlighted during DoJ speeches as a more recent model for international cooperation in merger investigations,[51] and is an example of the distinction outlined above. In a press release the DoJ stated: 'The Department cooperated closely with the European Commission and the Canadian Competition Bureau (CCB) in its review of this transaction',[52] a view echoed by the CCB,[53] yet unusually the European Commission case documents do not mention cooperation with international counterparts.[54] Nonetheless, anecdotal evidence from practitioners suggests that the case was far from an exemplar for international cooperation, and this view would seem logical in light of the facts and the relevant markets involved in the respective investigations. The reviewing authorities likely coordinated on the timing of review if possible and engaged in preliminary discussions, but there is little evidence to suggest more extensive cooperation took place. Alcan and Pechiney produced aluminium, with products spanning a very wide range of markets. The European Commission and DoJ investigations identified distinct geographic markets of concern that also concerned different product markets. The focus of the EC investigation was

---

[49] See FTC press releases e.g. 20 April 2006 Press Release: 'FTC Requires Asset Divestitures Before Allowing Boston Scientific's $27 Billion Acquisition of Guidant Corporation', Boston Scientific/Guidant, FTC Consent Order, Docket no. C-4164, 21 July 2006.

[50] Commission Decision *Alcan/Pechiney (II)* Case No.COMP/M.3225 of 29 September 2003.

[51] US submission to the OECD Working Party No.3, op cit, n 46. Also see reference in a speech by J.B. McDonald, DAAG, 'Antitrust update: Trinko and Microsoft' to the Houston Bar Association, 8 April 2004.

[52] DOJ Press Release, 'Department of Justice will require a divestiture of Alcan Inc. to complete its pending tender offer for Pechiney SA', 29 September 2003. Available at: <http://www.usdoj.gov/atr/public/press_releases/2003/201302.htm>.

[53] Annual Report of the Commissioner of Competition for the year ending 31 March 2004 – Reviewing Mergers, available at: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1345&lg=e>. Canadian Competition Bureau Press Release: 'Alcan's Offer for Pechiney Cleared by the Competition Bureau', 14 October 2003.

[54] European Commission Press Release 'Commission clears Alcan takeover bid for Pechiney, subject to conditions' (IP/03/1309), Commission Decision, op cit, n 50.

threefold: firstly the worldwide market involving alumina refining technology and the IP rights of the respective parties in this market; secondly the flat rolled aluminium product market, particularly the sub-market for 'aluminium can end/tab stock'; and the related third market of particular concern was the sub-market for beverage and food can sheet.[55] The second and third markets were limited to the EEA and Switzerland.[56] The DoJ, however, was particularly concerned with brazing sheet, an aluminium alloy used in manufacturing radiators and parts of vehicle engines. The relevant geographic market in the US investigation was the North American market.[57] In order to resolve the competition concerns, different and unrelated remedies were also required by the EC and US. Clearly there was little need for close cooperation in *Alcan/Pechiney II* in light of the unrelated relevant markets. With regard to the merger investigation by the Canadian Competition Bureau (CCB), it is unclear whether the CCB had any significant concerns regarding the merger, and indeed acknowledged that there was no actual overlap between Pechiney and Alcan assets in Canada.[58] The primary focus of the CCB investigation would appear to be the North American brazing sheet market, as with the DoJ investigation. In closing its investigation, the CCB stated that the enforcement activities of the DOJ and European Commission resolved Canadian competition concerns in the case, and there was no need to take further action. The CCB essentially deferred to the enforcement activity of its international counterparts. Hence, in spite of initial indicators of close cooperation between the European Commission, DoJ and CCB in *Alcan/Pechiney II*, it appears unlikely that extensive cooperation in this case could have produced any significant benefit for the merging parties or the authorities involved, given the minimal overlap in the competition concerns. Therefore the case could probably not be accurately described as a strong example of trilateral cooperation. The timing issue is also important in assessing the extent of cooperation undertaken, and the decision of the CCB two weeks after the EC and DOJ press releases support the view that a deferential approach was adopted. There is no evidence of the CCB engaging in detailed cooperation with either the DOJ or European Commission, and no evidence of the EC or US authorities proactively trying to take account of CCB concerns when devising their own remedies. Other possible cases involving multiple cooperation include *Boston Scientific/Guidant,*[59] *Dow Chemical/Union Carbide*[60] and *Alcoa/Reynolds*[61] with the latter two involving three-way teleconferences

[55] Op cit, n 50.

[56] Op cit, n 50, at paras 66-68.

[57] See *United States* v. *Alcan & Pechiney*, complaint before the Washington D.C. District Court, Case No. 1:03CV02012, September 29, 2003. Available at <http://www.usdoj.gov/atr/cases/f201300/201303.htm>.

[58] Canadian Competition Bureau Press Release: 'Alcan's Offer for Pechiney Cleared by the Competition Bureau', October 14, 2003.

[59] CCB Press Release: 'International Remedies Resolve Canadian Issues in Boston Scientific, Guidant Merger', May 11, 2006. Also see European Commission Press Release of April 11, 2006 'Mergers: Commission clears, subject to conditions, takeovers of Guidant by Boston Scientific and of Guidant's vascular businesses by Abbott Laboratories' (IP/06/491). Commission Decision *Boston Scientific/Guidant* Case No. COMP/M.4076 of April 11, 2006.

[60] Commission Decision *Dow Chemical/Union Carbide* Case No.COMP/M.1671, OJ 2001, L245/1.

and meetings between the European Commission, CCB and FTC/DOJ respectively. The European Commission press release concerning *Alcoa/Reynolds* also notes some cooperation with the Australian Competition and Consumer Commission (ACCC), although the ACCC appears to have adopted a deferential approach in stating that undertakings offered to the EC and DoJ satisfied their concerns regarding the transaction.[62]

Close cooperation in concurrent merger review is clearly possible and regularly takes place but there also appears to be limited scope for entering into extensive cooperation on more than a bilateral basis for the reasons discussed above. Furthermore, while case cooperation involves the EC and US competition authorities, with notable examples of cases involving the Canadian and Australian authorities, there are very few clear examples of extensive cooperation beyond this small group of relatively homogenous, developed competition authorities (again excluding the ECN and EFTA). The difficulty of engaging in wider cooperation in multi-jurisdictional merger review appears to be in contrast to the closer cooperation that is being fostered between larger numbers of authorities in cartel investigations, yet wider cooperation in multi-jurisdiction merger review would appear to be one of the possible means of further reducing the unnecessary costs borne by merging parties.

CONCLUSION

International efforts to facilitate procedural convergence so as to reduce the unnecessary costs of multi-jurisdictional merger review have had both successes and notable failures. The new merger control regimes in China and India appear to be largely consistent with the ICN best practices on matters of principle, although the 210 day period for the CCI to issue its finding vastly exceeds the initial 30 day limits adopted in most developed merger control regimes. Nonetheless, the drafting processes adopted by China and India at least suggest that the additional burden upon merging parties from the development of new regimes will be managed with a degree of clarity and predictability. The burden on merging parties as a result of new regimes will increase but it can hardly be said to be imposing unnecessary costs at the fault of the new authority if it is consistent with international best practice. In spite of managing the unnecessary costs imposed by new merger control regimes, many current competition laws and authorities do not comply with established best practices. This is an essential first step to minimising unnecessary costs. The next step must be to establish clearer procedures and guidance on when cooperation should take place in multi-jurisdictional merger review, this is a task the ICN can easily work to, and it is necessary to minimise the subjectivity of the process. There are clear benefits to engaging in extensive

---

61 European Commission Press Release 'Commission clears merger between Alcoa and Reynolds Metals, under conditions' (IP/00/424). European Commission Decision *Alcoa/Reynolds*, Case No.COMP/M.1693. See discussion in speech by D. Burlone, Assistant Deputy Commissioner, CCB, 'Canada and the internationalization of competition policy', to the Canadian Bar Association, September 21, 2000.

62 ACCC Press Release 'ACCC not to intervene in ALCOA/Reynolds Metals merger', May 4, 2000, available at <http://www.accc.gov.au/content/index.phtml/itemId/323061>.

cooperation for the authorities and the parties, in appropriate cases, yet very little public discussion of the circumstances when cooperation is appropriate. Competition law authorities can effectively enforce merger control laws and conduct merger reviews without cooperating with other authorities, due to extraterritoriality and mandatory notification requirements, and so it becomes even more important to engage in advocacy and encourage 'soft law' convergence to minimise unnecessary costs. Competition law authorities need to be persuaded of the need to engage in greater cooperation.[63]

In addition to clear guidance on 'triggers' for multi-jurisdictional cooperation there is a need for a transparent debate among antitrust authorities, NGOs and other interested parties on the merits and demerits of engaging in multilateral cooperation in specific merger cases. Multilateral cooperation may be infeasible for practical reasons, but could benefit merging parties and reduce unnecessary costs.

[63] See discussion in A. Ezrachi, 'The Role of Voluntary Frameworks in Multinational Cooperation over Merger Control' (2004) 36 Geo. Wash. Int'l L. Rev. 433 at 438.

ISSN 1745-638X (Online)

THE COMPETITION LAW REVIEW

Volume 5 Issue 2 pp 193-213 **July 2009**

Competition Law and the International Transport Sectors

*Sock-Yong Phang**

This article charts the evolving regulation of cooperation and coordination between international transport firms, in particular those operating within the liner shipping and international air transport sectors. There has been a long history of exemption of these sectors from the rules and regulations of antitrust or competition law. In the past three decades, regulatory reforms and privatization have, however, subjected these sectors to competitive forces that have transformed these industries. With the introduction of competition law in many jurisdictions, the justifications for their continued exemption have come under intense scrutiny. In the late 1970s, the US initiated deregulation of its domestic airline sector and introduced reforms in the regulation of liner shipping which resulted in greater competition and lower prices. In 2006, the EU adopted a tougher stance by becoming the first jurisdiction to remove exemption for IATA passenger tariff conferences from 2007 and for liner shipping conferences from 2008. While arguments for the benefits of competition can be generally made, the lack of harmonization of competition laws together with the international nature of these sectors (which are further complicated by high concentration, network characteristics, and government sanctioned barriers to entry) continue to present challenges for competition authorities.

1. INTRODUCTION

The international liner shipping and airline sectors are foundational pillars for global trade flows and passenger movements. Arising from their perceived strategic importance to a nation's trade and security, there has been a long history of exemption of these sectors from the rules and regulations of antitrust or competition law. In the past three decades, regulatory reforms and privatization have, however, subjected these sectors to competitive forces that have transformed the structure of these industries. With the introduction of competition law in many jurisdictions,[1] the justifications for their continued exemption have come under intense scrutiny. The international nature of these sectors and the dependence of countries on the services of foreign fleets and airlines have constrained national competition authorities from implementing policies that depart from the norm set by the major economic powers, in particular, the US and EU.

* Professor of Economics, Singapore Management University and Commission Member, Competition Commission of Singapore. The views expressed here are personal and do not reflect those of the Commission.

[1] In 2008, the International Competition Network (ICN) has a membership of 102 competition agencies from 91 countries. The list of members can be found at the ICN website at: <http://www.internationalcompetitionnetwork.org/>.

This article presents the historical arguments both for as well as against the exemption of these sectors and the practices adopted. It then discusses the current state of competition policy in these two sectors, focusing, in particular, on the landmark change in EC policy for liner conferences from October 2008. While arguments for the benefits of competition can be generally made, the lack of harmonization of competition laws together with the international nature of these sectors (which are often further complicated by high concentration, network characteristics, and government sanctioned barriers to entry) continue to present challenges for competition authorities.

The subject matter of this article involves both law and economic policy and serves as a good reminder, once again, that competition law is best understood when viewed in its extralegal historical as well as economic contexts. This is especially important in the context of the international transport sectors where we find strong interaction between market developments and economic policies on the one hand and the gradual development of competition laws on the other.

Let us turn now to the first of these sectors*, viz.*, liner shipping.

2. LINER SHIPPING

2.1. 1875 – 1998: A Century of Antitrust Immunity

Liner shipping is distinct from tramp shipping in that liners publish a freight tariff, operate on scheduled routes and leave at scheduled times. The formal history of liner shipping cartels dates from 1875, the opening year of the Calcutta Conference[2] and thereafter the practice rapidly spread to most of the main world trade routes. These cartels have been variously known as liner conferences, shipping conferences, and ocean shipping conferences. A conference is essentially an association of shipping lines, all travelling the same route and in the same direction; members explicitly and formally agree to common prices, a set schedule, and renegotiation and dispute settlement procedures. An agreement establishing a conference may include pooling profits or revenues, managing capacity, allocating routes, and offering loyalty discounts.[3]

The beginnings of liner conferences in the nineteenth century have been attributed to the advent of fast steamships which brought a considerable amount of instability into the liner shipping sector which was then dominated by obsolescent sailing ships. Fast steamships also increased the predictability of sailing times, which made coordination possible. The over-supply of capacity resulted in sharp rate drops which motivated

---

[2] More detailed information relating to the historical origins of shipping conferences may be found in Morton, 'Entry and Predation: British Shipping Cartels 1879-1929' (1997) 6(4) Journal of Economics and Management Strategy 679. Morton studies a small sample of price wars initiated by shipping cartels at the turn of the 20th century and uses the characteristics of the entrants that are fought to evaluate several theories of predation. He finds support for the 'long purse' theory of predation as 'weaker' entrants are more likely to be fought.

[3] See Sjostrom 'Ocean shipping cartels: a survey' (2004) 3(2) Review of Network Economics 107.

British shipping lines, the dominant players at that time, to opt for formal agreements amongst themselves to limit capacity and fix rates.[4] These shipping conferences were subsequently given sanction by the British courts in 1889 (and the House of Lords in 1892) when they held in a predatory pricing case that the law did not prohibit cartel agreements.[5]

In the United States, with the passage of the Sherman Act in 1890, federal courts frequently found conference conduct illegal. A major government investigation at the turn of the 20th century recommended that conferences be tolerated but subject to government oversight.[6] Shortly after, the US Congress passed the Shipping Act of 1916 which exempted the US international liner shipping industry from federal antitrust.[7] However, the Act required conferences in the US foreign trades to be 'open' and not to restrict entry and exit of any shipping company.

In the rest of the world, conferences have historically gone completely unregulated. Despite Canada's Competition Act of 1889 (the oldest antitrust statute in the world), it was not until 1970 that the *Shipping Conferences Exemption Act,* which followed a similar model to the US legislation, was passed.[8] Conferences continued to enjoy immunity from competition regulations even as new competition regimes were established. According to a recent OECD report, there were around 150 liner conferences worldwide in 2002, with membership ranging from two to as many as 40 separate lines.[9]

Besides liner conferences, there exist other forms of operational cooperation between shipping lines. Consortia agreements began at the end of the 1960s with the start of container services. Consortia agreements are aimed primarily at sharing fixed costs on a maritime route through various technical, operational or commercial arrangements such as joint use of vessels, port installations, marketing organizations, etc. These cooperative agreements were motivated by the need for high levels of capital

---

4 See OECD, Competition Policy in Liner Shipping, Final Report, 16 April 2002, at Sections 2.4 and 2.5. The report is available at the OECD website: <http://www.oecd.org>.

5 In the seminal English decision of *Mogul Steamship Co v McGregor, Gow, and Co*, both the Court of Appeal (in (1889) 23 QBD 598) and the House of Lords (in (1892) AC 25) held that a number of shipowners who formed a cartel which offered artificially low charges for the carriage of tea from certain Chinese ports with the aim of driving out of business other shipowners who were competing with them were not liable to those other shipowners when they succeeded in their aim; see, generally McBride, 'The Classification of Obligations and Legal Education', in Birks (ed.), *The Classification of Obligations*, London, Society of Public Teachers of Law, Oxford University Press, 1997, at p 85.

6 See Report of the Committee on the Merchant Marine and Fisheries on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade, H.R. Doc. No. 805, 63d Cong., 2d Sess., at 415 (1914), routinely referred to as the 'Alexander Report' after the chair of the committee, Rep Joshua Alexander.

7 See Sagers, 'The Demise of Regulation in Ocean Shipping: A Study in the Evolution of Competition Policy and the Predictive Power of Microeconomics' (2006) 39(3) Vanderbilt Journal of Transnational Law 779.

8 See Heaver, 'The Shipping Conferences Exemption Act: Review and Suggestions of Positions Appropriate for the Panel' (2001), paper commissioned by the Canada Transportation Act Review Panel.

9 See OECD, op cit, n 4, at p 19.

investment in new vessels, containers and port facilities. Unlike conferences, they do not contain price-fixing provisions and generally involve lower market shares than conferences. Members of a consortium may be independent lines or they may be members of the same conference. It is widely recognized that consortia agreements lead to cost reductions derived from risk sharing and economies of scale. [10]

Discussion or talking agreements emerged in the 1980s when conferences were unable to convince independent liners to join them. They facilitate exchange of information about freight rates, costs, capacity and conditions of service on a particular trade route, on non-binding terms. These agreements exist mainly in the US and Australia trade routes. In periods of scarce demand, competition may be limited by agreements between conference and non-conference liners such as Capacity Stabilization agreements (binding) and Discussion Agreements (which are non binding), by which liners attempt to control the supply capacity and the level of rates.[11]

In the mid-1990s, the liner industry underwent another period of restructuring arising from the formation of global strategic alliances amongst leading container carriers. Unlike the route specific nature of previous agreements, these alliances represent a new level of cooperation over major route networks. Theoretically, members are not involved in price setting (as this takes place within conferences) but in the rationalization of their services on a global basis and optimization of each carrier's assets through schemes such as sharing of vessels, ports, charters, terminals, joint scheduling and where permitted, coordination of inland services.[12] The establishment of alliances was motivated by the rapid globalization of world trade and investments and the resulting unprecedented levels of demand for world-wide services, supply chain management and the provision of logistics value added services.[13]

The usual arguments for the long standing exemption of these collusive activities in the shipping sector are summarized below.[14]

(i) The structure of the liner industry predisposes it to decreasing short run marginal costs. Consequently, a free market may result in destructive competition, which undermines the basic characteristics of the liner service, such as frequency and

---

[10] See OECD, op cit, n 4, at Section 2.7.

[11] See Benacchio, Ferrari and Musso, 'The liner shipping industry and EU competition rules' (2007) 14 Transport Policy 1.

[12] 1996 witnessed the formation of four large strategic alliances: Global Alliance, Grand Alliance, Maersk/Sealand, and Hanjin/Tricon. Membership of alliances in the initial years was characterized by a high level of instability according to a study by Midoro and Pitto, 'A critical evaluation of strategic alliances in liner shipping' (2000) 27(1) Maritime Policy and Management 31.

[13] A study of the changes in the container shipping industry as a result of strategic alliances is to be found in Slack, Comtois, and McCalla, 'Strategic alliances in the container shipping industry: a global perspective' (2002) 29 (1) Maritime Policy and Management 65.

[14] Ryoo and Lee, 'The role of liner shipping co-operation in business strategy and the impact of the financial crisis on Korean liner shipping companies', in Grammenos (ed.), *The Handbook of Maritime Economics and Business*, London, LLP, 2002, provides a list of arguments often advanced by carriers to justify exemption of the sector.

reliability of schedules, and the certainty that services will be provided ahead of demand. This argument represents the economic foundation for rate fixing, yet it implies that in order to stabilize rates, conferences will charge rates in line with the average cost of their less efficient members.

(ii) The standard investment for each ship has increased over time in order to exploit the economies of scale so that only large shipping lines can bear the financial burden of new ships.

(iii) There are substantial imbalances in traffic flows on the different routes served by liners in nearly all markets, resulting in voyages made with part of the ship's capacity used to carry ballast.

Other arguments include:[15]

(i) The theory of the empty core, that is, a natural market equilibrium does not exist. This is a characteristic of markets where few competitors generate supra-normal profits for the incumbents which then attracts entry and frenzied competition and results in losses for all the market participants. Consequently, exit and solidification of market shares by the remaining competitors once again attracts entry.

(ii) Containerization and the development of the hub-and–spoke structure have encouraged further mergers and alliances. Conferences remain a sort of bulwark in defense of a certain degree of competition within the market.

(iii) Inelastic demand in the short run.

(iv) The important role of liner shipping in the development of international commerce and economic development.

Carriers were generally successful in pushing these arguments until the 1980s. In 1984, the US Shipping Act was passed to clarify the boundaries of antitrust immunity. The legislation subjected all liner agreements to oversight from the Federal Maritime Commission as to the agreement's conformity with the public interest.[16] For the first time, ocean common carriers were permitted to enter into service contracts with shippers. The 1984 act allowed carriers to legally offer discounted rates so long as these were made public and communicated to other conference carriers. The effect was to make freight rates for service contracts transparent to all carriers as well as shippers. However, after passage of the Act, conferences either refused to allow their members to enter individually into service contracts, or they quickly withdrew that right after witnessing dramatic falls in freight rates. Not unexpectedly, independent carriers were aggressive in offering service contracts.[17]

---

[15] As presented by Benacchio et al, op cit, n 11, and Sjostrom, op cit, n 3.

[16] Reitzes and Sheran, 'Rolling seas in liner shipping' (2002) 20 Review of Industrial Organization 51.

[17] Ibid.

2.2.1. 1986 and 1995 EU block exemptions

The EU in 1986 allowed liner conferences a block exemption from antitrust legislation. Council Regulation (EEC) 4056/86 which came into force on 1st July 1987 ended years of speculation and uncertainty about whether Articles 81 and 82 EC Treaty applied to the liner conferences. This block exemption has often been called the most generous exemption ever given as it covered traditional hard-core restrictions and furthermore did not contain a review clause and was to remain in force for an unlimited period of time.[18]

Unlike other competition regimes that do not distinguish between different types of liner shipping agreements in granting immunity from competition law, the EC makes a distinction between liner conferences and liner consortia. First adopted in 1995, the consortia exemption sunsets every five years.[19] It was extended in 2000 in Regulation 823/2000 and again in 2005 and provides automatic exemption for joint service agreements that exclude price fixing.[20] It also sets a market share threshold of less than 30% (35% in the case of non-conference consortia) to qualify for exemption. The formation of consortia with market shares between 30% (35% in the case of non-conference consortia) and 50% must be notified to the Commission. Unlike the EU, the US does not distinguish between different types of agreements in its regulation of shipping. Canada requires conference agreements to be filed and does not regulate consortia agreements.[21] Significant differences thus exist in liner shipping regulation and institutional mechanisms in different jurisdictions. [22]

The adoption of the block exemptions in the EU was followed by a long period of conflicts over the interpretation of the regulations. During the 1990s, the Commission made a number of decisions that clarified the scope of the exemptions which were subsequently upheld by the Court of First Instance (CFI). The decisions include prohibiting: (i) inland haulage collective price fixing for the inland leg of multi-modal transport operations;[23] (ii) conference prohibitions on member companies entering into

---

[18] OJ 1986 L378/4 Council Regulation (EEC) No. 4056/86 laid down detailed rules for the application of Articles 81 and 82 of the Treaty to maritime transport: see Benacchio, et al, op cit, n 11 and Pozdnakova, *Liner Shipping and Competition Law*, The Netherlands, Kluwer Law International, 2008, at Section 9.2.

[19] Commission Regulation 870/95 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ 1995 L89/7: see OECD, op cit, n 4, at p 26 and Benacchio, et al, op cit, n 11.

[20] OJ 2000 L100/24 Commission Regulation (EC) No. 823/2000 expired on 25 April 2005 and was amended by OJ 2005 L101/10 Commission Regulation (EC) No. 611/2005.

[21] Heaver, op cit, n 8, at p 12.

[22] In Australia, Canada, Japan, New Zealand, and the United States, consortia agreements are entitled to immunity from anti-trust law, without reference to whether the agreement provides that ship operators should operate under uniform or common freight rates (OECD, op cit, n 4, at p 25).

[23] The Commission objected to inland haulage tariff fixing in two 1994 cases involving the Trans-Atlantic Agreement (TAA) and the Far East Freight Conference (FEFC) and in the 1998 Trans-Atlantic Conference Agreement (TACA): OJ 1994 L376/1, OJ 1994 L378/17, and OJ 1999 L95/1, respectively. The Commission's decisions were upheld by the Court of First Instance in three judgments issued on the same day 28.2.2002 (Case T86/95 *Campagnie Generale Maritime and others v Commission* [2002] ECR II-1011, better

individual contracts; (iii) restrictive clauses applied to individual service contracts; and, (iv) the fixing of ancillary charges such as freight forwarders commissions.[24] In November 2002, following the CFI confirmation of its earlier decisions, the Commission granted an individual exemption for the revised Trans-Atlantic Conference Agreement after it held that provisions in the agreement regarding service contracts and multi-carrier service contracts to be outside the scope of the block exemption.[25] The decision came after members agreed to make substantial concessions, and in the words of the then European Commissioner for Competition Policy, 'only because of circumstances peculiar to the market on which the Revised TACA operates'.[26]

2.2 1999 - 2008: The Gradual Demise of Liner Conferences

2.2.1. The US Ocean Shipping Reform Act

In 1998, the US passed the Ocean Shipping Reform Act (OSRA) which continued to grant immunity to all types of liner conference agreements but stipulated a list of permissions/conditions which served to undermine successful collusion, hence limiting the extent of anti-competitive behaviour. The list includes: (i) shippers and carriers may negotiate confidential service agreements and keep the terms of the contracts safe from other carriers and shippers; (ii) conference tariffs still had to be published; and, (iii) allowing independent rate action for carriers to cover multiple trade lanes, making it easier for larger shippers to do 'one-stop shopping'. Allowing independent rate action across multiple trade lanes dealt a further blow to conferences organized on the basis of individual trade lanes. The OSRA by eliminating tariff filing requirements also effectively eliminated FMC's role of enforcing tariff rates. In essence, the OSRA 'transformed ocean shipping in the US from the concept of "common carriage" to "contract carriage" whereby tariff filing with federal authorities and strict enforcement of these tariffs have been replaced by confidential contracts between shippers and carriers'.[27]

---

known as the *FEFC* case; Case T395/94 *Atlantic Container Line & others v Commission* [2002] ECR II-875, better known as the *TAA* case; and Case T18/97 *Atlantic Container Line & others v Commission* [2002] ECR II-1125, the *TACA Immunity* case).

[24] The 1998 Commission decision on *TACA*, ibid, was wide ranging in scope and dealt with fixing of freight forwarder commissions, conference restrictions on member companies entering into individual contracts, restrictive clauses applied to individual service contracts, and inducing competitors to join the conference (Benacchio, et al, op cit, n 11).

[25] The individual exemption, cleared in November 2003, replaced the agreement prohibited by the Commission in 1998: see Revised TACA, OJ 2003, L26/53. See also Marlow and Nair, 'Service Contracts – An instrument of international logistics supply chain: Under United States and European Union regulatory frameworks' (2008) 32 Marine Policy 489.

[26] Monti, 'A time for change? – Maritime competition policy at the crossroads', speech to the European Shipper's Council by then European Commissioner for Competition Policy, Antwerp, 12 June 2003.

[27] As succinctly described in 'Shipping Conferences Exemption Act, 1989, Consultation Paper', July 1999, Transport Canada Policy Group, Canada.

By reducing the transparency of freight rates and giving conference members independent contracting rights, the Act increased cartel enforcement costs. The US shipping market was effectively freed, except for the fact that carriers are still not subject to antitrust – they may share price information, agree to non-binding guidelines for rates and terms of service, adopt common non-binding tariffs, and so on. There have been several efforts since 1999 to do away with US conference antitrust exemption entirely.[28]

Since 1 May 1999, the day that OSRA became effective, the following impacts have been observed:

(i) There has been 'upheaval in liner conferences' – several conferences operating US trade routes have disbanded. While 32 conference agreements were in effect in 1997, the number had dwindled to 22 by May 2000. Conferences that remained lost significant membership.[29]

(ii) There has been an increase in the number of discussion agreements involving conference carriers and independent carriers.

(iii) The use of confidential service contracts increased dramatically. The FMC reported that between 1 May 1999 and 30 June 1999, 15,000 service contracts were signed in comparison with 3,400 in the same period of the prior year.[30]

(iv) Many conferences stopped issuing joint service contracts – only four conference service contracts remained in effect in May 2000, as compared with over 400 a year earlier.[31]

(v) Price discrimination increased.

(vi) There has been consolidation of shipping lines through mergers and acquisition.

(vii) Data published on the website of Containerization International showed an increasing gap between westbound and eastbound freight rates in the transatlantic and transpacific routes from 1999. From approximate parity in 1999, average eastbound (US-Europe) freight rates were approximately 80% below average westbound (Europe-US) rates on the transatlantic route by 2005. Average westbound (US-Asia) rates were halved average eastbound (Asia-US) rates on the transpacific route by 2005. While a part of the rate imbalance is due to trade patterns, US exports/shippers have undoubtedly benefited from a large reduction in freight rates as a consequence of the OSRA.[32]

---

[28] Sagers, op cit, n 7, reviews the US deregulation of the liner shipping sector and concludes that the experience suggests that liner markets can perform well under normal price competition, contrary to long-standing claims from the industry and some academics.

[29] Statistics from the Federal Maritime Commission as reported by Reitzes and Sheran, op cit, n 16.

[30] As reported by Reitzes and Sheran, op cit, n 16.

[31] Ibid.

[32] See Benacchia et al, op cit, n 11, for graphs of the trends in freight rates.

2.2.2. 2006 EU repeals block exemption for liner shipping conferences

The effects of the 1998 US reform of ocean shipping practices were closely monitored across the Atlantic. In March 2003, following an OECD report[33] which severely criticized the need for conferences to have antitrust exemption, the EU competition commission decided to re-examine Regulation 4056/86. The Commission adopted a three stage approach: the first being a consultation paper in March 2003,[34] followed by a White Paper published in October 2004,[35] and thereafter, a legislative proposal for a Council regulation to repeal the conference exemption on 14 December 2005.[36] The proposal to repeal the block exemption was thus the result of a thorough three year long process of consultation, review and studies. The Commission findings were that the exemption did not fulfil the four cumulative conditions of Article 81(3) which were necessary for it to continue, these being:[37]

(i) concrete benefits resulting from price fixing and capacity regulation are identified;

(ii) a fair share of the proved benefits are passed on to consumers;

(iii) the indispensability of price fixing and capacity regulation for the provision of reliable services; and

(iv) competition is not eliminated on a substantial part of the market.

Instead, the Commission's review process found:[38]

(i) no causal link between price fixing and reliable liner services as conferences are not able to enforce the conference tariff nor do they manage the capacity available. However, the conference tariff still acts as the benchmark which impacts on the negotiation of individual contracts. Of greater concern was the joint fixing of charges and surcharges (on average 30% of the price of transport) where there is no competition between conference members as well as non-conference members.

---

[33] See OECD, op cit, n 4. The OECD report recommended that member countries seriously consider removing antitrust exemptions for price fixing and rate discussions. Exemptions for other operational arrangements may be retained so long as these do not result in excessive market power.

[34] See Commission, 'Consultation Paper on the review of Council Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 81 and 82 of the Treaty to maritime transport', 27 March 2003. Available at DG Competition website, section Maritime Transport under 'Antitrust – Legislation': <http://ec.europa.eu/competition/antitrust/legislation/maritime/>.

[35] See Commission, 'White Paper on the review of Regulation 4056/86, applying the EC competition rules to maritime transport', COM (2004) 675 final. Available at DG Competition website, ibid.

[36] See Commission, 'Proposal for a Council Regulation repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services', COM (2005) 651 final. Available at DG Competition website, ibid.

[37] See "Impact Assessment", Annex to the Commission Proposal, ibid. Also Evans, 'The future regulatory framework for liner shipping', speech at 8th Global Liner Shipping Conference, London, 27th April 2006; and Benacchia et al, op cit, n 11.

[38] Ibid.

(ii) transport users have opposed the conference system which they do not consider to deliver adequate services.

(iii) reliable scheduled liner services are provided in several ways.

(iv) given the extent of relationships between carriers in conferences, consortia, alliances and vessel sharing agreements, determining the extent to which a conference is subject to outside competition is a complex analysis that must be carried out on a case by case basis. However, the Commission noted that all carriers operating on the same trade tend to apply the same charges and surcharges.

The Commission also assessed the expected impact of the repeal on the basis of independent consultancy reports and concluded that it would lead to a moderate drop in ocean transport prices and considerable reductions in charges and surcharges. It also expected service quality and innovation to be improved.[39]

The European Parliament subsequently issued a report in July 2006 and on 25 September 2006, the Competitiveness Council agreed to repeal Council Regulation 4056/86. The repeal of the block exemption makes the EU the first jurisdiction to put an end to the possibility for liner carriers to meet in conferences, fix prices and regulate capacities with effect from October 2008 (Council Regulation 1419/2006 of 25 September 2006 repealing Regulation (EEC) 4056/86).[40] In July 2008, the Commission published guidelines on the application of Article 81 of the EC Treaty to maritime transport services.[41] Regulation 823/2000 on maritime consortia which has been extended until 2010 is not affected by the repeal and liner carriers will continue to be allowed to offer joint services.

2.3 THE FUTURE: EFFECTS OF THE EU REPEAL FROM OCTOBER 2008

With the EU repeal of the block exemption for liner conferences from October 2008, two questions are raised here with regard to the future: (i) the likely market effects, and (ii) expected changes in regulatory regimes in other jurisdictions.

2.3.1. What will be the market effects of the EU repeal?

The commission has predicted that with newfound competition, prices will decline and 'service quality will either be unaffected or will improve'.[42] Professor Haralambides of Erasmus University has, however, continued to push the traditional argument that the liner conference system produces much-need certainty and predicted that rates would

[39] Ibid.

[40] OJ 2006 L269/1. The documents relating to the review process are available in the DG COMP website: <http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/>.

[41] Commission of the European Communities, 'Guidelines on the application of Article 81 of the EC Treaty to maritime transport services', published on 1 July 2008, may be accessed at: <http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/guidelines_en.pdf>.

[42] EUROPA Press Release, 'Competition: repeal of block exemption for liner shipping conferences – frequently asked questions' (25 September 2006) MEMO/06/344 Brussels.

instead rise as carriers consolidate further. Logistics costs would also rise, he said, while carriers may consider a return to the use of smaller vessels as capacity sharing declines. 'The European officials are making a big blunder -- they are looking inside themselves when their competitors are thinking globally'.[43] However, contrary to the views expressed by Haralambides, studies on the effects of the US OSRA have shown clearly that competition in the liner shipping sector can work and can bring prices down.

With the repeal of the block exemption, the market conduct of shipping companies will be subject to the full application of the EC Treaty competition provisions. Given the industry's privileged position historically and the existing complex links among competitors, interpreting and applying the competition rules of the EC Treaty present legal problems in their own right.[44] Many issues remain to be clarified while in some cases existing interpretation of competition law may not be appropriate in the specific context of liner shipping. Without doubt, the shipping industry will continue to consolidate and most existing conferences will be transformed into consortia. The EU Competition Commission will necessarily need to study the net economic benefits of proposed mergers and individual applications for exemptions. In concentrated markets, the market conduct of dominant firm(s) becomes potentially subject to prohibition of abuse of dominance laid down in Article 82 EC. The Commission will have to devote substantial resources to investigating alleged abuses of dominance as well as gathering evidence of price fixing activities which are likely to go underground.

2.3.2. Which is a preferred way to regulate the maritime transport sector?

Other jurisdictions including Australia, Japan and Brazil have also been reviewing exemptions for liner shipping agreements. In 2006, the newly formed Competition Commission of Singapore decided to grant a five year block exemption to all liner shipping agreements, subject to a list of conditions.[45] The decision was made a few months prior to the EU announcement of the repeal of block exemption for liner shipping. As a major transshipment hub competing for transshipment cargo with other regional ports, a non-exempt decision could have risked the diversion of cargo to nearby ports without a competition law regime or with antitrust exemption for the sector. These considerations also weighed in Canada's 1999 review of its Shipping Conferences Exemption Act where the following views were expressed: 'For Canada to remove the exemption while others, particularly the U.S. do not, would in all likelihood result in a shift of some cargo being moved through U.S. ports rather than Canadian ports due to the imbalance in antitrust protection. Significant economic harm to

---

[43] International Herald Tribune, 22 Nov 2006. 'Free Flow: A maritime cartel nears its end'.

[44] Pozdnakova, op cit, n 18, is a recent book based on the author's doctoral thesis that analyzes the application of Articles 81 and 82 EC Treaty to the market conduct of liner shipping companies.

[45] On 14 July 2006, the Singapore Minister for Trade and Industry issued the Competition (Block Exemption for Liner Shipping Agreements) Order 2006, exempting a category of liner shipping agreements from the section 34 prohibition of Singapore's Competition Act. The order is available online at the Competition Commission of Singapore's website at: <www.ccs.gov.sg/Legislation/Block+Exemption+Order/>.

Canadian shippers, railway and trucking firms, and ports could result if the Act were to be abolished at this time.'[46]

With the EU repeal, existing competition authorities will need to consider the following: Is the US likely to follow the EU in removing antitrust exemption for liner shipping conferences? Is the US present maritime regulatory model of conditional antitrust exemption sufficiently competitive and efficient in its outcome, or should the EU strict repeal of liner conferences be followed? Nascent competition authorities would also have to consider whether to make distinctions between the different liner shipping agreements when granting exemptions. International competition policy for the maritime sector now stands at the crossroads, with future developments dependent on whether the US chooses to align its policy with the EU.

We now turn to a discussion of competition issues in the international aviation sector.

3. INTERNATIONAL AIRLINES

3.1. The Past: The Arcane Web of Aviation Regulation

The aviation industry has been shaped largely by government policy for most of its history. Within the US domestic interstate market, the Civil Aeronautics Board (CAB) regulated entry, exit, and fares of privately owned airlines as well as undertook merger reviews and other antitrust functions from 1938-1978.[47] The result was relatively high fares, inefficient operations, and airline earnings volatility as rents were dissipated through competition on service quality.

In the area of international aviation, the 1944 Chicago Convention[48] established the framework for market behaviour that discouraged competition as it was based on bilateral agreements between governments from which airlines derive the right to operate international air services. It led to the general adoption of a one country one airline policy. State ownership and subsidies for flag carriers became the norm in the international aviation sector. Restrictions on foreign ownership of domestic air carriers were universal. International services were tightly controlled by bilateral Air Services Agreements (ASAs)[49] and prices generally established jointly by airlines themselves under the ASAs or International Air Transport Association (IATA) conferences (IATA

---

[46] 'Shipping Conferences Exemption Act, 1989, Consultation Paper', op cit, n 27.

[47] Civil Aeronautic Act of 1938, 52 Stat. 973. For a historical overview of US regulation and deregulation of the domestic aviation sector, see Borenstein and Rose, 'How airline markets work, or do they? Regulatory reform in the airline industry' in Rose (ed.), *Economic Regulation and Its Reform: What Have We Learned?,* Chicago, The University of Chicago Press, 2006; and Bailey, 'Aviation policy: past and present' (2002) 69 (1) Southern Economic Journal 12.

[48] International Civil Aviation Organization (ICAO), Convention on International Civil Aviation, Doc 7300/9, 9th edition, Montreal, 2007. This and all earlier editions are available at the ICAO website at: <http://www.icao.int/icaonet/dcs/7300.html>.

[49] The first bilateral agreement was signed between the US and UK at Bermuda on 11 February 1946 (known as Bermuda I): 'Agreement between the United Kingdom and the United States', 11 February 1946, 60 Stat. 1499.

is a trade association representing some 260 airlines worldwide). The bilateral agreements often did not permit fifth freedom which enables airlines to carry passengers to one country, and then fly on to another country rather than back to their own.[50]

The US became the first country to deregulate its domestic airline industry in 1978 when the US Congress passed the Airline Deregulation Act.[51] The Act provided for a phase out of the CAB by January 1983 its elimination by 1985. Under the CAB Sunset Act of 1984,[52] CAB's antitrust authority was transferred to the Department of Transportation (DOT). However, DOT's antitrust powers with respect to domestic air transportation expired on 1 January 1989 and this was transferred to the Department of Justice (DOJ) Antitrust Division. For international intercarrier arrangements, both DOT and the DOJ are empowered.

The result of airline deregulation has been tremendous growth in capacity, lower fares and more efficient operations – all of which have benefited the majority of consumers. Competition has resulted in innovations in the form of hub-and-spoke networks, complex yield management systems, price discrimination among travellers, as well as the development of computer reservation systems initially and internet sales in recent years. The initial entry of about one hundred new low cost carriers was followed by a wave of airline mergers, insolvencies and consolidation of the industry. Volatility in industry earnings has continued and average earnings have declined.[53] The industry continues to contain a complex mix of competitive, cooperative and regulated elements with airport slot allocations and international route allocations still not competitively determined.

The US experience with deregulation was followed with much interest around the world. New Zealand abolished the government control of fares and entry barriers in 1983 with subsequent privatization of Air New Zealand in 1989. Canada moved to partially liberalize its airline sector in 1984 and 1988; deregulation in Australia was introduced through the passage of the Airline Agreement (Termination) Act of 1990.[54]

Deregulation in the EU was implemented in phases starting from 1988.[55] The first phase allowed multiple designations, fifth freedom rights and automatic approval of

---

[50] Jennings has described the resulting framework as the 'insane world of international aviation regulation'. Jennings, 'The insane world of bilateral international aviation regulation' (2003); available at: <http://www.samizdata.net/blog/archives/005229.html>.

[51] The Airline Deregulation Act of 1978, 92 Stat. 1744.

[52] The Civil Aeronautic Board Sunset Act of 1984, 98 Stat. 1703. See Lu, *International Airline Alliances: EC Competition Law, US Antitrust Law and International Air Transport*, The Hague, Kluwer Law International, 2003, at p 26.

[53] See Borenstein and Rose, op cit, n 47.

[54] See Sinha, *Deregulation and Liberalisation of the Airline Industry: Asia, Europe, North America and Oceania*, England, Ashgate, Aldershot, 2001, for the experiences with domestic airline deregulation in New Zealand, Australia, Canada, Europe and India.

[55] See Lu, op cit, n 52, at Section 2.2.1; and Gil-Molto and Piga, 'Entry and exit in a liberalised market', Discussion Paper Series, Department of Economics, Loughborough University, UK, 2006.

discount fares.[56] This package, and the second in 1990, loosened the constraints of bilateral agreements by freeing capacity limitations, allowing additional airlines to be designated and creating additional route rights.[57] The third and most significant package implemented from 1993 to 1997 replaced the bilateral system with a multilateral system of air transport regulation.[58] Most significantly, there was to be no restrictions on pricing, no regulatory distinction between scheduled and charter airlines, and movement away from the requirement of national ownership. From 1997, full cabotage (occasionally referred to as the ninth freedom) granted permission to European carriers to operate domestic flights in member countries other than their home market.[59]

The first package also contained three block exemptions for the air transport sector for joint planning, coordination of schedules, joint operations, and consultation on tariffs and slot allocation agreements; categories of agreements between undertakings relating to computer reservation systems; and ground handling services.[60] The majority of the exemptions had been allowed to expire with the exception the block exemption for IATA tariff conferences, and IATA slots and scheduling conferences which was renewed in 1993.[61]

3.2. The Present: The Age of Budget Airlines and Alliances

The past decade has seen increased liberalization which has resulted in worldwide growth in the volume of air passengers, the proliferation of low cost carriers worldwide and the increased cooperation between airlines in the form of global alliances and code-sharing arrangements. Increased liberalization has also been accompanied by the greater frequency in the application of competition law to a variety of issues within the airline sector.

---

[56] The first package contains four pieces of legislation: Council Regulation 3975/87, OJ 1987 L374/1; Council Regulation 3976/87, OJ 1987 L374/9; Council Directive 87/601, OJ 1987 L374/12; and Council Decision 87/602, OJ 1987 L374/19.

[57] The second liberalization package contains five regulations: Council Regulation 2342/90 revoking Council Directive 87/601, Council Regulation 2343/90 revoking Council Decision 87/602, Council Regulation 2344/90, Commission Regulations 83/91 and 84/91. See OJ 1990, L217/15 and OJ 1991, L10/14.

[58] Council Regulation 2407/92, OJ 1992, L240/1. See Morrell, 'Air transport liberalization in Europe: the progress so far' (1998) 3(1) Journal of Air Transportation World Wide 42.

[59] Chang and Williams investigate how European major airlines responded to the liberalized policy. They conclude that British Airways and the SAirGroup have pursued a policy of acquiring airlines in EU countries, with the former finding it an expensive and questionable strategy and the latter disastrous: see Chang and Williams, 'European major airlines' strategic reactions to the Third Package' (2002) 9 Transport Policy 129.

[60] See supra, n 56. The air transport sector had enjoyed special exemption from EC competition law dating back to 1962 under Council Regulation 141/62, OJ 124, 28.11.62, p 2751; English Special Edition 1959-62, p 291.

[61] Commission Regulation 1617/93 (IATA Tariff and Slot Conferences), OJ 1993 L155/18. See infra, text accompanying n 75 and n 77.

3.2.1. Low cost carriers (LCCs) take off worldwide

In the aftermath of deregulation, low cost carriers have carved a sizeable niche of the industry for themselves. In the US, Southwest Airlines, America's most profitable airline, and JetBlue have shown that the low cost segment can be very lucrative.[62] In Europe, low cost air carriers such as Ireland's Ryanair and UK's EasyJet have been very successful as well.[63] The success of LCCs in the US and Europe helped to break down resistance to aviation liberalization globally. In the past five years in the Asia Pacific, the growth of LCCs has been the single most important factor shaping the airline industry in the region. In the Asian Pacific region, LCCs have emerged in India, Japan, Malaysia, New Zealand, Philippines, Thailand, Australia and Singapore.[64] The growth of LCCs internationally however continues to be constrained by regulations on foreign participation in ownership and management and bilateral agreements between governments.

3.2.2. Alliances and other forms of cooperation

Increased competition in the aviation sector has been paralleled by increased cooperation between airlines in the form of both domestic and global alliances and code-share agreements. Since the formation of the Star Alliance global network in 1997, other major global alliance groups have been formed. At present the three major global alliances are Star Alliance, oneworld and SkyTeam, each involving major carriers from at least ten different nationalities. Alliances may represent different levels of cooperation from joint marketing to integration of businesses. Alliance cooperation can include code-sharing agreements which allow airlines to market seats on flights operated by partner airlines where the flight carries both airline identifiers and airline specific flight numbers. However, non-alliance airlines also make use of code-share agreements which allows partner airlines to jointly set fares. [65]

The most important reason for the prevalence of alliances is that generally, cross-border mergers and acquisitions of airlines in order to expand route networks are not possible. The obstacle derives from bilateral air services agreements (ASAs) between pairs of states which provide that a state may refuse to allow an airline from the other state to operate if it is not substantially owned and effectively controlled by that other state or its nationals. Given that a change of ownership could result in the withdrawal

---

[62] Ito and Lee, 'Low Cost Carrier Growth in the U.S. Airline Industry: Past, Present, and Future' (2003) Brown University Department of Economics Paper No. 2003-12.

[63] Gil Moto and Piga, op cit, n 27; Paul and Hartmann, 'The World Airline Industry: A European Perspective' (2003), Case 303-073-1, European Case Clearing House Collection.

[64] Findlay and Goldstein, 'Liberalization and Foreign Direct Investment in Asian Transport Systems: The Case of Aviation' (2004) 21(1) Asian Development Review 37, also presents case studies of development in China, Thailand and India.

[65] Czerny, 'Code-sharing and its effect on airline fares and welfare' (2006) CNI-Working Paper No. 2006-15, Center for Network Industries and Infrastructure (CNI) at Berlin University of Technology.

of operating permission, alliances which do not involve the acquisition of substantial ownership or effective control are the next best option.[66]

Regulators and competition authorities can either approve or prohibit an alliance or adopt a decision with remedies. A database on 'Regulatory Actions on Major Airline Alliances' can be found on the website of the International Civil Aviation Organization (ICAO).[67] Most applications for immunity concern air traffic on routes between the US and Europe. Although there are at present more than a hundred jurisdictions with competition law regimes, the database contains only regulatory actions of the US DOT (39 cases), European Commission (24 cases), the UK Office of Fair Trading (3 cases), the Australian Competition and Consumer Commission (8 cases) and the New Zealand Commerce Commission (2 cases).[68]

Legal procedures and requirements for approval of alliances differ between countries.[69] In the US, international airline alliances apply to the Department of Transportation (DOT) for immunity from antitrust litigation, which DOT has the sole authority to confer or withhold. DOT considers several broadly defined factors such as the 'public interest' and 'foreign policy', and also relies on the Department of Justice (DOJ) to complement its qualitative approach with a more quantitative analysis of the proposed alliance similar to the approach DOJ utilizes for domestic airline mergers.[70] DOT generally grants antitrust immunity subject to a review after five years. DOT has also granted antitrust immunity for alliance partners to jointly set fares on an individual basis. However, in some instances, coordinate pricing between alliance members has not been permitted. According to Chang and Williams, the US DOT's policy in the 1990s was to strategically grant anti-trust immunity to transatlantic alliances subject to the conclusion of Open Skies Agreements with the governments of the airlines involved.[71]

---

[66] See Balfour, 'EC competition law and airline alliances' (2004) 10 Journal of Air Transport Management 81.

[67] ICAO's database of regulatory actions on major airline alliances is at: <http://www.icao.int/icao/en/atb/epm/ecp/AirlineAlliances.pdf>.

[68] Since competition law came into effect in Singapore in 2006, the Competition Commission of Singapore has excluded two airline agreements from Section 35 prohibition of the Competition Act: the Qantas-British Airways Joint Services Agreement and the Qantas-Orangestar Co-operation Agreement; both decisions were made in 2007. Details of the decisions may be found online at the Competition Commission's website at: <http://www.ccs.gov.sg/PublicRegister/Notifications+Decisions+-+Public+Register.htm>.

[69] Lu, op cit, n 52, is a detailed study of the problems facing international airlines due to conflicts arising from the applications of varying competition laws by the US and EC on airline alliance activities.

[70] See Schlangen, 'Differing Views of Competition: Antitrust Review of International Airline Alliances' (2000) University of Chicago Legal Forum 413. Schlangen highlights the similarities and differences in the antitrust analysis by DOT and DOJ.

[71] Switzerland and Belgium signed open skies agreements with the US in 1995; in 1996 Swissair, Austrian Airlines Sabena and Delta Air Lines were granted antitrust immunity by the US authorities. A full Open Skies deal was signed by the French and US government in Oct 2001, which enabled the Air France-Delta alliance to be granted antitrust immunity: see Chang and Williams, op cit, n 59. In Fennes' view, the US 'opens skies policy and its twin arrangement, the enticing bait of antitrust immunity, represents one of the most important breakthroughs in changing the international regulatory framework of commercial air transport …': see

The European Commission's approach to a proposed alliance has been to investigate its effect on competition by considering market shares on the relevant routes as well as legal and/or practical barriers to entry by potential competitors. Alliances have often been permitted to proceed subject to remedies. The types of remedies ordered by the Commission in order to mitigate the potential negative effects on competition have included:

(i) freezing or reducing frequencies on the routes in question;

(ii) constraints on fare reductions for the services offered by the parties to make it more difficult for them to engage in anti-competitive pricing strategies;

(iii) parties agreeing to allow would-be competitors access to their frequent flyer programs and airport slots, as well as allowing competitors to interline with the parties;

(iv) relaxation of bilateral constraints by governments in order to allow competition; and

(v) wider remedies such as undertakings from the airlines not to offer volume related discounts or bonus commissions.[72]

The welfare and competition effects of alliances and code-sharing have been intensely studied.[73] Amongst the oft cited benefits are that alliances offer more extensive networks where partners are complementary resulting in decreased costs and fares, and better quality of service. However, they also raise competition concerns on routes where partners are competitors as this reduces competition and may preclude competitors from entering the markets served by alliances. While on some routes there is strong competition between alliances, this is not the case in every instance. On some routes, a particular alliance might be the only operator and competitors face too high

Fennes, 'The European Community and the United States: expanding horizons and clipped wings', European Air Law Association, Eleventh Annual Conference in Lisbon, 5 November 1991.

[72] Balfour examines in detail the Commission's decisions on the Lufthansa / SAS alliance in 1996, the KLM / Alitalia alliance in 1999, the Luthansa /Austrian Airlines alliance in 2002, the British Airways / SN Brussels Airlines cooperation agreement in 2003, as well as three transatlantic alliances for which investigations stretched from 1996 to 2002. See Balfour, op cit, n 66.

[73] The literature analyzing the effects of these cooperation agreements is extensive and includes Bilotkach, 'Price competition between international airline alliances' (2005) 39(2) Journal of Transport Economics and Policy 167; Brueckner, 'International airfares in the age of alliances: the effects of codesharing and antitrust immunity' (2003) 85(1) The Review of Economics and Statistics 105; Brueckner and Whalen 'The price effects of international airline alliances' (2000) 43(2) Journal of Law and Economics 503; Clougherty, 'Globalization and the autonomy of domestic competition policy: an empirical test on the world airline industry' (2001) 32(3) Journal of International Business Studies 459; Hassin and Shy, 'Code-sharing agreements and interconnections in markets for international flights' (2004) 12(3) Review of International Economics 337; Oum, 'Key Aspects of Global Strategic Alliances and the Impacts on the Future of Air Canada and other Canadian Air Carriers' (2001) Research paper commissioned by the Canada Transportation Act Review; Park and Zhang, 'An empirical analysis of global airline alliances: cases in North Atlantic markets' (2000) 16 Review of Industrial Organization 367; and Whalen, 'A panel data analysis of code sharing, antitrust immunity and open skies treaties in international aviation markets' (2007) 30(1) Review of Industrial Organization 39.

hurdles to have any chance to access such markets. Recently, increasing public concern in the US over the possible anticompetitive effects of international airline alliances prompted a congressman to propose legislation in February 2009 that calls for a federal government study of alliances and the antitrust immunity they receive.[74]

3.3 The Future: Competition Policy for Imperfect Aviation Markets

3.3.1. EU revises block exemption for IATA conferences

In 2005, the European Commissioner for Competition made a proposal to lift the exemption for IATA passenger tariff conferences which allows members to discuss interlining prices for scheduled passenger flights.[75] This was followed in July 2006 by the US DOT proposal to revoke long standing antitrust immunity held by the IATA to set passenger and cargo prices for US-Europe and US-Australia flights, claiming the growth of airline alliances has made the pricing conferences unnecessary.[76] Competition authorities argued that the growth of international aviation alliances has enhanced competition, lowered fares and offered consumers more choices, making it difficult to justify a continuation of the exemption.

In October 2006, European Commission acted decisively to revoke the exemption IATA passenger tariff conferences have enjoyed in phases.[77] For routes within EU, tariff conferences ceased to be exempt from January 2007, for routes between the EU and the US and Australia, from June 2007 and routes between EU and other non-EU countries, from October 2007. To prolong the exemption for routes to non-EU countries, IATA will have to provide data to the commission showing that IATA interlining continues to benefit consumers. The new regulation also ended the block exemption for IATA slots and scheduling conferences. Since the EC decision, Australia's ACCC has also ended immunity for IATA tariff conferences at the end of June 2008 for markets to and from Australia.

3.3.2. US-EU Open Skies

The success of domestic deregulation of airlines in the US and the EU naturally led to considerations for 'Open Skies' between Europe and the US. The US had negotiated bilateral 'Open Skies' agreements with several individual European governments in the 1990s. However about 10 EU Member States including Britain, which account for

---

[74] Legislation introduced by Rep. James Oberstar, H.R. 831, 'A Bill to Ensure Adequate Airline Competition Between the United States and Europe', 3 February 2009. Its provisions have since been attached to the Federal Aviation Administration (FAA) Reauthorization Bill.

[75] Commission's Discussion paper on Regulation 1617/93 (IATA Tariff and Slot Conferences) may be viewed at the Commission's website at: <http://ec.europa.eu/competition/antitrust/others/air_transport.html>.

[76] See US DOT proposal at the agency's website: <http://www.dot.gov/affairs/dot7506.htm>.

[77] Commission Regulation 1459/2006, OJ 2006 L272/3. See European Commission. 'Competition: Commission revises Block Exemption for IATA passenger tariff conferences' (2 Oct 2006) IP/06/1294, Brussels.

about half of all EU-US traffic, had not signed Open Skies agreements with the US.[78] One outcome was the failed merger of KLM and British Airways in 2000 because of the risk of jeopardizing routes to US under the bilateral treaties.

The European Commission had argued throughout the 1990s that the bilateral Open Skies Agreements between US and individual member states resulted in fragmentation of Europe's common aviation market and therefore infringed EU law. On 5 November 2002, the European Court of Justice made a landmark decision that declared the then existing national bilateral treaties illegal.[79] With the uncertainty hanging over the bilateral treaties, the European Commission was given the mandate it had long sought to begin negotiations for an open aviation area with the US in 2003. The US-EU aviation pact[80] that was finally announced in March 2007 (for open skies from March 2008) ended the 'dangerous legal uncertainty that has clouded transatlantic aviation for five years'. It is expected to result in cheaper flights that will boost transatlantic traffic by 50% or 26 million passengers a year within five years as well as trigger further consolidation of EU airlines through mergers.[81]

Under the pact, European and American airlines can fly any route between any European city in the 27-nation bloc and one city in the US. However, while US carriers can operate services between European countries, European airlines will not be allowed to fly from city to city within the US. Restrictions on foreign investment in US airlines remain. Second stage talks have begun in May 2008 and are aimed at opening up the US domestic market and at easing current ownership restrictions on foreign investment in US airlines. The most significant outcome of the pact has been to open up access to London's Heathrow Airport which had previously limited rights to fly between US and Heathrow to four carriers (British Airways, Virgin Atlantic, United Airlines and American Airlines).

The landmark US-EU Open Skies deal has prompted discussion of airspace liberalization in Japan[82] as well as within ASEAN.[83] The US and China have also began discussions on a US-China open skies deal.[84] The pace of liberalization has however been painfully slow, with governments having to weigh the benefits of traffic growth

---

[78] Robyn, Reitzes and Moselle, 'Beyond Open Skies: The Economic Impact of a US-EU Open Aviation Area', in Hamilton and Quinlan (eds), *Deep Integration: How Transatlantic Markets are Leading Globalization*, Johns Hopkins University Center for Transatlantic Relations, Washington, D.C. and Centre for European Policy Studies, Brussels, 2005.

[79] Judgments of the Court, in Case C-466/98 *Commission v UK* [2002] ECR I-9427; Case C-467/98 *Commission v Denmark* [2002] ECR I-9519; Case C-468/98 *Commission v Sweden* [2002] ECR I-9575; Case C-469/98 *Commission v Finland* [2002] ECR I-9627; Case C-471/98 *Commission v Belgium* [2002] ECR I-9681; Case C-472/98 *Commission v Luxembourg* [2002] ECR I-9741; Case C-475/98 *Commission v Austria* [2002] ECR I-9797; and Case C-476/98 *Commission v Germany* [2002] ECR I-9855.

[80] EC-US Air Transport Agreement, OJ 2007, C301 E/143.

[81] 'EU agrees US open skies deal', The Financial Times, 23 March 2007.

[82] 'Japan in open skies airport access push', The Financial Times, 31 March - 1 April 2007.

[83] 'ASEAN Open Skies seen to gain momentum this year', The Inquirer, 9 April 2007.

[84] 'US presses China for Open Skies deal', The Straits Times, 14 April 2007.

against threats to the commercial interests of their own country's carriers. National carriers in many instances, fearful of foreign competition, continue to lobby fiercely for the protection of their own interests.

4. CONCLUSION: THE ABANDONED OCEANS AND CONTESTED SKIES

Despite the international liner shipping and aviation sectors being key infrastructure providers for global trade and mobility, competition in these two sectors is a fairly recent phenomenon. The two sectors have presented different kinds of challenges to antitrust and competition authorities, generating numerous studies both for as well as against their exemption from competition laws. Beginning in the late 1970s, the US was the first mover to deregulate the airlines sector and to introduce reforms in the regulation of the international shipping sector -- which have resulted in greater competition and lower prices in both sectors. In 2006, the EU adopted a tougher stance by becoming the first jurisdiction to remove exemption for IATA passenger tariff conferences from 2007 and for liner shipping conferences from 2008. Other forms of cooperative agreements in both sectors however continue to receive favourable treatment under competition laws worldwide.

Gibson and Donovan[85] have highlighted the increasing comparative disadvantage of the US, first, in shipbuilding and, later, in operating a US flag foreign going merchant marine fleet. The exemption of the shipping conferences from antitrust law for most of the previous century helped to preserve an industry that was in obvious decline, that is, until the passage of the OSRA in 1998. Reitzes and Sheran have argued that this policy change to favour shippers over carriers was 'not unexpected, given the general importance of international trade to US businesses and the further diminution in the already small number of US flag carriers. The two largest US flag carriers, American President Lines and Sealand, have been acquired by foreign-owned carriers (Neptune Orient Line in 1997 and Maersk in 1999, respectively) in recent years.'[86] As a result, the industry structure of international shipping has become increasingly concentrated through acquisitions and mergers even as freight rates have declined with increased competition.

While many nations have chosen to follow the US lead in abandoning national flag carriers for the oceans, the international skies remain a contested domain, greatly distorted by an arcane web of restrictive national aviation policies. Immunity for cooperation between airlines through ASAs, code sharing and alliances continues to be justified and justifiable as a result of market distorting regulations: foreign ownership restrictions that obstruct efficiency enhancing cross-border mergers and acquisitions, state aids for national carriers, bilaterally negotiated air rights, as well as restrictions to airport access. The spread of the 1970s US innovation, the low cost carrier, to other

---

[85] Gibson and Donovan, *The Abandoned Ocean: A History of United States Maritime Policy*, Columbia, University of South Carolina Press, 2000.

[86] See Reitzes and Sheran, op cit, n 16, at p 56.

regions of the world (only) in the past decade, has certainly benefited passengers greatly. The terms of the recent US-EU Open Skies agreement however illustrate that restrictions on substantial foreign ownership of airlines and on domestic flights by foreign-owned airlines within the US remain obstacles in the liberalization process.

The international transport sectors, with their network characteristics, continue to pose challenges to national competition policy which must be tailored to deal effectively with their unique characteristics - not so much in terms of traditional concerns of competitive prices and abuse of dominance but, rather, conflicting national interests, especially with regard to foreign ownership and air rights. Even as the international shipping sector consolidates and adjust to the full application of competition law in the EU, there will be greater convergence of competition policy in the airline sector, albeit at a pace that continues to leave much to be desired. The clear desirability for international harmonization and compatible regulatory approaches to reduce the potential for conflicting application of competition laws is apparent. Proposals for 'an integrated international policy position, leading to the eventual establishment of an independent supranational airline regulation authority' are not new.[87] While this will be beneficial globally, national agendas and local conditions differ. The uncertain distribution of benefits causes one to be sceptical that we will be able to witness the establishment of such a supranational airline regulation authority in the near future.[88]

[87] Round and Findlay, 'Competition policy in international airline markets: an agenda and a proposed solution', presentation at 17th International ECMT/OECD Symposium on Transport Economics and Policy, Berlin, 25-27 October 2006.

[88] This scepticism is shared at the general level by Guzman, 'Is international antitrust possible?' (1998) 73 New York University Law Review 1501. Guzman suggests that negotiations on antitrust policy be combined with negotiations of other issues as concessions in other areas of negotiations may be necessary to compensate countries that will suffer a loss under a cooperative antitrust policy.

ISSN 1745-638X (Online)

THE COMPETITION LAW REVIEW

Volume 5 Issue 2 pp 215-226 **July 2009**

Book Review – E.S. Rockefeller, *The Antitrust Religion*, Washington D.C., Cato Institute, 2007, ix + 123. ISBN 978-1-933995-09-0.

*Matteo P Negrinotti**

The *Antitrust Religion* is not the first and probably will not be the last book arguing for abolition of antitrust laws.[1] However, Rockefeller's attack on the legal foundations of antitrust laws is remarkable in its effort to show how antitrust laws are not 'consistent with our aspiration of the rule of law'.[2] According to the author the so-called 'antitrust principles' such as the notions of 'unreasonable restrictions', 'monopolization', 'market power', and 'consumer welfare' are more akin to religious dogmas rather than to legal principles. As religious dogma antitrust principles are accepted as a matter of faith, but cannot be rationally justified or empirically proven.

In Rockefeller's view, antitrust laws fall short of the traditional notion of rule of law on at least two grounds. Firstly, statutes embedding antitrust provisions are vague and drafted in very broad language, thus conferring a lot of discretion on jurors and judges and granting them a power which is not accountable, since it is not reflected in the language of the statute.[3] Secondly, there are no clear rules for enforcement of antitrust statutes which, in turn, enables judges and government officials to make arbitrary decisions.[4] After identifying the aforementioned shortcomings of antitrust laws, the author carries out a thorough review of the evolution and application of American antitrust laws. No stone is left unturned as the three major areas of antitrust

* Lecturer of EC Competition Law, Tilburg University, TILEC (Tilburg Law and Economics Center).

1 In the last twenty years, some scholars have maintained that antitrust law should be abolished, since they generally do more harm to society than good, see for instance: F. L. Smith Jr., 'Why Not Abolish Antitrust?', (1983) January/February Regulation 23 (reviewing the main arguments against antitrust); T. Armentano, *Antitrust Policy. The Case for Repeal*, Washington, Cato Institute, 1986 (maintaining that the economic case for antitrust is flawed); G. Hull, 'Antitrust Is Immoral' in G. Hull (ed.), *The Abolition of Antitrust*, New Brunswick, Transaction Publishers, 2005, p 143 (arguing that antitrust is immoral since it supports the 'underdog', replacing 'rational egoism' with 'altruism'); R. W. Crandall and C. Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence', (2003) 17 Journal of Economic Perspective 3 (submitting that the empirical evidence concerning the enhancing effects of antitrust on consumer welfare are weak and therefore recommending to antitrust authorities to prosecute only 'egregious anticompetitive violations' such as blatant price fixing and merger-to-monopoly, while 'benign[ly] neglect' all the others).

2 ES Rockefeller, *The Antitrust Religion*, p 1. Rockefeller does not define what the rule of law means for him, although it can be inferred from his writing. For an introduction to the issues underlying the concept of the rule of law see L. Bingham, 'The Rule of Law' (2007) 66 Cambridge Law Journal 67; P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) Public Law 467 and M. Radin, 'Reconsidering the Rule of Law' (1989) 69 BU L. Rev. 781. The relationship between antitrust and the rule of law was the subject of a recent roundtable at Loyola University; the papers presented are available at: <http://www.luc.edu/law/academics/special/center/antitrust/events.html#marathon>.

3 Ibid, p 6.

4 Ibid, p 8.

intervention, namely: agreements, mergers, and single firm conduct are examined. For each of these areas, the author illustrates and analyzes their alleged inconsistency with the rule of law in their current application.

In particular, as for the monopolization abuse, the author stresses that monopolization is a concept without any factual reference, i.e. without a reflection in the physical world, unlike for instance the offense of robbery. As a consequence of the vagueness of the statute, 'there is no rule or standard that can be stated in advance to guide and evaluate the conduct',[5] so that 'counseling to avoid prosecution for monopolization is impossible'[6] and therefore successful competitors are turned upon when they win.[7]

Merger control is also fraught with uncertainty and discretion in its application. In the early days of application of s 7 of the Clayton Act, the Supreme Court condemned mergers with no impact on the market for the sake of protecting 'Mom and Pop's shops'.[8] Today, guidelines[9] are supposed to shed light on the agencies' practice in the administration of merger review and supplement the language of the statute. However, in the author's view, they neither guide nor enhance predictability in merger cases.[10] Quite the opposite, guidelines simply give the false impression of a structured analysis, actually masking a process where decisions are secretly taken by 'unidentified, unelected, unaccountable government officials'.[11]

Turning to agreements, as for contractual restrictions, specifically, tying and exclusive dealing, Rockefeller remarks that such practices are never mentioned in antitrust statutes.[12] Furthermore, the author follows the traditional Chicago school critique of the antitrust scrutiny of vertical agreements, relying on the well known single monopoly profit theorem.[13]

One would expect Rockefeller to advocate upholding antitrust enforcement at least when it comes to horizontal price fixing agreements. Indeed, the rule governing this type of conduct seems pretty clear (basically, 'Thou shalt not agree with your rivals on

---

5 Ibid, p 53.

6 Ibid, p 54.

7 Citing, as examples, the government cases against Alcoa (*United States v Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945)) and IBM (*In re IBM Corp.*, 687 F.2d 591 (2d Cir. 1982)).

8 See *United States v Von's Grocery Co*, 384 US 270, 288 (1966); *Brown Shoe, Inc. v United States*, 370 US 294 (1962); *United States v Philadelphia National Bank*, 374 US 321 (1963); *United States v General Dynamics Corp.*, 415 US 486 (1974).

9 See U.S. DOJ/FTC, Horizontal Merger Guidelines, 1992 (revised 1997) as well as the U.S. DOJ/FTC Commentary on Horizontal Merger Guidelines issued in 2006, available on the respective websites <www.ftc.gov> and <www.usdoj.gov/atr>.

10 ES Rockefeller, *The Antirust Religion*, p 67.

11 Ibid, p 72.

12 Ibid, p 77.

13 Ibid, p 82 et seq.

prices, market shares allocation of customers, etc …'),[14] easy to apply, based on a long-standing case law constraining judges, jurors or government's discretion. Nonetheless, the author maintains that cartels are simply temporary mergers. If mergers are normally thought to be pro-competitive, notwithstanding the fact that they eliminate a competitor permanently, *a fortiori*, cartels should be legitimate: after all, participants in a cartel remain independent entities, while coordinating their action in the market.[15] In the author's view, the prosecution of cartels is not worth it, because on the one hand, as cartels are self-destructive, chasing cartels would just waste taxpayers' money;[16] on the other hand, prohibiting cartels would simply turn firms to the government to seek protection under (federal or state) regulations.[17]

In Rockefeller's view, lawyers have attempted to correct the vagueness of antitrust statutes by injecting economics in the analysis of anticompetitive conducts; however, according to Rockefeller, the use of economic tools and concepts such as the notion of market power or consumer welfare, failed the mission. Economic analysis, he concludes, has not streamlined antitrust practice with the concept of rule of law. Much as the language of antitrust statutes, economic concepts are vague and do not have any reflection in the real world. In the author's words they are 'imagined and unverifiable' and are only used 'to provide a façade for subjective decision as to what the decisionmaker feels is fair'.[18]

As a consequence of the criticism above, all antitrust laws should be abolished, since they do more harm than good, according to the author. However, this is not going to happen (at all or any time soon) because of the 'antitrust community' to which

---

[14] Indeed, if antitrust is a religion, the prohibition of cartels is its first commandment. The Supreme Court in Trinko labeled price fixing as the 'supreme evil of antitrust' (*Verizon Communications v Law Offices of Curtis v. Trinko*, 540 U.S. 398, 408 (2004)) and Adam Smith, more than two centuries ago, admonished us about the consequences of competitors getting together. Even antitrust minimalists, such as Posner, defend the idea that antitrust laws should prohibit and prosecute collusive pricing practices see R. Posner, *Antitrust Law. An Economic Perspective*, Chicago, The University of Chicago Press, 1976, p 22 and p 212 where he concludes: 'I would like to see the antitrust laws other than section 1 of the Sherman Act repealed' and F. Easterbrook, 'Workable Antitrust Policy' (1986) 84 Mich. L. Rev 1696, 1701 maintaining that antitrust enforcement should be used to prosecute only 'plain vanilla cartels and mergers to monopoly'.

[15] ES Rockefeller, *The Antitrust Religion*, p 87.

[16] Ibid, p 91.

[17] See for instance, the antitrust exemption clauses contained in several federal statues such as the McCarran-Ferguson Act (15 U.S.C. 1011) shielding the 'business of insurance' from antitrust law. As for the scope of the judicially crated state action doctrine, shielding states and business from antitrust liability resulting from state anticompetitive action see *Parker v Brown*, 317 US 341 (1943); *Goldfarb v Virginia State Bar*, 421 US 773 (1975); *California Retail Liquor Dealers Assn. v Midcal Aluminium (Midcal)*, 445 US 97 (1980). For an overview of these statutory and judicially exceptions and proposals for their reform see H. Hovenkamp, *Federalism and Antitrust Reform*, University of Iowa Legal Studies Research Paper, No. 05-24, October 2005. The Antitrust Modernization Commission, in its May 2007 report, pointed out that lower courts have sometimes interpreted too loosely the state action doctrine as laid down by the Supreme Court, therefore it recommends a stricter application in the future case law, while at the same time rejecting any proposal of Congress intervention in the field p 344 et seq (available at: <http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm>).

[18] Ibid, p 44 and 46 respectively; see as well p 83, where the author criticizes the theory of raising rivals' costs.

Rockefeller himself once belonged to as one of its most influential members.[19] The 'antitrust community' is composed of 'professional followers'[20] i.e., lawyers, government officials (more recently economists) who practice antitrust and periodically meet in national and international *fora* and debate antitrust issues. For the author, the 'antitrust community' performs the sole task of spreading the gospel of antitrust and enhancing the feel of self–righteousness regarding the overall mission of antitrust.[21]

It is submitted that Rockefeller's critique to the legal foundations of antitrust laws does not carry the day for several reasons which will be examined hereinafter. Firstly, it is true that antitrust statutes are drafted in an open language and contain expressions such as 'monopolization', 'abuse of dominant position', 'restraint of competition', 'substantial lessening of competition', which are objectively broad and undefined. However, it is submitted that this is not enough to affirm that they do not abide with the rule of law. Many other legal concepts and terms are equally or even more open-textured and broader than those enshrined in antitrust statutes. Notions like 'good faith', 'unjust enrichment' as well as the constitutional provisions concerning 'equality' and 'non-discrimination' are also broadly worded and, notwithstanding the fact they have been subject to judicial interpretation for a while, courts still struggle in defining their meaning and their reach in actual cases. Those provisions, as much as antitrust provisions, and unlike the robbery offence (continuing Rockefeller's example), have no reference in the physical world. So, following our author's line of reasoning: do all these legal concepts infringe the traditional concept of the rule of law? It is submitted that they do not and neither do the antitrust statutes.[22]

General clauses and their open texture formulation are necessary in order to provide flexibility within the legal system and allow its adjustment to the multifaceted facts of the real world as well as to keep it in pace with times.[23] Equally, antitrust statutes are drafted to be applicable throughout the economy, across different sectors and to a variety of conducts. The fact that antitrust concepts, as many other legal concepts, do not have an immediate reference in the physical world is therefore insufficient to affirm their incompatibility with the rule of law. Additionally, it is important to point out that such clauses are not a blank check to the government or to any other legal institutions. On the contrary, it should be noted that decisions adopted by antitrust agencies are on

---

[19] He served as chairman of the Section of Antitrust Law of the American Bar Association (1976-1977) and, since 1961 as Chairman of the Antitrust Advisory Board of the Bureau of National Affairs' Antitrust and Trade Regulation Reporter.

[20] ES Rockefeller, *The Antitrust Religion,* p 15.

[21] Ibid, p 22 et seq.

[22] For an examination of vagueness within the legal theory see L. Lombardi Vallauri, 'Norme vaghe e teoria generale del diritto' (1998) 3 Ars Interpretandi 155 as well as F. Dallmayr, 'Hermeneutics and the Rule of Law' and K. Kross, 'Legal Indeterminacy and Legitimacy', in G. Leyh (ed.), *Legal Hermeneutics: History, Theory and Practice*, Berkeley/Los Angeles/Oxford, California University Press, 1992, pp 1 and 200, respectively.

[23] See H. Hart, *The Concept of Law*, 2nd ed., Oxford, OUP, 1994, p 128-130.

the one hand subject to judicial review[24] and on the other, Courts have laid down tests for filling in open-textured provisions, thereby constraining their own as well as anyone else's discretion in the adjudication process. So, for instance, in interpreting constitutional provisions like the equal protection clause of the XIV amendment the US Supreme Court has devised different tests, with different levels of scrutiny, in order to assess whether state legislation is in breach of the general principle according to which: 'No state shall […] deny to any person within its jurisdiction the equal protection of the laws'.[25] In the field of antirust concepts like '*per se* rules', 'rules of reason', 'balancing test' have been devised to flesh out the bare bones of the antitrust statutes and provide a framework for the analysis of anticompetitive restrictions and conducts, with the aim of improving the overall application of the antitrust laws. Indeed, if the 'logic' put forward by Rockefeller should be followed and brought to its extreme consequences, then we should do away with many other indeterminate and vague legal concepts as those mentioned above. It is apparent that such a result is neither desirable nor acceptable.

Secondly, most of the cases that Rockefeller uses in his book to argue his view were decided before the so called 'Chicago revolution'. Actually, if the aim of the book is to criticize the excess of the Warren Court (1953-1969), the book comes thirty years too late, since on the one hand, the over-reaching antitrust jurisprudence of the Warren Court has already been the target of the Chicago School's critique in the 70s,[26] which,

---

[24] For a review of the EU case law and a thorough discussion on standard of judicial review in merger cases see B. Vesterdorf, 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts' (2005) 1 European Competition Journal 3; in Article 81 EC cases D. Bailey, 'Scope of judicial review under Article 81 EC' (2004) 41 CMLRev 1328; as for Article 82 EC cases, in the recent *Microsoft* case the CFI endorsed for the review of abuse of dominance cases the same standard of review adopted in merger cases see Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601, para 89 and P. Larouche, 'The European Microsoft Case at the Crossroads of Competition Policy and Innovation: Comment on Ahlborn and Evans', (2009) 75 Antitrust L.J. 933 at 937. For a political science approach to the topic see D. Lehmkuhl, 'On Government, Governance and Judicial Review: The Case of European Competition Policy', (2008) 28 Journal of Public Policy 139.

[25] For an introduction to American constitutional law and to the methodology of equal protection see E. Chemerinsky, *Constitutional Law. Principles and Policies*, 3rd ed., New York, Aspen Publishers, 2006, p 667 et seq. The freedom of speech granted by the first amendment is another example of a constitutional open-textured provision for which the Court had to devise tests in order to apply the broad language of the amendment, which reads: 'Congress shall make no law […] abridging the freedom of speech […]'.

[26] See R. Bork, *The Antitrust Paradox. A Policy in War with Itself*, New York, Free Press, 1978 which can be considered the summa of the Chicago school of thought as well as R. Posner, "The Chicago School of Antitrust Analysis", (1979) 127 U. Pa. L. Rev. 925. The excesses of the Warren Court were also remarked by other non Chicago scholars, such as T. Kauper, 'The "Warren Court" and the Antitrust Laws: Of Economics, Populism and Cynicism' (1968) 67 Mich. L. Rev. 325. For a critique of the Chicago school analysis and a summary of the post Chicago theories see the essays in R. Pitofsky (ed.), *How the Chicago School Overshot the Mark*, Cambridge, CUP, 2008; R. Pardolosi, A. Cucinotta & R. Van den Bergh (eds.), *Post-Chicago Developments in Antitrust Law*, Cheltenham/Northampton, Edward Elgar Publishing, 2003; E. Fox, 'The Modernization of Antitrust - New Equilibrium' (1981) 66 Cornell L. Rev. 1140; H. Hovenkamp, 'Antitrust Policy After Chicago' (1985) 84 Mich. L. Rev. 213. A rich comparison between the Chicago and post-Chicago use of economics in antitrust analysis can be found in M. Jacobs, 'An Essay on the Normative Foundations of Antitrust Economics' (1995) 74 N.C. L. Rev. 219.

however, never argued for the repeal of antitrust laws, but for their reform.[27] On the other hand, many of the judgments quoted by Rockefeller have been reversed or curtailed by later decisions of the Supreme Court itself.[28] Furthermore, Rockefeller's analysis of anticompetitive conducts, especially in the field of merger enforcement and monopolization, lacks legal realism.

As for mergers, it is apparent from the statistics published by both the FTC and the DOJ that the presumption of illegality for mergers is long gone in the US,[29] as nowadays more than 97 per cent of mergers are cleared by the agencies as a result of the introduction of both procedural and substantive reforms in merger control.[30]

---

[27] See R. Bork, *The Antitrust Paradox. A Policy in War with Itself*, p 8 'this book attempts to supply the theory necessary to guide antitrust reform' and the *Recommendations* at p. 405-407.

[28] In the last thirty years the Supreme Court have indeed removed every per se rule applying to vertical agreements (see *Continental T.V., Inc. v GTE Sylvania , Inc.*, 433 U. S. 36 (1977); *Business Electronics Corp. v Sharp Electronics Corp.*, 485 US 717 (1988); *State Oil Co. v Kahn*, 522 US 3 (1997); *NYNEX Corp. v Discon, Inc.*, 525 US 128 (1998); *Leegin Creative Leather Products, Inc. v PSKS, Inc.* 551 U.S. 877 (2007); *Illinois Tool Works, Inc. v Independent Ink, Inc.*, 547 US 28 (2006)), restricted the material scope of application of per se rules to horizontal agreements (see *Texaco, Inc. v Dagher*, 547 US 1 (2006); *National Collegiate Athletic Ass'n v Board of Regents*, 468 US 85 (1984); *Broadcast Music Inc. v Columbia Broadcast Sys., Inc.*, 441 US 1 (1979); *Northwest Wholesale Stationers, Inc. v Pacific Stationery & Printing Co.*, 472 US 284 (1985)), basically eliminated predatory pricing claims (see *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 US 574 (1986), *Brook Group Ltd. v Brown & Williamson Tobacco Corp.*, 509 US 209 (1993) and *Weyrhaeuser Co. v Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007)) and marginalized monopolization cases (see *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (2004) and more recently *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 US not yet reported (2009)). The above mentioned case law has shifted the "government always wins" refrain of the 50s and 60s to the modern tune of 'antitrust defendants always win', see E. Elhauge, 'Harvard, Not Chicago: Which Antitrust School Dries Recent Supreme Court Decisions? (2007) 3 Competition Policy International 59, but see D. Crane, 'Rules Versus Standard in Antitrust Adjudication' (2008) 64 Wash. & Lee L. Rev. 65 (arguing that the last decade shift towards a greater use of the rule of reason in deciding antitrust cases leaded to more cases won by plaintiff than in the past). For a prediction of the next possible targets of the Roberts' Court in the field of antitrust see G. Warden, 'Next Steps in the Evolution of Antitrust Law: What to Expect from the Roberts Court', (2009) 5 Journal of Competition Law and Economics 49. For a first assessment of the Roberts Court activity in the antitrust field as well as its possible trends see D. Gifford & E. Sullivan, 'The Roberts antitrust court: A transformative beginning', (2007) 52 Antitrust Bull. 435.

[29] The statistics on merger enforcement activity are available in the annual joint report to the Congress issued by the DOJ and the FTC, at <http://www.ftc.gov/bc/anncompreports.shtm>. Interestingly enough for someone concerned with the role of rule of law in antitrust enforcement, Rockefeller does not discuss in his essay the legitimacy of the DOJ/FTC guidelines with respect to their effect of shifting the paradigm of merger enforcement form a per se illegality to a per se illegality rule, limiting his comment to a comparison between merger review and highway speed limits: 'the antitrust statue on mergers has been interpreted in such a way as to prohibit all mergers, but, like highway speed limits, there is no predictability as to when the law will be enforced', E. Rockefeller, *The Antitrust Religion*, p. 75, see also p 72.

[30] At the procedural level, the introduction of the pre-notification system by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Pub. L 94-435, 90 Stat. 1390, as codified at 15 U.S.C. 18a) gave the DOJ and the FTC the possibility of reviewing mergers before they are consumed and thus it conferred them the tools for streamlining merger enforcement. On the substantive ground, the introduction of a more economic approach to mergers via the guidelines jointly adopted by the DOJ and FTC has increased the predictability of the outcomes in merger review . On the role of guidelines and economic analysis in antitrust enforcement see also *infra*.

With regard to monopolization cases, Rockefeller's attack does not take into consideration the fact that in the last 20-25 years, public enforcement of monopolization cases has steadily rolled back.[31] Additionally, he does not acknowledge that as a result of the adoption by the Supreme Court of a very conservative economic analysis in the adjudication of antitrust cases, plaintiffs almost invariably lose monopolization cases.[32] Moreover, the author does not pay any attention to the recent efforts carried out by legal scholarship both in the US and in the EU aimed at refining monopolization standards and looking for unifying criteria for dealing with exclusionary conducts.[33]

---

[31] Indeed, it is sufficient to have a glance over the major monopolization cases which reached the Supreme Court's docket in last two decades years and it will be apparent that all were initiated by private parties seeking for damages, rather than by public enforcement agencies (FTC and DOJ). For some data and comments on the public enforcement of Section 2 Sherman Act during the Clinton and Bush administrations see J. Lagenfeld & D. Shulman, 'The Future of US Federal Antitrust Enforcement: Learning From the Past and Current Influences', (2007) 8 The Sedona Conference Journal 1. Data on the public enforcement of Section 2 during the Regan administration can be found in E. Fox & L. Sullivan, 'Retrospective and Perspective: Where Are we Coming From? Where Are We Going?' (1987) 62 N.Y.U. L. Rev. 936. See as well L. Brannon & D. Ginsburg 'Antitrust and the US Supreme Court' (2007) 3 Competition Policy International 1 and E. Sullivan & R. Thomson, 'The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust' (2004) 53 Emory L.J. 1571 (dealing with the antitrust enforcement activity of the Rehnquist Court (1986-2005)); for data on the antitrust cases decided by the Burger Court (1969-86) see E. Sullivan, 'The Economic Jurisprudence of the Burger Court's Antitrust Policy' (1982) 58 Notre Dame L. Rev. 1. But see D. Crane, 'Technocracy and Antitrust' (2008) 86 Tex. L. Rev. 1159 (arguing that although antitrust has lost its political salience, disappearing form presidential speeches and political platforms, its enforcement has not declined significantly in real terms).

[32] T. Kauper, 'The Influence of Conservative Economic Analysis on the Development of the Law of Antitrust', in R. Pitofsky (ed.), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, Oxford, OUP, 2008, p 40 et seq.

[33] Legal scholars have recently proposed several tests in order to rationalize and make the application of section 2 of the Sherman Act to exclusionary conducts clearer; however, until now none of these proposals has been formally endorsed by the Supreme Court, see E. Elhauge, 'Defining Better Monopolization Standards' (2003) 56 Stan. L. Rev. 253; H. Hovenkamp, 'Exclusion and the Sherman Act', (2005) 72 U. Chi. L. Rev. 155; T. Kauper, 'Section Two of the Sherman Act: The Search for Standards' (2005) 93 Geo. L.J. 1623; D. Melamed, 'Exclusive dealing Agreements and Other Exclusionary Conducts-Are there Unifying Principles?', (2006) 73 Antitrust L.J. 375; G. Werden, 'Identifying Exclusionary Conduct Under Section 2', (2006) 73 Antitrust L.J. 413; M. Popofsky, 'Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules', (2006) 73 Antitrust L.J. 435; M. Lao, 'Defining Exclusionary Conduct Under Section 2: The Case for Non-Universal Standards', in B. Hawk (ed.) *Fordham Competition Law Institute International Antitrust Law & Policy*, Huntington, Juris Publishing, 2006, p. 433 et seqq.; K. Hylton, 'The Law and Economics of Monopolization Standards', (2008) Boston Univ. School of Law Working Paper No. 08-18. In the EU see the contribution of J. Vickers, 'Abuse of Market Power', (2005) 115 Economic Journal F244; R. O'Donughe, 'Verbalizing a General Test for Exclusionary Conduct under Article 82 EC', in C.D. Ehlermann & M. Marquis (eds.), *European Competition Law Annual 2007. A Reformed Approach to Art. 82 EC*, Oxford/Portland, Hart Publishing, 2008, p. 327 et seq. In its report (pp 81-116), the Antirust Modernization Commission pointed out that notwithstanding the broad proscription against anticompetitive conduct contained in Section 2, 'the standards currently employed by U.S. courts […] are generally appropriate'. This in turn leaded the Commission to the following conclusions: i) no amendment of Section 2 is necessary, ii) 'section 2 standards should be designed to minimize over-deterrence and under-deterrence, both of which impair long-run consumer welfare'; iii) leave the development of section 2 law to the courts iv) it is too early for adopting a one catch all test for all exclusionary conducts. Furthermore, after a series of joint hearings with the FTC, in September 2008 the DOJ unilaterally issued its Competition and Monopoly: Single Firm

As for cartels, the idea that they are self-destructive is harder to defend today than a few decades ago.[34] Empirical data and actual examples of cartels show that some cartels are sustainable over a long period of time. For instance, in the EU organic peroxides cartel or the German high-voltage power cable cartel lasted for 29 and 39 years, respectively.[35] Furthermore, theoretical research has demonstrated that, under certain conditions, cartels are profitable and sustainable strategies harmful to consumers, thus requiring incisive antitrust enforcement.[36]

Rockefeller does have a point when he argues that prosecuting cartels under antitrust law is likely to turn undertakings towards governments, in order to obtain statutory antitrust exemptions or anticompetitive state regulation, the latter largely shielded under the state action doctrine. It is submitted, however, that this is not an argument for blessing cartels and waive antitrust enforcement. On the contrary, recognizing that states can restrict competition - through anticompetitive regulation - equally (and more

---

Conduct Under Section 2 of the Sherman Act (available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>), reviewing all the above proposed tests, but finally encouraging the development of conduct specific tests and safe harbours. Three out of the four FTC Commissioners (the fifth seat being vacant) publicly distanced themselves from the report, denouncing that it is 'a blueprint for radically weakened enforcement of Section 2' that 'goes beyond the holdings of the Supreme Court cases upon which it relies' and 'seriously overstate the level of legal, economic and academic consensus regarding Section 2' (see the statement of the Commissioners is available at <http://www2.ftc.gov/os/2008/09/080908section2stmt.pdf>, *passim*); FTC Chairman, William Kovacic released its own statement neither endorsing nor opposing the DoJ report, but regretting the lack of coordination between the agencies in issuing a common report (<http://www2.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf>). However, the change in the administration following the November 2008 elections is very likely to bring about a more vigorous enforcement of antitrust law and especially of Sec. 2 SA. In particular, one of the first acts of the new Assistant Attorney General in charge of Antitrust was to withdraw the Report issued in September 2008. Moreover, in her first speech in her capacity as DOJ Antitrust division head, Christine Varney emphasized the need for a new enforcement policy of Sec. 2 SA, stressing in particular that the DOJ September Report on the one hand 'raised many hurdles to Government antitrust enforcement', and contrary to what implied in the Report 'antitrust enforcers are able to separate the wheat from the chaff in identifying exclusionary and predatory acts' see 'Vigorous Antitrust Enforcement in this Challenging Era' (May 12, 2009) at <http://www.usdoj.gov/atr/public/speeches/245777.htm>, *passim*. Furthermore, while acknowledging that the Report: 'provided a comprehensive evaluation of the history of single-firm enforcement and careful consideration of the risks and benefits of particular enforcement strategies', the new Assistant Attorney General also remarked how it 'lost sight of an ultimate goal of antitrust laws- the protection of consumer welfare'.

[34] See G. Stigler, 'A Theory of Oligopoly' (1964) 72 Journal of Political Economy 44.

[35] On the peroxide organic cartel see EC Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement, Case COMP/E-2/37.857 - Organic peroxides, OJ 2005, L110/44; for the German power cable cartel see H. Normann and E. Tan, 'The Effects of Cartel Policy: Evidence from the German Power-Cable Industry' (available at <http://www.tilburguniversity.nl/tilec/meetings/wip/normann.pdf>). For a more theoretical study on the duration of cartels see J. Zimmerman and J. Connor, 'Determinants of Cartel Duration: A Cross-Sectional Study of Modern Private International Cartels' (2005), available at <www.ssrn.com>.

[36] For the economic analysis of cartel duration and success see, *ex multis*, the works of M. Levenstein and V. Suslow, 'What Determines Cartel Success?' (2006) 44 Journal of Economic Literature 43; J. Clarke and S. Evenett, 'The Deterrent Effect of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel' (2003) 48 Antitrust Bull. 689. P. Grossman (ed.), *How Cartels Endure and How They Fail: Studies of Industrial Collusion*, Cheltenham/Northampton, Edward Elgar Publishing, 2004.

effectively) than private undertakings is an argument for a stricter control of state action distorting competition and an impulse for reforming the current wording of antitrust exemption statutes, as well as the present application of exemption doctrines.[37]

Contrary to what was submitted by Rockefeller, both the introduction of guidelines and the use of economic analysis have improved the application and the predictability of antitrust rules. Guidelines as well as other soft law instruments adopted by antitrust agencies over the last 30 years have indeed clarified the application of competition law provisions. On the one hand, these instruments provide legal counsellors with a framework of analysis for the assessment of anticompetitive conduct. In particular, guidelines allow to infer the reasoning and to anticipate those elements upon which an agency will decide whether a certain practice is harmful to competition.[38] On the other hand, guidelines straightjacket the discretionary powers enjoyed by the agencies, one of Rockefeller's major concerns, while leaving them enough flexibility to tailor the framework therein -which normally applies irrespective of the industry- to specific market situation. In the EU, for instance, the European Courts have emphasized that although guidelines are not binding instruments towards third parties they can still have some legal effects; notably a self-binding effect on the institution issuing them, under the principles of equality, good governance and legitimate expectation.[39] Therefore the guidelines, issued by the Commission in the competition field, bind the Commission to follow them and oblige the Commission to motivate its departure from the rules stated therein.[40] Moreover, the use of economic analysis in antitrust cases has enhanced the

---

[37] It has correctly been remarked that one of the key feature of the Rehnquist Court in the field of antitrust has been the expansion of the state action doctrine, see Roundtable discussion, 'The Legacy of the Rehnquist-O'Connor Court', (2006) 20 Antitrust 8. An equally broad reading of such doctrine, shielding both states and private initiatives from the application of competition law, was also endorsed by the European Court of Justice, see Case C-2/91, *Meng* [1993] ECR I-5751; Case C-245/91 *OHRA Schadeverzekeringen*, [1993] ECR I-5851; Case C-185/91, Reiff, [1993] ECR I-5801; Case C-35/99 *Arduino* [2002] ECR I-1529; Joined Cases C-94 and 202/04, *Cipolla et al.* [2006] ECR I-11421. When it comes to State action it is worthwhile remembering the admonishment addressed by Adam Smith over two centuries ago: '[…] People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible, indeed, to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. *But though the law cannot hinder people of the same trade form sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less render them necessary.* […]' A. Smith, *An Inquiry into the Nature and the Causes of the Wealth of Nations*, London, 1776, Book I, Chapter X, quoting from the version edited by E. Cannan, Chicago, The Chicago University Press, 1976, p 144 (emphasis added).

[38] Amongst the most relevant guidelines issued by the EC Commission in the last years see the guidelines on Vertical Restraints (OJ 2000, C291/1) on Horizontal Mergers (OJ 2004, C31/5), on Non-Horizontal Mergers (OJ 2008, C265/6). Recently the Commission has adopted guidelines (*rectius*: a guidance on its enforcement priorities) in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ 2009, C45/7).

[39] Case C-313/90, *CIFRS v. Commission* [1993] ECR I-1125; P. Craig, *EU Administrative Law*, Oxford, OUP, 2006, p 641 et seq. and L. Senden, *Soft Law in European Community Law*, Portland/Oxford, Hart Publishing, 2004, p 401 et seq.

[40] Case 148/73, *Louwage v Commission* [1974] ECR 81, in the context of the staff cases; in competition cases Case T-9/89, *Hüls v Commission* [1992] ECR II-499; Case T-214/95, *Vlaamse Gewest v Commission* [1998] ECR II-717.

understanding of markets and of firms' behaviour in the marketplace. It is true, as Rockefeller points out, that economic models are based on simplified assumptions, which are sometimes detached from reality; however, the correctness of an antitrust decision does not depend on whether that decision follows one or another economic theory. The role of economics concepts such as 'market power' or 'market definition' and economics analysis in competition cases is to provide the interpreter with proxies for evaluating the conduct of firms in the market and its effects, not to give him the 'right' solution.[41] Economic analysis has provided tools for understanding and interpreting facts, thereby providing a more structured and accurate analysis of competitive and anticompetitive behaviour.[42] It cannot be denied that economic insights have helped in fine-tuning and fleshing out the bones of broad legal concepts, thus increasing legal predictability with respect to application of antitrust statutes to the activity of undertakings in the market.[43]

At the end of the day, the arguments put forward by Rockefeller for abolishing antitrust laws are not convincing and their apparent force vanishes when they are closely examined. This does not mean that the antitrust building is perfect, indeed as all buildings, it needs to be fixed, maintained and renovated from time to time. As in all fields of law, the enforcement of antitrust laws can lead to over-deterrence or under-deterrence of anti-competitive behaviours, but the solution suggested by Rockefeller to overcome this problem, i.e. getting rid of antitrust laws, seems too extreme. If so, why not abolish criminal law? After all, false convictions and false acquittals happen regularly in criminal law, but nobody would suggest abolishing criminal statutes for this reason. Following Rockefeller's proposal would throw out the baby with the bath water and that is not desirable.[44] The application of antitrust rules, as with all human

---

41 As correctly pointed out by J. Breyer in his dissenting opinion in Leegin: 'Economic discussion, [...], can *help* provide answers to these questions, and in doing so, economics can, and should, inform antitrust law. But antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views. That is because law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients.' *Leegin Creative Leather Products, Inc. v PSKS, Inc.*, (2007) 127 S.Ct. 2705, 2729.

42 For an in depth examination of the use and the role of economic analysis in the adjudication of competition cases, see A.-L. Sibony, *Le juge et le raisonnement économique en droit de la concurrence*, Paris, L.G.D.J, 2008. See as well R. Schmalensee, 'On the use of economic models in antitrust: the *Realmon* case' (1979) 127 U. Pa. L. Rev. 994 and M.P. Schinkel, 'Forensic Economics in Competition Law Enforcement' (2008) 4 Journal of Competition Law and Economics 1.

43 For outstanding examples of how of economic analysis can be successfully incorporated into the legal assessment anticompetitive conducts, thereby enhancing predictability and legal certainty see P. Areeda & D. Turner, 'Predatory Pricing and Related Practices Under Section 2 of the Sherman Act', (1975) 88 Harv. L. Rev. 697 as well as W. Landes & R. Posner, 'Market Power in Antitrust Cases'(1981) 94 Harv. L. Rev. 937.

44 This is not the place for reviewing the benefits of antitrust enforcement from the legal, economic or political perspective. More or less accurate exposition of the benefits of antitrust control may be found just opening any antirust or competition law book. For its clarity and conciseness, see *ex multi*s, R. Whish, *EC Competition Law*, Oxford, OUP, 6th ed., 2008, p 3 et seq.; for a review of the economic arguments J.B. Baker, 'The Case for Antitrust Enforcement' (2003) 17 Journal of Economics Perspective 27; D. Neven, 'Competition Economics and Antitrust in Europe', (2006) 21 Economic Policy, October, 741; For a political science approach to competition policy see M. Cini & L. McGowan, *Competition Policy in the European Union*, 2nd ed., Basingstoke, Palgrave, 2008; G.B. Doren and S. Wilks (eds.), *Comparative Competition Policy*, Oxford, OUP,

activities, is destined to be imperfect; however, learning from previous achievements and mistakes is fundamental for improving the quality of antitrust enforcement and better distinguishing pro-competitive from anticompetitive conducts.[45]

In this process of learning and changing the enforcement of antitrust laws, the 'antitrust community' plays a key role in shaping and re-thinking legal concepts, despite what is maintained by Rockefeller. The exchange of views amongst members of the community (scholars, practitioners, enforcers) has the potential to, and in practice does, help in understanding current practices and tackling upcoming issues as well as in proposing reforms and circulating legal solutions.[46] The 'antitrust community' is indeed a global epistemic community,[47] considering that nowadays more than 100 countries have enacted antitrust statutes, generally following US or EU competition laws as templates, whose role should be emphasised rather than despised in the quest for better answers to some of the unresolved issues of antitrust enforcement. In this context, contrary to what is argued by Rockefeller,[48] the use of a specific language by antitrust specialists is

1996; see as well J. Monnet, *Mémoires*, Paris, Fayard, 1976, p. 411-412; G. Marenco, 'The Birth of Modern Competition Law in Europe' in A. von Bogdandy (ed.), *European Integration and International Co-operation: Studies in International Economic Law in honour of Claus-Dieter Ehlermann*, Kluwer Law International, The Hague, 2002, p 279 and D. Gerber, *Law and Competition in Twentieth Century Europe. Protecting Prometheus*, Oxford, OUP, 1998 on the origin and negotiations of the competition provisions in the Paris and Rome Treaty establishing the European Community of Coal and Steel and the European Economic Community respectively. Recently the Office of Fair Trading (OFT) has carried out an assessment on the benefits of antitrust enforcement for British consumers, finding that the agency enforcement activity has saved consumers five times the operating costs of the agency, see OFT, *Annual Report and Resource Accounts 2007-08*, available at <http://www.oft.gov.uk/shared_oft/annual_report/2007/HC836.pdf>, pp 35-37.

[45] For an overview of the evolution of the American antitrust enforcement see R. Pertiz, *Competition Policy in America: History, Rhetoric, Law*, Oxford, OUP, 2001; H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practices*, 3rd ed., St. Paul Minn., Thomson/West, 2005, pp 48-77. For a review of the evolution of EC Competition law over the decades see P.J. Slot, 'A view from the mountain: 40 years of developments in EC competition law', (2004) 41 CMLRev. 443; A. Weitbrecht, 'From Freiburg to Chicago and Beyond-The First 50 Years of European Competition Law' (2008) 29 ECLR 81; A. Pera, 'Changing views of competition, economic analysis and EC antitrust law' (2008) 4 European Competition Journal 127. For a strong call for a move from a form-based to an effects-based approach fundamental in European legal scholarship has been the work of V. Korah, see for instance, 'EEC Competition Policy: Legal Form or Economic Efficiency', (1986) 39 Current Legal Problems 85.

[46] For instance, the reception in Europe and elsewhere of the leniency programs firstly developed in the US is an example of successful circulation of antitrust enforcement models. A key role at the international level in this regard is played by the ICN (<www.internationalcompetitionnetwork.org>), the UNCTAD (<www.unctad.org>) and the OECD (<www.oecd.org>).

[47] For an overview of the notion and role of epistemic communities in the competition policy setting see F. Van Warrden & M. Drahos, 'Courts and (epistemic) communities in the convergence of competition policies', (2002) 9 Journal of European Public Policy 913; S. Wilks, 'Understanding Competition Policy Networks in Europe: A Political Social Perspective', in C.D. Ehlermann & I. Atanasiu (eds.), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, Oxford/Portland, Hart Publishing, 2003, p 65 et seq; H. Kassim & K. Wright, 'Revisiting Modernization: the European Commission, Policy Change and the Reform of EC Competition Policy', CCP Working Paper 07-19, August 2007 (submitting that the modernization of European competition law was driven by the changing views within the competition law epistemic community rather than by the Commission acting as a self-interest agent aiming at maximizing its power through the decentralization of EC competition law).

[48] ES Rockefeller, *The Antitrust Religion*, pp 16 and 24.

an indispensible tool in order to set a common background and foster dialogue among people coming from different legal cultures.[49]

In conclusion, *The Antitrust Religion* will not be *The Antitrust Paradox* of the 21st century: it will not revolutionise the way of thinking about antitrust as much, or bring about an equally strong shift in the application of antitrust statues, nor finally will it lay the foundation for the abolition of antitrust statutes. Nonetheless, its reading may be instructive for two reasons. First, the book presents an articulated attack to the legal foundation of antitrust laws, although, as it has been shown above, the arguments put forward by Rockefeller are not convincing. Second, by questioning the foundations of antitrust the book performs the unintended mission of reminding all those who think that antitrust laws can perform something good (even a little), why antitrust laws are desirable and should be enforced. Such an exercise is worthwhile in order to recast the view of the antitrust forest, which members of the 'antitrust community' sometimes lose sight of when focusing on the trees of specific anticompetitive conducts.

[49] The development and use of a specific vocabulary and a technical register is common to all legal subjects and more generally to all disciplines. In the legal field, think for instance to the notion of 'exhaustion' or to the 'reverse doctrine of equivalents' in patent law. In the medical field, terms like 'bovine spongiform encephalopathy', 'computerized axial tomography' or 'septicemia' are equally examples technical and specialized language.