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The importance of coherence between competition policies and government policies

MANUEL SEBASTIÃO[·]

This essay discusses a topical subject that relates so closely to what competition authorities do, can do, and cannot do. It will aim to shed light on the reason why there is so much "tension", to use Eleanor Fox's words, on reconciling competition policies with a number of other government policies; or why it is so difficult to reconcile the public interest of competition with other public interests, whether in the European Union or in developing economies.

In the following I will touch on three topics and provide brief conclusion. First, I will go through the difference between competition policy on the one hand and competition enforcement and advocacy on the other, as well as covering who is – or should be – responsible for each one. Second, I will present key competition and regulation measures of the Memorandum of Understanding (MoU) recently agreed upon between Portugal and the European Commission, the European Central Bank and the International Monetary Fund: this clearly illustrates the role of policies in setting up the right competition environment. Third, I will focus on the role of the Portuguese Competition Authority (PCA). Finally, I will draw some conclusions.

1. COMPETITION POLICY VERSUS COMPETITION ENFORCEMENT AND ADVOCACY

Let me start by introducing what I think is a key conceptual difference, not between "Competition Policy" and "Government Policies," but between "Competition Policy" on one hand and "Competition Enforcement and Advocacy" on the other.

Competition policy, like other government policies, is the responsibility of the government; competition enforcement and advocacy is the responsibility of the competition authority.

It is true that in any country we need to raise productivity, competitiveness and growth, and promote the reduction of social inequalities. None of this will be achieved by simply reducing the budget deficit. Instead, a host of economic policies and structural reforms are required, all aimed at removing all types of impediments to growth, namely restrictions to competition generated by a number of government policies.

Competition authorities, through their advocacy role, can contribute to raising awareness and put forward suggestions concerning the need to promote competition-friendly economic policies. In turn, they can also contribute to avoiding "apparently" pro-competitive policies and practices, which may very well be popular but are fundamentally wrong from an economic point of view.

[·] Manuel Sebastião is President of the Portuguese Competition Authority. The article is based on a speech delivered at the UNCTAD 11th Intergovernmental Group of Experts on Competition Law and Policy conference, Geneva, 20 July 2011.

A clear example is provided by the years of credit expansion that preceded the 2008 financial crisis, with risk premia far below what was required. They were fostered by various kinds of economic policies and were never curbed by decisive action from banking supervisors and regulators.

In their advocacy role or in their enforcement capacity, competition authorities are fundamentally constrained by two realities:

- On one hand, the economic policies and the legal and regulatory framework of the country in which they operate, which can be more or it can be less competition-friendly; and

- On the other hand, the judicial system, and this in the end will uphold or not the competition authority's decisions after any appeal; and it will tend to let appeals reach the statute of limitation or not.

It is obvious that these constraints on the work of a competition authority will be less and less hampering as all economic agents in the economy, and the government, understand that the rule of law and a market environment that together promote competitive outcomes are to be complied with.

It is very curious that in several instances the same policy-makers and legislators that set market price regimes, rather than regulated prices, are the ones who criticise competition authorities for not intervening when prices of tradable goods are high and volatile; or that those setting non-competitive policies and regulations are the ones who convey the idea that it is up to the competition authorities to solve problems that such policies and regulations created in the first place.

2. THE MEMORANDUM OF UNDERSTANDING (MoU)

Let me move now to the competition and regulation issues stemming from the MoU agreed in May 2011 between Portugal and three multilateral institutions – the European Commission (EC), the European Central Bank (ECB) and the International Monetary Fund (IMF), commonly referred to as the "troika".

Similar memoranda of understanding had already been agreed between these three institutions and Greece, and thereafter Ireland. They all attempt to find a response to a challenge that has never had to be faced before: how to draw up a program for countries without their own currency, where the traditional monetary and exchange rate policy instruments are not available. It is for this reason that everything has to be thought out, not only in terms of budget variables, but also in structural terms, where competition and market regulation play a decisive role.

In my opinion, the greatest achievement of the MoU that Portugal signed with the EC, the ECB and the IMF, as did Greece and Ireland before it, is precisely to contribute decisively to moving the country in the direction of a more competition-friendly economy.

In this context, the MoU with Portugal is based on a two-pronged stance:

- Firstly, it is grounded on a philosophy of fostering and buttressing competition across the economy, including those sectors that are still regulated, involving a raft of structural reforms with very demanding deadlines; and

- Secondly, an array of measures, also with tight deadlines, aimed at improving the country's competition and regulation legal framework, following best international practices. This will pave the way to more efficient and speedier action by the authorities in charge of ensuring that the rules of competition are upheld and infringements punished. These authorities are the PCA and the courts which decide on appeals against PCA decisions.

The analyses and recommendations of the PCA in relevant sectors were scrutinised by the "troika", and it is very gratifying to see that the MoU flags up certain points that have also been identified by the PCA. Some of its measures also concur with conclusions reached and recommendations made by the PCA in such important sectors as telecommunications and energy.

In matters of competition and regulation, the MoU proposes measures in five areas:

i. The creation of a specialist court for competition issues, to be set up by the 1st quarter of 2012;
ii. Revision of the Portuguese Competition Law, to be carried out by the 4th quarter of 2011;
iii. Measures that ensure financing for the PCA that is *sufficient and stable*, to be enacted also by the 4th quarter of 2011;
iv. Measures that guarantee the country's regulators the independence and the funds they need to fulfil their missions, to be in place by the 1st quarter of 2012; and
v. The end of golden shares in the telecom and energy sectors, to be carried out by end-July 2011.

i. *The specialist court*

We heard yesterday the pros and cons of specialised competition courts. I will not go through these arguments again. I will simply say that in my country, given the judicial system we have, the creation of a specialist court to handle competition issues will go a long way towards bringing about fairer solutions and speedier procedures whenever there is an appeal against a PCA decision. The new court, which will hear competition, regulation and supervision appeals, has just been created, and it will likely be operational even before the deadline set out in the MoU.

ii. *Competition Law*

The current Portuguese Competition Law dates from 2003, and a revision of various aspects of it can be justified at this point in time as already pointed out by the PCA, given the experience that has been garnered in the meantime, through its investigations, its decisions, its appeals and its handling of cases in court. In addition, there have been developments in the national and community jurisprudence framework.

The PCA has contributed to this measure by concluding the internal review work of the current Competition Law that was started very early on in the present Board's mandate. In finalising this internal review work, there was the concern to provide a better response to what has been set out in the MoU. The PCA has no power to legislate or to take legislative initiatives, but its in-house assessment could be very useful, since the work carried out fully addresses the following MoU considerations:

a. Possible reformulation of the current Competition Law, with a comprehensive and coherent overhaul;
b. Introduction of the principle of opportunity to rationalise the conditions that determine the opening of investigations, which is a breakthrough vis-à-vis the Portuguese legal tradition;
c. Greater autonomy from other Portuguese legislation to which it is currently subordinate (the Administrative Procedure Code, the Administrative Sanctions Code and the Penal Code);
d. Increased convergence with EU legislation and jurisprudence, specifically through abandoning the criteria of market share for merger notification; and
e. Enhancing the appeals process against PCA decisions and the resulting procedures in the courts *to increase fairness and efficiency in terms of due process and timeliness of proceedings.*

The in-house reappraisal at the PCA will go further than just a reformulation of the Competition Law because it will also include a complete reformulation of the leniency regime to bring it more into line with European law and jurisprudence. On this point also, it is our opinion that there is no justification for approving the new regime through a mere change to the existing law; rather should there be a completely new law. In the light of this, the PCA has presented to the Government a comprehensive document covering a new legal framework for competition and leniency.

In line with best practice at the European Commission, the proposal that the Government adopts would benefit from a public consultation process before being submitted to Parliament for appreciation. If the Government decides to go ahead with such a public consultation, the PCA will give any assistance that is required. This is the usual procedure followed by the PCA before any new regulation or guideline of its own comes into being. These documents depend only on the PCA and have been made available for public consultation. The aims are threefold: to make the PCA more transparent and more accountable to its stakeholders; to enhance efficiency and the speed of investigations and cases; and to bolster the judicial quality of the cases we are responsible for taking to the courts.

iii. *Financing the PCA*

The PCA's budget outturn since 2008, in the framework of its existing financing model, has been exemplary. The model was set out in Decree Law no. 30/2004, of 6 February 2004, and is essentially made up of two components: the first, representing about 3/4 of the PCA revenue, comes from contributions made by seven sectoral regulators; and the second, representing almost ¼, comes from 40% of the sanctions imposed by the PCA, as and when the money is collected. It should be noted here, however, that under normal circumstances, collection is only ensured several years after a PCA decision, following

all the appeals procedures allowed in law, and the final amount depends on what the judge decides.

This financing model has two major virtues: it was construed as an integrated national system for competition and regulation; and it is able to ensure *sufficient and stable financing*, as long as no *ad hoc* changes make it very difficult to pursue a responsible and efficient management of the institution.

It is of course incumbent on the Government to choose a different financing model, guaranteeing *sufficient and stable financing*, bearing in mind also the capacity of the PCA to carry out its remit; or to maintain the current model, but with enough safeguards that also allows the institution to reach the same goals.

The ability of the PCA to carry out its remit in the future is critical. It is the essential point of reference for ensuring this *sufficient and stable financing.* The exemplary PCA budget outturns since 2008 have demanded intelligent budget control over every item and they do not in any way call our work into question, though there has been a sacrifice and that is in the recruitment of new staff. For an institution such as ours, this means we have had to cut into what is most essential for the future.

It is for this reason that I think the issue must be revisited, preferably this year, in the same way, in fact, as was allowed for the Competition Authority in Greece, the only public institution in that country authorised to increase staff in the current crisis. The PCA, as I set out for the first time to a parliamentary committee, needs 10 new specialists, half of them economists and the other half legal experts, besides the replacement of all those that have left the institution in the last two years. Serious attention to this issue is warranted by the extra work that can be expected as a result of the measures set out in the MoU covering the liberalisation of certain sectors of the economy and substantial adjustments to the regulatory scope of others.

iv. *Regulatory institutional framework*

In terms of the country's regulators, the MoU proposes that:

- by the 4th quarter of 2011, there should be an independent report by renowned international specialists to put forward a benchmark of Portuguese regulators with the best international practices. This should cover the appointment of boards, competencies, independence and available funds and, in the case of sectoral regulators, the scope of their work, their powers to intervene and the mechanisms for coordination with the PCA; and

- also by the 1st quarter of 2012, based on this report, to present a proposal that brings on board the best international practices in such as way as to bolster the independence of the regulators where necessary, and dovetail fully with EU legislation.

3. THE ROLE OF THE PCA

As I mentioned before, the MoU is grounded on a philosophy of fostering and buttressing competition across the economy. The PCA will have a pivotal role to play

here, with the addition of a new interface with the judicial system, now in the form of a new competition, regulation and supervision court, which must perforce be markedly speedier.

This role has a further cornerstone: the PCA is a member of the European competition system, and this provides at one and the same time:

- a European Union legal framework to act as reference, one which takes precedence over the Portuguese legal framework; and

- a guarantee that the work of the PCA must be on a par with the demands of an institution that is not merely national but also European, subject to the scrutiny of its peers in the European Competition Network, specifically the European Commission's General Directorate for Competition.

Along with this European scrutiny, the PCA is also subject to international assessments, and these define the benchmarks that allow for an appraisal of its performance, not just from an exclusively domestic viewpoint, but also through international comparisons. There have been recent assessments of the PCA, one through the *Global Merger Control Index* (GMCI) of the *Centre for European Law and Economics,* and the other on *overall competition enforcement* carried out by the *Global Competition Review*. These assessments are important and we need to pay attention to them, draw the right conclusions and improve the institution accordingly.

4. CONCLUSION

Portugal, as well as Greece and Ireland, is living through times of change. These changes are throwing up challenges, creating opportunities, and highlighting questions. They will test the adequacy of economic policies and the quality of institutions.
Concerning economic policies, those which come through the test will play a decisive part in bringing about a more competitive landscape in their economies. And the work of competition authorities will have to be more effective, because all economic actors, including the State, will have to develop their activity in an environment increasingly dominated by a culture of competition and market rules.

In terms of institutions, such as competition authorities, those which come through the test will be strong on continuity and innovation; strong on rigour and flexibility; strong on resilience and a willingness to look outside the box; and stronger still in the way they work to the highest professional standards.

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Searching for the Basis of International Convergence in Competition Law and Policy

LEONARDO TOMÁS ORLANSKI[·]

1. INTRODUCTION

There are now over one hundred countries that believe in the benefits of competition for innovation, growth and, most importantly, consumer welfare. Based on this conviction they have adopted competition regimes. Certain of them have existed for more than one hundred and twenty years and others, perhaps the majority, were only formalized during the 1990s[3]. Defense of competition is now a common policy in countries all over the world and in all kinds of economies, regardless of their size, grade of development, industry orientation or prevailing economic and political ideology.

Although divergences among different regimes exist, there is a shared concern that those benefits of competition will not be achieved to the highest extent possible, unless a common understanding or increased commonality, also known as convergence, is reached on some of its basic principles.

These efforts for convergence are normally concentrated in unifying the provisions of competition laws or the criteria applicable to uncertain or disputed cases, as well as in other basic standards described in Part II. Conversely, the thesis of this article is that a more important basis of competition law harmonization actually lies in two other areas: on one hand, on the institutions applying the laws more than on the laws themselves, and on the other hand in identifying and reducing large sectors of the economy unfairly excluded from the competition regimes.

Given that premise, this paper acknowledges that the way in which anti-competitive conducts, for example, are regulated in each jurisdiction remains a relevant matter of convergence. Significantly, this paper sustains that it is, however, even more relevant to determine who will be the authority applying those regulations and what is its degree of independence from the political power. Also, the second core argument implies that great efforts in convergence may end up being hugely diminished even if the best possible unified competition law can be easily avoided by each country through a wide range of exemptions. Ultimately, the proposal of this paper is to suggest an approach to the issue of convergence that is not, as usual, made from inside the specific competition regulations.

Part II begins by articulating the basic problems arising from multiple antitrust regimes in a global economy, it describes the main topics, where convergence efforts are

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[·] Leonardo Orlanski is a deputy professor of Constitutional Law at the Universidad Austral in Argentina and has been admitted to the bar in Buenos Aires in 2000.

[3] Competition started early in some countries: the U.S. enacted the Sherman Act in 1890, Japan issued its first Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade back in 1947, the United Kingdom Monopolies and Restrictive Practices (Inquiry and Control) Act was adopted in 1948, and the German Act Against Unfair Restraints of Competition was enacted in 1957, same year in which Treaty of Rome created the basis of the EU competition regime.

typically focused and present some reasons why those areas of concern may not be sufficient to maximize competition benefits.

Part III describes the central, conceptual arguments of this paper. Section A elaborates the key institutional organization flaws that prevent even well-drafted competition laws from being effectively and fairly applied and proposes in each of those cases a desired solution. Section B explains the different types of exemptions to antitrust laws and in which circumstances they erode the achievements that convergence may obtain. At the end, it proposes some standards that could be globally accepted as a framework under which exemptions could be granted.

In each of the described sections and its subsections, there is particular focus on how a particular subject is regulated in a selected jurisdiction that helps to better understand its main issues. References on how the same subject is addressed in other countries are also included.

2. THE PROBLEMS OF MULTIPLE ANTITRUST REGIMES AND THE USUAL FOCUS OF HARMONIZATION

The proliferation of antitrust regimes the world has lead to a complex legal environment for multinational business. As indicated above, there are numerous countries that have adopted competition legal frameworks with inherent degrees of difference among each other. The contrast is, in some cases, substantial.

Multinational companies struggle to navigate through these sinuous routes trying to adjust their conduct to each jurisdiction. In doing that, they must determine if a certain conduct may be objected to or punished or if the business concentration they are planning is subject to approval and, in affirmative cases, which criteria will be applied and what will be the final outcome (i.e. if the subject action will be approved, conditioned or rejected). The negative implications of the aforementioned divergences are fairly obvious: they may put the rights of affected companies and individuals at risk, increase costs and become a barrier for legitimate businesses.[4]

Consumers may also be harmed by these differences. Protection of consumers as the underlying purpose of competition law has been repeated constantly, particularly in the U.S. context. Yet, there could be cases of consumers affected by the same conduct that are protected in one jurisdiction and not in the other. Or consumers prejudiced by the effects of a concentration permitted or forbidden in accordance with different criterion in each jurisdiction.[5] If, instead, those differences were reduced by a solid process of

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[4] J. William Rowley & A. Neil Campbell, *A Comment on the Estimated Costs of Multi-Jurisdictional Merger Reviews*, [2003] THE ANTITRUST SOURCE, at 1, available at http://www.abanet.org/antitrust/at-source/03/09/comment.pdf (last visited August 31, 2011) describe the findings of a survey concerning the multinational antitrust filings and conclude that there are virtually no economies of scale in terms of external costs as the number of reviews increases (i.e., doubling the number of filings generally means twice as much cost) and that lack of consistency between filing requirements of the review regimes in different jurisdictions is seen as a real issue by businesses, with almost 60 percent of respondents identifying scope for improvement and convergence.

[5] In this connection, see William J. Kolasky, *Speech at the London conference sponsored by the British Institute of International and Comparative Law (BIICL)*, May 17, 2002, UNITED STATES OF AMERICA DEPARTMENT OF STATE, U.S. - E.U. COMPETITION POLICY: COMMON THEMES, COMMON CHALLENGES (October 8, 2002), 4, available at http://photos.state.gov/libraries/spain/5/archivo/competition.pdf, visited

convergence, consumers would have benefited by the constant improvement of their country's competition regime caused by the absorption from other jurisdictions of the best possible solution to each of the competition issues.[6] They would also enjoy a reduction of transactional costs permitted by legal standardization that should be passed through prices.

Notwithstanding the above, realities acknowledge that complete harmonization at a global scale is impossible, as it is the case with practically all legal areas that affect international businesses - such as tax law -, and likely is not desirable either. It could be relatively achieved at a regional level, as it is the case of the EU, but it would require a supranational agency and/or a multilateral competition treaty, hardly conceivable at a broader scale.[7]

Yet, as indicated above, once a competition law framework has been seriously adopted, its improvement using the experiences of other jurisdictions and the work towards convergence should flow naturally.

This has been in fact the position adopted by the U.S. agencies, who recognize there are some central precepts of modern antitrust common to most if not all efforts to globally impart sound competition policy, including: the goal of promoting consumer welfare, the importance of economics in competition analysis, the need to deter and punish hard-core cartels, the value of separating social and employment policy from competition policy, and non-discrimination on the basis of nationality.[8]

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on May 22, 2011, which notes that differences in certain antitrust policies between U.S. and the EU may have contributed to the slower growth of the European economy.

[6] *See* Robert D. Anderson and Alberto Heimler, *What has Competition Done for Europe? An Inter-Disciplinary Answer*, 4 AUSSENWIRTSCHAFT, [2007] SWISS REVIEW OF INTERNATIONAL ECONOMIC RELATIONS, http://ssrn.com/abstract=1081563 (last visited May 27, 2011), subsection 5, who sustain that "…the potential benefits of trade liberalization will not be realized unless countries simultaneously take steps to address anti-competitive practices and structural barriers to development such as private and public monopolies in infrastructure sectors, domestic and international cartels that raise business input costs and reduce the welfare of consumers, and restrictions on entry, exit and pricing in manufacturing and other industries."

[7] *See* Byrandolph W. Tritell, *International Antitrust Convergence: A Positive View*, AMERICAN BAR ASSOCIATION, [2005] ANTITRUST MAGAZINE, at 25. According to Tritell, "Harmonizing competition laws or policy in the foreseeable future is impractical and, moreover, probably undesirable. Its achievement would be possible only through a supranational body or a multinational code. The rejection, primarily by developing countries, of proposals to negotiate competition disciplines in the World Trade Organization's Doha Round demonstrates that the world is not ready for multilateral competition rules. There are simply too many jurisdictions with too many differences in levels of economic development, legal systems, histories, and cultures to envision a unified worldwide competition system any time soon. Moreover, such rules would be static, while competition policy is evolving dynamically. Preserving the ability to experiment with different rules and procedures and to adapt them to the local environment is critical to enable competition law and policy to evolve, as has occurred throughout the history of the U.S. antitrust laws. At the same time, leaving every jurisdiction to develop and apply its competition laws and policies in a vacuum would likely be a recipe for chaos. Firms engaged in cross-border mergers could be subject to scores of merger reviews, each with its own procedures and substantive standards, imposing significant costs and conceivably deterring firms from pursuing precompetitive transactions. Agreements and single-firm policies with crossborder effects could be subject to inconsistent legal obligations, potentially thwarting efficient exploitation of more open markets".

[8] *See* Tritell, *supra* note 7, at 26: "The U.S. agencies believe the most promising means for promoting best practice and avoiding conflict is a process of "soft" convergence. Soft convergence occurs not because it is mandated by rules, but because competition agencies and national lawmakers believe it is in their best interests to move toward policies used by other jurisdictions or promulgated internationally in

In the listing of the useful areas for convergence quoted above, two items refer to the purpose for which a competition regime should be used (i.e. to protect consumers and not for other goals, such as social and employment objectives).

Protection of consumers is a fair concern and probably the most significant basis for competition law. Indeed, it is a commonplace to argue that in the U.S. the goal of antitrust laws is consumer protection while in the EU the competition policy is also driven by other goals - such as protection of labor, small companies, etc. -.[9] The EU approach, however, has also shifted towards the consumer protection purpose[10], while in developing countries the weight of other ends in competition authorities' decisions seems to continue to be relevant.[11]

In the same vein, one of the aims of insisting on economic analysis is to avoid disruption due to the existence of other goals different than consumer protection and to achieve the best possible and well-founded solution. Sound economic analysis also brings other benefits to a competition regime, including making convergence possible.[12]

None of these purposes, however, can be achieved when there are institutional failures. While this paper will not asses the results of each of the different substantive antitrust policies,[13] it is worth mentioning that recent economic literature has demonstrated

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best practice standards. Convergence is facilitated by providing opportunities for agencies to work together on matters and by sharing experiences in international fora devoted to promoting sound policy. Convergence implies moving toward the same result, but it matters that the result is the "right" one (…). Recognizing the different circumstances in developing, as opposed to industrialized, countries and among nations with newer competition regimes, "no one size fits all" is an oft-repeated mantra."

[9] *See* the discussion of this difference at the *General Electric-Honeywell case*, *infra* subsection 3.1.3.

[10] See Mario Monti, *The Future for Competition Policy in the European Union*, Speech at the Merchant Taylor's Hall, London, 9 July 2001. Commissioner Monti expressly stated that "the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market". Extracts of the speech are published in http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/340&format=HTML&aged=0&language=EN&guiLanguage=en (last visited May 22, 2011). Notwithstanding the foregoing, the overview of competition at the EU's official website says: "The large may not exploit the small In doing business with smaller firms, large firms may not use their bargaining power to impose conditions which would make it difficult for their supplier or customer to do business with the large firm's competitors. The Commission can (and does) fine companies for all these practices." http://europa.eu/pol/comp/index_en.htm (last visited May 25, 2011).

[11] This approach of developing countries is supported by Eleanor M. Fox, *Economic Development, Poverty, and Antitrust: The Other Path*, [2007], NEW YORK UNIVERSITY LAW AND ECONOMICS WORKING PAPERS, Paper 102; http://lsr.nellco.org/nyu_lewp/102 (last visited May 22, 2011).

[12] Lars-Hendrik Röller, *Economic Analysis and Competition, Policy Enforcement in Europe*, MODELLING EUROPEAN MERGERS: THEORY, COMPETITION POLICY AND CASE STUDIES (Edward Elgar, ed. 2005), at Section 1, lists several reasons that support the relevance that has been attributed to the economic analysis in recent years. Among those reasons is precisely the possibility to reach a certain level of convergence: "the use of economic analysis is useful when working closely and on a consistent basis with other jurisdictions. This is the case for DG COMP and its U.S. sister institutions, i.e. the FTC and DoJ. More generally, reliance on economics – rather than other policy considerations – has the potential to reduce conflict between jurisdictions. Increased emphasis on economics will not, however, lead to complete convergence, in the sense of one-to-one decision making. Important differences and asymmetries exist and will continue to exist."

[13] Ignacio De León, *Latin American Competition Policy: From Nirvana Antitrust Policy To Reality-Based Institutional Competition Building*, 83:1, [2008], 39, CHICAGO-KENT LAW REVIEW, 65, sustains that are in fact few empirical studies on the effectiveness of antitrust policy in attaining its goals and quotes the studies of Arnold C. Harberger, *Monopoly and Resource Allocation*, 44 AM. [1954], ECON. REV. 77;

empirically the direct relationship between the strength and independency of the competition agency and the efficacy of the competition regime on the development and growth of a country.[14]In a more simple manner, as good as a competition framework's written purpose, consumer protection, or its workings, using sound economic analysis may be, such achievements could be undone if the agency in charge of its application lacks of the appropriate institutional organization and the necessary independence from other interests.[15]

Similar to the above problem of institutional issues, the problem of exemptions quickly arises in the case of other of the above-quoted convergence examples, such as deterring and punishing hard-core cartels or avoiding discrimination on the basis of nationality. Assuming, for example, that optimal convergence was reached on the punishment of hard-core cartels, existing exemptions in many converging jurisdictions would nonetheless allow many such cartels, thus undermining the sought-after primary convergence. Further, if the exemptions were applicable, as it is often the case, only to a certain group of local companies, the secondary convergence area, agreement against discrimination on the basis of nationality would also be defeated.

Richard A. Posner, A Statistical Study of Antitrust Enforcement, [1970], 13 J.L. & ECON. 365; George J. Stigler, The Economic Effects of the Antitrust Laws, [1966] 9 J.L. & ECON. 225; Keith N. Hylton & Fei Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects* (Boston Univ. Sch. Of Law, Working Paper Series, Law & Econ., Working Paper No. 06-47, 2006); and Michael W. Nichol-son, *Quantifying Antitrust Regimes* (FTC Bureau of Econ., Working Paper No. 267, 2004)]. The recent economic literature, however, has an opposite position. Damien J. Neven, *Competition economics and antitrust*, *in Europe*, [2006] 21 Economic Policy, 48, 741-791, sustains that over the last twenty years, a significant body of evidence has accumulated which confirms that competition matters for economic efficiency and in particular for productive efficiency and incentives to innovate. In the same vein, Anderson & Heimler, *supra* note 6, argue that competition has made essential contributions to the high standard of living enjoyed by European citizens, to the policy and institutional infrastructure of Europe, to related international initiatives and, indeed, to the creation of Europe itself. Carlos Winograd, *Argentina in the Eye of a Practioner*, [2009] 2 CONCURRENCES, REVUE DES DROITS DE LA CONCURRENCE, 18, makes an interesting distinction: the empirics on the impact of competition policies on economic performance shows a consensus on the positive effect on productivity and growth in the long run, though in the short run competition policies may increase costs due to restructuring. In times of crisis, social and political anxiety tends to overprice the short run, leading to high pressures on competition institutions and its practice. The empirical studies run by Tay-Cheng Ma, *The Effect of Competition Law Enforcement on Economic Growth*, [2011], 7 (2), JNL OF COMPETITION LAW & ECONOMICS: 301-334, reach a very important conclusion: the effectiveness of competition law on development and growth varies from one jurisdiction to the other, depending on the level of independence and strength of the competition agencies, which is consistent with the main arguments of this paper. After a cross-country study of 101 countries that enforce competition law, the author concludes that there is an asymmetrical pattern depending on the stage of development of each country. For the poor less developed countries (LDCs) whose institutional frameworks cannot exceed a threshold level, competition law has a very limited effect on changing economic activity, and its legislation is neither harmful nor helpful in terms of market competition or economic growth. As to the developed and middle-income countries, although their institutional frameworks have passed the threshold level, the effect of competition law on growth still depends on the law enforcement efficiency of the government. His study demonstrates that without an efficient enforcement scheme, a stronger competition law not only cannot support productivity growth, but might also slow down the potential path of growth.

[14] *See* Tay-Cheng Ma, *Competition authority independence, antitrust effectiveness, and institutions*, [September 2010] 30, Issue 3, INTERNATIONAL REVIEW OF LAW AND ECONOMICS, at 226-235; Tay-Cheng Ma, *supra* note 13.

[15] *See* Anderson & Heimler, *supra* note 13 at 3, who recognized that "success lies in the details and in having an institutional structure that meaningfully implements relevant rules."

The explanation above shows that pointing to the commonly-listed targets of convergence is not enough. It is understandable and desirable that convergence activity focuses on those areas raised in the commented examples. However, if the efforts do not go beyond them, it would be like treating the symptoms and not the disease.

3. PROPOSED BASIS OF HARMONIZATION AND CONVERGENCE

3.1 Institutional organization and strength

As explained above, in order to achieve a real and effective convergence, the analysis must explore other factors outside of specific provisions of antitrust laws. The first of those aspects is the institutional organization.

It is fairly evident that each jurisdiction must be allowed to choose whichever institutional organization better fits with its own culture and governmental structure. Notwithstanding the foregoing, certain basic institutional principles seem to be essential to achieve the relevant competition law goal. This proposed approach, however, does not mean that pursuit of convergence should be fully replaced by building stronger institutions.[16] Rather, it means that the former cannot be done without the latter.

3.1.1 Basic institutional organization

In theoretical terms, the type of organization, whether under a commission, agency, administrative tribunal or court of law, should not be a major concern of convergence activities to the extent organizational independence is present in all cases. However, it should be noted that the purpose of creating administrative tribunals or commissions instead of specialized judicial courts should be justified by efficiency reasons only and not as a means to keep the institution closer to the influence of the executive power. Moreover, the fact that a competition authority is closer to the executive power demands greater care in the independence protections with which the agency should be vested.

In other words, whichever legal structure is adopted, it must always be structured in such a way that ensures the greatest possible independence of the agency. That should be a mandatory starting point. Once such institutional organization is in place, the effective results of the competition regime will be in a direct proportion to the *effective* independence of the agency, as demonstrated by recent empiric studies.[17]

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[16] This seems to be the position of Fox: "…the competition agency must be as independent as possible, free from political interference, lest the government and its politicians commandeer antitrust and confine it to a not-too meaningful realm. Third, institutions: Ideally, the agency should be well-funded and sufficiently staffed with educated and trained personnel. The leaders and staff should not be corrupt. Appellate channels should be provided. These institutions, too, should be staffed by well-qualified and non-corrupt individuals. Due process should be assured in all proceedings. The workings of the institutions should be transparent and their agents accountable. Indeed, well-functioning institutions are more important to trade and competition than is the convergence of the laws of various nations" (*supra note* 11, at 122).

[17] *See* Ma, *supra* note 14. The results of his study suggest that the authority's effectiveness is empirically associated with the *de facto* independence and not with the *de iure* organization. Additionally, the de facto independence is the main mediating channel through which the institutions influence antitrust effectiveness.

As indicated above, there are many possible ways of organizing a competition agency available for each jurisdiction to choose. It is not the point of convergence to unify all agencies in a single type. Yet, there are basic principles that do promote the independence of the agency and preserve the rights of the involved parties that could be applicable to all jurisdictions with proper adaptations.

For the purposes of this paper, it is not possible to discuss at length the benefits and downsides of a single agency system or a dual agency structure, though there appears to be, in principle, benefits in efficiency and clarity which favor the single agency approach, since the potential problems related to the distribution of powers and potential divergence of criteria between agencies are eliminated.[18]

Notwithstanding the above, as relates to analyzing, across jurisdictions, the institutional structure that better leads to a consistent treatment of parties, the single agency design may increase the risks of losing objectivity by investigating and adjudicating at the same time when compared to a dual system in which one agency investigates and the other adjudicates.[19]

It is also worthy to note particular cases like the one of Japan, where the consolidation of competition enforcement in a single agency has been accused of being among the main reasons of the country's weak competition performance.[20]

In that connection, the Spanish Competition Act 15/2007 creates a reasonable intermediate solution by having an investigation division within the Competition Commission whose chief officer is appointed independently from the members of the Competition Council.[21] Similarly, within the U.S. Federal Trade Commission, the Office of Inspector General was established in 1989 as an independent and objective sub-organization. In fact, the Federal Trade Commission agency itself actually plays a mixed role to the extent that it acts, at different times, as a prosecutor and as a judge on appeal: the Federal Trade Commission staff acts as prosecutor in the initial phase and brings the case to an administrative law court. However, if the administrative law court finds against the parties (or impose restrictions that the parties do not accept), the parties

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[18] In fact, in the case of the U.S. Department of Justice and Federal Trade Commission, the Antitrust Modernization Commission recognized the potential negative consequences of agency divergence and even urged the U.S. Congress to ensure that the DOJ and FTC maintain a uniform approach to mergers. *See* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 138 (2007).

[19] This was particularly visible, for example, in the European system of hearings at the time of the General Electric and Honeywell failed merger. *See* Jeremy Grant & Damien J. Neven, *The attempted merger between General Electric and Honeywell. A case study of transatlantic conflict*, [2005], 1 (3). JNL OF COMPETITION LAW & ECONOMICS: 595-633, who explain that "the EC process revolves around formal hearings during phases 1 and 2 of an investigation. However, Pattersen and Shapiro (2001) categorize these as resembling "seminars" rather than court hearings. Evidential standards during these hearings are not comparable with those of a court, with the merging parties having to defend themselves from both the Commission and competitors. The Commission case team plays the role of policeman, prosecutor, judge and jury, while the merging parties are forced to make their case and come up with solutions with little guidance, so end up arguing against/incriminating themselves (Welch). Power seems to lie almost exclusively with the case team. There is a Hearing Officer, but he has limited powers, and does not rule on the admissibility or weight to be accorded to the evidence or have any say in outcome. It was also unclear in the European regulatory process where the burden of proof lay, at this point."

[20] *See* Harry First & Tadashi Shiraishi, *Concentrated Power: The Paradox of Antitrust in Japan*, [2005] LAW IN JAPAN, University of Washington Press, available at Available at SSRN: http://ssrn.com/abstract=652505 (last visited May 27, 2011).

[21] Competition Act 15/2007, Spanish Official Gazette, 159 at 28849 (July 4, 2007).

can appeal its decision to the Federal Trade Commission, which in that case acts as an appellate body. This does not mean, however, that they are fully released from the so called "prosecutorial bias".[22]

Something towards the opposite occurs with the U.S. Department of Justice, which is always acting in independent forums. The Department of Justice must seek an injunction in a federal District Court to block a merger, which may in fact lead to a full trial, and appeals from such trial would occur in federal Courts of Appeal.[23]

At the spectrum's further end, extreme cases like the ones of Brazil and China,[24] with up to three government bodies with antitrust powers, should preferably be avoided. In fact, the OECD recommended Brazil to unify the investigative, prosecutorial and adjudicative functions in a single independent agency.[25] Furthermore, China's tripartite agency framework not only has the downsides of multiple agencies systems, but it also never accomplishes a separation of the merger control system from the above-mentioned prosecutorial bias.[26]

3.1.2 Independence from political power and other interests

The basic premise that the competition analysis of conducts and business concentrations is a technical matter which must be based on objective economic and legal reasons has become well accepted in countries with long competition tradition. However, in other jurisdictions, it is not unusual for some antitrust agencies, politicians and even scholars to assume that antitrust decisions should be subject to a certain degree of political interference. It is also relatively common to assume that the competition agency can pursue goals other than market protection (such as, for instance, preserving national

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[22] Referring to the EU Commission, Naven explains that if "it is found in the course of a phase II investigation that the there is no competition concern, officials will tend to believe that they should have known this at the time when they wrote the statement of objection which led to a phase II. This hindsight will lead to a problem of cognitive dissonance, which might call into question the confidence that officials have in their judgment, and they will naturally try to avoid this dissonance. The consequence would be that officials would tend to concentrate on evidence that confirms their own judgment. The symptom is a "self confirming bias" which some commentators claim to observe in fact (see Kühn, 2002). Burnside (2001) for instance observes: "The frequent opinion of industry is that a view, once entrenched in the Commission's thinking, cannot be dislodged: "I have made up my mind. Do not try to confuse me with the facts"""". The author also shows the conclusion of empirical studies reaching similar conclusions within the U.S. Federal Trade Commission (*supra* note 13, subsection 6.1).

[23] *See* Grant & Neven, *supra* note 19, Part III: "This immediately places a higher burden of proof on regulators, as the case will be publicly scrutinized by independent observers. The facts of the case will then be examined in a hearing, where the government and competitors evidence is cross-examined by the merging parties counsel under oath with clear rules of evidence and procedure. Beyond this the authorities face the prospect of a full public trial."

[24] *See, e.g.*, Angela Huyue Zhang, *The enforcement of the Anti-Monopoly Law in China: An institutional design perspective*, Forthcoming (March 10, 2011), ANTITRUST BULLETIN, available at SSRN: http://ssrn.com/abstract=1783037 (last visited May 28, 2011); Nathan Bush, *Constraints on Convergence in Chinese Antitrust*, [2009] 54 ANTITRUST BULL. 87, 104-105; Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*, [2008-2009], 75 ANTITRUST L.J. 133, 144-146.

[25] See OECD, *Competition Law and Policy in Latin America*, Peer Reviews of Argentina, Brazil, Chile, Mexico and Peru, at 154, http://www.oecd.org/newsearch/0,3766,en_33873108_36016449_1_1_1_1_1,00.html?q=derecho+y+pol%C3%ADtica+de+competencia+en+brasil&cx=012432601748511391518%3Axzeadub0b0a&cof=FORID%3A11&ie=UTF-8 (last visited May 23, 2011).

[26] *See* Zhang, *supra* note 24, subsection B.1.b.

ownership of energy resources or key infrastructure).[27] Based on such a view, merger control is a fair opportunity to protect whichever political interest is at stake (whether is legitimate or not).[28] Finally, in the worst instances, the competition laws can be used as a subjective weapon against those that may be on bad terms with the current administration. For that reason, there is a constant claim for independence of the agencies.[29]

It is acknowledged that there can be important political aspects to business matters, for example, in concentrations involving natural resources, and therefore the aim by public officers to have influence over them is valid and understandable. But that aim has nothing to do with the antitrust analysis and therefore it should be channeled through other legal or political instruments that each jurisdiction should have if it so wishes. This was the case, for example, of the failed acquisition of the private U.S. Unocal firm by the Chinese state-owned oil company CNOOC. The attempt to block the transaction manifested itself through the application of the national security provisions of the Exxon-Florio Act, notwithstanding the fact that the merger would have probably been approved if analyzed for purely antitrust considerations.[30]

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[27] *See* U.S. Merger Policies & Anticompetitive Government Actions - U.S. - E.U. Cooperation on Antitrust Issues (Selected Documents), Information Resource Center, Embassy of the United States of America, Madrid, Spain, 15, http://photos.state.gov/libraries/spain/5/archivo/competition.pdf (last visited May 27, 2011): "The difficulty we face is how to accommodate the legitimate interests of jurisdictions in antitrust matters that affect their economies with the interests of businesses and consumers in not having antitrust enforcement used as a tool of industrial policy, protectionism, rent-seeking, or worse. This is especially true in merger enforcement, where multinational transactions often involve contemporaneous reviews by multiple antitrust authorities… Finally, and most seriously, there is the significant risk that economic nationalism will prevail in antitrust merger enforcement in some jurisdictions, with the accompanying politicization of enforcement. Antitrust is, or should be, focused on protecting competition, not competitors. As one of my predecessors, Thurman Arnold, said 60 years ago: "[t]he economic philosophy behind the antitrust laws is a tough philosophy. [Those laws] recognize that competition means someone may go bankrupt. They do not contemplate a game in which everyone who plays can win."

[28] Tony A. Freyer, *Comparative Antitrust Enforcement and Business History*, http://www.ftc.gov/os/sectiontwohearings/docs/ComparativeBusinessHistory-Freyer.pdf (last visited May 27, 2011), 2, sustains that "More so than the in U.S., bureaucratic intervention in other antitrust regimes attempted to balance competition and public interest objectives."

[29] In the EU, for example, when the Commission put out to consultation Best Practices Guidelines on its antitrust procedures in 2010, responses pointed towards tighter controls and greater independent checks on how the regulator tackled competition breaches. They also encouraged the Commission for a broader debate on reform of the entire structure of competition decision-making to ensure defense rights are respected. One of the proposed solutions would be to have an independent tribunal where the Commission must present its case. Interim steps can also be taken to inject independence into the procedure, such as making the hearing officer 'truly independent' of the Commission. Other suggestions include having representatives of the other 26 commissioners' cabinets attend the hearings, or that the competition commissioner should not attend the 'college' meetings. This is aimed at ensuring independent control by the other 26 commissioners (see Response by Baker & McKenzie to DG Comp Consultation: Best Practices on the Conduct of Antitrust Proceedings and Guidance on Procedures of the Hearing Officers Louise Harvey, 2010, at http://ec.europa.eu/competition/consultations/2010_best_practices/baker_mckenzie_en.pdf; Gwendoline Motte, *Competition and Politics: Riding to the Rescue of Recovering Competitive Markets*, The European Antitrust Review 2011, at http://www.globalcompetitionreview.com/reviews/28/sections/98/chapters/1087/public-affairs/, both visited on May 22, 2011).

[30] See Edward M. Graham, *No Reason to Block the Deal*, [July 2005], Far Eastern Economic Review, Peterson Institute for International Economics, available at http://www.iie.com/publications/opeds/print.cfm?researchid=535&doc=pub.

In the case of Argentina, the Competition Act 25,156 of 1999 created an administrative tribunal as an autonomous agency within the structure of a ministry of the Executive Power. It has powers of investigation and punishment of breaches to the Competition Act as well as of approval of business concentrations.

In practice, however, the Competition Tribunal was never constituted. Instead, its powers continue to be "provisionally" exercised by a Competition Commission existing under the prior competition regime and by a Secretary of State (currently the Secretary of Domestic Trade).[31] The Competition Commission performs the administrative procedures called for by the Competition Act and produces a non-binding opinion for the Secretary of State who, in turn, issues the final decision. The selection and tenure provisions applicable to the members of the dormant Competition Tribunal do not apply to officers of the Competition Commission, who are freely appointed and removed by the Executive Power.

In this context, the obvious concern is that the Argentinian structure for competition enforcement is subject to all sorts of prejudicial incentives.[32] Additionally, not only is the Secretary of Domestic Trade active in the application of the Competition Act as described above: he is also the public official directing the price agreements with industrials to manage inflation that have been implemented for the past eight years and further exercises other economic powers quite incompatible with a sound competition policy or enforcement, such as the ones related to the Mandatory Supply Act.[33]

The failure of successive administrations since 1999 to establish the Competition Tribunal is certainly an unconstitutional omission for several reasons.[34] Unfortunately, the Supreme Court missed several opportunities to put an end to this regrettable situation. Instead, it confirmed the procedures and decisions under the above-described

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[31] According to Section 58 of the Competition Act, "Act No. 22,262 [the former antitrust act] is hereby repealed. This notwithstanding, any cases pending resolution as of the effective date of this Act shall continue to be heard in accordance with the provisions of Act No. 22,262 by the applicable authorities, which shall continue to exist until the National Tribunal for the Defense of Competition is formed and becomes operational. They will also hear all claims filed after this Act becomes effective. Once the National Tribunal for the Defense of Competition is organized, any such claims shall be transferred to the National Tribunal for the Defense of Competition."

[32] *See* OECD, Competition Law and Policy in Latin America, Peer Reviews of Argentina, Brazil, Chile, Mexico And Peru, at http://www.oecd.org/newsearch/0,3766,en_33873108_36016449_1_1_1_1_1,00.html?q=derecho+y+pol%C3%ADtica+de+competencia+en+brasil&cx=012432601748511391518%3Axzeadub0b0a&cof=FORID%3A11&ie=UTF-8, at 48 and 53, where it recommended a prompt implementation of the Competition Tribunal, as well as preserving the independence of the Competition Commission to the maximum extent possible until the tribunal is constituted. It also recommends providing the Competition Commission with an independent budget.

[33] *See infra*, subsection g.).

[34] The omission to implement the Competition Tribunal is unconstitutional since: (i) it contravenes express provisions of the Competition Act, (ii) it disobeys the command contained in Section 42 of the National Constitution to protect competition and avoid market distortions and (iii) it grants to political officers powers thought for officers with the independence of a judge. Moreover, the idea of an administrative tribunal already needs to overcome the prohibition for the Executive Power to exercise judicial powers contained in Section 109 of the National Constitution (which the Argentinian Supreme Court has accepted with limitations, *Fernández Arias vs. Poggio*, *Fallos* 247:646, J.A. 1960-V-447), as a result of which the attribution of those powers to political officers openly opposes the plain language of the National Constitution.

structure.[35] More recently, however, in a significant development, the Federal Courts of Appeals on Economic Crimes and on Civil and Commercial Matters finally decided to confront this scandal and annulled several decisions of the Competition Commission.[36] The risk of the interference of additional types under this weak institutional structure was made evident when the Competition Commission of Argentina suspended the clearance process of transactions involving parties with legal actions against the Republic of Argentina until the time when it received an authorizing opinion by the Attorney General (which never arrived), even though the transactions presented no apparent competition issues and the legal proceedings against the Republic of Argentina were completely unrelated to the competition aspects of the transactions.[37]

Further, during the unsuccessful occasion when the Competition Tribunal was perhaps to be constituted, there was an attempt to severely limit its independence and decision powers.[38] As previously stated, the status of the Competition Tribunal as an administrative tribunal leads to an underlying pre-disposition that it should be subject to some level of political control rather than being an independent, adjudicative body. It is disappointing and somewhat unique that this situation does not cause outcry in the competition field. For example, in cases of other existing administrative tribunals (such as, in Argentina, the Administrative Tax Court or the Navigation Court) there is little belief that such tribunals should condition their technical decisions to higher political interests, even when matters of great strategic relevance for a country may be at stake (such as, continuing with the Argentina's example, the financing of the government in the case of the Administrative Tax Court).

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[35] *See Credit Suisse First Boston Private Equity Argentina II y otros s/apel. Resol. CNDC and Recreativos Franco s/apel. Resol.* CNDC, June 5, 2007, and Belmonte, *Manuel y Asociación Ruralista General Alvear s/ Acción de Amparo c/ Estado Nacional*, April 16, 2008. Specifically, the business concentration clearance procedure was approved by the Supreme Court in *Aeroandina S.A. y otra*, April 4, 2006.

[36] *See* II Federal Court of Appeals on Civil and Commercial Matters, *Telecom Italia SpA y otro*, July 27, 2009; *Direct TV Argentina S.A.*, February 25, 2010, AR/JUR/222/2010; *Cablevisión S.A.*, February 19, 2010, AR/JUR/213/2010; Federal Court of Appeals on Economic Crimes, *Grupo Clarín S.A.*; *Vistone LLC; Fintech Advisory Inc. Fintech Media LLC; VLG Argentina LLC y Cablevisión S.A. s/ notificación* art. 8 de la ley 25.156 (conc. 0596 incidente), December 30, 2009, AR/JUR/57454/2009. *See* also *Sintonia S.A. y Otros S/ Rec.* de queja por apelación denegada, June 17, 2010; *Telecom Italia SPA y otro* S/ Recurso de queja por apelación denegada and *Telecom Italia SPA y otro* S/ Recurso de queja por rec. directo denegado. In the Telecom case, the Court of Appeals revoked a ruling of the Secretary of Domestic Trade that conditioned the approval of a business concentration and imposed sanctions to the parties of the transaction. Such decision was based on due process breaches and, in particular, on the lack of constitution of the Competition Tribunal. For this reason, the Court required the Executive Power to implement the Competition Tribunal [*see Incidente de Apelación de Telefónica S.A. y otros contra Resolución SCI Nº 483/09 (en autos principales: "Pirelli & CS.P.A. y otros s/ notificación art. 8 ley 25.156)*, February 1, 2010.

[37] This happened, for example, in a business concentration involving Monsanto, which had pending litigation with Argentina regarding the property rights over transgenic soybean. The antitrust procedure suspended by the CNDC was subsequently resumed following the issuance of an order by the Court of Appeals on Economic Crimes in re "Monsanto Arg.", dated February 18, 2009.

[38] The bill to amend the Competition Act sent by the Executive Power to the Congress on 2005 empowered the Secretary of Technical Coordination of the Ministry of Economy to modify the decision of the Competition Tribunal regarding a business concentration when "there are reasons of general interest of the Nation and only in case the business concentration takes place in the areas of public utilities, defense, energy or mining, or if the analyzed transaction has a high impact on employment or investment…". Additionally, the bill intended to avoid the mechanisms contemplated in the Competition Act to appoint the members of the Tribunal through a public contest by setting up the Competition Tribunal with the members of the Competition Commission that were in office at that time plus two members appointed directly by the Executive Power.

The remarks on these institutional failures do not mean that important progress in areas of competition law in Argentina, since the enactment of the 1999 Competition Act 25,156, has not occurred.[39] Yet, to enable further necessary advancement of competition law while preserving the rights of parties, the actions of the agency, as good as they may be, must be framed within the proper institutional organization.

As mentioned above (such as in the case of mergers involving natural resources entities), the desire by public officers to have influence on commercial transactions apart from the competition analysis is constant and can sometimes be fair, but it does not belong to the competition process. In this context, the Spanish Competition Act 15/2007 introduced a middle solution that could be a step forward towards the independence of the agency for some other jurisdictions.
Once a transaction is evaluated by the National Competition Commission (which is an independent government agency), the government's cabinet council can evaluate the concentration based on a limited list of grounds other than competition:

a) defence and national security,
b) protection of public safety or health,
c) free flow of goods and services within the national territory,
d) protection of the environment,
e) promotion of research and technological development,
f) preservation of the objectives of sector regulation.

The first advantage of this Spanish structure is that it reveals the real purpose behind the decision, without hiding a political or economic choice having nothing to do with competition concerns behind a competition law approval or disapproval ruling.

Furthermore, a real contribution also comes from the operation of the Spanish mechanisms: they can only be used if the National Competition Commission decides to deny or to condition the authorization of a business concentration. It will therefore be appropriately awkward for a public officer to approve a concentration that the specialized agency decided to prohibit from a technical antitrust point. Similarly, the system also blocks abuses in the other direction, where a political officer would veto, under a claimed antitrust basis, a transaction that raised no competition issues for the agency.[40] In addition to that, the mechanism is balanced by regular Congress oversight.[41]

It is evident that any mechanism of political revision of the competition agency's decisions like the one described above, even if undesirable, could only be accepted if it is limited to prospective business concentrations. By contrast, the decisions of a competition agency related to competition enforcement should only be subject to judicial review.

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[39] *See* a description of those progresses in Winograd, *supra* note 13, at 25.
[40] That was the case in the proposed amendment to the Argentina's Competition Act explained *supra*, note 38.
[41] *See* Section 28 of the Spanish Competition Act 15/2007.

3.1.3 Institutional organization enabling independent economic analysis. The EU path.

As the OECD points out, competition agencies typically apply broadly written legal standards to what can be highly complex forms of commercial activity. Technical expertise enables meaningful communication with the involved parties and is fundamental to arrive at decisions that accurately distinguish harmful from benign conduct. Accurate economic and legal analysis is important not only because of the interests of the parties involved, but also because ill enforcement of a competition law can, on one hand, materially impair economic vitality, discourage investment, and reduce innovation,[42] and on the other hand cause a serious violation of individual or economic rights. It should also be borne in mind that in some jurisdictions antitrust violations have a criminal nature and may result in imprisonment sanctions. Additionally, the decisions of the competition agency can be used as a basis for private legal actions and therefore, a wrong assessment of harm to consumers attributed to a company, for example, could result in unfair private litigation against that company or even imprisonment of its officers.

As indicated in Part 2 above, the importance of economics in competition analysis is and should be one of the main aspects of harmonization efforts among jurisdictions. Yet, no proclamation or legal provision recognizing this principle will be sufficient if the agencies are under-resourced or do not operate with the level of expertise their work requirers.

The difference in this aspect between the U.S. and the EU was remarked as one of the reasons for reaching opposite decisions in the *G.E.-Honeywell case*.[43] At that point, the U.S. Department of Justice had a much larger professional staff and employed over 50 PhD economists. But more important is the way in which such internal structure worked. At least one economist was attached to each case, and *could not be removed* from the case team. The economists on the case teams reported to the Section Chiefs, who in turn reported to the Department of Justice's Chief Economist. Their work was also reviewed by the legal Section Chief with industry expertise.[44]

This U.S. structure and the way in which was organized was in distinct contrast with the one existing in the EU at that time, as well as in most of other jurisdictions. [45] As it will be explained below, European courts noticed this situation and reversed several decisions of the EU Commission due to the lack of enough economic support.[46]

The EU Commission subsequently addressed this issue and created, effective as of September 1st, 2003, a new position of Chief Competition Economist within the

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[42] OECD, *supra* note 25, at 156.
[43] *See* Grant & Neven, *supra*, note 19, Part III.
[44] *See id*.
[45] *See id*. In fact, as Grant & Neven explain, in the *G.E.-Honeywell case*, "the EU Commission made no attempt to create its own economic models, rather it relied "heavily on economic models supplied by competitors opposing the deal" (Shapiro and Pattersen, 2001). When flaws in these models were pointed out, it then claimed in the final decision "reliance on one or the other model not necessary for its conclusions." The Commission hired its own economic expert, Professor Xavier Vives. However, the Commission dismissed him when he stated his misgivings about the case... Such differences reflect both a lack of emphasis on economic reasoning in decisions, and the lack of immediate and informed third party scrutiny of such decisions."
[46] *See infra*, subsection 3.1.5; Anderson & Heimler, *supra* note 13, at subsection 3.1.

Competition Directorate-General, with its own staff to provide an independent economic viewpoint to all decision-makers within the agency. The Chief Economist must provide independent guidance on methodological issues of economics and econometrics in the application of EU competition rules. He also contributes to individual competition cases (in particular the ones involving complex economic issues and quantitative analysis), to the development of general policy instruments, and assists with cases pending before the EU Courts.[47] At a high level, his functions consist in:

(i) getting involved during initial investigation phases, giving economic guidance and methodological assistance ("support function");

(ii) providing the Commissioner with an independent opinion, in particular before a final decision to the College of Commissioners is proposed ("check-and-balances" function).[48]

As a result of the above described structural changes, recent literature shows that economic analysis has now become a key element in EU's antitrust enforcement.[49] Studies also show that expenditures in economic advice for antitrust cases in the EU now match the traditionally larger role that they played in U.S. competition cases.[50]

This evolution of the EU system demonstrates that a similar trend of institutional reforms should be followed by other jurisdictions in order to achieve the convergence goal of giving priority to the economic analysis, even while taking into consideration the limits and challenges that a full integration of economic analytics in antitrust

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[47] *See* http://ec.europa.eu/dgs/competition/economist/role_en.html (last visited May 25, 2011).

[48] *See* Lars-Hendrik Röller & Pierre A. Buigues, *The Office of the Chief Competition Economist at the European Commission*, [June 2005), GLOBAL COMPETITION REVIEW, http://ec.europa.eu/dgs/competition/economist/officechiefecon_ec.pdf (last visited May 25, 2011).

[49] *See, e.g.*, Andrea Amelio & Daniel Donath, *Market definition in recent EC merger investigations: The role of empirical analysis*, [2009], 3 CONCURRENCES, REVUE DES DROITS DE LA CONCURRENCE, LAW & ECONOMICS, 1; Damien Neven & Vincent Verouden, *Towards a more refined economic approach in State aid control*, [2008], IV EU COMPETITION LAW, Chapter 4; Neven, *supra* note 13; Anderson & Heimler, *supra* note 13, subsection 3.1, who explain that recent Commission decisions are much more based on factual analysis, including econometric evidence, than in the past: "For example, in the recent prohibition of the merger between AIR LINGUS and RYANAIR, the Commission employed a number of different techniques (e.g., interviews with dozens of airlines, consumer surveys, and quantitative analysis) that showed, contrary to what the parties were claiming, that AIR LINGUS was a direct competitor of RYANAIR on 35 routes to and from Ireland and exercised a significant constraining influence on the exercise of market power. The Commission therefore prohibited the merger. Its timely intervention in this case, preventing a merger that would have resulted in a substantial increase of air transport fares on these routes, illustrates the importance of effective merger enforcement for the well-being of European consumers."

[50] *See* Damien Neven, *Economic analysis in European competition policy: The first 2000 (or so) years*, OXERA ECONOMICS COUNCIL 2008, http://ec.europa.eu/dgs/competition/economist/oxera.pdf (last visited May 25, 2011). Neven cites a study of 2006 pursuant to which expenditures on economic advice in antitrust cases have increased from five to about 15% of total fees over the last ten years. The report also shows the tremendous increase in turnover that economic consultancy firms have had as a result from a few hundred thousand euros in 1991 to more than 40 million Euros in 2006. This study, however, refers to expenditure on consultant firms. As regards the in-house officers of the EU Commission, it is worth noting that by 2005 the number of officials that held a PhD in economics was still significantly lower than in the U.S. Department of Justice. There were in fact about twenty, only ten of which were working in the office of the Chief Competition Economist. *See* Röller, *supra* note 12, at Section 2. The reasons for this difference are explained and justified by Röller & Buigues, *supra* note 48, at Section 4.

procedures may meet.[51] Provision must be made for practical solutions, such as when full-time staffing of the best possible experts is not possible or when a certain case presents particular difficulties, the ability to retain external advisors with recognized knowledge on those issues should also be contemplated.[52]

3.1.4 Other institutional design policies towards a better and more independent agency

Whichever structural model is chosen, there are some measures to preserve independence of the agencies that should be encouraged in convergence efforts. Few legitimate arguments exist opposing these simple organizational parameters, although their absence can seriously compromise the isolation of the agency from external pressures and therefore ruin any convergence progress.

Those basic measures are the following:

a.) To ensure the agency is self-financed

This is one of the main tenants of true or *de facto* independence. The agency's budget should not be mixed with the central government's budget and should be enough to support a sufficient and well-prepared staff.

The path to achieve self-financing, however, should not be reliant on the proceeds of fines applied by the same agency. This situation was objected by the OECD in the case of Brazil, arguing that it is undesirable to give a law enforcement agency a budgetary interest in the size of penalties it imposes by discretionary judgment. Even if the agency remains uninfluenced by the prospect of revenue in the specific cases where fines are imposed, it is impossible to prove this impartiality. The OECD recommendation was to remit fines to a general account disassociated with the enforcement agency.[53]

As the OECD also stated, there are other suitable, non-penalty, mechanisms for independent funding, such as application fees, since there would be no similar basis for objecting a system under which fees attributable to services provided (such as for reviewing merger notifications) are remitted to the agency performing the service.[54]

b.) Selection of members by merits –particularly technical background- and through a public election

In Argentina, for instance, the Competition Act 25,156 sets forth that members of the Competition Tribunal shall be appointed by the Executive Power after a selection process led by a jury composed, among others, by the Chairpersons of the Business Committees of the House of Representatives and the Senate, the Chairperson of the National Appellate Court in Commercial Matters, and the Chairpersons of the National Law Academy and the National Academy of Economy. Mechanisms of this sort

[51] Röller, *supra* note 12 at Section 4, describes the following challenges: effective enforcement, legal certainty, communication and capacity building.

[52] This is what the U.S. Department of Justice did in the *GE-Honeywell case*. *See* Grant & Neven, *supra* note 19, Part 1.3.

[53] *See* OECD, *supra* note 25, at 157.

[54] OECD, *supra* note 25, at 183, note 156.

reinforce the ability of having a competition agency formed by professionals that are independent and talented.[55]

c.) Sufficient term of duration (i.e. more than four years) and staggered expiration of each member's term

This is the system for the Competition Tribunal under the Argentina's Competition Act 25,156,[56] and was the recommendation made by the OECD to Brazil.[57]

Members of the agencies should not be subject to removal from their position before the expiration of their terms unless for a justified cause and following due process. Furthermore, the expiration of their terms at different times will ensure continuity in the agency's work and avoid wholesale changes due to political or other influences. It is also important that members of the competition agencies devote their whole professional activity to their role at the agency during their terms.

d.) Publicity of the agency's decisions

The publicity of the agency's decisions, excluding sensitive information that may affect the parties' confidential interest, is essential for several purposes, including transparency and predictability. It also serves as an incentive for agencies to ensure that their decisions are based on accurate facts and solid economic and legal principles. Furthermore, public proceeding and ruling allow competitors and/or consumers who may not specifically be involved but who have valuable inputs, to participate in the approval process. In addition, from the convergence perspective it seems hard to seek harmonization when the way in which competition laws are applied is not open to study and analysis.

As sound as this reasoning may sound, it is far from being universally accepted. Some agencies are reluctant to publish all of their decisions - particularly decisions approving transactions - based on the dual arguments of the excessive burden that it would imply for a government body with already scarce resources and also on business confidentiality reasons. This is the case of the U.S. Department of Justice and Federal Trade Commission, and of China's competition agency.

The typical practice in the U.S. is for the reviewing agency to allow the waiting period under the Hart-Scott-Rodino Act to expire without any public explanation. Indeed, unless the parties have received early termination of a transaction - in which case a brief mention of the transaction appears on the Federal Trade Commission's web site - there is generally no public acknowledgement by the agency that a transaction has been reviewed and cleared by the government.[58]

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[55] Unfortunately, as detailed earlier, the Competition Tribunal has not yet been implemented; in Argentina the members of the provisional Competition Commission are freely appointed and removed by the Executive Power.

[56] Section 19 of the Argentina's Competition Act establishes that members of the Tribunal shall remain in office for six years. Court members shall be partially renewed every three years.

[57] *See supra* note 25, at 101.

[58] See David Gelfand & Jeremy Carlsyn, *Transparency in Antitrust Merger Review: A Modest Proposal for More*, [January 2005], ANTITRUST SOURCE.

In China, the MOFCOM - which is the competition agency in charge of merger clearance - is not obliged under the competition act to publish its decision when a merger is cleared without imposing remedies, and thus in such cases no public record is left whatsoever.[59]

However, it is not clear that such arguments of work load and confidentiality outweigh the benefit of publicity in antitrust decisions.[60] In fact, where the agency conducts a sound process to approve a merger, it is unlikely that the mere fact of making it public would add a significant burden. Regarding confidentiality, it is worth to note that agencies already have in place a number of sufficient solutions when issuing statements, filing court briefs, and giving speeches. Additionally, if confidentiality is a concern, a non confidential summary could be prepared with the merging parties' counsel.[61]

In fact, a practice opposite to the U.S. and China has been adopted, among others, by the EU Commission and Argentina. When the EU approves a transaction, it issues statements identifying the parties and the nature of the transaction as well as explaining the relevant product and geographic markets, the degree of overlap of the participating firms, and other pertinent facts. Similarly, the Competition Commission of Argentina regularly publishes summarized and full-text decisions on merger cases, which can also be reviewed and copied at the agency's offices, even if they are not yet uploaded on the webpage. Only infrequent decisions declared confidential are excluded.

3.1.5 Key role of the court system

To say that an appropriate court system is required for effective competition law activities seems to be a fairly obvious conclusion applicable to any legal process. Still, the special features of the competition law setting require a particular interaction by courts. In fact, this paper sustains that the independence of the agencies is a necessary condition for harmonization and convergence to be successful. However, ultimately that organizational independence cannot be sustained if a non-supportive or otherwise deficient court system exists.

In other words, if competition is enforced by administrative agencies, as it is the case in most of the jurisdictions, the best assurance the system will meet basic standards of fairness and predictability is if an independent tribunal oversees the decision maker.[62]

Indeed, while a well established administrative organization can fail if it is not properly followed by a professional and independent court system, the worst-case scenarios

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[59] Section 30 of China's Competition Act establishes that "When the Competition Agency under State Council decides to prohibit a concentration or imposes restrictive conditions on a concentration, it shall make those decisions public in a timely manner". *See* Zhang, *supra* note 24 at subsection B.1(d).

[60] A different position is proposed by Robert Pitofsky, *Comments on Warren Grimes: Transparency in Federal Antitrust Enforcement*, [2003], 51 BUFF. L. REV. 995-999, who agrees that there is no issue with confidentiality, but additional publicity would imply an unreasonable burden for the agencies. In the same vein, R. Preston McAfee, *Transparency and Antitrust Policy*, January 8, 2010, at http://www.mcafee.cc/Papers/PDF/TransparencyAntitrustEnglish.pdf (last visited May 28, 2011), sustains that increased transparency has an enormous impact on costs, flexibility, and legitimacy, and therefore the optimal level of transparency requires a balancing of costs and benefits.

[61] See Gelfand & Carlsyn, *supra* note 58, at 7.

[62] *See* Mark Leddy, Christopher Cook, James Abell & Georgina Eclair-Heath, *Transatlantic Merger Control: The Courts and the Agencies*, [Winter 2010], 43 Cornell Int'l L.J. 25.

invariable develop in instances in which the activities of a bad administrative organization are not limited by a strong judicial control.[63]

Even in the US, where both the Federal Trade Commission and the Department of Justice must access the courts if they desire to block, in advance, a business concentration from occurring, the role of the courts imposes a greater rigor and fairness to the agencies' decision-making and fact gathering.[64]

The key role of courts can be seen, for example, in the influence of judicial decisions on the European Commission's structural changes, including the development of a deeper economic analysis of business concentrations.[65] The fact that the number of cases brought to courts represent approximately just one percent of the Commission merger decisions since the Merger Regulation entered into force in 1990, evidences the disproportionately large impact they can have on the development of a competition regime.[66]

Airtours/First Choice was the first case in which a Commission's decision to block a concentration was overturned by courts. The Commission had blocked the two U.K. short-haul, foreign-package holiday suppliers on the ground that the proposed transaction would create a situation of collective dominance. The Court of First Instance annulled a decision of the Commission because of the lack of a sufficiently rigorous economic analysis of the incentives for, and ability to, coordinate behavior as a direct consequence of the proposed merger.[67] In such a case, the Court articulated a new standard for the identification of a collective dominant position.[68]

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[63] *See* Grant & Neven, *supra* note 19, Part III: "The extent to which civil servants will be able to pursue objectives that are different from those that they have been assigned and, for instance prohibit a merger with weak evidence, is clearly dependent on what, they expect, will happen at the stage of appeal. If they anticipate that an appeal is unlikely and/or that Court will not scrutinize their ruling, they will benefit from greater freedom and the scope for capture will be greater". *See* also Charles A. James, *Antitrust in the Early 21st Century*: *Core Values and Convergence*, speech at a seminar sponsored by the European Commission's Directorate on May 15, 2002, U.S. - E.U. Cooperation on Anti-trust Issues (Selected Documents), Information Resource Center, Embassy of the United States of America, Madrid, Spain, 14, http://photos.state.gov/libraries/spain/5/archivo/competition.pdf (last visited May 27, 2011): "The landmark decisions in GTE Sylvania and General Dynamics, as well as numerous others at all levels of the federal judiciary, demonstrate the critical role that the courts have played in shaping antitrust doctrine into what it is today. I have already extolled the virtues of flexibility and an openness to new ideas. But flexibility cannot go unchecked. In the United States, even though the enforcement agencies have broad discretion in deciding which cases to bring, ultimately those cases must be proven before an independent fact-finder. Not only have our courts been an important disciplining device on agency initiatives over the years, but they also have provided a vehicle for exchanging ideas on where antitrust should be. Justices and judges have been willing to think hard about the issues and arguments central to antitrust, and their work has done much to shape antitrust law and policy and to keep us moving in the right direction. Independent judicial review by courts of general jurisdiction provides an important check on the sometime insularity of the antitrust community and the possibility that agency officials may become intoxicated with their own thinking, a phenomenon I refer to as "drinking one's own wine." Courts, with their focus on evidence and their grounding in the technical requirements of the law, subject our antitrust theories to a true test of merit."

[64] See Leddy, Cook, Abell & Eclair-Heath, *supra* note 62 at 29.

[65] *See* Anderson & Heimler, *supra* note 13 at subsection 3.1.

[66] The number of court decisions is approximately 40 out of 4,000 business concentrations decided by the Commission since 1990. *See* Leddy, Cook, Abell & Eclair-Heath, *supra* note 62 at 30.

[67] Case IV/M.524, *Airtours/First Choice*, 2000 O.J. (L 93) 1, 5 C.M.L.R. 494, overturned in Case T-342/99, *Airtours v. Comm'n* [Airtours Case], 2002 E.C.R. II-2585.

[68] *See* Anderson & Heimler, *supra* note 13, at subsection 3.1.

In the *Schneider/Legrand* case, the same Court annulled the Commission's decision on the basis that the Commission had committed procedural errors and failed to take account of the different degrees of competition in each of the national markets it identified and did not provide Schneider with enough information to offer an appropriate remedy.[69] In the *Tetra Laval/Sidel action*, the General Court annulled the Commission's decision on the basis that concern of leveraging market power between two otherwise separate markets, which was the stated reason for the Commission prohibition, could have been blocked by ex-post article 102 TFEU interventions, a possibility that the Commission did not consider. This decision was subsequently upheld by the European Court of Justice.[70] While recognizing that the Commission has a margin of discretion with regard to economic matters, the Court of Justice nevertheless noted that this "does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature." Furthermore, the Court of Justice confirmed that the EU Courts must not only "establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it."

Finally, in the *Impala International Association* proceeding, the General Court for the first time annulled an authorization decision (concerning the *Sony/BMG* merger), suggesting that the same standard-of-proof should be applied by the Commission for both prohibition and for clearance decisions. In the judgment, the Court further clarified the conditions for establishing a collective dominant position, indicating that the Commission failed to carry out a genuinely forward looking analysis, being overly influenced by current market conditions and behavior.[71] A similar trend of revision of the agency's economic theories and legal arguments has been followed by U.S. courts, in which they recommended, among other things, the use of quantitative analysis applying modern econometric methods, such as merger simulation models.[72]

In Argentina courts have become a crucial player in competition law, due to the current institutional situation in which the impartial Competition Tribunal created by the Competition Act 25,156 in 1999 has not yet been constituted, although a ruling from the Supreme Court on this matter is still expected.[73]

It would be desirable that courts in China also begin to operate as a balance against the concentrated powers of the competition agencies. Unfortunately, since China's competition act was enacted, no merger case has ever reached a court. The combination of a mandatory administrative reconsideration remedy before the same agency plus a

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[69] *Schneider-Legrand*, January 30, 2002, Case COMP/M.2283; *Schneider Electric SA v Commission*, Case T-77/02.

[70] *Tetra Laval BV vs. Commission*, October 25, 2002; Cases T-5/02 and T-80/02; *Commission v Tetra Laval BV*, February 15, 2005, Case C-12/03 P.

[71] *Independent Music Publishers and Labels Association (Impala, international association) v Commission*, July 13, 2006, Case T-464/04.

[72] *See, e.g.*, *United States v. Oracle Corp*., 331 F. Supp. 2d 1098, 1158– 65 (N.D. Cal. 2004); *FTC v. Arch Coal*, 329 F. Supp. 2d 109 (D.D.C. 2004); *FTC v. Whole Foods Mkt., Inc*., 502 F. Supp. 2d 1 (D.D.C. 2007).

[73] *See supra* note 36.

lengthy judicial process causes the parties to either settle or abandon their cases.[74] It should be noted, however, that increasing judicial review of antitrust cases also requires that the involved court system have a suitable organizational structure and capabilities.
In China's case there remains a valid concern regarding the independence of the court system that itself requires deep reforms.[75] Significant lack of expertise in competition matters of the great majority of the courts is another challenge, all of which suggests that the implementation of specialized competition courts would be a desirable step forward for China.[76]

The above referred cases of the EU and Argentina implied that courts acted actively when they were placed before a patent institutional failure. The case of China further shows the necessity of this role for an adequate implementation of a competition law framework. This key function of the judicial branch does not mean, however, that courts are regularly in a position to replace the expert analysis that the competition agency should perform. In this connection, warnings about the risks of courts taking the position of the agencies should be attended, [77] particularly in jurisdictions like the U.S. in which there is an asymmetric review of the agency's decisions.[78]

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[74] *See* Zhang, *supra* note 24, at 20, who explains that parties who are anxious to close deals are left in a take-it-or-leave-it position: they must choose between accepting the proposed settlement terms from the government or abandoning the deal. In the controversial *Coca-Cola/Huiyuan case*, for instance, the competition agency reportedly asked Coca-Cola to divest the Huiyuan brand as one of the conditions for approval. Because Coca-Cola failed to agree to this condition, the competition agency ultimately decided to block the deal.

[75] *See* H. Stephen Harris, Jr. and Rodney J. Ganske, *The Monopolization And IP Abuse Provisions Of China's Anti-Monopoly Law: Concerns and a Proposal,* [2008], 75 ANTITRUST L. J. 213, 226, according to which "The perceived lack of transparency and independence of the judiciary will dissuade defendants from seeking such judicial review, especially where a court may be regarded as linked to a government that favors a local champion in competition with the defendant, depriving a defendant of meaningful recourse from an unsatisfactory agency decision (or at least creating the perception that it is so deprived). Absent substantial reforms, lack of confidence in the transparent, equal application of the new Anti-Monopoly Law (as well as other laws bearing on market activity) will chill foreign companies' continuing investment and innovation in China."

[76] *See* Harris & Ganske, *supra* note 75, at section VII, who explain that "Almost without exception, the thousands of judges in the hundreds of People's Courts throughout China have no training in competition law or market economics. Many are former military officers with little judicial training of any kind. While the general training of judges is improving, the reliance on this judiciary to establish the fundamental antitrust jurisprudence of an economy as advanced and varied as that of China's economy is a recipe for great inconsistencies within such jurisprudence. Many court decisions are thus likely to be uninformed by the modern economic thought that informed the Anti-Monopoly Law's drafting and enactment. That careful drafting, and subsequent policies, guidelines and decisions of the Anti-Monopoly Committee and the Anti-Monopoly Enforcement Authority, could all come to naught if the ultimate interpreters of this new, complex competition law regime are courts without the background and independence necessary to establish a consistent, modern competition culture in China."

[77] *See* Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, [2008], 1 UTAH LAW REVIEW, 159-219. According to Frakel, "The policy problem of how one structures judicial review of government decision making in areas that involve a high degree of technical knowledge, large quantities of information, and considerable expertise is not a new one. In many areas of the law, it is important to provide an independent judicial check on agency determinations (for example, to prevent obvious errors or overreaching) while at the same time preserving the advantages that inure from having decisions made by a specialized agency with superior expertise, resources, and access to information. In the administrative law context, in which judicial review of agency action is generally covered by the Administrative Procedure Act (APA), most agency action is reviewed to determine whether the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This deferential standard presumably represents the sound policy judgment that agencies should have primary responsibility for enforcing the relevant statute, due in part to their superior expertise and resources, and that courts generally should be playing a checking function rather than one of

3.2 Exemptions to antitrust application

3.2.1 Impact of exemptions on international convergence

Assuming that a free market is the best tool to advance general welfare, exemptions to antitrust frameworks should be, in fact, exceptional and properly justified on applicable market failures. If, on the contrary, the system is open to exemptions on more frequent or more subjective grounds, its efficiency will be certainly prejudiced, consumers will be harmed and discrimination issues may also arise.

As Justice L. Hand remarked in 1945, "Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them."[79]

This restrictive view on exemptions seems to be an opinion shared by the antitrust literature.[80]

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simply substituting their judgments for those of the agency. In addition, agency factual findings made after a formal hearing are upheld as long as they are supported by "substantial evidence," and reasonable agency interpretations of ambiguous statutory provisions are accorded Chevron deference. Even where an agency interpretation is not entitled to Chevron deference, the Supreme Court has recognized that due to an agency's superior information and expertise, agency decisions may be entitled to "respect" and constitute "a body of experience and informed judgment to which courts . . . may properly resort for guidance." In short, in many situations where a reviewing body has inferior expertise, information, and resources to the body making the initial decision, the law tries to ensure that review does not create more errors than it corrects by imposing a deferential standard of review on the reviewer. This sort of deferential standard is not typical for judicial review of merger decisions made by an antitrust agency. When the DOJ files a case in federal court, that case is usually evaluated under a "preponderance of the evidence" standard. The standard faced by the FTC in district court merger challenges is similarly nondeferential. The agency determination that the merger is anticompetitive gets no deference, despite having been made by an entity with greater expertise and information. Perhaps there was a time when courts would grant implicit deference, but that is clearly no longer the case given the high percentage of merger cases that the government loses. The point here is not that some sort of deferential standard would necessarily be appropriate (…); rather, it simply is that in a highly complex, technical area where accurate decision making depends on analysis of large quantities of information, if the reviewing entity not only has less expertise, information, and resources than the entity making the initial decision but also reviews that decision under a nondeferential, de novo standard, it dramatically increases the possibility that review will create more errors than it corrects. Put more simply, if the initial decision maker is better positioned than the reviewer to make difficult assessments, a rule in which the reviewer can simply replace the initial decision maker's determination with its own view is likely to lead to worse, rather than better, decision making, all else being equal."

[78] *See id.*, at 171. Judicial revision is asymmetric because if the agency determines that a merger is anticompetitive, that decision is subject to review by a federal court, since to "enforce" its determination that the merger is anticompetitive the agency must seek an injunction in federal court. On the other hand, if the agency determines that the merger is not anticompetitive (or even that it is anticompetitive, but other factors, such as opportunity costs or litigation risks are sufficiently high as to make a challenge unwise), that is typically the end of the matter: there is no judicial review.

[79] *United States v. Aluminum Co. of America et al.*, 148 F.2d 416, 427 (2d Cir. 1945).

[80] *See*, *e.g.*, ABA Antitrust Section Testimony on The Health Insurance Industry Antitrust Enforcement Act of 2009 and the Railroad Antitrust Enforcement Act of 2009; ABA Antitrust Section Comments to the Antitrust Modernization Commission on General Immunities and Exemptions, the Shipping Act Antitrust Exemption, and the McCarran-Ferguson Act; Reports of the ABA Antitrust Section on the Free

From the convergence standpoint, reluctance towards exemptions should be further enhanced for several reasons. If a certain principle is agreed among jurisdictions (i.e. the punishment of hard-core cartels), it seems somewhat illogical that such principle is overruled by some jurisdictions through particular exemptions. Secondly, the positive effects of facilitating multinational businesses are diminished, since it becomes difficult to know exactly what rule is applicable and to whom it applies. Finally, a problem of intellectual consistency arises when a country promotes competition in international fora while it maintains an unfair system of exceptions internally.

This Section will therefore describe in 3.2.2 below the different types of exemptions existing in the analyzed jurisdictions and attempt to define the way in which they may prejudice the necessary and desirable harmonization among competition laws. Subsection 3.2.3 will make particular reference to an additional negative consequence caused by many exemptions. Finally, subsection 3.2.4 will propose alternatives to implement necessary exemptions in a way that is compatible with universally accepted competition principles.

3.2.2 Types of exemptions

This subsection classifies exemptions to competition laws in seven categories with the aim of enabling a better understanding of their impact on convergence among jurisdictions.[81] The order in which they are placed follows the degree in which they are compatible with sound internationally accepted competition principles.[82]

a.) Regulated activities

The broadest category of "exemptions" to competition laws is the one concerning regulated activities, typically applicable to infrastructure industries.

Market Antitrust Immunity Reform Act of 1999, the Quality Health-Care Coalition Act of 1999, the Antitrust Health Care Advancement Act of 1997, and the Television Improvement Act of 1977 (all available at http://www.abanet.org/antitrust/at-comments/comments.shtml, last visited May 30, 2011).

[81] There are certainly other classifications of the type of exemptions. According to Amber MCDONALD and W. Todd MILLER, *The Interplay Between Regulation, Antitrust and Other Public Policy*, [2011], THE ANTITRUST REVIEW OF THE AMERICAS, GLOBAL COMPETITION REVIEW, http://www.globalcompetitionreview.com/reviews/29/sections/103/chapters/1140/us-exemptions (last visited May 28, 2011), U.S. exemptions and immunities to the antitrust laws can be classified into four broad categories:

• public policy-based exemptions created by either the legislature or the courts that reflect a belief that the antitrust laws cannot be properly applied to certain conduct because of competing (often Constitutionally-based) policies about the intended reach of the federal antitrust laws (e.g. 'free speech', 'states' rights');

• public policy-based exemptions that reflect a belief that the free market principles of the antitrust laws should be secondary to other regulatory or economic goals, especially where there is a relevant regulatory authority charged with monitoring the market and marketing practices (eg, labor or agriculture organisations, insurance, certain aviation agreements);

• special industry exemptions where the broader public policy goals do not seem to justify the antitrust protection given (e.g. the Newspaper Preservation Act, the Sports Broadcasting Act; the Shipping Tariff Act); and

• individual immunities granted by law enforcement agencies to obtain testimony or discover wrongdoing (e.g. leniency programs).

[82] Note that, as any other legal classification, it hardly labels all possible situations that can be found in practice. It rather intends to serve as a general division that may help understanding the complex variety of exemptions.

However, from a theoretical standpoint, regulated activities should not be considered an exemption to competition law. There are indeed several legal structures affecting commercial activities and promoting consumer welfare. Where market forces can work, competition law - together with contract and torts or civil responsibility law -[83] provides a framework for agents to freely develop their businesses. When such situation is impaired by market failures[84] (such as scale economies,[85] externalities or asymmetric information), regulation replaces and emulates the market forces. By contrast to competition, when regulation takes place, market agents do not take the decisions they would choose in the absence of regulation.

In a more simple way, decisions in a marketplace subject to competition are free, while in a regulated business they are substantially conditioned and even dictated by the regulator. Furthermore, by contrast to activities under a competition regime, regulated companies are typically *obliged* to render the service they provide.[86]

The clearest example is prices vs. tariffs: the paradigm of competition activity is the free and independent determination of prices, while the worst breach of competion law is price fixing. Yet, in regulated industries, probably the most prevalent regulatory activity is the determination of tariffs.

There are certainly grey areas in the distinction between these two types of activities that become even more complex as technology evolves. Nevertheless, the principles of distinction stated in the above paragraph should still serve to attempt a high level determination of where competition should apply and where it should not, by dividing activities in three different classes:

- When the activity is not subject to any regulation other than those horizontally applied to all market activities, such as contracts or torts law, competition law should fully apply
- When there is a vertical regulation over the activity that does not replace individuals in its decisions, but instead permits a competition that otherwise would not be possible due to market failures, then competition law should apply

[83] *See* Oscar Aguilar Valdez, *Entes reguladores de servicios públicos: apuntes sobre su funcionamiento*, VI JORNADAS INTERNACIONALES DE DERECHO ADMINISTRATIVO ALLAN-RANDOLPH BREWER-CARÍAS, Caracas, [2002], at 18. These regulations, in Coase's theory, have been classified as "civil regulation", in the sense that markets do not work in a vacum but, on the contrary, need certain rules to work such as property rights and contracts law. *See* Juan DE LA CRUZ FERRER, *PRINCIPIOS DE REGULACIÓN ECONÓMICA EN LA UNIÓN EUROPEA*, 2002, at 136.

[84] Regarding the justifications of regulation, *see, e.g.*, FERRER, *supra* note 83, at 125-190; Gaspar ARIÑO ORTIZ, LA REGULACIÓN ECONÓMICA, [1996], at 103; Francisco GONZÁLEZ BLANCH, FUNDAMENTOS DEL ANÁLISIS ECONÓMICO DE LA REGULACIÓN, [1997], at 24.

[85] If the fixed costs can be distributed over the total production of the market, a company that produces such a good can have an average cost lower than the production cost of two companies, since each of those two companies would incur in the same fixed costs but would only be able to charge them to half of the total demand. This is possible even when the marginal cost increases which each unit of production. *See* Richard A. POSNER, ECONOMIC ANALYSIS OF LAW (1977), at 251.

[86] See, e.g. Héctor A. Mairal, *La ideología del servicio público*, 14 REVISTA DE DERECHO ADMINISTRATIVO, at 380 (1993); Oscar Aguilar Valdez, *Competencia y Regulación Económica, - Lineamientos para una introducción jurídica a su estudio*, SERVICIO PÚBLICO, POLICÍA Y FOMENTO, UNIVERSIDAD AUSTRAL LAW SCHOOL (2003) at 79.

to that aspect of the activity where decisions are free and there is in fact competition

- When regulation replaces individual decisions, competition law cannot apply since the basic element of freedom is missing. Instead, the rules of the particularly applicable regulation must be followed.[87]

There are plenty of examples of the second and third types of activities referred to above. Among the ones that would fall within the former typically is, for example, power generation. In that case, under many regulatory systems, power producers only sell when they receive the order from a centralized body that manages the dispatch and are subject to significant technical regulation. Nonetheless, they actually compete with other power generators to have a lower cost because that will enable them to be dispatched first. The price is finally determined hourly by the centralized agency but, still, competition law can be fairly applicable to their determination and declaration of costs, where they could collude with competitors just like any other industry. A similar situation can be found in the telecommunication industry as well as in many others.[88]

In the third type of activities listed above, it should be agreed that competition law is not applicable not merely because the activity is regulated and may thus receive an exemption, but rather because of the nature of the activity itself, which lacks one of the fundamental basis for competition, which is free access to markets and consumers. This would be the case, for example, of natural gas, water or electricity distribution through captive networks. In these situations, the regulator may emulate competition through modeling or create an indirect competition by benchmarking with neighbor companies, but actual competition or the threat of the same by the potential entry of a competitor does not usually exist.

This general description does not imply a static view of these industries. On the contrary, the proposed criteria described in this paper can help to constantly identify new circumstances where competition law should start being applied in those industries that are typically excluded, mostly considering constant developments of technology.

From the distinction above it arises that regulation - when designed to offset the effects of real market failures - is not an exemption to competition law, as previously indicated. Instead, it is a different public policy choice of structures to obtain the same goal (consumer welfare) in a different situation.

In fact, there are differences between regulation and actual exemptions to competition laws that are substantial for purposes of this paper, such as the following:

- Competition law does not apply in regulated activities because of its own nature, as these industries lack the necessary freedom, at least in that certain aspect where competition law is excluded. Where there is room for freedom in

[87] *See* a discussion on these distinctions, the interaction between competition and regulation and the allocation of roles between the competition agencies and regulatory agencies in LEONARDO T. ORLANSKI, COMPETENCIA Y REGULACIÓN, 2006.

[88] In this connection, the U.S. Supreme Court held that "Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry" [*National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 US 378, 388 (1981)].

regulated activities, competition law may and should apply. This is not the case of many actual exemptions to antitrust law, where a particular conduct falls within the scope of competition law, but is excluded by an authority (through laws, individual authority determinations or even *de facto*). In fact, the effect is precisely the opposite in these exemptions than in regulated industry activities: the absence of competition law increases the liberty of individuals and the risk of marketplace abuses instead of suppressing it, since competition law's absence eliminates one of the few basic rules of the marketplace (which, as indicated above, are generally contracts law, torts or civil responsibility and competition law).

- In the case of regulated activities, there is a regulatory agency and a regulatory framework that to some extent - which may vary upon the circumstances- replaces the individual decisions and cares that the goal of the regulation - which by definition is the same that the one of competition - is reached. Differently, exemptions to antitrust law in these instances create a vacuum where political institutions or industries design their own rules in replacement of competition law (for example, by cartelizing to fix their prices).

The proposed understanding that competition law does not apply to regulated activities has been justified in the U.S. under several doctrines, though typically the offered analysis is as an "exemption" to antitrust laws and not necessarily openly arguing for the use of regulation as an alternate governmental tool to reach consumer welfare.

This is the case of the so called "filed-rate doctrine", under which "any filed rate - that is, one approved under established standards and procedures of the governing regulatory agency - [is] per se reasonable and unassailable in judicial proceedings brought by ratepayers".[89] The same conclusion would be reached by the application of the "implied exemption" doctrine, according to which a conflict between antitrust laws and other regulatory regimes might result in a finding of implied immunity,[90] and even by application of the "state action" doctrine.[91] Furthermore, under the Noerr-Pennington doctrine, the activity of petitioning the government to create and apply any of these regulations would be exempted from antitrust law.[92] Consistent with the explanation of

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[89] *Coll v. First American Title Insurance Co.*, —- F.3d —-, 2011 WL 1549233 (10th Cir. Apr. 26, 2011). The filed-rate doctrine was first applied by the U.S. Supreme Court to reject damages arising out of tariff-related matters in spite of an allegation of an antitrust law breach in *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156, 159 (1922). The effects of this doctrine, however, apply to the enforcement of regulatory decisions in many other areas, in addition to the preclusion of antitrust-based damage claims (see Kevin M. Decker, *The filed-rate doctrine: leaving regulation to the regulators*, WILLIAM MITCHELL LAW REVIEW, 34:4 at 1351.

[90] *See Silver v. New York Stock Exchange*, 373 US 341 (1964), in which the Supreme Court sustained that "[r]epeal is to be regarded as implied only if necessary to make the [regulation] work, and even then only to the minimum extent necessary".

[91] *See Parker v. Brown*, 317 US 341 (1943). Even when this exemption was first conceived to protect actions taken directly by governmental agencies (*Parker* was a state official), case law has extended the application of the state action doctrine to actions of private persons [see California Retail Liquor Dealers *Ass'n v. Midcal Aluminum Inc.*, 445 US 97, 105 (1980); also John C. Christie Jr. & Wendy Anderson Terry, *Antitrust Exemptions and Immunities*, [2001], THE ANTITRUST REVIEW OF THE AMERICAS, a Global Competition Review special report at www.global-competition.com (last visited May 24, 2011)].

[92] The Noerr-Pennington Doctrine was created by the U.S. Supreme Court in *Eastern R. Conference V. Noerr Motors*, 365 U. S. 127 (1961). See Joseph P. Bauer & Earl Kintner, *Antitrust Exemptions for Private Requests for Governmental Action: A Critical Analysis of the Noerr-Pennington Doctrine*, 17 UC-DAVIS LAW REVIEW, at 549-589 (1984).

the above paragraph, an activity subject to specific regulatory provisions would preclude the application of antitrust laws even in the absence of an express exemption.[93]

Competition law does not apply to regulated activities in the EU either, though under different criteria than in the US. [94] Consistently with the threefold division of activities suggested above, the EU went through a progressive process of liberalization of industries such as transport, energy, postal services and telecommunications, in order to determine which portions of those industries could be subject to competition laws - even when also subject to some technical regulation - and which could not.

In any event, whether it is considered an exemption or a different government instrument, the exclusion of the applicability of competition law to regulated activities is not an obstacle for convergence to the extent regulation is justified on sound economic reasons and its scope is reduced only to those portions of the industries where competition does not exist.

By contrast, when regulation is not properly justified, it becomes a very harmful *real* exemption to competition, as it hides behind false technical reasons the actual objective of avoiding competition. This situation certainly means cheating convergence efforts and, most importantly, harms consumers for the sole benefit of small groups.[95]

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[93] In *Verizon Communications Inc v Trinko*, 540 US 398 (2004), the U.S. Supreme Court held that repeals of the antitrust laws by implication are strongly disfavored, and implied repeals should be found only in cases of 'plain repugnancy between the antitrust and regulatory provisions. This position, however, has not prevented the Supreme Court to find such a repugnancy in *Credit Suisse Sec (USA), LLC v Billing*, 551 US 264 (2007).

[94] In fact, the application of a state action excemption in the EU would probably struggle against prevailing provisions Community Law. Similarly, the Noerr-Pennington doctrine could only find a European parallel in the initiation of litigation. The Commission and the General Court have recognized the fundamental right to access the courts, but have also recognized that an undertaking with a dominant position could bring litigation for the purpose of harassing a competitor with a goal of eliminating competition. In this circumstance, a violation of article 102 of the Treaty on the Functioning of the European Union would likely be found. *See* McDonald & Miller, *supra* note 81.

[95] For a detailed economic study of this phenomenon, *see, e.g.*, Martin C. Stewart-Smith, *Industry structure and regulation*, THE WORLD BANK LEGAL DEPARTMENT, POLICY RESEARCH WORKING PAPER, WPS1419, at 25-26; J. Luis Guasch & Robert W. Hahn, *The costs and benefits of regulation. Implications for Developing Countries*, [1997], WORLD BANK, POLICY RESEARCH WORKING PAPER WPS1773, who describe how unnecessary regulation harmed consumers in the U.S. but resulted difficult to remove: "An example of a small group's benefiting from regulation at the cost of a large group is the peanut-quota system. Since 1949 the federal government has run a program that limits the number of farmers who can sell peanuts in the United States. Imports are also severely restricted. On top of these restrictions, price supports are used to guarantee that farmers with peanut quotas can cover their production costs each years. This generally results in the minimum selling price being about 50 percent higher than the world price. For 1982-1987, it was estimated that the average annual consumer-to-producer transfer was $225 million (in 1987 dollars) with an associated deadweight loss of $34 million (Rucker and Thurman, 1990). In 1982 there were 23,046 peanut farmers, which means that on average each received a net transfer of $11,000. In contrast, the cost to the average consumer of this program was only $1.23. Few consumers would be willing to spend their own time and money to dismantle the peanut program when they would only gain $1.23. However, the program is worth $11,000 to the average peanut farmer and that would certainly make it worth one's while to see that the program continues." This same view is applied by the Section of Antitrust Laws to unjustified exemptions and immunities (*see Comments of the ABA Section of Antitrust Law on the Railroad Antitrust Enforcement Act* (2008), at 3 and *Comments on the Comprehensive Alcohol Regulatory Effectiveness Act* (2010), http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_2010_care.authcheckdam.pdf (last visited May 30, 2011), at 5: "The Section believes that certain exemptions and immunities from the antitrust laws have survived as long as they have because of the asymmetry of costs

Finally, it is worth noting that although regulated industries will always exist to some extent, the scope of their exclusion from the competition framework should be decreasing.[96] Consequently, instances of reliance on industry regulation should regularly be reviewed to ensure those situations continue being the most efficient solution.[97]

b.) General category exemptions

A second broad type of antitrust exemption is the one of general category exemptions, where such categories are chosen by application of established and beneficial guidelines based on market or economic rationale. Excluding the regulated industry type above - which in fact, as previously indicated, should not be considered an actual exemption -, if competition is to be exempted, this approach may be the next most appropriate.

In this connection, Article 101 (3) of the Treaty on the Functioning of the European Union establishes the following:

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and benefits created by such exemptions and immunities. The benefits associated with statutory antitrust exemptions and immunities typically apply to small, concentrated interest groups. Industries or groups of firms covered by a statutory exemption or immunity receive substantial benefits, and the benefits tend to accrue proportionally to all competitors within the favored industry or interest group. Unlike the benefits, however, the costs associated with statutory exemptions and immunities are diffuse. Consumer welfare costs imposed by antitrust exemptions and immunities are usually passed through to individual consumers in the form of higher prices, lower output, reduced quality, or reduced innovation. These costs tend to be spread among vast numbers of consumers. Therefore, in most cases no single consumer or group of consumers is sufficiently adversely affected to initiate effective opposition to the exemption or immunity."

[96] *See* ARIÑO ORTIZ, *supra* note 84, at 102; Stewart-Smith, *supra* note 95, at 22, where it explains that "Both academics and politicians have in the past emphasized that effective competition in a market reduces the need for external regulation, principally because strong competition for a market constitutes a self-regulating system which ensures the elimination of excess profits. Competition drives firms to reduce their costs as much as possible to minimize loss of market share to competitors, and spurs innovation, research and development. Furthermore, where there are many players in the market, the opportunities for collusive and anti-competitive behavior are severely limited. In comparison, regulation is often difficult to establish, cumbersome and costly and prone to neutralization by capture. It is therefore understandable that many have proposed that regulation in infrastructure is a transitory phase, to be replaced by competition once sufficient entrants are operating in the market. However, while the extension of competition undoubtedly serves to assist regulation, in infrastructure sectors in particular, regulation is still required in order to allow competition to be effective. It may be argued that if the market is fully contestable, regulation ex post in the form of anti-trust law would be sufficient. The test would be such that the failure of any one competitor would not significantly alter the market power of any other player. However, in all country experiences it has been the case that infrastructure sectors fall below this test -- the failure of a service provider in infrastructure would have a dramatic impact on the market power of competitors. Thus competition and regulation are not to be seen as alternatives in sectors such as gas, telecommunications and electricity, but rather complimentary to each other. In infrastructure, transition in regulation goes more to the style of regulation employed rather than its elimination".

[97] This is exactly the principle adopted, for example, in the preamble to the U.S. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56: "To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."

"*The provisions of paragraph 1 may,*[98] *however, be declared inapplicable in the case of:*
- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,
which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) *afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*"

These provisions enable the EU to establish both particular and general excemptions to competition law. The former will be discussed below at subsection e.). Regarding the latter, the system seems to have several benefits compared to other types of exemptions.

In an ideal global market, there should be no exemptions to competition law. Yet, since they will probably always exist, the general category exemption system of the EU enjoys these advantages:

- They are express instead of implicit or covert.
- They provide legal certainty.[99]
- They must pursue a valid goal that goes beyond the particular individuals that may use it (i.e. improving the production or distribution of goods or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit).
- They must be based on solid economic grounds, by contrast to exemptions existing in other jurisdictions where the justification is unclear, unknown or was thought decades earlier and does not exist anymore.
- They are horizontally applicable across all individuals and industries instead of being vertical benefits only enjoyable by a particular group of individuals or industries. As a result, they can hardly raise discrimination issues.

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[98] Paragraph 1 of Article 101 reads as follows: "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

[99] *See* K. Mehta & L. Peeperkorn, *Licensing of Intellectual Property under EU Competition Rules: the Review of the Technology Transfer Block Exemption Regulation*, A Statement to the FTC/DOJ Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy, Washington, May 22, 2002, http://www.ftc.gov/opp/intellect/020522mehtadoc.pdf (last visited May 30, 2011), at 3.

- The block exemption can be withdrawn for a specific circumstance if it is considered that it does not fulfill all the above mentioned conditions of Article 101 (3). But such withdrawal can only have effect for the future and can only be done by the Commission and, under certain conditions, by national competition authorities.
- The block exemptions are subject to a sunset provision and are periodically reviewed in order to ensure that they maintain their required economic justifications.
- Its transparency enables limiting the risk of the exemption knowingly or unknowingly covering hard-core antitrust conduct, such as fixing prices, limiting output or sales or allocating markets or customers; a safeguard which is not the case with most of the other types of exemptions.
- Benefits of the exemption can be withdrawn if the conduct does not benefit consumers.

The EU has issued and regularly reviewed several block exemptions under Article 101 (3), including, among others, the technology transfer block exemption regulation,[100] the exemption for vertical supply and distribution agreements,[101] the research and development agreements exemption,[102] and the specialization agreements regulation.[103] These rulings governing exemptions are typically accompanied by useful explanatory guidelines.[104]

c.) Particular exemption of certain industries

A third type of exemption to competition laws is that granted to certain industries, existing in many jurisdictions, based simply on political, social, cultural, historical or other unique, non-market-based, circumstances.

In the US, the 50-year-old broadcasting exemption of the Sports Broadcasting Act allows the NFL to sign TV contracts on behalf of all teams. The exemption also applies to professional baseball, basketball and hockey. The health industry is also exempted from antitrust laws pursuant to the 1945 McCarran-Ferguson Act, which has been expressly criticized recently by the White House.[105]

The EU also allows several industries to be exempted from antitrust regulations. For example, the motor vehicle sector benefits from its own block exemption or 'safe harbour' from competition rules for agreements for the distribution and servicing of

[100] Commission Regulation (EC) No 772/2004.
[101] Commission Regulation (EU) No 330/2010.
[102] Commission Regulation (EC) No 2659/2000.
[103] Commission Regulation (EC) No 2658/2000.
[104] *See*, e.g. guidelines on horizontal cooperation agreements, Commission notice of 6 January 2001, Official Journal C 3 of January 6, 2001.
[105] *See* Statement of Administration Policy H.R. 4626 — Health Insurance Industry Fair Competition Act: "The Administration strongly supports House passage of H.R. 4626. The repeal of the antitrust exemption in the McCarran-Ferguson Act as it applies to the health insurance industry would give American families and businesses, big and small, more control over their own health care choices by promoting greater insurance competition. The repeal also will outlaw existing, anti-competitive health insurance practices like price fixing, bid rigging, and market allocation that drive up costs for all Americans. Health insurance reform should be built on a strong commitment to competition in all health care markets, including health insurance. This bill will benefit the American health care consumer by ensuring that competition has a prominent role in reforming health insurance markets throughout the Nation".

motor vehicles in the EU. In fact a revised regulation and accompanying guidelines, valid until 2023, came into force on June 1, 2010 and apply to repair and maintenance services only.[106]

It is worth noting, however, that after public consultation, the European Commission considered that a specific block exemption was no longer warranted for the sale of new cars and commercial vehicles. The Commission has therefore provided for a three year transition period until 2013 during which the previous regulations will continue to apply. After this transitional period, the general block exemption on vertical distribution agreements will only apply to the sale of new cars and commercial vehicles.[107]

Certain agreements between liner shipping companies ("consortia") are also subject to an express exemption.[108] Similarly, there is an exemption of certain air transport agreements.[109] In fact, the International Air Transport Association (IATA) has been subject to exemptions in many jurisdictions for many years, though after several investigations it ended up withdrawing the "IATA fares".

If the type of exemptions referred to above are based on influence of the underlying industries, risks such as unfair discrimination with other industries and harm to consumers are fairly obvious. If, on the contrary, the industry exemption is grounded on an existing market failure, that takes us back to a situation similar than the one of the regulated industries.

In fact, many of the expressly exempted agreements within the aforementioned EU block exemptions refer to aspects that would be the usual subject of regulation in regulated industries.[110] A significant difference, however, is that there is no specific regulatory agency controlling and enforcing the regulations. Instead, individuals are allowed to a self-regulation of the industry in those aspects.

To some extent, this exemption from antitrust and replacement with self-regulation could be understood as a soft transition between regulation and competition for industries that would otherwise need to be subject to a heavy and costly regulatory regime.[111] In that understanding, as long as certain conditions are met, there would be no reasons to object the exemption. Those conditions should include, among others: (i) to pursue legitimate goals that market forces cannot achieve (i.e. previous existence of a market failure), (ii) exclusion of hard-core practices, (ii) periodical review, and (iv) actual benefits for consumers, and (vi) existence of an effective self-regulation structure.

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[106] Commission Regulation (EU) No 461/2010.
[107] Commission Regulation (EU) No 330/2010.
[108] Commission Regulation (EC) No 906/2009.
[109] Council Regulation (EC) No 487/2009.
[110] For example, in transportation, the standardization of equipment, transport supplies, vehicles or fixed installations; the use, for journeys by a single mode of transport, of the routes which are most rational from the operational point of view; and the coordination of transport timetables for connecting routes. Similarly, in air transportation, joint planning and coordination of airline schedules; consultations on tariffs for the carriage of passengers and baggage and of freight on scheduled air services; joint operations on new less busy scheduled air services; and slot allocation at airports and airport scheduling.
[111] *See* Stewart-Smith, *supra* note 95 and particularly the discussion of note 96.

If, instead, those conditions are not fulfilled, the situation can be one of courting disaster, granting an industry the ability to choose its conduct where antitrust laws are not applicable but where it is not subject to regulation and to a regulator either.

d.) Particular exemptions to certain collective activity

Some instances of collective activity and association are also granted competition exemptions, often also linked to a certain type of industry, and usually where such combinations are viewed as having other benefits or low risks of harm.

In the US, the original Clayton Act of 1914 included in section 6 an express exemption from the general operation of the antitrust laws to the creation of farmer cooperatives and labor unions (section 6 entities) and collective activities by farmers and workers. This exemption was expanded by the Capper-Volstead Act in 1922 with regard to agricultural cooperatives and by the Norris-LaGuardia Act in 1936 with regard to labor unions.

While in theory seemingly limited, in practice, the policy underlying the exemptions for agricultural cooperatives and labor unions has on occasion been much broader than the earlier-described statutory exemptions favoring single industries with exemptions from antitrust coverage.[112]

Exemptions of this type addressed to limited types of collective activity and associations do demand deep and frequent revision. Unfortunately, except for the limitations imposed by case law, this does not seem to have happened in many of the U.S. exemptions that in some cases have almost one hundred years of existence.

In addition to a possible harm to consumers, the way in which this exemption operates can quickly devolve into unfair advantage over regular competitors or a barrier of entry towards domestic or foreign companies that cannot access the benefit. In either case, the disadvantaged parties may have little chance of success against a group of persons benefited by the exemption that has accumulated large portions of market. In addition, the activities of that group of persons may not be limited to the originally-intended local or specialized markets and therefore the effects of the exemption can be exported to other arenas where harm occurs. In fact, beneficiaries of this type exemption can often, quite legally access many of the unfair advantages of a domestic cartel when conducting international business.[113]

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[112] For example, beyond agreements among farmers or workers (the 'statutory exemption' in labor antitrust law), the courts have also developed an additional exemption in the labor area - the 'non-statutory' exemption - to protect union/employer agreements that are part of the collective bargaining system regulated under the National Labor Relations Act. Both labor exemptions have been subject to intensive litigation (especially in the professional sports area) and have been the subject of numerous Supreme Court cases. See MCDONALD and MILLER, *supra* note 81. It should be noted, however, that a Pennsylvania Federal Court has recently limited the scope of the Capper-Volstead exemption in "Mushroom Direct Purchaser Antitrust Litig.", Master File No. 06-0620 (E.D. Pa. Mar. 26, 2009). The Supreme Court had also held in 1978 that even one non-farmer member in a cooperative disqualifies the cooperative from claiming the Capper-Volstead exemption [*National Broiler Marketing Assn. v. U.S.*, 436 U.S. 816 (1978), 436 U.S. 816].

[113] For further discussion, *see* infra subsection 3.2.3.

e.) On-demand, discretionary exemptions

Another category of exemptions is that many jurisdictions contemplate the possibility for the executive branch or the competition agency to grant exemptions to competition laws at the request of interested parties.[114]

Australia is a good example of a thorough regulation of on-demand exemptions,[115] which was amended in 1976 to further reinforce that, in some circumstances, public benefits beyond those generated by competition may be considered by Australian law more desirable than competition *per se*.[116]

The use of this type of system for exemptions certainly has some upsides. It requires exemptions to be express and public, and, when granted by the competition agency, forces an economic analysis of the exemption from the competition viewpoint.[117] On the other hand, it shares the downsides of exemptions to certain industries or individuals,[118] aggravated by more possibilities of discrimination and lack of transparency based on the fact that they are granted on a case-by-case basis. The existence of the exemption possibility and process involved can also increase the workload of the agencies and detract from their ability or resources in more-regular competition law enforcement.

Considering these reasons, the EU shifted from an on-demand system of exemptions to a general industry exemption type. In the maritime sector, for instance, the EU argued

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[114] *See, e.g.*, Treaty on the Functioning of the European Union, Article 101(3) and Spanish Competition Act 15/2007. In the case of South Africa, Section 10 of the Competition Act (Act No.89 of 1998), authorizes the competition tribunal to grant exemptions if an agreement or practice constitutes a prohibited practice and is found to contribute to the following objectives: maintenance or promotion of exports, promotion of the competitiveness of small businesses or firms controlled or owned by historically disadvantaged persons, changing the productive capacity to stop decline in an industry or maintaining economic stability in an industry designated by the Minister. In addition, exemptions may be granted for an agreement or practice that relates to the "exercise of a right, which falls within the ambit of specific laws", pursuant to Section 10 (4) of the Act. Furthermore, professional associations designated in Schedule 1 to the Competition Act may apply to have all or part of their rules exempted from antitrust provisions in relation to restrictive practices. Notwithstanding the foregoing, by contrast to Australia, South African case law seems to indicate a restrictive view on exemptions (*See* Mondi Ltd. & Kohler *Cores and Tubes v. Competition Tribunal*, Competition Appeal Court, 2003 (l) CPLR 25(CAC) (S. Afr.): "…exemptions must not be overly broad. Antitrust operates only within the area carved out for it. Exemptions and immunities, including untouchable market actors who may be favored by the state, can so shrink this area as to lose most of antitrust law's promised benefits.").

[115] *See* Section 88 of the Competition and Consumer Act.

[116] *See* Robert French, *Authorisation and Public Benefit - Playing with Categories of Meaningless Reference?*, [October 2006], 4th ANNUAL UNIVERSITY OF SOUTH AUSTRALIA TRADE PRACTICES WORKSHOP, 20-21, at paragraph 13; *Competition Law – Covering a Multitude of Sins*, COMPETITION LAW CONFERENCE, Sydney, May 15, 2004 at 9-17, www.fedcourt.gov.au/aboutct/judges_papers/speeches_frenchj10.rtf (last visited May 30, 2011).

[117] This is not the case of air transportation exemptions in the US, which can be granted by the Department of Transportation. Section 41309 of Title 49 of the United States Code requires disapproval of an agreement that substantially reduces or eliminates competition, unless the agreement is necessary to meet a serious transportation need or to secure important public benefits, including international comity or foreign policy considerations, and the transportation need it meets or public benefits it generates cannot be secured by reasonably available alternatives that are materially less anticompetitive. Once a necessary and appropriately limited anticompetitive agreement is approved, Section 41308 of the same code requires that the Department of Transportation exempts any person affected by its approval from the operation of the antitrust laws to the extent necessary to enable such a person to proceed under the agreement.

[118] See *supra*, subsections c.) and 0.

that the former system led to a large number of agreements being notified by companies, a fact which has undermined efforts to promote a rigorous and decentralized application of the EU competition rules.[119]

f.) State aid

A further category of potential exemptions from competition law is represented by instances where market activity is affected by state aid. There are no jurisdictions where there is not in place some sort of subsidy or other governmental benefit for portions of their economy. Yet, it is often rare to find discussions about the compatibility of this situation with antitrust laws or the proper exemption analysis.

In fact, the issue of state aid is addressed at regional organizations such as the EU not usually because there is a concern about a distortion to competition itself, but because the only way to avoid discrimination among member states is to limit and regulate the benefits such states grant to their nationals in a centralized manner. A similar concern can be perceived, for instance, from the federal or national-level regulation with regards to benefits granted by internal provinces or regions (e.g. Spainsh state aid regulation or similar U.S. federal principles).

There are undoubtedly, however, severe distortions caused by state aid to competition. Indeed, it is difficult that a state promotional measure actually reaches all competitors in the target group. Instead, it is more likely that some will benefit and others will not. Still, all of them will continue to be subject to varying enforcement or exemptions of antitrust provisions and related sanctions, but competing in an unbalanced manner.

When analyzed from a convergence perspective, the situation that has just been described becomes more serious. If it is unlikely that a State aid reaches all competitors in a market, it would be even more rare that it includes foreign competitors. As a result, two jurisdictions may have the same antitrust laws, but nationals of each of them will not compete equally on each other's markets.

In addition, unlike other exemptions referred to above, state aid as well as other government interventions in economy are usually a covert exemption to competition law instead of an express one, thus causing a high level of commercial uncertainty.

State aid will likely never cease to exist and, in fact, many of them are also established or likely to be agreed upon as a result of direct negotiations among nations, such as at the World Trade Organization. But the fact that they will always be there reinforces the argument of the need of harmonization with competition laws.

The best way to address that goal seems firstly to recognize the need of harmonization between state aid and competition policies and secondly to adopt mandatory regular revision mechanisms of those measures based on objective criteria for economic analysis of its justification and its impact on competition.

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[119] *See* official summary of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, at http://europa.eu/legislation_summaries/competition/firms/l26092_en.htm (last visited May 30, 2011).

The EU State Aid Action Plan is a good example of this practice.[120] It presents a general balancing test as a conceptual framework for analyzing state aid cases, consisting in: (i) whether the state aid addresses a market failure or other objective of common interest; (ii) whether there is an incentive effect (i.e. whether the aid affects the behavior of the recipient in a way which meets the objective) (iii) whether the aid leads to distortions of competition and trade and (iv) whether given the magnitude of the positive and negative effects, the overall balance is positive.[121]

The first positive feature of the EU approach is that the incompatibility of fully applying both competition and state aid policies at the same time is overtly recognized. The second one is that a thorough economic analysis is performed to justify the extent to which competition will be displaced. Finally, the exemption is expressly recognized and authorized by the competition agency.[122]

The Spanish Competition Act 15/2007 takes a similar step, requiring, among other things, a mandatory consultancy intervention of the competition agency at least once a year on State aid.[123]

g.) Other direct governmental interventions in the economy

Governments intervene in the economy in many other, less formal ways than that of state aid that may interfere with competition. This instances also constitute a category as to which the appropriateness or not of antitrust exemption must be analyzed. Yet, usually these indirect governmental practices are barely reflected in competition laws and therefore are consequently excluded from any convergence effort. This type of exemptions is intrinsically harmful for any competition system since, in addition to the previously-articulated negative aspects of all other exemptions, they are, by definition, indirect and not transparent and therefore cause a great level of legal and commercial uncertainty. Even the state aid provides a more predictable framework that the measures contemplated in this subsection.

One visible set of those interferences could arise in the case of state-owned companies. When a state company acts as any other agent in the market competing with other

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[120] Anderson & Heimler, *supra* note 13, subsection 3.3, explain that "The state aid provisions of the Treaty were meant to ensure that competition is not distorted in the common market. Contrary to antitrust where the legal and economic communities are all very active in the discussion of standards to be applied, on State aid the Commission was and continues to be substantially alone. Economic research, which could contribute usefully to defining what should be treated as a competition restrictive subsidy, has, until recently, been scarce (see BESLEY and SEABRIGHT [1999]). Nonetheless, a good argument can be made that the contribution of state aid enforcement to European welfare has been enhanced by recent reforms.
In 2005, the Commission launched its State Aid Action plan, with economic analysis being explicitly identified as the tool of the reform. Such analysis is meant to be used for identifying both the necessity and the proportionality of the aid, with an emphasis on the effect of the aid on market conditions. This is a big change over past practices according to which the Commissions considered State aid to be illegitimate only if it created distortions within a particular country, not considering that markets may be larger."

[121] Neven & Verouden, *supra* note 49, at 1.3.

[122] This was the case, for example, of the state aids to financial institutions during the last crisis. See Paris Anestis & Sarah Jordan, *State Aid after the Financial Crisis: Restructuring Measures to Restore Viability and Minimise Competitive Distortion*, [2011], THE EUROPEAN ANTITRUST REVIEW, available at: http://www.globalcompetitionreview.com/reviews/28/sections/98/chapters/1089/state-aid/ (last visited May 30, 2011).

[123] *See* Spanish Competition Act 15/2007, Section 11.

private companies, some distortions to competition could be brought about, for example, due to asymmetric information or because the state company may base its decisions in reasons other than profit, such as support to a determinate government policy, even if implies not making rational market or economic choices.[124] If instead the state company acts as a monopoly, while there are no direct horizontal competitors that could be prejudiced, abusive or distortive potential continues to exist with respect to higher or lower vertical and other related markets.[125]

Another harmful covered exemption to competition laws consist in regulations on different sectors of the economy that indirectly affect competition. Harmonization of these regulations with competition is even more difficult in those countries in which they can be issued by internal divisions (states, provinces or regions).[126]

Other forms of governmental intervention that occur in parallel to, but in an uncertain relation with, competition policies include agreements to freeze prices as a method to control inflation, determination of quotas to export and to sell to the domestic market, obligation to supply certain consumers or to buy from certain suppliers and "buy national" programs. These practices many times occur not only *de facto* superseding competition law provisions, but even without any legal support.

This was the case in Argentina during recent years, in which inflation was coped through mandatory price fixing "agreements", limitations to exports of products that may affect local prices or obligations to supply certain key industries, such as power producers. The informal and indirect aspect of this category is underscored by this situation, where not only were these measures taken without legal support, but they were even implemented by phone from the Secretary of Domestic Trade. Further complicating the interaction with the antitrust laws was that this public official is the same authority with final decision on competition matters due to the lack of implementation of the Competition Tribunal (see supra subsection 3.1.2).[127]

An aspect of the above confusion also occurs in the cases where the Argentinian Secretary of Commerce has from time-to-time claimed having the powers of the controversial 1974 Mandatory Supply Act 20,680, according to which it can basically

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[124] A perfect example of this distortion took place with the former Argentinian pension funds system. When public debt was mandatory converted into pesos during the 2002 crisis, the Executive Power issued several decrees (644/02, 79/03 and 530/03) according to which the companies that managed the pension funds (AFJPs) had to firstly consent the conversion to pesos of certain public debt that was a major part of the funds they were managing and secondly waive their rights to any claim if they wanted to continue collecting payment. All the AFJPs understood that they could not consent the conversion to pesos following their fiduciary duty towards their affiliates, except for a state-owned AFJP. Subsequently, the government discontinued the payment of said public debt to those AFJPs that had not consented, which were subsequently forced into a complete restructuring two years later. Meanwhile, the government-owned AFJP continued collecting and its results improved significantly compared to the others, thus causing it to receive a massive transfer of affiliates from the other AFJPs.

[125] *See* the progress on that regard in China in Harris & Ganske, *supra* note 75, at Section VI.

[126] *See, e.g.*, the discussion in the U.S. about the Comprehensive Alcohol Regulatory Effectiveness Act of 2010, H.R. 5034, at *Comments of the ABA Section of Antitrust Law on the Comprehensive Alcohol Regulatory Effectiveness Act*, *supra* note 95.

[127] These informal measures where recognized, among others, by a former president of the Competition Commission after his resignation. *See http://www.diarioperfil.com.ar/edimp/0284/articulo.php?art=8963&ed=0284* (last visited May 30, 2011).

dictate to any agent of the economy to produce and how much to produce, fix prices and revenue margins and apply severe sanctions. It does not seem necessary to discuss how incompatible these powers are with the role of a competition agency. As insisted before, the imposition of these governmental influences on private parties precludes any chance of uniform market competition.

This category of government influences clearly threaten competition, so its proper identification is necessary for purposes of a correct assessment of the actual level of competition law convergence that may be reached. More importantly, the precise characterization of these interventions is essential to secure protection of the rights of any individuals involved.

It is not minor concern to be able to anticipate how the competition agency may react in cases of this governmental involvement in private activities, for example, if a claim of cartelization against a price fixing agreement promoted by the government is submitted. These government intervention examples exclude the application of competition law not because they explicitly say so, but because they separate market conduct from the essential element of liberty that characterizes free competition. Therefore, it would be illegal and irrational to punish the parties involved based on a violation to the competition law.[128]

3.2.3 Incompatibility of convergence, extraterritorial application of competition laws and exemptions: the paradox of exemptions at home and enforcement abroad

It seems reasonable to sustain that each country should project internationally the principles it enforces internally and avoid expecting from others what it does not intend to do in its own jurisdiction. Moreover, extraterritorial enforcement of local antitrust laws to conduct that takes place outside the territory of a country should only be done under the acceptance that other countries could do the same with regards to similar conducts occurring in the original country.

This uniformity and parallelism is, nonetheless, hardly possible with many of the types of exemptions described above, which end up causing an important problem of consistency for jurisdictions that work towards harmonization of competition law.

Assume, for purposes of example, that Alpha Company operating in country A enters into an agreement with its competitors in country A under a particular exemption it enjoys, to fix the price of a substantial volume of exports to the U.S. In such a situation, under existing U.S. law, that price fixing agreement, involving exports to the U.S. would violate U.S. antitrust laws and, therefore, the U.S. domestic courts would have subject matter jurisdiction over the conduct of Alpha company and its competitors. This is true even though the illegal conduct of Alpha company and its competitors occurred entirely in country A, since the effects of the conduct would have a direct impact upon the United States. [129] Pursuant to U.S. case law, individuals of the foreign companies

[128] The Argentinian Competition Commission expressly recognized that these practices limited free trade and as a result excluded the application of competition laws. *See,* e.g. Opinions CNDC No 538/06, 552/06 and 556/07. A similar conclusion should be reached by applying the U.S. State Action doctrine (*see supra* note 91).
[129] *See* Thomas V. Vakerics, *Antitrbas* s 12.02 (2004), WL 3152510.

participating in the described practice could be even subject to criminal prosecution in the US.[130]

In that connection, the Foreign Trade Antitrust Improvements Act of 1982 establishes that, in order for the antitrust laws to apply to conduct occurring in foreign countries, that conduct must have a "direct, substantial, and reasonably foreseeable effect" on United States commerce. Identical amendments were made in 1982 to the Federal Trade Commission Act.[131] The Foreign Trade Antitrust Improvements Act excludes from the reach of the Sherman Act much anticompetitive conduct that causes only foreign injury, but creates an exception to the general rule when the challenged conduct causes significant harm to U.S imports, domestic commerce or American exporters.

Assume now that country A has a similar jurisdictional criterion to that of the US. If it receives products from U.S. exporters that, for example, under the U.S. exemption to agricultural cooperatives have a price fixing or quota distribution agreement,[132] it could validly argue that such conduct violates its antitrust law, even if it is legal inside the US.[133] Similarly, if exporters from country A wanted to enter into the U.S. market and faced the opposition of a cartel protected by an exemption, such country could also argue that the conduct of the U.S. companies breaches its own antitrust law since it causes significant harm to country A's exporters. The combination could go even further, since the same individual or group of individuals could be subject both to an antitrust exemption and to a State aid.[134]

The EU has indeed faced those concerns about exemptions in other jurisdictions harming nationals of its Member States. This is the reason of EU Council Regulation

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[130] *See United States v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1, 4 (1st Cir. 1997).
[131] *See* Vakerics, *supra* note 129.
[132] *See supra* subsection 0.
[133] In fact, in a cooperative's webpage, for example, it says it is the largest marketing cooperative in the world's fruit and vegetable industry and, precisely, points out as the main advantage of joining it that "Cooperatives give producers clout. In today's competitive international market, an independent grower stands alone against the competition. As a member of a cooperative, each individual grower joins with other growers to gain a mutually larger market share. A cooperative of growers together can do many things that a grower alone cannot afford to do -- develop a worldwide market, promote a brand name, access a global transportation system, develop comprehensive research capabilities, and gain governmental access to overseas markets -- to name a few" (FAQ Nº 4). Furthermore, it declares that during the current season, 45% of the cooperative's fresh fruit sales revenues were earned in markets outside the United States as well as more than 20% of its processed products revenues, and that it continually works with the U.S. government and the governments of foreign countries to open new markets presently closed to western citrus by unfair trade barriers. "Such efforts continue to meet with success" (FAQ 7). Cooperative's growers own two of the West's largest citrus processing plants. Fruit not meeting fresh market standards is processed into a variety of juice, oil and peel products which are marketed worldwide. With these plants, cooperative's members are guaranteed that all their fruit, regardless of quantity or quality, will be handled to advantage (FAQ 13) Http://www.sunkist.com/about/faqs.aspx (last visited May 25, 2011).
[134] For instance, the U.S. National Milk Producers Federation benefits from the Dairy Export Incentive Program (DEIP), which purpose is to help exporters of U.S. dairy products meet prevailing world prices for targeted dairy products and destinations. Under the program, the U.S. Department of Agriculture pays cash to exporters as bonuses, allowing them to sell certain U.S. dairy products at prices lower than the exporter's costs of acquiring them. The major objective of the program, based on the explanations Foreign Agricultural Service of the U.S. Department of Agriculture, is to develop export markets for dairy products where U.S. products are not competitive because of the presence of subsidized products from other countries. *See* http://www.fas.usda.gov/excredits/deip/deip-new.asp and http://www.nmpf.org/washington_watch/trade/DEIP (last visited May 30, 2011).

applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries,[135] and the EU Council Regulation on free access to ocean trades.[136]

The former regulation addresses the concern for EU ship owners facing restrictions imposed on them by non-EU countries regarding the provision of maritime transport services for shippers established in an EU country, or in the non-EU countries concerned. The latter, in turn, applies when action by a non-Community country or by its agents restricts free access to the transport of liner cargoes, bulk cargoes or other cargoes by shipping companies of Member States or by ships registered in a Member State, except where such action is taken in conformity with the UN Liner Code. Furthermore, Regulation (EEC) on unfair pricing in maritime transport enables the European Commission to apply compensatory duties in order to protect ship owners in Member States from unfair pricing practices on the part of non-Community ship owners.[137]

At the same time, some restrictive practices engaged in by members of one or more liner conferences are exempted in the EU from the prohibition in Article 101 (1), including the allocation of sailings among members of the conference, the regulation of carrying capacity and an obligation on members of a consortium to use in the relevant market or markets vessels allocated to the consortium and to refrain from chartering space on vessels belonging to third parties except with the prior consent of the other members of the consortium.[138]

As a result, it seems that the EU acts to address competition restrictions abroad while at the same time it preserves them internally.

Regarding exemptions, these basic examples demonstrate, on the one hand, that there is sometimes a continuing-loop offsetting convergence effects, consisting in the preservation of local exemptions to counterweight less rigorous competition provisions or similar exemptions in other countries. In other cases local exemptions are solely the result of local conditions without a relationship to the activities of other jurisdictions, but they may still cause the problem of lack of consistency explained above.

In the end, this discussion indicates that important evidence of the true willingness for a jurisdiction to search a meaningful international convergence in competition law is often to be seen in how such jurisdiction deals with its own exemptions.

3.2.4 Proposals

Exemptions cannot be completely eliminated and in some cases it is not desirable either. As explained above, some of them cannot be eliminated due to technical reasons, such as the case of regulated activities based on actual market failures. In fact, those activities are not subject to "exemptions" to antitrust but rather to a different government

[135] Council Regulation (EEC) No 4055/86.
[136] Council Regulation (EEC) No 4058/86.
[137] Council Regulation (EEC) No 4057/86.
[138] *See* Commission Regulation (EC) No 906/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia).

policy.[139] Other exemptions are not expected to be eliminated because the specific economic need that forced them continues to exist, because they serve as a counterweight to exemptions in other jurisdictions or simply because of political reasons.

The fact that exemptions are expected to continue to coexist with competition law is a strong reason to look for convergence and promote agreement not only on the provisions of antitrust laws, but also on the criteria to grant or exclude exemptions.

Some of the standards that could be recommended for harmonization among jurisdictions are listed below.[140]

a.) Basis for the exemption

Common acceptable basis for exemptions should be identified, such as market failures or other policy reasons (i.e. free speech or national security).

b.) Necessary technical features of the exemption

It would be possible and desirable for jurisdictions to agree that exemptions must be:

a. supported on grounded reasons, including economic analysis, and be granted only after rigorous consideration of the impact of the proposed exemption on consumer welfare (which shall be presumed to be harmed unless otherwise evidenced)
b. periodically reviewed (i.e. every 5 years)
c. contain a sunset provision
d. be applicable to a general category of persons or industries and not to certain parties alone
e. be express and public
f. be drafted narrowly so that competition is reduced only to the minimum extent necessary to achieve the intended goal
g. privilege those structures that restrict antitrust remedies only, rather than complete immunity from antitrust scrutiny

c.) Role of the competition agency

As described above, in most of the jurisdictions exemptions are granted by the competition agency. Other countries, such as the US, require legislative branch approval.[141]

Participation of the competition agency has the benefit of ensuring technical assessment of the exemption, while the need for legislative approval guarantees that exemptions

[139] *See supra* subsection a.).
[140] Many of these recommendations are consistent with the standards for assessing exemptions and immunities from the antitrust laws recommended by the Section of Antitrust Law of the American Bar Association. *See Comments of the ABA Section of Antitrust Law on the Comprehensive Alcohol Regulatory Effectiveness Act*, *supra* note 95, at 5.
[141] In Argentina there are no legal provisions about exemptions to competition law. However, since the National Constitution commands the authorities to protect competition, it would be reasonable to sustain that any exemption to that principle should at least be approved by Congress. *See supra* note 34.

will be granted only in rare cases and in instances likely to have some measure of popular support.

In any event, for convergence purposes, it seems that a necessary point of agreement should be that the competition agency must participate, either by granting the exemption or by serving as a consultant for the governmental power that has the power to grant the exemption.

d.) Necessary evidence by the requesting parties

Parties requesting exemptions should be obliged to submit evidence and analysis to demonstrate (i) that the benefits of competition are in fact less important than the particular value promoted by the exemption and (ii) that the proposed exemption or immunity is the least restrictive means to achieve that important value.

e.) Limitation of effects of the exemption to local markets

The use of antitrust exemptions to strengthen market power in foreign markets should be avoided. It would be unfair to protect the domestic market from distortions at the same time that practices prohibited locally are encouraged to conquer external markets. This principle requires a regular economic analysis of how the exemption is being used by its beneficiaries.

f.) Need to avoid using the exemption as a counterweight for exemptions in other jurisdictions

Complementing the recommendation of e.)point e.) above, countries applying antitrust regimes should agree to avoid using local exemptions as an offset of exemptions applied by each other. Otherwise, there is a risk of a re-occurring loop that finally results in harm to consumers.[142]

4. CONCLUSION

Protection of elements of competition is now a common policy in countries on all continents and in all kinds of economies. The way in which such policy is applied in those jurisdictions, however, may vary substantially.

As Part II describes, there is a shared concern that the benefits of competition for innovation, growth and consumer welfare will not be achieved to the highest extent possible unless a common legal understanding is reached on some of its basic principles. For that purpose, resulting convergence efforts in competition law are normally concentrated in promoting the certain basic antitrust law principles such as the goal of consumer welfare or the need to deter and punish hard-core cartels.

While the importance of harmonization in those areas is not contested, the core argument of this article is that the basis of a more effective convergence in competition laws would concentrate on two different matters: (i) ensuring an adequate organization

[142] *See supra* subsection 3.2.3.

of the institutions applying the competition laws and (ii) identifying and reducing large sectors of the economy excluded from the competition regimes.

Section A of Part III explores how different alternatives of institutional design greatly affect the effectiveness of a competition agency and ultimately of competition law itself, by determining the extent to which the agency will be independent from other interests and will be able to base its decisions on appropriate technical analysis and rationales.

Section B, in turn, addresses the problem of competition law exemptions, assuming as a starting point that a simple declaration that exemptions are undesirable is not sufficient to produce significant convergence benefits. The alternative proposal of this paper contained in subsection 3.2.2 is to distinguish seven different types of exemptions so that in each of them a precise determination of its compatibility with the values protected by competition law can be assessed. The result shows that certain types of exemptions may be appropriate or benign under competition law, such as the case of regulated activities, while other exemption types have little objective reason to be excluded and can be extremely harmful for competition purposes.

A further problematic criticism is suggested in subsection 3.2.3, regarding the inconsistency of many jurisdictions that promote competition values for other jurisdictions to adopt, while at the same time they maintain incompatible exemptions in their own domestic markets.

Finally, assuming that exemptions are expected to continue to coexist with competition law, subsection 3.2.4 proposes a number of standards for analyzing and implementing exemptions to competition law that, if adopted, would substantially improve the convergence process.

This article does not attempt to describe the best possible competition law. It rather suggests that the best results will be achieved when existing and future laws are applied objectively by strong institutions to all sectors of the economy. It is toward these two ends that current convergence efforts should focus.

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National merger control – Towards further convergence in multi-jurisdictional filing processes

EMMA TROGEN[·]

This article departs from the newly published draft "Best Practices on cooperation between EU national competition authorities in merger review" and conducts a more detailed assessment of the current state of filing procedures in the Member States of the European Union. Recent signals show that there is an increasing awareness of the national authorities and the European Commission regarding the burden imposed on companies by multi-jurisdictional merger filings and, hence, the importance of adapting and harmonizing the regulatory requirements accordingly. Although the European Commission may not interfere with the national legislative processes, it needs to act as a driver to this effect. The article enumerates the principal areas where there is still room for progress in merger procedures. It is only when national legislations have been harmonized and the national authorities have integrated similar ways of acting with respect to merger control that the cooperation as pre-conceived in the Best Practices will indeed be effective.

1. INTRODUCTION

Any junior competition law associate has been confronted with his or her first merger filing analysis. During the first months of employment and typically with a transaction clock ticking, the junior will be learning, first hand, how to manage such analysis, researching desperately, the latest news regarding the new Indian merger regulation "soon to be published", trying to understand what the Russian authorities mean by "local assets" and, realizing that despite European harmonization at all levels, each member state of the European Union actually has its own "Merger Regime".

Multi-jurisdictional filings account for a large part of many competition lawyers work and represent a lot of effort in terms of time and money for many international companies. It is crucial for all parties involved in a transaction to be able to implement their agreement and proceed to closing as soon as possible and, arguably; many transactions are being delayed because of the complexity and diversity of the regulatory merger filing requirements that have to be fulfilled. The European national merger control regimes remain the initial legal framework of reference and, with the exception of the referral mechanisms of articles 4, 9 and 22 of the EU Merger Regulation, national merger procedures are not harmonized at EU-level. There is no legal basis for cooperation with respect to merger control between the competition authorities within the EU, similar to that granted by Council Regulation 1/2003 for the enforcement of articles 101 and 102 TFEU.

Various attempts to increase coordination at the European level between authorities have been made in the past. The association between the European authorities called "The European Competition Authorities" (ECA) was the first initiative to this effect.

[·] Emma Trogen is an associate at Advokatfirman Vinge. The author would like to thank her colleague Kristian Hugmark for his comments on a previous draft of the article.

For merger control in particular, the ECA has created a procedural guide relating to the exchange of information between members on multi-jurisdictional merger filings[144]. Further on, in 2008, several European competition authorities[145] signed the Marchfeld declaration,[146] whereby they stressed the importance of promoting and strengthening cooperation in the field of competition law enforcement and policy, including merger control. However, save for the setting up by the ECA in 2001 of an informal information system whereby authorities that are notified of a transaction pass on this information to other authorities, no concrete measures as to how cooperation should become smoother have yet been taken. At international level, both the International Competition Network (ICN)[147] and the Organization for Economic Cooperation and Development (OECD)[148] have been far more active for some time now, focusing on transnational merger control proceedings and producing recommendations and guidelines to allow for smoother regulatory proceedings[149]. While this article only focuses on the European Union, it is interesting for the practitioner to see that many of the recommendations made by these two organizations during the last ten years have contributed to considerably facilitating the filing procedures and merger assessments in many countries both inside and outside Europe.

2. THE EU MERGER WORKING GROUP BEST PRACTICES

It appears however that the European national competition authorities as well as the Commission are now starting to focus on this part of the regulatory framework. Created in January 2010, the EU Merger Working Group, a working group chaired by the Commission and two national competition authorities and with a remit to reinforce cooperation by creating a permanent structure for technical discussions has now presented a draft Best Practices published for comments regarding cooperation between national competition authorities in merger cases[150] (the "Best Practices"). The aim is to publish a final version of the Best Practices in the autumn of 2011. Additionally, Vice-President Almunia, commenting on the current merger control rules in a speech in March 2011[151], indicated his intention to launch a debate regarding further partnership between the European competition authorities on this matter.

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144 http://www.bundeskartellamt.de/wDeutsch/download/pdf/ECA/ECA_procedures_guide_post_Athens.pdf.

145 The competition authorities that signed the Marchfeld declaration are the competition authorities of Austria, the Czech Republic, Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, the Slovak Republic, Slovenia, Croatia and Switzerland as well as DG Competition of the European Commission.

146 http://www.bwb.gv.at/SiteCollectionDocuments/MemorandumofUnderstanding.pdf.

147 ICN's 'Recommended practices for merger notification procedures' at www.internationalcompetitionnetwork.com.

148 OECD's 1999 'Report on notification of transnational mergers' DAFFE/CLP(99)2/FINAL at www.oecd.org.

149 For a detailed screening of these two organisations works in relation to multi-jurisdictional merger review, see Marco Botta 'Multi-jurisdiction mergers and acquisitions in an era of globalisation: The Telecom Italia – Telefónica case', [2008], Global Antitrust Review, p. 97.

150 Draft/Best Practices on cooperation between EU national competition authorities in merger review. Published for public consultation on 28 april 2011. See http://ec.europa.eu/competition/consultations/2011_merger_best_practices/index_en.html.

151 Reference is made to the speech addressed by the Vice-President Almunia 'EU merger control has come of age' at the conference "Merger Regulation in the EU after 20 years' co-presented by the IBA Antitrust Committee and the European Commission on 10 March 2011. In this speech VP Alumnia stated that with respect to merger control, "*companies are calling for more convergence on procedures, substantive tests and remedies*' and that "[he] *would like to launch a debate by asking how* [to] *strengthen*

The Best Practices are intended to provide guidance to the National Competition Authorities (the "NCAs"), the merging and third parties on how cooperation among the authorities will be managed in multi-jurisdictional merger cases. The Best Practices pre-conceive cooperation between the authorities on matters such as procedures, the substantive analysis and assessment of remedies. They also encourage the merging parties to contribute to this cooperation by allowing for the alignment of the review proceedings and providing waivers of confidentiality to the authorities to enable more effective communication.

The scope of cooperation, as outlined by the Best Practices, needs to be further clarified on various points[152] and ideally should go beyond its current state. It is regretful that the document is too vague on, for example, clearly defining the situations where the cooperation becomes necessary or the exact scope of the cooperation, by including practical examples. Arguably, these guidelines do not provide any revolutionary input for competition lawyers who in most cases already strategically initiate parallel proceedings in all EU member states and keep the various pertinent authorities aware of the proceedings in other jurisdictions to ensure as a smooth process as possible. Nevertheless, the document is an initial and very important step towards further discussion regarding greater efficiency in terms of proceedings and – to the extent relevant in the particular case – harmonized assessment with respect to both the merits of a case and remedies. In addition, it is already of great benefit for many European companies if, in the future, the parties can where relevant refer to this document in order to persuade smaller and less experienced European competition authorities to listen and learn from their more experienced colleagues with respect to discussions on substantive issues and remedies.

However, it should be stressed that any such cooperation may only be beneficial to the extent the competitive conditions on the geographical markets are similar and provided that the need for cooperation is not being used by the authorities as an excuse to slow down the review process in each individual jurisdiction. Similarly, any assessment of the merits or the remedies should eventually be made exclusively with reference to the national legislative framework to ensure legal certainty for the parties involved.

In addition, the level of cooperation needs to remain at the appropriate level. National merger control is and will remain a national competency and the assessment of a merger could not be compared to the assessment of practices under articles 101 and 102 TFEU. The parties still want to master the various national processes and be part of the discussions with each competition authority. Indeed, even if the competitive conditions and the overall argumentation remain the same, a specific line of argumentation and related evidence will almost always be developed for each country. Hence, the solution suggested by some comments to the Best Practices, of one authority (for example the authority in the country which is the most affected by a transaction) acting as a *one-stop-shop* and taking the lead in coordinating exchanges between the authorities and with the notifying parties, appears unrealistic and not desirable.

[the] *partnership in merger control, perhaps adapting the patterns of the existing ECN structure for antitrust*'.

[152] See all comments received at http://ec.europa.eu/competition/consultations/2011_merger_best_practices/index_en.html.

3. COOPERATION COULD ONLY BE EFFECTIVE IF THERE IS REAL COHERENCE IN THE EUROPEAN NATIONAL LEGISLATIVE FRAMEWORKS

More importantly, the Best Practices and the recent statements by VP Almunia opened up the possibility for a wider discussion regarding merger control procedures in the EU and the issues and costs such filings represent for many companies[153]. Indeed, as many of the practices referred to in the draft are already established and the authorities already discuss matters informally in multi-filing cases, complex or not, the main issue still remains the differences in the legislative frameworks and procedures.

Today, all 27 EU member states have different merger filing requirements, and while many of the national legislations have been developed to capture transactions with a clear effect on the national markets, it is still sometimes difficult to see the rationale behind some European merger control regimes where filings are almost systematically triggered for larger companies, despite only *de minimis* presence by one or all parties. In addition, while many countries apply thresholds based on turnover, some jurisdictions still base the whole or part of their turnover thresholds on market shares[154] which oblige the parties to take a view on market definition at a preliminary stage and may lead to legal uncertainty as to the obligation to file or not.[155].

Further, in most jurisdictions, the review periods and the information to be provided almost always remain the same for complex and non-complex mergers, exacerbating the companies and unnecessarily delaying even transactions presenting null merits issues because of the unreasonable level of information to be submitted. Arguably, for these situations, it should be standard to develop short form procedures, thereby limiting the extent of the information to be provided. Overall, it is necessary to harmonize the level of information to be submitted in merger filings. While some jurisdictions only require a minimum level of information in their filing forms, other jurisdictions require information which in many cases may seem totally irrelevant with respect to the transaction considered or request that company-related documents or transaction agreements should be translated. Sometimes it is possible to informally ask for waivers but the response will always depend on the case handler and the parties may not rely on this for full legal certainty. It has been suggested that the Commission and the national competition authorities propose "a model notification form" both in a long and a short format to harmonize the level of information to be submitted. This indeed appears to be a very appealing initiative. Going even further, why not imagine a single form used by all competition authorities with a first part that would be the same for all jurisdictions

[153] See ICN 'Report on the Costs and Burdens of Multijurisdictional Merger review'. The report identifies the "unnecessary " costs and classifies them into four categories: (i) costs associated with assessing notifications requirements where notification thresholds are imprecise and/or subjective; (ii) costs associated with complying with notification requirements for transactions lacking an appreciable nexus with the reviewing jurisdictions; (iii) costs associated with complying with unduly burdensome filing requirements, including translation and formalistic procedural requirements; and (iv) costs associated with unnecessary delays in the merger filing and review process.

[154] The European countries which still base all or part of their jurisdictional thresholds on market shares are Latvia, UK, Spain and Portugal.

[155] See, for example, ICN 'Recommended practices for merger notification procedures' Section II, A, Comment 1

including the information relating to the parties and completed by the parties once[156] and with a second part including any country specific information, to be completed separately for each jurisdiction?

In addition, in many cases with no or very limited overlaps, even a shorter time period for review would lighten the impact of the merger review on the overall transaction schedule. Some authorities such as the Swedish or the German authorities often clear transactions presenting no issues on the merits before the deadline. However, this will often depend on their workload and is not a practice the parties may systematically rely on. Paradoxically, receiving a clearance before deadline may sometimes also disturb the transaction timeline since all necessary arrangements for the execution of a transaction have been made for a closing date which the parties have agreed based on statutory timelines. It is therefore important that the parties always have full legal certainty as to when a decision may be expected. One suggestion could be to introduce for all cases where a short form notification is triggered either a shorter statutory time period for review or at least the possibility to request "early termination" such as that provided for by the US procedural rules.

A reduced format for the information to be provided as well as a reduced review period in non-merits cases would not only be in the parties' interest but also in the authorities' interest as it will thus enable them to allocate more resources and focus on larger more complex transactions.

Other aspects are the further harmonization should focus on are the notion of concentration, the criteria for the substantive assessment as well as the structure of remedies. First, with respect to the notion of concentration, not all Member States have the same interpretation. In some member states, such as Germany, even minority shareholdings[157] need to be notified under the merger rules and the EU Merger Regulation's definition of a "full function joint venture" has not been adopted by all legislators. Secondly, different substantive standards may render cooperation difficult since transactions may sometimes be scrutinized differently. For example, an agreement between undertakings may be considered and analyzed as a concentration under German merger control rules while the same agreement may be analyzed based on article 101 TFUE (or the equivalent national rule) in another member state. As pointed out by some commentators to the Best Practices, this difference in standards is not acceptable for companies developing business in a common market[158]. Finally, it would be desirable to have a coherent approach throughout Europe with respect to what remedies may or may not be acceptable to enable companies to plan for their engagements in a transaction at an overall level.

4. CONCLUSION

It suffices to review the state of various European merger control regimes in the early part of 2000 to note that important steps toward harmonization in particular on the

[156] Similar to sections 1 to 5 in the Form CO. Admittedly, the question of a common language for this first part of the notification remains to be resolved.

[157] It is expected that the Commission in the near future will start analyzing the question regarding notification of minority shareholdings.

[158] See comments submitted by McDermoot Will & Emery to the draft Best practices at http://ec.europa.eu/competition/index_en.html.

procedural level have already been made, resulting from the accession of many new eastern European countries to the European Union and also thanks to the work performed by organizations such as the ICN and the OECD. However, a second step in such convergence work must now be taken with respect to the more substantive assessments. Although the European Commission may not currently interfere with national merger controls and cannot impose any requirements on the 27 Member States on how to proceed, it needs however to serve as a driver to this effect, either within the ECN extended to merger control or by continuing the work within the Merger Working Group. Indeed, many European companies have their principal place of businesses in Europe and hence are most likely to trigger in the majority European merger filings. The Commission needs to work together with the European competition authorities and suggest standards and produce models to increase the level of coherence between the national merger control frameworks. It is only if there is increased convergence with respect to the general legislative framework for merger assessments, that the intended cooperation as currently recommended by the Best Practices would be fully accomplished.

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Differences between the U.S. and the EU in Antitrust Review of Intellectual Property: A Comparative Analysis of the Essential Facilities Doctrine

MARIA CHARLOTTE TROBERG[*]

1. INTRODUCTION

Recently, the U.S. and the EU have taken different views of the essential facilities doctrine. The right of access a monopolist's essential facility is a controversial subject in antitrust law; Increasingly, the monopolist's dominance depends on intellectual property, which makes the essential facilities doctrine particularly important. Recent developments show some growing divergence between the approach of the U.S. and EU antitrust enforcers to the application of antitrust rules to intellectual property rights, especially when it comes to the essential facilities doctrine. Whereas the scope of antitrust laws has been shrinking in the U.S., EU competition law has continuously been used to regulate issues that are considered to be outside the scope of U.S. law.

This paper will examine such divergences between the U.S. and the EU antitrust laws and aim at understanding how American and European antitrust enforcers approach competition concerns resulting from the combination of market power and intellectual property. Moreover, this paper will analyze the application of the essential facilities doctrine under U.S. and EU antitrust law through a comparative approach and examine what is the rationale for these differences.

The paper begins with a brief discussion of the main elements of the relationship between antitrust law and intellectual property. Before diving into the more detailed analysis of the application and enforcement of the essential facilities doctrine in the U.S. and the EU, a summary of the main differences between the two jurisdictions is provided in the second part of the paper. The third part of the paper examines the essential facilities doctrine under U.S. antitrust law, followed by a discussion on the doctrine as applied and enforced in the EU. The possible rational for the differences between the two jurisdictions is the subject of the fifth part of the paper. Conclusions follow.

2. INTERFACE BETWEEN ANTITRUST LAW AND INTELLECTUAL PROPERTY

Historically, antitrust law and intellectual property have been treated as complementary regimes, both designed to encourage innovation within appropriate limits.[160] Nevertheless, striking the balance between antitrust law and intellectual property is sometimes difficult and the issue of what role antitrust enforcement should play when it comes to intellectual property based market power has been much debated on both sides of the Atlantic. However, antitrust does play a role in assessing market power based on intellectual property.[161] The interplay between the two policies is becoming even more

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[*] Maria Charlotte Troberg is an associate with Roschier Attorneys Ltd., Helsinki, Finland.

[160] Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property*, 68 Antitrust Law Journal 919 (2001). Missing pin cite.

[161] See e.g. Robert Pitofsky, *Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy*, 16 Berkeley Technology Law Journal 536 (2001)("it is [also] rather naïve to conclude, as

significant, products and services that are embodiments of ideas represent an increasing part of the economy, which makes dominant market positions based on intellectual property more important.[162] The difficult question that follows, is how big a role should antitrust play? Courts and commentators have tried to define what can be a legitimate exercise of intellectual property rights and what kind of behavior - involving intellectual property - amounts to illegal conduct under antitrust laws. The fundamental rationale for the protection of intellectual property is to foster innovation. Some commentators argue that this protection should be provided whether or not a market advantage, or even market power, is created for the lawful duration of the right.[163] Otherwise the basic rights of intellectual property holders would be undermined. However, it is clear that antitrust law certainly values innovation as a policy goal. Thus intellectual property and antitrust rules have the common objective of fostering innovation and growth.[164] Despite this notion that intellectual property and antitrust law do not have conflicting aims,[165] and should work in unison to maximize wealth by promoting innovation and economic progress, they do, however, strive to achieve their goals by different and sometimes conflicting means. Thus the conflict between intellectual property and antitrust law is more focused on the means that the two policies use to promote the goals. Whereas antitrust law aims to promote competition by constraining the way monopoly power is created and maintained, intellectual property may permit or even encourage monopoly to create incentives to innovate.

The historic background of the debate concerning the intersection between antitrust and intellectual property is found in the classic contributions of Joseph Schumpeter and Kenneth Arrow. These commentators have significantly influenced and formed the debate on the scope of antitrust intervention in the intellectual property field. Schumpeter emphasized the role played by market concentration in promoting innovation. In contrast, Arrow, assuming the existence of intellectual property rights, showed that a competitive environment may be better for that purpose.[166]

Abuse of dominance is an area where there is little convergence between U.S. and EU law. This is even more the case when it comes to the area of antitrust review of

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some have urged, that antitrust enforcement has little or no role to play when it comes to market power based on intellectual property").

[162] Robert Pitofsky, Donna Patterson, Jonathan Hooks, *The Essential Facilities Doctrine under U.S. Antitrust Law*, 70 Antitrust Law Journal 444 (2003). Missing a pin cite, if author want to point to article in generally she should use signals

[163] Paul D. Marquardt and Mark Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitofsky, Patterson and Hooks*, 70 Antitrust Law Journal 848 (2003). Missing pin cite or signal

[164] Antitrust, by protecting competition, and intellectual property, by rewarding innovation, both create incentives to introduce new products. *See e.g.* Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property*, 68 Antitrust Law Journal 917 (2001).

[165] See Herbert Hovenkamp, Mark D. Janis and Mark A. Lemley, *Unilateral Refusals to License in the US, in* Antitrust, Patents and Copyright – EU and US Perspectives 12 (François Lévêque and Howard Shelanski ed., 2005)("The antitrust and intellectual property laws are not necessarily in conflict. For the most part they serve complementary goals, though each must limit the scope of the other").

[166] This paper does not allow for a further discussion on the historic background of the debate concerning the intersection between antitrust and intellectual property. However, for further reading on this subject, see, Joseph A. Schumpeter, Capitalism, Socialism and Democracy (1950); Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources to Invention*, The Rate and Direction of Inventive Activity (R.R. Nelson ed., 1962). Also, see genrally, Herbert Hovenkamp, *Schumpetarian Competition and Antitrust*, 4 Competition Policy International 273 (2008) and Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 Antitrust Law Journal 575 (2007).

intellectual property rights. However, it is clear in both jurisdictions, that the mere existence of a patent, trademark, or copyright is not sufficient to establish a dominant position; nor is the exercise of an intellectual property right by a dominant company in itself an abuse. In general it seems to be accepted on both sides of the Atlantic that intellectual property and antitrust rules have the common objective of fostering innovation and growth, and that intellectual property rights need to be treated with some level of deference so that antitrust enforcement does not undermine the objectives of intellectual property policy.[167] Nevertheless, there are divergences between the approach taken in the two jurisdictions with regard to the interaction between antitrust laws and intellectual property, which also mirrors on the approach taken on the essential facilities doctrine. In general it seems to be that whereas U.S. antitrust enforcers avoid direct interference with the core of intellectual property rights, EU antitrust enforcers view the role of competition policy as to correct what is considered faulty intellectual property rights.[168] Especially the very different approaches taken by the U.S. Supreme Court ("Supreme Court") in its opinion in *Trinko*[169], in which the court basically dismissed the essential facilities doctrine, and the decision of the General Court[170] in *Microsoft*[171], which affirmed European antitrust activism, go to show the transatlantic differences in the application of antitrust scrutiny to intellectual property and perhaps demonstrate the variations in the underlying philosophy of antitrust enforcement in the two jurisdictions.

3. SUMMARY OF THE MAIN DIFFERENCES BETWEEN THE JURISDICTIONS

Before engaging in a more detailed comparative discussion on the essential facilities doctrine in the U.S. and the EU, it is useful to summarize the main differences that occur between the two jurisdictions.

Most importantly, the legal framework under which the essential facilities doctrine is applied in the U.S. and the EU differs to a significant extent. In the U.S., essential facilities cases are considered exceptions to the general "Colgate defense" principle that companies are under no obligation to deal. Whereas in the EU, dominant firms have a general duty to deal. Moreover, in the EU, dominant firms have a "special responsibility" not to impair competition in the market. It follows that the obligation on dominant firms to deal with competitors and customers under EU law goes beyond that recognized under U.S. law.

Both Section 2 of the Sherman Act ("Section 2") and Article 102 of the Treaty on the Functioning of the European Union[172] ("Article 102")[173] are concerned with regulating market power, but whereas Article 102 focuses on abuse of a dominant position, Section

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[167] *See e.g.* Katarzyna Czapracka, Intellectual Property and the Limits of Antitrust: A Comparative Study of US and EU Approaches (2009), at 36.
[168] *Ibid*.
[169] *Verizon Communications v. Law Offices of Curtis V. Trinko (Trinko),* 540 US 398 (2004).
[170] Formerly named the Court of First Instance.
[171] Case T-201/04, *Microsoft Corp. v. Commission (Microsoft),* [2007] E.C.R. II-3601.
[172] Formerly named the Treaty of Rome. Im not an expert on EU law, but I believe the tray was replaced with the Lisbon treaty not re-named, this appears to denote simply a name in change not a new treaty.
[173] For ease of reference, only the new numbering (brought about by the entering into force of the Treaty of Lisbon) in the Treaty on the Functioning of the European Union (the "Treaty") will be referred to in this paper.

2 focuses on the manner in which a firm acquires, expands or maintains a monopoly power.[174] Article 102 has a broader application than Section 2, since companies may be charged with an abuse of dominance when they have less market power than would be required under Section 2. On the other hand, under U.S. antitrust law, transactions intended to create or maintain monopoly power are prohibited. Thus U.S. antitrust law focuses on the role of intent when assessing anticompetitive behavior, whereas EU antitrust law prevents abuse of dominance without consideration of intent.

In addition to the role of intent, another significant difference between the jurisdictions is the so called *new product* condition, applied in the EU. Generally the test for establishing antitrust liability in essential facilities cases in the U.S. and the EU is quite alike. However, in *Magill*[175] the Court of Justice brought in a new element to be considered as part of the essential facilities test when imposing antitrust liability; the creation of a new product. There is no equivalent in U.S. law.

Further, when it comes to intellectual property, as exemplified by the decisions in *Trinko* and *Microsoft* there are significant differences in the enforcement levels in the U.S. and in the EU. The approach to the relation between antitrust law and regulation also differs between the two jurisdictions; whereas EU competition rules have been applied to national regulatory measures disrupting competition and to address externalities in regulated markets. In contrast, U.S. antitrust authorities avoid interfering with regulated markets, as they do also with intellectual property regulations.

In conclusion, whereas European antitrust enforcers subject the acquisition and enforcement of intellectual property rights to greater antitrust scrutiny, Americans are doing the opposite. This development also mirrors the approach to the essential facilities doctrine in the two jurisdictions.

4. THE ESSENTIAL FACILITIES DOCTRINE IN THE U.S.

The relevant legal framework for the essential facilities doctrine in the U.S. is Section 2 of the Sherman Act, which is designed to protect competition by prohibiting the acquisition or maintenance of monopoly power. For the purpose of applying Section 2, a monopolist is a company which has power over prices and can engage in exclusionary conduct.[176] Whereas Section 2 addresses monopolies, the creation or maintenance of monopoly power, the corresponding legal framework in the EU, i.e. Article 102, aims to control the conduct of firms that are in a dominant position.[177] This constitutes a significant difference between the two jurisdictions and also goes to explain, to a certain

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[174] *See e.g.*, Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust Law Journal 841, 846-847 [1989-1990].

[175] Joined Cases C-241/91 P & C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITP) v. Commission (Magill)*, [1995] E.C.R. I-743.

[176] *See e.g.*, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992); *United States v. Microsoft Corporation*, 253 F.3d 34,51 (D.C. Cir. 2001); *see also*, William E. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harvard Law Review 937, 956-957 (1981).

[177] Advocate General Jacobs has pointed out that Section 2 of the Sherman Act and Article [102] protect competition in different ways: "[u]nder US law the freedom to deal or not to deal is regarded as a fundamental aspect of freedom of trade. US antitrust law, embodied in Section 2 of the Sherman Act 1890, essentially aims to protect competition by prohibiting the acquisition or maintenance of monopoly power, rather than by regulating the actions of companies in dominant positions." Opinion of Advocate General Jacobs in Case C-7/97, *Oscar Bronner v. Mediaprint Zeitungs (Bronner)*, [1998] E.C.R. I-7791, at 46.

extent, the reason for divergence between U.S and EU antitrust enforcers' approach to the application of the essential facilities doctrine.[178]

4.1 The Colgate principle

The general rule in U.S. antitrust law is that a firm has no obligation to deal with its competitors. This basic principle was set out in *U.S. v. Colgate & Co*., where the court held that "[i]n the absence of any purpose to create or maintain a monopoly," even a monopolist can "exercise his own independent discretion as to the parties with whom he will deal."[179] U.S. courts have emphasized that the antitrust laws are for the benefit of competition, not competitors.[180] However, U.S. courts have recognized that the *Colgate* rule is subject to certain exceptions.[181] According to the court, "it is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal."[182] To put it simply; the right to refuse to deal is "neither absolute nor exempt from regulation."[183] Thus forced sharing is the exception to the general rule, a firm even a monopolist, is not obliged to cooperate with its competitors. The decision of the Supreme Court in 1985, *Aspen Skiing, to be discussed below,* is the leading U.S. case upholding liability for refusing to cooperate with a competitor.[184]

4.2 United States v. Terminal Railroad Association and beyond

The essential facilities doctrine originates in the Supreme Court's decision in *United States v. Terminal Railroad Association* in 1912.[185] In this case a group of railroads controlled all railway bridges and switching yards in and out of St. Louis, an important railroad junction. The group of railroads prevented competing railroad services from offering transportation to and through St. Louis. The court found that this was both an illegal restraint on trade and an attempt to monopolize.[186] Since its decision in *United States v. Terminal Railroad Association*, the Supreme Court has in a line of cases established that a unilateral refusal to deal is subject to potential liability as a monopolization violation of Section 2. However, critics of the essential facilities

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[178] Alexandros Stratakis, *Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine*, 8 European Competition Law Review 434-435 (2006).
[179] *United States v. Colgate & Co*., 250 U.S. 300, 307 (1919)..
[180] *See*, *Ball Mem'l Hosat, Inc. v. Mutual Hosat Ins., Inc.*, 784 F.2d 1325,1338 (7th Cir. 1986)(where the court held that "[c]ompetition is a ruthless process. A firm that reduces cost and expands sales injures rivals sometimes fatally. […] These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds. The antitrust laws are for the benefit of competition, not competitors"); *see also*; *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993), (where the court noted that the purpose of the antitrust laws "is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest").
[181] Robert Pitofsky, *The Essential Facilities Doctrine under United States Antitrust Law*, paper submitted to the European Commission in support of National Data Corporation in its essential facilities case against IMS, at 1, *available at*, www.ftc.gov/os/comments/intelpropertycomments/pitofskyrobert.pdf.
[182] *Eastman Kodak Co. v. Image Technical Services, Inc*., 504 U.S. 451, 483 n32 (1992).
[183] *Lorain Journal Co. v. United States (Lorain Journal)*, 342 U.S. 143, 155 (1951).
[184] "The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp. (Aspen Skiing)*, 472 U.S. 585, 601 (1985).
[185] 224 U.S. 383 (1912).
[186] *United States v. Terminal Railroad Association*, 224 U.S. 383, 409-410 (1912).

doctrine have emphasized that the Supreme Court has never actually invoked the doctrine in refusal to deal cases.[187] The first explicit mention of the doctrine by the Supreme Court was in *Aspen Skiing*, and the most comprehensive pronouncement on the essential facilities doctrine can be found in the Seventh Circuit's decision in *MCI Communications,*[188] where the court set forth a leading formulation of the doctrine, to be discussed further below.

In the landmark essential facilities case *Associated Press v. United States,*[189] the court found that the by-laws of the Associated Press violated the Sherman Act, as they limited membership in the organization and thereby access to the copyrighted news services. The court held that while it is true in a very general sense that one can dispose of his property as he pleases, he cannot "go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade."[190] In another Supreme Court case, *Lorain Journal,* it was examined whether the defendant newspaper, which was the only local business circulating news and advertisements in the town, violated the Sherman Act by refusing to accept advertising from businesses that placed advertisements with a small radio station.[191] The court held that the conduct of the defendant newspaper was an attempt to monopolize interstate commerce in violation of Section 2 and the court found expressly that the purpose and intent of this procedure was to destroy the radio station.[192] The court pointed out that the right claimed by the newspaper publisher is neither absolute nor exempt from regulation: *"[i]n the absence of any purpose to create or maintain a monopoly*, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[193] In the case of *Otter Tail Power Co. v. United States,* an electric power company, Otter Tail, refused to sell energy at wholesale prices and to wield power from other suppliers of wholesale energy to municipalities.[194] The Supreme Court found that the company violated the Sherman Act, as it preserved its monopolistic position by preventing the municipalities from establishing their own power supply system when its retail franchises expired.[195]

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[187] *See e.g.* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust Law Journal 841 (1989-1990); Paul D. Marquardt and Mark Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitofsky, Patterson and Hooks*, 70 Antitrust Law Journal 849 (2003). *contrast*, see Robert Pitofsky, Donna Patterson, Jonathan Hooks, *The Essential Facilities Doctrine under U.S. Antitrust Law*, 70 Antitrust Law Journal 445 (2003) ("[T]he essential facilities doctrine has a long and respected history as part of U.S. antitrust law. […] the Supreme Court and lower courts consistently have applied the essential facilities doctrine throughout this century in appropriate, though limited, circumstances.")

[188] *MCI Communications Corp. v. American Tel. & Tel. Co. (MCI Communications)*, 708 F.2d need reporter page number (7th Cir. 1983).

[189] 326 U.S. 1 (1945).

[190] The court made reference to *United States v. Bausch & Lomb. Co*, 321 U.S. 707, 722 (1944)(*quoting* Robert Pitofsky, Harvey J. Goldschmid, Diane AT Wood, Trade Regulation – Cases and Materials 366 (6th ed., 2010).

[191] *Lorain Journal Co. v. United States (Lorain Journal)*, 342 U.S. 143, 146-149 (1951).

[192] The court described this as "bold, relentless, and predatory commercial behavior". See Robert Pitofsky, Harvey J. Goldschmid, Diane AT Wood, Trade Regulation – Cases and Materials 811-813 (6th ed., 2010),.

[193] Quoting *United States v. Colgate Co*., 250 U.S. 300, 307 (1919) (emphasis added).

[194] *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

[195] *Ibid*., at 377-379. *see* also, *Fishman v. Estate of Wirtz,* 807 F.2d need reporter page (7th Cir. 1986) (which concerned an entity controlling a stadium having to provide access to potential competitors and owners of sporting teams).

In an often-cited refusal to deal case, *Aspen Skiing,* the Supreme Court ruled that the monopolist ski resort, owner of the three flagship ski mountains in Aspen, violated the Sherman Act, because it terminated its long-standing participation with a smaller competitor ski resort in providing a four-mountain ticket. The court described the four-mountain ticket as an essential facility to which the monopolist ski resort was denying access, with the intent to monopolize by putting the competitor ski resort out of business.[196] The decision in *Aspen Skiing* is regarded as the leading case upholding liability for refusing to cooperate with a competitor.

Another widely-cited decision, and probably the most significant lower court decision on essential facilities, is *MCI Communications*, in which the essential facilities doctrine was applied to require the monopolist telecommunications provider to grant access to its local service network to rivals in long-distance services.[197] The decision in *MCI Communications* set forth the most frequently cited list of elements of an essential facilities claim.[198] Before the court will require a monopolist to grant its competitors access to an essential facility, a party must prove the following four factors:

1) control of the essential facility by a monopolist
2) a competitor's inability practically or reasonably to duplicate the essential facility
3) the denial of the use of the facility to a competitor, and
4) the feasibility of providing the facility to competitors".[199]

If these conditions are satisfied, access to an essential facility may be ordered on reasonable and non-discriminatory terms. However, the requirements set forth by the Seventh Circuit are rather stringent. Thus U.S. courts only rarely find antitrust liability under the essential facilities doctrine. The essential facilities doctrine is applied cautiously and usually in exceptional circumstances that meet these strict requirements.[200]

One of the reasons for the essential facilities doctrine only rarely giving rise to antitrust liability is that the courts require a showing that the facility controlled by the monopolist is truly *essential* to competition, meaning that it constitutes an input without which a company cannot compete with the monopolist. An essential facility is one which is not merely helpful but vital to the claimant's competitive viability.[201] Further, it has been held that a facility controlled by a single firm is truly essential only if control

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[196] *Aspen Skiing*, *supra* at 611.
[197] 708 F.2d 1081 (7th Cir. 1983).
[198] See Robert Pitofsky, Donna Patterson, Jonathan Hooks, *The Essential Facilities Doctrine under U.S. Antitrust Law*, 70 Antitrust Law Journal 448-449 (2003)("This test for antitrust liability has been adopted by virtually every court to consider an essential facilities claim").
[199] *MCI Communications*, 708 F.2d 1081, 1132-1133 (7th Cir. 1983)
[200] Robert Pitofsky, *The Essential Facilities Doctrine under United States Antitrust Law,* paper submitted to the European Commission in support of National Data Corporation in its essential facilities case against IMS, at 5.
[201] *Cyber Promotions, Inc. v. America Online, Inc*. 948 F. Supp. 456, 463 (E.D. Pa. 1996).

of the facility carries with it the power to eliminate competition.[202] This does not, however mean that the party denied access or supply need to have gone out of business as a result of the refusal.[203] The courts have emphasized that a facility will not be regarded as essential if it is available from other sources, nor if it is capable of being duplicated by the company seeking access to it. Further, the courts have held that the word essential indicates that "the plaintiff must show more than inconvenience, or even some economic loss: he must show that an alternative to the facility is not feasible."[204] The condition regarding the feasibility of providing access to competitors, emphasized in *MCI Communications*, delimits the application of the essential facilities doctrine. The doctrine does not impose liability if the defendant monopolist can show a legitimate business or technological justification for refusing access to the disputed assets to its competitor; "[t]he antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately."[205] The attitude to legitimate business justifications in the EU differs from the one in the U.S. As mentioned, whereas Article 102 imposes broad duties to deal on dominant companies, in the U.S. there is a broad general rule that allows companies to deal with whom they choose, even if that choice limits competition, provided that their choice has some business justification.[206]

Several U.S. court decisions show that anticompetitive intent is relevant to the application of the essential facilities doctrine. Antitrust liability is often found when the denial of access is motivated by an anticompetitive intent. This can come out as a change in existing business practices with a specific animus to harm rivals, for example. In *Aspen Skiing*, the Supreme Court focused on the anticompetitive intent, which was demonstrated by the "decision by a monopolist to make an important change in the character of the market".[207] It was held that there existed no valid business justification for the termination of a long-standing profitable arrangement with a competitor; "the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years."[208]

In the case of *Intergraph Corp. v. Intel Corp*., the Federal Circuit noted that "[a] refusal to deal may raise antitrust concerns when the refusal is directed against competition and the purpose is to create, maintain, or enlarge a monopoly."[209] However, as regards the notion of intent, academic commentators have argued that intent does not meaningfully distinguish anticompetitive conduct, because intentionally striving to acquire a legitimate advantage over rivals is the essence of competition and intent is present in

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[202] *Alaska Airlines, Inc. v. United Airlines, Inc*., 948 F.2d 536, 544 (9th Cir. 1991); *City of Anaheim v. S. Cal. Edison Co*., 955 F.2d 1373, 1380 n.5 (9th Cir. 1992).
[203] *Aspen Skiing*, 472 U.S.at 594-595.
[204] *Twin Labs. v. Weider Health & Fitness*, 900 F.2d need reported page ,570 (2nd Cir. 1990).
[205] *Hecht v. Pro-Football, Inc*., 570 F.2d 982, 992-993 (D.C.Cir. 1977).
[206] James S. Venit, John J. Kallaugher, *Essential Facilities: A Comparative Law Approach*, Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy 333 (1994).
[207] *Aspen Skiing*, 472 U.S. at 604.
[208] *Ibid.*, at 603; see also *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973)(, where the Supreme Court noted that the utility's "refusals to sell at wholesale [or otherwise provide access to the essential facility] were solely to prevent municipal power systems from eroding its monopolistic position").
[209] *Intergraph Corat v. Intel Corat*, 195 F.3d 1346, 1358 (Fed. Cir. 1999).

every refusal to license an innovation conferring market power.[210] Merely referring to the intention of the right holder to injure competitors is not a reliable method of distinguishing unlawful from lawful use of an intellectual property right.[211] Interestingly, in the EU, there is no equivalent focus on anticompetitive intent, as intent is not an element of Article 102. EU competition law seeks to prevent the abuse of a dominant position, when acquired, regardless of any intent.[212] Moreover, the Court of Justice has often held that the concept of abuse is an objective one.[213] However, in its decision in *Clearstream*, the Commission noted that although intent is not as such a prerequisite to establish an abuse, if present, it is a factor in showing "objectively abusive behavior."[214] Thus there is perhaps certain influence of the American approach to intent in assessing anticompetitive behavior in Europe.

4.3 Essential facilities in intellectual property cases

Traditionally the essential facilities doctrine has been applied to natural monopolies, but U.S. antitrust enforcement policy shows that the doctrine applies to intellectual property as well.[215] However, enforcement levels are different when it comes to intellectual property, as U.S. courts are hesitant to put intellectual property rights under strict antitrust scrutiny. The main concern is that limiting intellectual property protections may lessen incentive for innovation.[216] This is somewhat similar to the approach in the EU, where the special nature of intellectual property rights have generally been seen as meriting a stricter test for applying the essential facilities doctrine.[217] There is, however, a growing divergence between the antitrust enforcers in the two jurisdictions with regard to the attitude to the application of antitrust rules to intellectual property rights, as will be discussed further below.

The essential facilities doctrine was applied to intellectual property in the case of *BellSouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc.*, where the court examined a claim applying the doctrine to telephone directory listings in which the defendant, the local telephone company and a publisher of telephone directories,

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[210] *See e.g.* Paul D. Marquardt and Mark Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitofsky, Patterson and Hooks*, 70 Antitrust Law Journal 857 (2003).

[211] Ian S. Forrester, *EC Competition Law as a Limitation on the Use of IP Rights in Europe: Is there a Reason to Panic?* European Competition Law Annual 2003: What Is an Abuse of a Dominant Position? 518.

[212] Alexandros Stratakis, *Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine*, 8 European Competition Law Review there is probably a page number missing, all we have is pin cite 434-435 (2006).

[213] *See e.g.* Case 85/76, *Hoffmann La-Roche v. Commission*, [1979] E.C.R. 461.

[214] Case COMP/38.096, *PO/Clearstream*, has this case been cited before, there is not short cite or supra? at 218.

[215] Robert Pitofsky, *The Essential Facilities Doctrine under United States Antitrust Law,* paper submitted to the European Commission in support of National Data Corporation in its essential facilities case against IMS, at 11-19.

[216] This concern about preserving monopolist's incentives to innovate was clearly seen in *Aldridge v. Microsoft Corp*, 995 F. Supp. 728 (S.D. Tex. 1998)(where the court warned against punishing Microsoft for improving its product: "[s]uch a result would inhibit, not promote, competition in the market. The antitrust laws do not require a competitor to maintain archaic or outdated technology; even monopolists may improve their products").

[217] Ivo Van Bael & Jean-François Bellis, Competition Law of the European Community at 837 (5th ed., 2010).

claimed copyright protection.[218] The court addressed the fact that the facility in question was information, and noted that "[a]lthough the doctrine of essential facilities has been applied predominantly to tangible assets, there is no reason why it could not apply, as in this case, to information wrongfully withheld. The effect in both situations is the same: a party is prevented from sharing in something essential to compete."[219] The essential facilities doctrine has also been applied to other intangible assets such as copyrighted real estate listing services[220] and health care referral services.[221]

Another case where the doctrine was applied is *Data General*, which concerned a claim in which a competitor service provider needed access to the copyrighted diagnostic software produced by the system manufacturer.[222] In this case the court showed some restrictions in applying the essential facilities doctrine by adopting the following presumption: "while exclusionary conduct can include a monopolist's refusal to license a copyright, an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers."[223] The court, however, went on to add that "[w]e do not hold that an antitrust plaintiff can never rebut this presumption, for there may be rare cases in which imposing antitrust liability is unlikely to frustrate the objectives of the Copyright Act."[224] In *Image Technical Servs., Inc. v. Eastman Kodak Co*. the court held that abuse of intellectual property rights, such as patent protection, can give rise to antitrust liability.[225] The case was about an alleged illegal monopolization by Kodak, a manufacturer and servicer for copiers, of the latter market for service of its copiers by refusing to deal in its patented replacement parts needed for repair of the copiers. The court adopted the approach taken in the *Data General* decision and noted that intellectual property protection provides only a "presumptively valid business justification" for a unilateral refusal to deal.[226] Thus a company could be held liable for refusal to deal in protected intellectual property where the presumption of a valid reason not to license is rebutted by evidence of anticompetitive intent.[227] In the case of *Intergraph Corp. v. Intel Corp*., the U.S. Court of Appeals for the Federal Circuit concluded that certain cases might justify mandated access to intellectual property, and that such mandatory access may be imposed where the defendant's refusal to license demonstrates anticompetitive intent.[228]

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[218] *BellSouth Adver. & Publ'g Corat v. Donnelley Info. Publ'g, Inc.,* 719 F. Supp. 1551 (S.D. Fla. 1988), *rev'd on other grounds*, 999 F.2d 1436 (11th Cir. 1993), *cert. denied*, 520 U.S. 401 (1994).
[219] *Ibid.,* at 1566.
[220] *Montgomery County Assoc. of Realtors, Inc. v. Realty Photo Master Corp*, 878 F. Supp. Page number is missing, also no pin cite (D. Md. 1995), *aff'd*, 91 F.3d 132 (4th Cir. 1996).
[221] *American Health Sys. Inv. V. Visiting Nurse Association of Greater Philadelphia*, No. CIV. A. 93-542, 1994 WL 314313, (E.D. Pa. June 29, 1994); *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d not page number, (4th Cir. 1990). See also *Tri-Tech Machine Sales Ltd. v. Artos Eng'g Co*., 928 F. Supp. 836, 839 (E.D. Wis. 1996). (where the court held that "[t]he term facility can apply to tangibles such as sports or entertainment, venues, means of transportation, the transmission of energy or the transmission of information and to intangibles such as information itself")
[222] *Data General Corp. v. Grumman Sys. Support Corp. (Data General)*, 36 F.3d no page number again (1st Cir. 1994).
[223] *Ibid*., at 1183-1184.
[224] *Ibid*.
[225] *Image Technical Servs., Inc. v. Eastman Kodak Co. (Eastman Kodak),* 125 F.3d 1216 (9th Cir. 1997).
[226] *Eastman Kodak,* 125 F.3d at 1218.
[227] *Eastman Kodak,* 125 F.3d at 1219; see Robert Pitofsky, Donna Patterson, Jonathan Hooks, *The Essential Facilities Doctrine under U.S. Antitrust Law*, 70 Antitrust Law Journal 455 (2003).
[228] *Intergraph Corp. v. Intel Corp,* 195 F.3d 1346, 1356, 1363 (Fed. Cir. 1999); *see also Aldridge v. Microsoft Corp*, 995 F. Supp 728 (S.D. Tex. 1998)(where the court examined the case under the four-part test established in MCI and concluded that the plaintiff failed to meet several elements of the test)

The most far-reaching position on unilateral refusals to license was expressed in *In re Independent Service Organizations Antitrust Litigation,* where the D.C. Circuit held that there is no prohibition from lawfully using a patent to acquire a monopoly in more than one relevant antitrust market.[229] According to the court's reasoning, although intellectual property rights are not immune from antitrust scrutiny, they do not negate the patentee's right to exclude others from patented property.[230]

One of the most widely noted antitrust enforcement actions involving intellectual property is the complaint against Intel Corporation issued by the Federal Trade Commission in 1998.[231] The complaint alleged that Intel was a monopolist in the microprocessor market and that it had tried to maintain its dominance by denying essential technical information and product samples of new microprocessors to companies that, because of intellectual property disputes, had initiated litigation against Intel or the customers of Intel. The case was settled by Intel agreeing not to withhold or threaten to withhold product or technical information for reasons relating to an intellectual property dispute.[232]

As shown by the discussed case law, U.S. courts show some reluctance to condemn unconditional unilateral refusals to license intellectual property rights. The essential facilities doctrine in U.S. law has inspired a mass of academic commentary and there are divergent views regarding the utility of the doctrine, in particular when it comes to intellectual property rights. The doctrine has raised controversy also in the EU.[233] Some leading commentators suggest that all unilateral refusals to deal should be treated as legal,[234] whereas others hold that "the essential facility doctrine is both harmful and unnecessary and should be abandoned."[235] The Supreme Court seems to have joined this criticism of the doctrine in its *Trinko* decision, where the court held that unilateral refusals to deal are rarely, if ever, anticompetitive.[236] Many American commentators

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[229] 203 F.3d 1322, 1325 (Fed. Cir. 2000)
[230] *Ibid*.
[231] *In Re Intel Corp*, No. 9288, 1999 F.T.C. LEXIS 145 (Aug. 3, 1999).
[232] Robert Pitofsky, *Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy*, 16 Berkeley Technology Law Journal missing page number 549-550 (2001).
[233] "[I]t is in cases involving intellectual property rights that there is the greatest danger of misuse of the essential facility doctrine". Simon Bishop and Mike Walker, The Economics of EC Competition Law (1999), at 119. See also Van den Bergh and Camesasca, European Competition Law and Economics: a comparative perspective (2001), at 272-277; Valentine Korah, *Access to Essential Facilities under the Commerce Act in Light of Experience in Australia, the European Union and the United States*, 31 Victoria University of Wellington Law Review (2000) 252-253.
[234] *See* Richard Posner, Antitrust Law (2nd ed., 2001), 242-244. Another leading antitrust scholar held that unilateral refusals to deal should be treated as per se legal except, maybe, as regards natural monopolies. *See* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust Law Journal 841 (1989-1990).
[235] Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust Law Journal 846-847 (1989-1990). Hovenkamp argues that the "so called essential facilities doctrine is one of the most troublesome, incoherent and unmanageable bases for Sherman Section 2 liability. The antitrust world would almost certainly be a better place if it were jettisoned, with a little fine tuning of the general doctrine of the monopolist's duty to deal to fill in the resulting gaps". See Herbert Hovenkamp, Federal Antitrust Policy (1994), at 273.
[236] *Trinko,* 540 US 398 (2004).

consider this is the most important antitrust decision in the last twenty years.[237] The decision clearly placed limits on a monopolist's duty to deal with competitors.

4.4 *Trinko* - the end of the essential facilities doctrine?

Trinko, a New York City law firm, was a local telephone service customer of AT&T. In its complaint, Trinko alleged that Verizon had provided interconnection access to its local exchange network on a discriminatory basis as part of an anticompetitive scheme to prevent AT&T and other competitors from encroaching on its historical local exchange monopoly. The Supreme Court held that the plaintiff's refusal to deal claim failed to state a cause of action under Section 2. The Supreme Court questioned the merits of forcing monopolists to share their assets with competitors. Writing for the majority, Justice Scalia referred to the *Colgate* decision and emphasized that the antitrust laws impose no generalized duty upon firms, even firms in a monopoly position, to deal with their rivals. According to the court, "[c]ompelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing–a role for which they are ill-suited."[238] The court further noted that the refusal to deal in *Trinko* did not fit within the limited exception recognized in *Aspen Skiing,* because there was no allegation that Verizon had voluntarily engaged in a prior course of dealings with its rivals, or that it had refused to provide any product that it already sold at the retail level to any other customers. Notably, the court gave *Aspen Skiing* a very narrow reading by stating that *Aspen Skiing* "is at or near the outer boundary of [Section] 2 liability."[239] The court used even stronger language when discussing the essential facilities doctrine by noting that the doctrine had been "crafted by some lower courts." Furthermore, the court emphasized that the doctrine has never been recognized by the Supreme Court, and the court found "no need to either recognize it or to repudiate it here."[240] Thus it seems that the Supreme Court, by taking a very hostile attitude towards the essential facilities doctrine, aimed to limit the scope for antitrust scrutiny over unilateral refusals to deal. In the post-*Trinko* era, cases raising essential facilities claims have survived only where there has been a change in behavior by the dominant firm in an unregulated market.[241] Commentators argue whether the *Trinko* decision actually put an end to the existence of the essential facilities doctrine in the U.S.[242]

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[237] Damien Geradin, *Limiting the Scope of Article 82 EC: What Can the EU Learn from the U.S. Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS, and Deutsche Telekom?*, 41 Common Market Law Review 1519 (2004). See also Jonathan Rubin, *The Truth About Trinko*, 50 Antitrust Bulletin (2005); George Hay, *Trinko: Going All the Way*, 50 Antitrust Bulletin (2005); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 147 University of Chicago Law Review (2005); Eleanor Fox, *Is There Life in Aspen After Trinko? The Silent Revolution of Section 2 of the Sherman Act*, 73 Antitrust Law Journal (2005).

[238] *Trinko,* 540 US 398 (2004), at 408.

[239] *Ibid.*, at 408-409.

[240] *Ibid.*, at 411.

[241] See *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048 (D. Colo 2004), at 1112-1114. In *NYMEX*, also a case decided after *Trinko*, the trial court followed the Supreme Court's approach in *Trinko* and dismissed the application of the essential facilities doctrine. *New York Mercantile Exch. v. Intercontinental Exch. (NYMEX)*, 323 F. Supp. 2d 559 (S.D.N.Y. 2004).

[242] "Whether the essential facilities doctrine will survive at all is not clear; *Trinko* says that Section 2 will not go further than *Aspen Skiing*, but the Court did not state whether *Aspen Skiing* already went too far".

The hostile approach to the essential facilities doctrine adopted by the Supreme Court in *Trinko* seems to be relied upon in the report of the Antitrust Modernization Commission in 2007[243] and in the disavowed and withdrawn report on Section 2 enforcement by the Department of Justice in 2008.[244] In its report, the Department of Justice held, among other, that "antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in Section 2 enforcement" and that the agency agrees that "the essential facilities doctrine is a flawed means of deciding whether a unilateral, unconditional refusal to deal harms competition."[245]

With regard to the above described *Trinko* decision and the approach of the Antitrust Modernization Commission and Department of Justice in its report on Section 2 enforcement, combined with the academic hostility for the essential facilities doctrine, it seems like there is a growing consensus in the U.S. that antitrust intervention in unilateral, unconditional refusals to deal is unwanted. These developments show some increasing divergence between U.S. and EU antitrust enforcers over the approach to the application of antitrust rules to intellectual property rights and the use of the essential facilities doctrine. Whereas in the U.S. there seems to be a growing reluctance towards regulating future conduct of companies enjoying market power, EU competition law continues to regulate the activities of dominant companies, also in the field of intellectual property, as will be discussed in the next part.

5. ESSENTIAL FACILITIES AND REFUSALS TO DEAL IN THE EU

The EU was the first jurisdiction outside the U.S. to rely on the essential facilities doctrine to impose liability for refusal to deal.[246] The EU applies its version of the essential facilities doctrine as part of the broader provision of Article 102, which is used to regulate actions of companies in dominant positions. It prohibits the abuse of a

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Opinion of J. B. MacDonald, Deputy Assistant Attorney-General for Regulatory Matters, Department of Justice, available at: www.abanet.org/antitrust/source/Jul04-MacDonaldIntrvw7=23.prdf. Assistant Attorney General R. H. Pate argued that *Trinko* "clarified that there is no basis in U.S. antitrust law for a stand-alone essential facilities doctrine", opinion available at: www.usdoj.gov/atr/public/speeches/205389.htm (quoting Alexandros Stratakis, *Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine*, 8 European Competition Law Review 437 (2006)).

[243] According to the recommendations of the Antitrust Modernization Commission, "[r]efusals to deal with horizontal rivals in the same market should rarely, if ever, be unlawful under antitrust law, even for a monopolist". Antitrust Modernization Commission, Report and Recommendations, at 101-104, available at: http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[244] Department of Justice, Competition and Monopoly: Single Firm Conduct under Section 2 of the Sherman Act, available at: http://www.usdoj.gov/atr/public/reports/236681.pdf. The report was the outcome of what were originally joint hearings on single firm conduct by the Antitrust Division of the Department of Justice and the Federal Trade Commission. The Federal Trade Commission refused to sign onto the report and following its release the report was subsequently disavowed by the head of the Antitrust Division of the Department of Justice. See Spencer Weber Waller and William Tasch, *Harmonizing Essential Facilities*, 76 Antitrust Law Journal 744-745 (2010).

[245] *Ibid*, at 127, 129. The agency referred to Professor Areeda's thesis that essential facilities "is less a doctrine than an epithet, indicating some exception to the right to keep one's creations to oneself, but not telling us what those exceptions are." In its conclusions, the agency stated that it believes that "there is a significant risk of long-run harm to consumers from antitrust intervention against unilateral, unconditional refusals to deal with rivals, particularly considering the effects of economy-wide disincentives and remedial difficulties."

[246] Spencer Weber Waller and William Tasch, *Harmonizing Essential Facilities*, 76 Antitrust Law Journal 745 (2010).

dominant position and also covers a variety of practices that would not fall within the scope of Section 2. It has been held that whereas U.S. law prevents the creation or maintenance of monopolies, EU law seeks to police the conduct of dominant firms.[247] It follows that the obligation under Article 102 on dominant firms to deal with customers goes beyond that recognized under Section 2.

The definition of dominance elaborated by the European Court of Justice ("Court of Justice") makes reference to the possession of economic power in a relevant market "which enables [a company] to prevent effective competition being maintained in the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[248] This definition comes close to the above discussed U.S. definition of monopoly power as excessive power over prices or the ability to exclude competition. However, although both Section 2 and Article 102 prohibit anticompetitive conduct by companies possessing market power, there are significant divergences between the two jurisdictions when it comes to the required degree of market power. This also has an implication on how refusals to deal and essential facilities are treated on the two sides of the Atlantic.

The conventional proxy for assessing market power is by means of market shares, and this is where significant differences between the U.S. and the EU arise. Contrary to Section 2, Article 102 does not distinguish between monopolization and an attempt to monopolize. Article 102 only captures behavior by companies which dominate a relevant market at the time when the alleged abuse started. Nevertheless, Article 102 has a broader application than Section 2, since companies may be charged with an abuse of dominance when they have less market power than would be required under Section 2. In *United Brands*[249], a market share between 40 and 45 percent was held sufficient to establish dominance, and even a company holding less than 40 percent of the relevant market can be found dominant.[250] Moreover, the Court of Justice has held that a market share of 50 percent, absent exceptional circumstances, creates a presumption of dominance.[251] This is very different to the approach taken in the U.S., where market shares need to be in the range of 70 to 90 percent, and held over a significant period of time, in order to be sufficient to establish a prima facie case of monopoly power.[252]

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[247] J. Bruce McDonald, *Section 2 and Article 82: Cowboys and Gentlemen*, Speech at Article 82 Second Annual Conference, Brussels, Belgium (16-17 June 2005).

[248] *United Brands v. Commission (United Brands)*, [1978] E.C.R. 207, at 65; *Hoffmann-La Roche v. Commission*, [1979] E.C.R. 461, at 38-39.

[249] *United Brands*, [1978] E.C.R. 207.

[250] See C-250/92, *Gøttrup-Klim and others v. Dansk Landbrugs Grovvareselskab*, [1994] E.C.R. I-5641.

[251] Case C-62/86, *AKZO v. Commission*, [1991] E.C.R. I-3359. However, in its *Article 82 Guidance*, the Commission suggests a more flexible approach, by noting that "[e]xperience suggests that the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position and, in certain circumstances, of possible serious effects of abusive conduct, justifying an intervention by the Commission under Article [102]. However, as a general rule, the Commission will not come to a final conclusion as to whether or not a case should be pursued without examining all the factors which may be sufficient to constrain the behavior of the undertaking." Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02 *(Article 82 Guidance)*, at 15, available at:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF.

[252] See e.g. *United States v. Aluminium Co. of America*, 148 F.2d 416, 424 (2nd. Cir. 1945), in which it was held that a market share of 90 percent was enough to constitute a monopoly, and it was doubtful whether 60 or 64 percent would be enough and certainly 33 percent is not.

5.1 Special responsibility of dominant firms

As mentioned, in the U.S. the essential facilities doctrine is an exception to a broad general rule allowing firms to deal with whom they choose, even in the case where that choice limits competition, provided that their choice has some business justification.[253] Although the European Commission ("Commission") and the European courts, similarly to the U.S. antitrust enforcers, have recognized that dominant companies, as a general rule, are free to choose their business partners, they have nevertheless imposed an obligation to supply products and license intellectual property rights in certain circumstances. Thus Article 102, in contrast to Section 2, imposes a broad duty to deal on dominant firms.[254] In the EU, dominant firms are said to have a "special responsibility" not to impair competition in the market and they are prohibited to use their market power to unfairly exclude rivals.[255] As the General Court has put it: "[w]hilst the finding that a dominant position exists does not in itself imply any reproach to the undertaking concerned, [the dominant undertaking] has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market."[256]

5.2 Essential facilities in EU case law

Although the Court of Justice has never made an explicit reference to the essential facilities doctrine, it has long recognized the doctrine.[257] In a series of cases beginning with *Commercial Solvents* in 1974, the Court of Justice recognized that there are circumstances where the refusal by a dominant company to supply competitors with an essential input may amount to an abuse of dominance under Article 102.[258] The Commission in the beginning used the essential facilities doctrine only in cases regarding physical infrastructure and networks, where owners of harbors, ports, tunnels and related facilities used their control of that facility to prevent the emergence of downstream competition.[259] The first case in which the Commission explicitly articulated an essential facility theory was *Sea Containers v. Stena Sealink*.[260] The

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[253] See e.g. James S. Venit, John J. Kallaugher, *Essential Facilities: A Comparative Law Approach*, Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy 333 (1994).

[254] It can be argued that this duty is controversial, since it interferes with freedom of contract and basic property rights, which are fundamental to a free market economy. See further Robert O'Donoghue and A. Jorge Padilla, The Law and Economics of Article 82 EC (2006), at 407.

[255] Case 322/81, *NV Nederlandsche Banden Industrie Michelin v. Commission*, [1983] E.C.R. 3461.

[256] Case T-219/99, *British Airways plc v. Commission*, [2003] E.C.R. II-5917, at 242.

[257] See e.g. John Temple Lang, *The Application of the Essential Facility Doctrine to Intellectual Property Rights under European Competition Law*, *in* Antitrust, Patents and Copyright – EU and US Perspectives, 58 (François Lévêque and Howard Shelanski ed., 2005).

[258] Joined Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v. Commission (Commercial Solvents)*, [1974] E.C.R. 223n.

[259] *See e.g.* Case IV/34.174 *B&I Line PLC v. Sealink Harbours Ltd. & Sealink Stena Ltd*., 5 C.M.L.R. 255, 1992; Case COMP/94/119/EC *Port of Rodby*, Commission Decision, 1994 O.J. L55/52; Case COMP/IV/34.689 *Sea Containers v. Stena Sealink – Interim measure*, 1994 O.J. L15/8; Case COMP/IV/32.490 *Eurotunnel*, Commission Decision, 1994 O.J. L354/66. *See also*,*London European/Sabena*, O.J. 1988 L 317/47, *British Midland v. Aaer Lingus*, O.J. 1992 L 96/34; *FAG-Flughafen Frankfurt/Main AG*, O.J. 1998 L 72/30.

[260] Case COMP/IV/34.689 *Sea Containers v. Stena Sealink – Interim measure*, 1994 O.J. L15/8. *See also*, James S. Venit, John J. Kallaugher, *Essential Facilities: A Comparative Law Approach*, Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy 330 (1994).

Commission has defined the concept of essential facilities as follows: "[a]n undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility (i. e. a facility or infrastructure, without access to which competitors cannot provide services to their customers), and which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favorable than those which it gives its own services, infringes Article [102] if the other conditions of that Article are met. An undertaking in a dominant position may not discriminate in favor of its own activities in a related market. The owner of an essential facility which uses its power in one market in order to protect or strengthen its position in another related market, in particular, by refusing to grant access to a competitor, or by granting access on less favorable terms than those of its own services, and thus imposing a competitive disadvantage on its competitor, infringes Article [102]."[261]

Advocate General Jacobs discussed the concept of essential facilities in his much-noted opinion in *Bronner*.[262] The Advocate General pointed out that the concept is broader than only facilities such as harbors, and held that "[a]n essential facility can be a product such as a raw material or a service, including provision of access to a place such as a harbor or airport or to a distribution system such as a telecommunications network."[263] The European antitrust enforcers have found liability for refusals to supply both in cases regarding refusals to supply existing as well as new customers. The first case to deal with a dominant company's refusal to supply existing customers was *Commercial Solvents*.[264] The reasoning of the Court of Justice suggested that a dominant company's refusal to supply can amount to an abuse when the dominant company ceases to supply a product or service to an existing customer in an effort to eliminate all competition in a downstream market.[265] In *United Brands* the court dealt with another kind of refusal to supply, as *United Brands* was not active in the market in which its customers were operating.[266] The court held that "an undertaking in a dominant position […] cannot stop supplying a long-standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary."[267] This far-reaching interpretation of Article 102 and the duty to supply has been confirmed by the Court of Justice some thirty years later in *GlaxoSmithKline*, which concerned parallel trade in the field of pharmaceuticals.[268]

In *Bronner*, the Court of Justice considered if a dominant company can be required to supply new customers seeking access to its products or services.[269] Bronner was seeking access to Mediaprint's home delivery services for its newspapers, and argued that Mediaprint operated the only economically viable home-delivery scheme in Austria.

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[261] *Sea Containers v. Stena Sealink – Interim measure*, O.J. 1994 L15/8, at recital 66.
[262] Opinion of Advocate General Jacobs in Case C-7/97, *BronneR*, [1998] E.C.R. I-7791.
[263] *Ibid*., at 50.
[264] *Commercial Solvents*, [1974] E.C.R. 223n.
[265] *Ibid*., at 25.
[266] *United Brands*, [1978] E.C.R. 207.
[267] *Ibid*., at 182.
[268] Joined Cases C-468/06 to C-478/06, *Sot. Lélos kai Sia EE and Others v. GlaxoSmithKline AEVE Farmakeftikon Proionton, formerly Glaxowellcome AEVE (GlaxoSmithKline)*, [2008] E.C.R. I-7139 (In this case the Court of Justice strongly emphasized the special characteristics of the pharmaceutical markets, and hence it is uncertain whether the ruling can be applied more broadly to other market segments).
[269] Case C-7/97, *Bronner*, [1998] E.C.R. I-7791.

The Court of Justice held that the indispensability of the requested product for competitors is a critical element of any duty to deal, and that Bronner needed to prove that the home-delivery scheme was indispensable in the meaning that "it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme."[270]

5.3 Application of the doctrine in intellectual property cases

The Court of Justice extended the use of the essential facilities doctrine to exclusive privileges based on intellectual property rights in "exceptional circumstances" in its landmark decision in *Magill*.[271] Thus when it comes to the interface between antitrust intervention and intellectual property rights in Europe, the special nature of intellectual property rights have generally been seen as meriting a stricter test for applying the essential facilities doctrine.[272] There is established case law where refusals to license have been found to constitute an abuse of a dominant position under Article 102. Early case law includes decisions such as *Volvo v. Erik Veng (UK)*[273] and *Maxicar v. Renault*[274], where the Court of Justice held that a refusal to license a registered design, even in return for reasonable royalties, did not in itself constitute an abuse. Nevertheless, the Court of Justice recognized the potential for an abuse in such cases.[275] In *Magill,* three television broadcasting companies refused to grant a license to the Magill TV Guide to reprint their respective advance weekly program listings, which meant that no comprehensive TV guide existed in Ireland or the U.K. The court found that the television broadcasting companies had abused their dominant position in preventing the introduction of a new product to the market. In its judgment, the Court of Justice cited *Volvo v. Erik Veng (UK)* and held that "in the absence of Community standardization or harmonization of laws, determination of the conditions and procedures for granting protection of an intellectual property right is a matter for national rules. Further, the exclusive right of reproduction forms part of the author' s rights, so that refusal to grant a license, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position."[276] The court went on to add, however, that it is also clear that "the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct."[277]

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[270] *Ibid*., at 46. For commentary on *Bronner*, *see e.g.* John Temple Lang, *The Principles of Essential Facilities in European Community Competition Law – The Position Since Bronner*, 1 Journal of Network Industries 375 (2000).
[271] Joined Cases C-241/91 P & C-242/91 P; *Magill*, 1995 E.C.R. I-743, at 50.
[272] Ivo Van Bael & Jean-François Bellis; Competition Law of the European Community; (5th ed., 2010); at 837; John Temple Lang; *The Application of the Essential Facility Doctrine to Intellectual Property Rights under European Competition Law*, *in* Antitrust, Patents and Copyright – EU and US Perspectives 62 (François Lévêque and Howard Shelanski ed., 2005): "Compulsory licensing of intellectual property rights has been regarded as a special example of the essential facility principles". Is this two citations or one,? The author needs to split up.
[273] *Volvo. V. Erik Veng (UK)*, [1998] E.C.R. 6211.
[274] *CICRA & Maxicar v. Régie Nationale des Usines Renault (Maxicar v. Renault)*, [1998] E.C.R. 6039.
[275] *See*, *Volvo. V Erik Veng (UK)*, [1998] E.C.R. 6211, at 9. *See also*, Case T-51/89, *Tetra Pak,* [1990] E.C.R. II-309(where it was held that the acquisition by a dominant company of an exclusive licensee of the principal alternative technology was contrary to Article [102]).
[276] Joined Cases C-241/91 P & C-242/91 P, *Magill*, [1995] E.C.R. I-743, at 49.
[277] *Ibid.*, at 50.

The reference to "exceptional circumstances" by the Court of Justice can be seen as ensuring that exceptions under Article 102 are limited to certain special cases.[278]

In *Magill*, the Court of Justice introduced a new condition to be considered when imposing antitrust liability; the creation of a new product. The court held that the refusal to provide basic information by relying on national copyright provisions prevented the appearance of a new product, a comprehensive weekly guide to television programs, which the copyright holders did not offer and for which there was a potential consumer demand. The court found that such refusal constituted an abuse under Article 102.[279] The new product condition was further developed in *IMS*, in which the court, twelve years after *Magill,* revisited the issue of unilateral refusals to license.[280] The issue at stake was the scope of a copyright protected data analysis structure in Germany, dividing the German territory into geographic "bricks". The court held that this brick structure had become a *de facto* industry standard for wholesaler pharmaceutical data presentation in Germany, which made the structure and essential facility that had to be made available for competing services. The judgment in *IMS* is the most comprehensive pronouncement by the Court of Justice on unilateral refusals to license and has also been regarded as one of the most controversial applications of the duty to license under Article 102.[281] The court repeated its language in *Magill* that a refusal to license cannot in itself constitute an abuse, but that the exercise of an exclusive right may, in exceptional circumstances, amount to abusive conduct.[282] The court continued by stating that "[i]t is clear from that case law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market."[283]

The court also confirmed the narrow definition of indispensability adopted in *Bronner.* The court held that the notion of indispensability requires a determination whether, "there are products or services which constitute alternative solutions, even if they are less advantageous, and whether there are technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, the alternative products or services. According to […] *Bronner*, in order to accept the existence of economic obstacles, it must be established, at the very least, that the creation of those products or services is not economically viable for production on a

[278] Ivo Van Bael & Jean-François Bellis; Competition Law of the European Community; (5th ed., 2010); at 847.
[279] Joined Cases C-241/91 P & C-242/91 P, *Magill*, [1995] E.C.R. I-743, at 54.
[280] Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG (IMS),* [2004] E.C.R. I-5039.
[281] *See e.g.*, Robert O'Donoghue and A. Jorge Padilla; The Law and Economics of Article 82 EC; (2006); 428-429.
[282] Case C-418/01, *IMS,* [2004] E.C.R. I-5039, at 34-35.
[283] *Ibid*., at 38. With regard to the likelihood of excluding competition on a secondary market, the court noted that "it is sufficient that a potential market or even hypothetical market can be identified" and "accordingly, it is determinative, that two different stages of production may be identified and that they are interconnected." *See* Id. at 44,45 of the decision.

scale comparable to that of the undertaking which controls the existing product or service.[284]

With regard to the condition concerning the emergence of a new product, the Court of Justice held that

> "*in the balancing of the interest in protection of the intellectual property right and the economic freedom of its owner against the interest in protection of free competition, the latter can prevail only where refusal to grant a license prevents the development of the secondary market to the detriment of consumers. Therefore, the refusal by an undertaking in a dominant position to allow access to a product protected by an intellectual property right, where that product is indispensable for operating on a secondary market, may be regarded as abusive only where the undertaking which requested the license does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.*"[285]

This new product condition has been criticized to fail to specify what should precisely be understood by the concept of a "new product."[286] What the Court of Justice left unclear in *IMS* is especially the notion of how "different" a product should be from the product already sold on the secondary market to be considered as "new."[287] The new product criterion was somewhat refined by the General Court in its *Microsoft* decision, where the court held that the circumstances relating to the appearance of a new product, as envisaged in *Magill* and *IMS*, cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of harming consumers within the meaning of Article [102].[288] As a result of this, the President of the General Court at the time of the *Microsoft* judgment commented that "[t]he new product criterion now also covers technical development, a criterion which is perhaps of a complex technical character and therefore also leaves the authorities a margin of

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[284] *Ibid*., at 28. The court has also analyzed the issue of indispensability in *Tiercé Ladbroke*, in which Ladbroke claimed that the French racecourses were acting abusively in refusing to grant it to license to transmit sound and pictures of French races for use in its betting shops in Belgium. The court held that such televised broadcasting of horse races was not indispensable for bookmakers. Case T-504/93, *Tiercé Ladbroke SA v. Commission*, [1997] E.C.R. II-923, at 131. *See also*, Christopher Bellamy & Graham Child; European Community Law of Competition; (2001); at 746.

[285] Case C-418/01, *IMS,* [2004] E.C.R. I-5039, at 48-49.

[286] The term is not subject to any well received legal or economic definition. *See*, Damien Geradin; *Limiting the Scope of Article 82 EC: What Can the EU Learn from the U.S. Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS, and Deutsche Telekom?*; 41 Common Market Law Review 1531; (2004).

[287] The Advocate General in his opinion in *IMS* held that the company requesting a license must intend to produce goods or services which have "different characteristics" which respond to specific needs of consumers which are not satisfied by existing goods or services. However, the proposed test was not dealt with by the Court of Justice. *See*, Opinion of A.G. Antonio Tizzano in Case C-418/01, *IMS,* [2004] E.C.R. I-5039.

[288] Case T-201/04, *Microsoft,* [2007] E.C.R. II-3601, at 647.

appreciation subject to limited control by the judiciary".[289] Hence the Commission is given a wide margin of discretion when assessing the new product criterion. The future application of the test lacks legal certainty and possibly runs the risk of enabling over-application of the essential facilities doctrine, raising the problem of "free-riding."[290] There is no similar new product prerequisite in U.S. antitrust law. Hence this condition constitutes a significant difference in the application of the essential facilities doctrine in the two jurisdictions. Further judicial elaboration of the test in the EU would be welcomed to create legal certainty.

The duty to license third parties was extended most broadly in the judgment of the General Court in *Microsoft,* in which it was held that unless Microsoft's competitors had access to the technology in question, there was a sufficient risk that viable competition could not remain. The General Court affirmed the decision of the Commission, holding that the Commission had sufficiently established the existence of exceptional circumstances for justifying the compulsory license of intellectual property that were involved. With regard to the indispensability condition, the court rejected Microsoft's arguments that the existence of competitors was sufficient to show the absence of indispensability.[291] The court also concluded that it was sufficient to demonstrate that the refusal to license was capable of excluding *effective* competition. The court subjected the Commission's findings about the existence of competition to only limited review, concluding that Microsoft had not established that the Commission manifestly erred in its assessment.[292]

It is interesting to compare the divergent approaches of the U.S. and the EU antitrust enforcers in the *Microsoft* case and the strikingly different conclusions that were reached by the authorities. The decision in the EU was preceded by a settlement of the U.S case against Microsoft. Whereas the U.S. antitrust enforcers focused on the possible adverse effects on Microsoft's incentives to innovate and the D.C. Circuit Court was persuaded to apply the rule of reason to the tying offense at issue,[293] the Commission and the General Court focused on the effect of Microsoft's refusal to license on innovation, and obliged Microsoft to share its interoperability information with its competitors.[294] It is notable that the General Court placed a high burden of proof on Microsoft, as it rejected the proposition that the existence of an intellectual property right or the innovative or original character of the protected subject matter can constitute, in itself, a sufficient justification for a refusal to license.[295] This burden of proof placed on a dominant company in a compulsory licensing case is very high as the compulsory licensing could be presumed to have a negative effect on the company's incentives to innovate. Indeed, in the U.S., some commentators argue that intellectual

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[289] Bo Vesterdorf;*Article 82 EC: Where do we stand after the Microsoft judgment?* 1 Global Antitrust Review (2008).

[290] Alexandros Stratakis, *Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine*, 8 European Competition Law Review 440 (2006). *See also*, Damien Geradin, *Limiting the Scope of Article 82 EC: What Can the EU Learn from the U.S. Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS, and Deutsche Telekom?*, 41 Common Market Law Review 1530-1532 (2004).

[291] Case T-201/04, *Microsoft*, [2007] E.C.R. II-3601, at 332-333.

[292] *Ibid*., at 273.

[293] *United States v. Microsoft Corp.*, 253 F.3d 34, 89-95 (D.C. Cir. 2001).

[294] The Commission was not satisfied with the disclosures made by Microsoft under the U.S. settlement, and concluded that Microsoft's refusal to provide interoperability information was abusive. Case COMP/C-3/37.792 – *Microsoft*; Case T-201/04, *Microsoft,* [2007] E.C.R. II-3601.

[295] *Ibid*., at 690, 693.

property rights in themselves are sufficient justification for a refusal to license.[296] Thus *Microsoft* serves as a good example of the different attitudes to legitimate business justifications in the U.S. and the EU.

5.4 Commission's Guidance Paper

The Commission's approach in its *Article 82 Discussion Paper*[297] and *Article 82 Guidance* is largely based on the General Court's *Microsoft* decision. The Commission published its *Article 82 Discussion Paper* a year after the Supreme Court's *Trinko* decision. The *Article 82 Discussion Paper* and *Article 82 Guidance,* which constituted a response to criticism that the EU rules on abuse of dominance lacked consistency and economic rigor,[298] restated the antitrust rules applicable to dominant companies and promoted a broad scope of antitrust regulation of unilateral conduct of dominant companies. The *Article 82 Guidance* uses a broad definition of when access is required:

> "*[t]he concept of refusal to supply covers a broad range of practices, such as a refusal to supply products to existing or new customers, refusal to license intellectual property rights, including when the license is necessary to provide interface information, or refusal to grant access to an essential facility or a network.*"[299]

Further, the *Article 82 Guidance* sets forth that the Commission will consider refusal to supply practices as an enforcement priority when the following circumstances are present: (i) the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market, (ii) the refusal is likely to lead to the elimination of effective competition on the downstream market, and (iii) the refusal is likely to lead to consumer harm.[300] It is interesting to note that whereas the Commission in its *Article 82 Guidance* clearly states that refusal to supply practices will be seen as one of the enforcement priorities under Article 102, the Department of Justice in its report on Section 2 enforcement took an almost completely opposite view, by holding that "antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in Section 2 enforcement."[301]

The aforementioned goes to show in a very clear way the different approaches of the American and the European antitrust enforcers to the essential facilities doctrine. Moreover, the language relating to the essential facilities doctrine in the *Article 82 Guidance* stands in direct contrast to the treatment by the Supreme Court of the doctrine

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[296] Paul D. Marquardt and Mark Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitofsky, Patterson and Hooks*, 70 Antitrust Law Journal 847, 859-863 (2003).

[297] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (*Article 82 Discussion Paper*), available at: http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf.

[298] *See e.g.* John Temple Lang, *Anticompetitive Non-Pricing Abuses Under European and National Antitrust Law,* Fordham Corporate Law Institute 235 (Barry Hawk ed., 2003); Damien Geradin, *Limiting the Scope of Article 82 EC: What Can the EU Learn from the U.S. Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS, and Deutsche Telekom?*, 41 Common Market Law Review need page number (2004).

[299] *Article 82 Guidance*, at 78.

[300] *Ibid.*, at 81.

[301] Department of Justice, Competition and Monopoly: Single Firm Conduct under Section 2 of the Sherman Act, at 127.

in the above discussed *Trinko* opinion.[302] In *Trinko*, the court held that the refusal to deal alleged by *Trinko* did not fit within the limited duty to deal exception recognized in *Aspen Skiing* since there was no allegation that Verizon had voluntarily engaged in a prior course of dealings with its rivals or that it had refused to provide any product that it already sold at the retail level to any other customers.[303] In the *Article 82 Guidance* the Commission states that liability for refusal to supply can "apply both to cases of disruption of previous supply, and to refusals to supply a good or service which the dominant company has not previously supplied to others (*de novo* refusals to supply)."[304] Thus the decision of the Supreme Court in *Trinko* and the Commission's *Article 82 Guidance* taken together with the General Court's *Microsoft* judgment are representative of the significant divergences relating to the antitrust approach to intellectual property in the U.S. and the EU.

6. REGULATION AND ANTITRUST RULES

In addition to the divergent attitudes in the U.S. and the EU concerning the interface between antitrust and intellectual property, there seems to be fundamental differences between the two jurisdictions in their application of antitrust laws in cases where the source of competition concern is regulation. The Supreme Court's decision in *Trinko* addressed the issue concerning the interface between antitrust law and sector-specific regulation. The ruling clearly reduced the scope for antitrust intervention in regulated industries by stating that where anticompetitive concerns can be addressed by industry-specific regulation, antitrust intervention is unnecessary and possibly harmful.[305] This reasoning was echoed in the *Billing* ruling in 2007, where the court held that the need for antitrust enforcement was "unusually small," given that there were other laws and regulatory structures specifically designed to deter and remedy the anticompetitive conduct in question.[306] In the U.S. there is hence a reluctance to apply antitrust rules when this may interfere with regulation. This has profoundly influenced the views on the application of antitrust rules to intellectual property rights, including the application of essential facilities doctrine.[307]

In the EU, however, the antitrust enforcers seem to have taken a very different approach to the U.S. This is perhaps best exemplified in the *Deutsche Telekom* decision,[308] in

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[302] See Spencer Weber Waller and William Tasch, *Harmonizing Essential Facilities*, 76 Antitrust Law Journal 746 (2010).

[303] *Trinko,* 540 US 398, 409 (2004).

[304] *Article 82 Guidance*, at 84. The Commission in its *Article 82 Guidance* does go on to say that "the termination of an existing supply arrangement is more likely to be found to be abusive than a *de novo* refusal to supply", but it is still remarkable how the language of the *Article 82 Guidance* takes a very different view that the one expressed by the Supreme Court in *Trinko*.

[305] *Trinko,* 540 US 398, 410-412 (2004). The Supreme Court took a favorable approach to regulation to the detriment of antitrust law, when holding that where "a regulatory structure designed to deter and remedy competition harm" exists, "the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny."

[306] *Credit Suisse Sec. (USA) LLC v. Billing*, wrong reporter (2007), at 2396 (quoting Katarzyna Czapracka, Intellectual Property and the Limits of Antitrust: A Comparative Study of US and EU Approaches (2009), at 23).

[307] Katarzyna Czapracka, Intellectual Property and the Limits of Antitrust: A Comparative Study of US and EU Approaches (2009), at 24.

[308] Commission Decision No 2003/707/EC of 21 May 2003, *Deutsche Telekom AG*, O.J. 2003, L 263/9-41.

which the Commission adopted almost the opposite view to the Supreme Court in *Trinko* by applying Article 102 despite sector-specific regulation. The Commission noted that "competition rules may apply where the sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition."[309] Thus it seems like there are significant differences in the U.S. and the EU approach to the relation between antitrust law and regulation.

7. RATIONAL FOR TRANSATLANTIC DIFFERENCES?

When examining the application and enforcement of the essential facilities doctrine in the U.S. and in the EU through comparative analysis of the relevant case law and the antitrust enforcers' attitudes, it becomes clear that there are significant differences in this area of law between the two jurisdictions. The question that arises is: what is the rational for these differences?

The different language and aims of the Sherman Act and the Treaty go to explain to some extent the differences between the two jurisdictions. Although both the U.S. and the EU antitrust system fundamentally have the same goal of promoting consumer welfare by eliminating exclusionary or anti-competitive behavior, EU antitrust law also concentrates on the integration of its member states' markets and on the prevention of national restraints.[310] Moreover, the Treaty has been interpreted in ways that have served this goal of integration of the common market (the single market imperative).[311] In addition, other fundamental aims laid down in the Treaty, such as the prohibition of discrimination on grounds of nationality, have also come to influence some court decisions.[312]

Since the entering into force of the Treaty, national intellectual property rights have been regarded as restricting the free movement of goods and competition within the EU internal market. The Court of Justice has often, when considering the potential conflict between the promotion of the EU single market and the protection of nationally based intellectual property rights, favored the free trade.[313] Intellectual property laws in the EU are still to a significant extent regulated at national level. It has been argued that EU compulsory licensing decisions sometime constitute means to deal with what is considered faulty national intellectual property rights and that competition concerns are too easily given priority over the need to effectively protect national intellectual

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[309] *Ibid*., at 54.
[310] Richard Whish, Competition Law (5th., 2003), at 20-21.
[311] Eleanor M. Fox, *Abuse of a Dominant Position Under the Treaty of Rome – A Comparison With U.S. Law*, *in* Annual Proceedings of the Fordham Corporate Law Institute, Antitrust and Trade Policies of the European Economic Community 368 (1983). *See also*, Ian S. Forrester, *EC Competition Law as a Limitation on the Use of IP Rights in Europe: Is there a Reason to Panic?* European Competition Law Annual 2003: What Is an Abuse of a Dominant Position? Is this a pg number? 504 ("It is difficult to overestimate the preoccupation with market integration, which colored ECJ case law affecting free movement, competition, primacy and other doctrines").
[312] *See e.g.* Case 7/82, *GVL v. Commission* [1983] E.C.R. 1513.
[313] *See e.g.* Cases 56/64 and 58/64, *Consten & Grundig v. Commission*, [1966] E.C.R. 299 (where the Court of Justice held that even thought the Treaty does not affect the grant of rights recognized by national intellectual property legislation, the exercise of those rights may nevertheless come within the Treaty prohibitions).

property rights.[314] Further, European law has been criticized for making significant encroachments on the entitlements of intellectual property right holders in the cause of free movement of goods, and these encroachments on that ground have been more significant than on the ground of competition law.[315] There is probably some merit in this criticism. In addition, this development also goes to explain the more aggressive antitrust scrutiny of intellectual property in Europe in comparison to the U.S.

It has been suggested by one U.S. official that whereas the Americans support "cowboy capitalism," allowing a monopolist to compete aggressively on the merits even if it includes harming its rivals, the European system requires dominant firms to "compete like gentlemen."[316] In other words, in the EU, dominant companies have a special responsibility and must keep an eye on maintaining competition by rivals. There is a significant difference in the nature of the conduct of a dominant company that may violate the law under the Treaty and the Sherman Act, respectively. Although both describe the forbidden conduct as exclusionary, the threshold for what sort of conduct qualifies as exclusionary is lower in Europe, where EU law requires only that the Commission establishes that the conduct in question prevents rivals from competing by means other than *normal competition* or *competition on the merits*, or that it otherwise violates the special responsibilities of dominant firms.[317] Further, in both jurisdictions, a company dominant or monopolist is liable for refusing to deal only if it has a negative effect in the market. As to this negative effect, in the EU, at least in the past, the focus has been on the likely and sometimes presumed impact on the *effective competition structure* and on competitors, and only indirectly on any impact on consumers. The European policy has been based on the premise that consumers are best served by protecting the competitive process, and therefore in the EU it is not necessary to show direct consumer harm. Where companies holding market power engage in conduct determined, sometimes presumed, to be anticompetitive, consumer harm has been presumed to take place. In the U.S., more attention is given to evidence of actual or likely price or output effects, and consumer harm is more directly implicated because the prohibition is against monopolies, not just abuse of dominance.[318] Thus, although the two jurisdictions share the same purpose of ultimately promoting consumer welfare, the U.S. is more concerned with an *efficient market*, whereas EU competition law is sometimes applied with competitors in mind, especially in the early Article 102 cases.[319] Although the Chicago School economic analysis has gradually come to dominate EU law, there are still instances where protecting competitors is within the scope of EU competition law as a means of preserving the competitive structure of the market. [320]

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[314] *See e.g.*, Karen Banks & Giuliano Marenco, *Intellectual Property and the Community Rules on Free Movement: Discrimination Unearthed*, 15 European Law Review 224-230 (1990).
[315] Ian S. Forrester, *EC Competition Law as a Limitation on the Use of IP Rights in Europe: Is there a Reason to Panic?* European Competition Law Annual 2003: What Is an Abuse of a Dominant Position? 505-505.
[316] J. Bruce McDonald, *Section 2 and Article 82: Cowboys and Gentlemen*, Speech at Article 82 Second Annual Conference, Brussels, Belgium (June 16-17, 2005).
[317] *Ibid*.
[318] *Ibid*.
[319] Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 20 Antitrust Law Journal 392 (2002-2003).
[320] Alexandros Stratakis, *Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine*, 8 European Competition Law Review 434 (2006).

Consequently, a number of decisions taken by European antitrust enforcers have been subject to serious criticism in the U.S. A senior U.S. antitrust official commented on the Commission's *Microsoft* decision that it was "protecting competitors, not competition, in ways that may ultimately harm innovation and the consumers that benefit from it".[321] Advocate General Jacobs in his opinion in *Bronner* focused on this issue by holding that "[i]t is important not to lose sight of the fact that the primary purpose of Article [102] is to prevent distortion of competition – and, in particular to safeguard the interests of consumers – rather than to protect the position of particular competitors."[322]

However, when looking at the other side of the coin, U.S. antitrust enforcers are being criticized for their overly cautious protection of intellectual property rights to the detriment of the application of antitrust rules. For example, it has been argued that "American antitrust analysis wrongly assumes a copyright is a copyright regardless of where and how it is claimed."[323] Moreover, with regard to the essential facilities doctrine, some commentators are of the opinion that "the United States' current position is out of step with international practice" and that "the U.S. Supreme Court [in *Trinko*] has questioned a doctrine that the rest of the world has embraced."[324] Thus it seems like whereas the Americans think that the Europeans are overeager in enforcing antitrust rules in intellectual property cases (to the detriment of innovation), the Europeans see the American under-enforcement of antitrust rules as blindly favoring intellectual property to the detriment of antitrust enforcement.

As to the transatlantic differences in the application of antitrust laws in cases where the source of competition concern is regulation, the divergence can to some part be explained by the different institutional and regulatory contexts. The hierarchy of legislative norms is different in the EU as the competition rules are for the most part written in the Treaty. It is unlikely that the Commission, as the guardian of the Treaty, or the European courts, would hold that Article 102 should not apply when a matter is regulated by sector-specific rules. In addition, whereas U.S. antitrust law is essentially a court-based system, EU competition law has essentially relied on an administrative based system.[325] Further, it is held that there is greater need for intervention on the basis of antitrust rules in Europe than in the U.S. because the applicable (sector-specific)

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[321] Press Release, Department of Justice, Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on the EC's Decision in its Microsoft Investigation, *available at*, http://www.usdoj.gov/opa/pr/2004/March/04_at_184.htm. The EU faced similar criticism in the aftermath of *GE/Honeywell*, a merger cleared by the American authorities and prohibited by the European authorities. "A chorus of American critics said of the European Commission: You protect competitors; we protect competition." Eleanor Fox, *Abuse of Dominance and Monopolization: How to Protect Competition Without Protecting the Competitors*, European Competition Law Annual 2003: What is Abuse of Dominant Position? at 71.

[322] Opinion of Advocate General Jacobs in Case C-7/97, *Bronner*, [1998] E.C.R. I-7791, at 58.

[323] Ian S. Forrester, *EC Competition Law as a Limitation on the Use of IP Rights in Europe: Is there a Reason to Panic?* European Competition Law Annual 2003: What Is an Abuse of a Dominant Position? 517-520. (Forrester emphasizes that not every intellectual property right is equally precious, equally sacrosanct, equally deserving of immunity or tolerant treatment under the competition rules).

[324] Spencer Weber Waller and William Tasch, *Harmonizing Essential Facilities*, 76 Antitrust Law Journal 759, 767 (2010).

[325] The Commission instructs cases, decides on the validity of the conduct in question, and decides the penalty to be imposed on the parties violating the EU competition rules. Damien Geradin, *Limiting the Scope of Article 82 EC: What Can the EU Learn from the U.S. Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS, and Deutsche Telekom?*, 41 Common Market Law Review 1548 (2004).

regulatory regime in the EU imposes fewer obligations on operators with market power, thus leaving greater space for antitrust intervention.[326]

In addition, the potential for enforcement activity is greater in the EU as it takes place also at national level in the various member states. After the modernization of EU competition law, the EU member states apply both Article 102 and their own national competition laws. Further, the member states may apply their national abuse of dominance provisions even more strictly than Article 102. As a result of this, there is significantly more potential for the future application of the essential facilities doctrine in Europe than in the U.S. In fact, recent cases on unilateral refusals to deal have come out of the courts or competition authorities of at least twenty of the member states.[327] However, this enforcement activity on national level also comes with the risk of creating different interpretations of the essential facilities doctrine and even allowing for over-enforcement of the doctrine. Thus there is the danger of legal uncertainty and greater complexity arising from an active enforcement of the essential facilities doctrine in the member states.[328] This could have an anticompetitive effect, because the uncertainty discourages companies from pro-competitive behavior in the fear of it being regarded as illegal, which could result in decreasing incentives to innovate. However, these concerns are perhaps exaggerated when looking at the unilateral refusals to deal cases that have come out of the member state courts and competition authorities.[329]

Some commentators argue that because the U.S. and the EU have taken markedly different views on the essential facilities doctrine, this area of law should be harmonized.[330] For example, it has been suggested that harmonization could be carried out through the International Competition Network by drafting best practices for unilateral refusals to deal.[331] However, with reference to the current hostile approach that the essential facilities doctrine is faced with in the U.S., as exemplified in this paper by the Supreme Court's *Trinko* decision, the Department of Justice's negative attitude in its report on Section 2 enforcement, and the abundance of academic criticism, it is unlikely that the U.S. would be willing to adopt a more "European" approach to the essential facilities doctrine, or that the European antitrust enforcers would consider refraining from their aggressive antitrust enforcement in intellectual property cases.

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[326] *Ibid*.

[327] For a useful overview of the application and enforcement of the essential facilities doctrine in the national laws of the EU member states, see Spencer Weber Waller and William Tasch, *Harmonizing Essential Facilities*, 76 Antitrust Law Journal 747-752 (2010).

[328] In the lacking of unclear rules, there is a risk that competition authorities will adopt decisions in intellectual property cases which perhaps increase competition in the short term, but reduce it in the long term by discouraging innovation. If there is no clear general principle, the case law is likely to develop through a series of short-term decisions which will erode the value of intellectual property rights. *See*, John Temple Lang, *The Application of the Essential Facility Doctrine to Intellectual Property Rights under European Competition Law*, Antitrust, Patents and Copyright – EU and US Perspectives 76-77 (François Lévêque and Howard Shelanski ed., 2005).

[329] *See*, Spencer Weber Waller and William Tasch, *Harmonizing Essential Facilities*, 76 Antitrust Law Journal 745-752 (2010)(where it is held that for the most part, the essential facilities doctrine has been applied sensibly in Europe. However, it is also noted that the new EU member states have applied the doctrine "with different degrees of sophistication").

[330] *See e.g.* Spencer Weber Waller and William Tasch, *Harmonizing Essential Facilities*, 76 Antitrust Law Journal no page number? (2010).

[331] *Ibid*., at 759-766.

Thus there is little hope that there will be global consensus on this issue.[332] In fact, it seems that there are increasingly divergent approaches to the essential facilities doctrine on the two sides of the Atlantic. This is not necessarily a completely negative development. As one leading American antitrust scholar has put it; "healthy diversity tends to sharpen the dialogue and facilitate adjustment and readjustment to whatever the context demands."[333]

8. CONCLUSION

It has been argued that an essential facility-type analysis is not appropriate in the case of intellectual property rights because such an analysis would automatically override the essential nature of the property right in favor of competing antitrust law claims, and thereby disregard or limit the scope of the property right and the monopoly that it confers.[334] Indeed, there is a difficulty in using the essential facilities doctrine to justify application of antitrust laws to intellectual property, as it requires a balancing of interests at the interface of antitrust law and intellectual property. This difficulty, or rather challenge, was stated by Advocate General Jacobs in his opinion in *Bronner*: "incursions on the fundamental right to choose one's own trading partners requires a "careful balancing of conflicting considerations".[335] Cases at the intersection between intellectual property and antitrust should be analyzed by examining the impact on economic incentives to innovate and balancing them against anticompetitive effects. Although this balance should be accomplished with great respect for and concern about protecting incentives to innovate, the analysis should not overly diminish the role of antitrust law, as seems to be the situation in the U.S.

As discussed in this paper, recent developments show some growing divergence between the U.S. and EU approach to the application of antitrust rules to intellectual property rights, in particular as regards the essential facilities doctrine. However, I think the doctrine should continue to have a play a role as an effective remedy in limited and strictly defined circumstances in antitrust law enforcement in intellectual property right cases on both sides of the Atlantic. Denying the use of the doctrine altogether because of fears of its possible over-application would remove a useful tool from the arsenal of antitrust law.[336]

There is no denying that the Supreme Court's opinion in *Trinko* together with the academic hostility against the essential facilities doctrine might limit the scope for antitrust intervention in cases involving unilateral refusals to deal in the U.S. However, there is nothing hindering lower U.S. courts from continuing to apply the doctrine even

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[332] There is also the question whether there is actually a need for harmonizing the essential facilities doctrine and whether harmonization in all cases is a good function. This discussion is, however, beyond the scope of this paper.

[333] Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 20 Antitrust Law Journal page number? All we have is a pin cite 410-411 (2002-2003).

[334] James S. Venit, John J. Kallaugher, *Essential Facilities: A Comparative Law Approach*, Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy 337 (1994). See also the opinion of Advocate General Gulmann in *Magill*, where the Advocate General noted that it is exactly the ability to exclude rivals and gain a competitive advantage that is the essence of the intellectual property right protected by the Treaty. Opinion of Advocate General Gulmann, Joined Cases C-241/91 P & C-242/91 P, *Magill,* delivered on 1 June 1994.

[335] Opinion of Advocate General Jacobs in Case C-7/97, *Bronner*, [1998] E.C.R. I-7791, at 57.

[336] Alexandros Stratakis, *Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine*, 8 European Competition Law Review 442 (2006).

though the Supreme Court has not explicitly recognized it. In fact, this is what some lower courts have done.[337] Thus the implication of *Trinko* is not necessarily the end of the essential facilities doctrine in the U.S.

On the other side of the Atlantic, antitrust enforcers do not shy away from referring to the doctrine when considering the scope of the various duties to deal under Article 102. Although the European approach to the essential facilities doctrine seems more coherent and clear than the American one, there might be a danger of overconfidence when using antitrust laws in addressing market failures and correcting imperfections in intellectual property laws in the EU, which creates a risk of over-enforcement and deterring investment in innovation. Thus it seems like neither the EU nor the U.S. has found equilibrium between antitrust law and intellectual property. In the pursuit thereof, there should be transatlantic discussion and exchange of ideas and attitudes, as both jurisdictions could probably learn something from each other.

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[337] See e.g. *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d. 1048 (D. Colo. 2004); *NYMEX*, 323 F. Supp. 2d 559 (S.D.N.Y. 2004).

EU competition law vs. standard setting agreements

MARTA STRYSZOWSKA[·]

Standard setting agreements may raise a tension between the competition policy and the innovation policy. The present article provides an economic perspective on the application of the European Union competition law to standard setting agreements and discusses its potential effects on innovation.

1. INTRODUCTION

Firms sometimes develop different technologies applying to the same use. For example, two competing technologies have been invented for storing data and high-definition video: HD DVD and Blu-ray. Different formats of text files (such as for example Microsoft Word, TeX and PDF) may also serve as an example of competing technologies.

In the presence of competing technological solutions, it may be more efficient for the society to rely on one technological standard instead of having to choose between the competing alternatives. Introducing a common standard may raise efficiency because of network externalities, economies of scale or presence of complementary products. Therefore, it may be less costly for the society to rely on one technological standard rather than on competing technologies. Furthermore, by assuring compatibility, standard introduction may stimulate demand and development of complementary products. For example, the choice of a given technological solution in a given type of microprocessors allowing for faster data processing may stimulate the development of the new graphic cards allowing for better user experience.

Standards are also useful when creating a technology which requires relying on a multitude of patents. Complex technologies sometimes require combining different patents held by different firms. For example, the technology MPEG-2, which is the technology for encoding of moving pictures and associated audio information, relies on 425 patents held by 28 firms.[339] Various patent holders may hence need to coordinate with each other in order to introduce a new technology. Standard setting processes enable such coordination.

Standard setting organizations recognize beneficial effects of standards and facilitate their development. By enabling the communication between developers and users of competing technologies, they help to compare alternative technological solutions and give the concerned market players an opportunity to coordinate for one industry standard. They may hence contribute to the development of new technologies or to the selection of one technology of the competing technologies as an industry standard. Their role may therefore be beneficial for the consumers, provided that they do not facilitate collusion or allow for patent ambushes[340].

[·] The author is an economist with Microeconomix. The views expressed in this article are those of the author and do not necessarily reflect the opinions of Microeconomix.

[339] These statistics have been indicated by Lévêque (2007).

[340] A patent ambush occurs when a member of a standard-setting organization reveals the information that it owns, has pending, or intends to file a patent relevant to the emerging standard only after the standard is introduced.

In order to introduce a new standard, standard setting organizations rely on standard setting agreements. A standard setting agreement is a formal agreement between the holders of intellectual property rights (IPR) for technological solutions used in the standard. It defines a set of rules on how to adopt a standard. It may specify the joint ownership of the standard and the licensing rules. It may indicate the essential patents for using the given standard. It may be also based on open-source technologies.

Standard setting agreements may be beneficial for consumers. By enabling standard adoption, they may lead to the creation of new or better products. Without a standard setting agreement in place, adopting a standard requires a potential user to identify and obtain licenses for every single patented component, which may be a very slow, complicated and costly process. Standard setting agreements help avoiding these unnecessary delays and implementation costs.

However, standard setting agreements between different patent holders may raise antitrust concerns. By combining various technological solutions while neglecting others, they may lead to the exclusion of the competing technological solutions. This may give additional market power to the holders of patents relevant to the standard enabling them to charge excessive royalties. This risk of the hold-up problem may be sometimes foreseen by standard setting members, when all the patents relevant to the standard are known by them. It may however also be difficult to avoid, if the relevant patents are not known by the standard setting members in the standard development phase.

There are two important possible applications of European Union competition law to standard setting agreements. First, some standard agreements may constitute a horizontal agreement forbidden by Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). Second, excessive royalties charged after the standard adoption may be interpreted as abuse of dominance forbidden by Article 102 TFEU.

There may be a certain tension between the application of European Union competition law to standard setting agreements and the innovation policy. The goal of European Union's innovation policy is to stimulate innovation: "*The main current European Union's innovation policy is the Innovation Union, Europe 2020 flagship initiative. Its aim is to boost Europe's research and innovation performance by speeding up the process from ideas to markets.*"[341] An effective application of the competition policy to innovative markets may support this goal by ensuring a level playing field and eliminating cartels and abuses of dominance, by giving a chance for new inventions to challenge existing technologies and compete with them on the merits. However, in certain contexts such as standard setting agreements, it may also distort innovation by eliminating a perspective of sufficient returns to investments in innovation. As technologies become more complex, a single invention may be insufficient to guarantee such returns. Firms may need to be then assured that standard setting agreements are a viable option of generating sufficient returns to investments in innovation. The application of the competition law to standard setting agreement may cast a doubt on

[341] The extract from the webpage of the European Commission's Directorate General Enterprise and Industry concerning Industrial Innovation Policy, http://ec.europa.eu/enterprise/policies/innovation/policy/index_en.htm

whether after reaching a standard setting agreement the holders of the relevant patent could actually generate sufficient returns.

The present article comments on the application of the European Union competition law to standard setting agreements between different patent holders from an economic perspective, highlighting its potential impact on innovation. It first explains the economic rationale of applying Article 101 (1) TFEU to standard setting agreements and next proceeds to the applicability of Article 102 TFEU to standard setting agreements. The final conclusions are presented in the last section.

2. APPLICATION OF ARTICLE 101 TFEU TO STANDARD SETTING AGREEMENTS

2.1 The existing regulation: Article 101 (1) vs. Article 101 (3) TFEU

A standard setting agreement may constitute a horizontal agreement between the competitors and therefore be forbidden by Article 101 (1) TFEU. Article 101 (1) TFEU prohibits various types of horizontal agreements distorting competition. There are two main possible ways by which standard setting agreements could distort competition. First, they may distort upstream competition (between patent holders) by selecting one technological solution over the other competing solutions. Second, they may distort downstream competition (between the producers using the standard) by introducing excessive or discriminatory licensing terms.

A standard setting agreement may be also exempted from Article 101 (1) TFEU by Article 101 (3) TFEU, which exempts horizontal agreements contributing to technological progress. A standard setting agreement may contribute to the emergence of new technologies based on the existing technological solutions and stimulate future innovation efforts. These positives effects on technological progress may be potentially used as an argument to apply Article 101 (3) TFEU to standard setting agreements.

In order to assess whether a standard setting agreement may be exempted from Article 101 (1) TFEU, one needs to establish whether an actual standard setting agreement (a) contributes to technical or economic progress, (b) while allowing consumers a fair share of the resulting benefit, (c) without imposing restrictions which are not indispensable for the attainment of the efficiencies[342], and (d) without eliminating competition in respect of a substantial part of the products in question.

2.2 Effects of standard setting agreements on technological progress

Standard setting agreements may directly contribute to technological progress. Without a standard setting agreement, it may be difficult or very expensive to develop certain technologies that require pooling of a high number of patents. For example, as indicated by Lévêque (2007), the MPEG2 standard relies on 425 patents held by 28 firms and the WCDMA standard involves 6000 patents held by 30 firms. Relying on potential users to collect all the necessary licenses for an emerging technology may end up in a failure. It may be an impossible or very expensive task to become a licensee of all the necessary patents. Furthermore, in contrast to the patent holders, the potential users may be less

[342] For example, a hard core price fixing couched as standard setting agreement would not be exempted.

informed about the patented technological solutions and thus be unable to collect all the necessary components to create the best state-of-the-art technology.

Standard setting agreements may not only affect directly technological progress but also have indirect effects on technological progress. By accelerating the standard emergence, standard setting agreements promote a wide use of new technologies and stimulate development of complementary technologies. Furthermore, by increasing certainty of standard implementation, standard setting agreements may increase the expected returns to the innovation efforts and therefore stimulate future innovation. As stated by Competition Commissioner Joaquin Almunia, "*[e]fficiency enhancing co-operation agreements between competitors, and in particular R&D and standardization agreements, can further innovation and competitiveness in Europe*".[343]

The European Commission Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements recognizes the potential beneficial impact of standard setting agreements on technological progress but warns about the potential for restrictions, too:

> *"263. Standardisation agreements usually produce significant positive economic effects, for example by promoting economic interpenetration on the internal market and encouraging the development of new and improved products or markets and improved supply conditions. Standards thus normally increase competition and lower output and sales costs, benefiting economies as a whole. Standards may maintain and enhance quality, provide information and ensure interoperability and compatibility (thus increasing value for consumers).*
>
> *264. Standard-setting can, however, in specific circumstances, also give rise to restrictive effects on competition by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development. This can occur through three main channels, namely reduction in price competition, foreclosure of innovative technologies and exclusion of, or discrimination against, certain companies by prevention of effective access to the standard."*[344]

2.3 Potential anticompetitive effects of standard setting agreements

A standard setting agreement may raise antitrust concerns if it leads to the upstream foreclosure (the exclusion of the competing technologies solutions) or downstream foreclosure (the exclusion of downstream producers interested in using the standard). The potential anticompetitive effects of the upstream foreclosure have raised lots of discussion in the economic literature and are discussed below.[345]

[343] EC Press Release IP/10/489 of 04/05/2010

[344] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, (OJ C 11/1, 14.1.2011), §§ 263 -264.

[345] Given limited space, the present article will not discuss the potential downstream foreclosure resulting from a standard setting agreement.

2.3.1 Hold-up problem and upstream foreclosure

A standard setting agreement may result in the upstream foreclosure. While at the standard development phase replacing one particular technological solution by another may be relatively easy, the replacement of the same technological solution by another technological solution may become much more complex once the standard is developed. Combining various technological solutions may require lots of development efforts and once these efforts are made replacing one of the used technological solutions may be extremely difficult. In that situation, the technological solutions that did not find its use in the standard may be never actually used by the final users. Then, their owners may be forced to quit a given market.

The upstream foreclosure resulting from a standard setting agreement appears more likely if the adoption of the standard leads to customer lock-in or implies too high switching costs from the adopted technology to the alternative technology. When adopting a new technology is costly[346], users may prefer to adopt only one technology and refrain from using the alternative technology. Then, it may be very difficult for the owners of the technological solutions not used in the adopted technology to convince the users to start using its particular technological solutions. In that case, if the owners of the technological solutions not used in the standard do not find any other application of their technological solution, they may be forced to quit the relevant market.

The upstream foreclosure resulting from a standard setting agreement may also be more likely in presence of network effects. If a successful introduction of the alternative technological solution requires convincing most of the customers to abandon the adopted standard and switch to the alternative technology, users of the adopted standard may never be willing to consider switching to the technological solution not included in the standard.

The upstream foreclosure resulting from a standard setting agreement may be also related to the interoperability issues. In certain situations development of one standard may stimulate the development of the other compatible technology that is incompatible with the technology that potentially constitutes an alternative to the introduced standard. For example, an introduction of a standard for a given type of microprocessor may yield a risk of the incompatibility between newly developed memory cards and an alternative microprocessor. In that case, an alternative type of microprocessor may have little chances to survive.

The economic literature (see for example Farrell et al., 2007) indicates that in certain circumstances an elimination of alternative technological solutions may lead to the abuse of the increased market power of the remaining patent holders. Such an abuse is often referred to as the hold-up problem. The following example illustrates the hold-up problem.

Suppose that:

- there are two competing patents (A and B) and one complementary patent C
- one of the competing patents (A or B) may be combined with the complementary patent (C) in order to create a technology

[346] The necessary investments may for example include re-arranging the production facilities in order to allow the adoption of the new technology.

- the creation of the technology is specified by a standard setting agreement
- competing technological solutions (covered by patents A and B) are not ex-ante compatible with the complementary technological solution (covered by patent C), so standard development requires additional effort to make the complementary technological solution compatible with one of the competing technological solutions
- investments in compatibility are technology specific, in the sense that making the complementary technological solution compatible with one of the competing technological solution does not make it automatically compatible with the other competing technology
- assuring compatibility costs 30 € per a technological solution and the holder of the patent C incurs this cost
- once compatibility is assured, the involved parties announce their royalties and license it to the downstream producer without incurring any marginal cost.
- using the emerged standard, a downstream producer produces a product at a zero unit production cost (excluding the royalties) and sells it at a price of 100 €.

Then, as indicated in table 1, before the investment in compatibility is made, the competition between holders for replaceable patents (A and B) will drive their royalties to 0 € and the holder of patent C will fully exploit its market power by setting a royalty of 100 €. The situation changes if the holder of patent A does not commit to its royalty before the holder of patent C invests in compatibility between the technology covered by patent A and the technology covered by patent C. Once the investment is done, the holder of patent A knows that it may set a royalty of 30 €, because the only alternative faced by the holder of patent C is to negotiate a technology development with holder of patent B. In the best case scenario, this outside option would be related with a new investment in compatibility (30 €) and no royalty demanded by holder of patent B. In that case, holder of patent C could set a royalty of 100 €, which is the difference between the retail price (100 €) and the royalty demanded by the holder of patent B (0 €). Therefore, after the investment is made, the reservation value of the holder of patent C is 70 €, which corresponds to the difference between the royalty that the holder of patent C could obtain in case of reaching a standard setting agreement with the holder of patent B (100 €) and the cost of assuring compatibility between the technology covered by patent B and the technology covered by patent C (30 €). Given this reservation value of 70 €, the holder of patent A may at most demand a royalty of 30 €. By not committing to the royalty ex-ante, the holder of patent A may thus be able to increase its royalty from 0 € to 30 €. Such a potential royalty increase is often called the hold-up problem.

Table 1: Example 1 of the hold-up problem

	Royalties set <u>before</u> investments in assuring compatibility	**Royalties set <u>after</u> investments in assuring compatibility**
Additional cost incurred when replacing a replaceable patent (A or B) included in the standard by the competing alternative	0 €	30 €
Royalty for replaceable patent (A or B) not included in the standard	0 €	0 €
Royalty for replaceable patent (A or B) included in the standard	0 €	30 €
Royalty for irreplaceable patent (C) included in the standard	100 €	70 €
Joint royalty for the standard	100 €	100 €
Retail price	100 €	100 €

The potential hold-up problem may not only harm downstream firms but also negatively affect the consumers. This is not the case in the above example, but it may happen if royalties constitute marginal costs that are passed on to the consumers. The following example provides an illustration of the hold-up problem passed on to the consumers.

Suppose that:

- There is technological solution 1 offered by holder of patent A and holder of patent B.
- There is technological solution 2 offered by holder of patent B and holder of patent C.
- A technology may be constructed on the basis of one of the patents for technological solution 1 and one of the patents for technological solution 2.
- There are two competing downstream producers facing zero marginal costs but the royalties.
- A cost of adoption of each technological solution is 30 € and is specific for each patent.
- Patent holders face no costs.

Then, as illustrated in table 2, if patent holders set their royalties before downstream producers incur their implementation costs, the upstream competition will drive each royalty to 0€. Then, the downstream competition will drive the retail prices to 0 €. If however, royalties are set after the investments in implementation are made, the required royalties will increase. Each holder for the patent included in the standard will now require 30 €, which is equal to the cost of switching to the competing alternative. The joint royalty will be hence 60 € (as 2 x 30 € = 60€). The royalty increase is a typical hold-up problem. What's more interesting in this example is the impact on consumers.

Given that the joint royalty increases from 0 € to 60 €, the retail prices will also increase from 0 € to 60 €. This is because royalties constitute here marginal costs that are passed on to consumers. All in all, in this example technology adoption costs may lead to the hold-up problem causing price increase.

Table 2: Example 2 of the hold-up problem

	Royalties set <u>before</u> investments in the implementation of the technology	**Royalties set <u>after</u> investments in the implementation of the technology**
Additional cost incurred when replacing a patent included in the standard by the competing alternative	0 €	30 €
Royalty for each patent included in the standard	0 €	30 €
Royalty for patent not included in the standard	0 €	0 €
Joint royalty for the standard	0 €	60 €
Retail price	0 €	60 €

The potential hold-up problem results from upstream foreclosure (disappearance of alternative technological solutions). Standard setting agreements sometimes select one technological solution over the others. The technological solutions not included in the standard may face no possibility for commercial application and therefore disappear from the market. Such market exclusion may give additional market power to the remaining technological solutions. The additional market power of patent holders that faced ex-ante competition may lead to potential anticompetitive abuses.

The hold-up problem may concern replaceable patents. In the presence of ex-ante competition, a standard setting agreement may lead to the upstream foreclosure giving additional market power to the patent holder that faced ex-ante competition. That may result in the hold-up problem, which is in the abuse of the additional market power gained by exclusion of competing technological solutions. In example 1, such an abuse consisted of increasing the royalty for replaceable patent included in the standard from 0 € to 30 €.

Holders of irreplaceable patents may not be the source of the hold-up problem, because they do not gain additional market power by joining a standard setting agreement. If a given patent holder faces no ex-ante competition for its technological solution, any potential upstream foreclosure does not increase its market power, implying that it will not be able to abuse its additional market power. It may not hence be the source of the hold-up problem. Furthermore, it may be potentially harmed by the hold-up problem. In example 1, the presence of the hold-up problem results in decreasing the royalty for irreplaceable patent from 100 € to 70 €.

2.3.2 Difficulty of solving the hold-up problem ex-ante

In theory, the potential hold-up problem arises when patent holders do not set their royalties before the standard is adopted. The natural question to ask is hence whether the simplest solution to the hold-up problem would be to oblige the concerned patent holders to set their royalties before the standard adoption. The answer to this question appears to be negative. In practice, such a solution may be difficult to implement.

Patent holders developing a standard are often not willing to fix the royalty for the emerging standard before it is introduced in the market. While developing the standard, patent holders do not know all the potential uses of the emerging technology and are thus unable to estimate the potential profits they will be able to generate on licensing it. They may hence find it not easy to agree on the royalty charged for the emerging technology and the division of this royalty between the involved patent holders.

It may be difficult to agree ex-ante on the royalty charged for the emerging technology no matter whether the royalty is nominal or proportional. Setting ex-ante a nominal royalty may be difficult, because it may yield a risk of setting too high a royalty yielding very low profits or alternatively setting too low a royalty as compared to the potential profits. What's more, as indicated by Lévêque and Ménière (2008), negotiating royalty fees before the standard emerges might be too costly.

Deciding ex-ante on a relative royalty (set as a percentage of the sale price) may be also challenging because the parties of the standard setting agreement may wrongly estimate the price elasticity for the downstream product. The relative royalty constitutes the marginal cost of the downstream producer and as such may be passed on the consumers by the downstream producers. Therefore, in order to maximize their profits, the upstream patent holders need to well estimate the possible effects of their relative royalties on the downstream demand. When it is still unknown to which products the royalties will apply this may be simply impossible.

Requiring the concerned patent holders to set ex-ante the division rule of the joint royalty between the relevant patent holders may be also unrealistic. Marginal contributions of different patent holders to the economic value of the developed standard are often not known ex-ante. Not knowing the final uses of the emerging standard, the patent holders may find it very difficult to estimate their economic impact on the economic value of the standard. Without this information, it is unclear on which business variables they could base their negotiations on the division rule.

2.3.3 FRAND as a practical solution to the hold-up problem

Given that there may not exist a perfect ex-ante solution to the potential future hold-up problem, the possible solution may need to rely on ex-ante commitment not to charge excessive royalties ex-post. While parties may not be willing to fully commit to future royalties, there may still reach certain agreement limiting potential future abuse of the increased market power. In particular, while reaching a standard setting agreement, they may commit not to abuse the additional market power gained from excluding competing technological solutions.

The idea of solving the hold-up problem ex-ante while postponing the royalty setting for the future relies on the commitment that the concerned patent holders will behave in the future as if the competing technological solutions that could have been used in the standard were not eliminated. There does not appear to be any particular reason why a standard setting including such ex-ante negotiation logic would not be reached. Before the standard is adopted, a holder of a replaceable patent is willing to join such an agreement, because if it does do not join such an agreement, its technological solution will be likely replaced by a competing alternative in the developed standard. Similarly, a holder of an irreplaceable patent may have nothing against such an agreement because it does not face any competing technological solutions ex-ante and thus the agreement would not really limit its behavior.

There have been practical attempts of solving the hold-up problem without forcing the patent holders to commit to the royalties ex-ante. In particular, standard setting organizations (for example JEDEC[347]) try to resolve the potential hold-up problem by requiring its members to commit to FRAND (Fair, Reasonable And Non-Discriminatory) licensing terms.[348] The FRAND commitment requires the royalties set ex-post to be fair, reasonable and non-discriminatory, without specifying these royalties ex-ante.[349] This practical solution allows the patent holder to postpone setting its royalties until the economic value of the emerging standard is known, while assuring that royalties charged ex-post are not excessive or discriminatory. The execution of the FRAND commitment relies on the contract law, as a violation of FRAND terms may be always brought to the court.

FRAND terms may be interpreted as licensing terms that would have been negotiated ex-ante if the economic value of the standard had then been known. Such an interpretation may rely on estimating the marginal contributions of every patent used in the standard. This approach clearly distinguishes between patents facing ex-ante competition and unique irreplaceable patents. The marginal contribution of the former is small, as it may be replaced by the competing alternative. Therefore, FRAND relying on ex-ante negotiation logic would attribute a small royalty to this patent holder.[350] The marginal contribution of the latter is relatively high as without its participation the standard would not arise. Therefore, FRAND relying on ex-ante negotiation logic would attribute higher royalty to this patent holder.

By attributing low royalties to patent holders facing ex-ante competition, FRAND terms relying on ex-ante negotiation logic may eliminate the potential hold-up problem. The hold-up problem is related to the abuse of supplementary market power gained after the standard emergence. It applies to patent holders facing ex-ante competition. By eliminating ex-ante competition, certain patent holders may be sometimes able to charge excessive royalties ex-post. These excessive royalties, known as the hold-up problem, would not be allowed under FRAND terms relying on ex-ante negotiation logic. Such

[347] For more information concerning JEDEC, see http://www.jedec.org/.
[348] See Farrell et al. (2007).
[349] While levels of royalties are often not set ex-ante, standard setting organizations sometimes require patent holders to commit to a royalty cap (see Leveque and Meniere, 2009).
[350] For the same reason FRAND terms relying on ex-ante negotiation logic would attribute relatively low royalties to so-called patent trolls. Patent trolls are companies holding patents of minor or null marginal contributions and enforcing these patents against the alleged infringers. Given their minor (or null) contributions, FRAND terms relying on ex-ante negotiation logic would attribute relatively low royalties to them.

terms attribute low royalties to patent holders which represent low marginal contribution. These ones face ex-ante competition.

2.4 Guidelines on applicability of Article 101 TFEU to standard setting agreements

The recently published guidelines on applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements recognize FRAND terms as one of the three conditions that if satisfied may indicate that a given standard setting agreement is not anticompetitive.[351] These three conditions are: (1) unrestricted participation in standard setting, (2) transparent procedure for standard adoption and (3) fair, reasonable and non-discriminatory terms for granting the access to the standard.

The three conditions identified by the guidelines seem to rely on different goals. The first two conditions (unrestricted participation and transparency) appear to maximize beneficial effects of standard setting agreements on technological progress. The last condition appears to be more related with the elimination of potential anticompetitive effects.

The unrestricted participation required by the guidelines gives an opportunity for patent holders to explain how their technological solutions could contribute to the emerging standard. As the recent innovations are not often common knowledge, unrestricted participation of potentially concerned inventors may help to develop a standard benefiting from the best available technologies. The unrestricted participation also gives a possibility for potential users of the emerging standard to voice their needs. This may help the developers of the standard to better match the specific requirements of the downstream producers and hence may contribute to the development of a wider range of products using a given standard.

The transparency of the standardization work is likely indicated in the guidelines in order to smooth the standard setting process. Standardization requires lots of coordination between different inventors as well some feedback from the downstream producers or the developers of the complementary technological solutions. The transparency of the process may facilitate such coordination. It seems for example that a potential inventor will be more willing to participate in the standard setting procedures if it is assured that the potential omission of its technological solution from the standard will be done in a transparent manner. Similarly a downstream producer potentially interested in the emerging standard may be more willing to comment on the emerging standard, if it is well informed that this standard is developed, has means to voice its comments and will be assured that its comments will be considered.

The third condition identified by the guidelines explicitly refers to the FRAND terms. The FRAND terms may in theory solve the hold-up problem, but this depends on how they are interpreted in practice. While there is no clear economic interpretation of FRAND[352], there is certain understanding that the fair and reasonable prong of FRAND may be given by licensing terms that would have been negotiated, if the parties had

[351] Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, § 280.
[352] See Layne-Farrar (2010) and Layen-Farrar et al. (2007).

knew the value of the innovation ex-ante[353]. As discussed in the previous subsection, such an interpretation appears to well address the potential hold-up problem.

The guidelines indicate two possible ways of verifying whether royalties charged ex-post are FRAND: (1) comparison of royalties charged ex-post with those charged before the standard adoption[354] and (2) comparison of royalties charged ex-post with the royalty rates charged for the same patent in other comparable standards[355]. Both ways tend to ignore the potential harm to innovation. As inventing may be a costly and risky process, the perspective of sufficiently high returns is needed to stimulate firms' investments in innovation. Those high returns imply royalties exceeding the development costs, so that firms could recover investments in both successful and unsuccessful innovation efforts. The royalties suggested by the guidelines may not satisfy this condition. The royalties charged before the standard adoption or the royalties charged for using the same technical solution in the other standard may not fully cover investments in innovation. A patent holder may be sometimes inclined to temporarily charge a very low licensing fee before the standard is set, as marginal patenting costs may be very low. The charged royalties may then not allow recovering (often very high) fixed costs.

All in all, the guidelines concerning application of Article 101 TFEU to standard setting agreements seem to make an important step in clarifying that standard setting agreements may contribute to technological progress and may be therefore highly desirable. They also rightly acknowledge that standard setting agreements may lead to hold-up problems. They seem to ignore however the fact that by limiting the level of royalties for all patents included in the standards they may eliminate incentives to reach a standard setting agreement and undertake innovation efforts.

2.5 FRAND as the solution to the hold-up problem that recognizes the goals of the innovation policy

It seems that FRAND terms may be used as a solution to the potential hold-up problem that does not harm innovation, if they are interpreted as licensing terms that would have been negotiated ex-ante if the value of the innovation was then known. Such an interpretation leads to a different treatment of holders of replaceable patents and holders of irreplaceable patents. The marginal contribution of the replaceable patent is rather small, as it may be always replaced by some other competing patent. Therefore, FRAND terms relying on the ex-ante negotiation would likely attribute a rather small royalty to this patent holder. The situation would be different for the holder of the irreplaceable patent. Its contribution is very important, because the standard would not emerge without it. FRAND terms based on the ex-ante negotiation logic would thus likely attribute a higher royalty to the holder of the irreplaceable patent.

FRAND terms relying on the ex-ante negotiation logic may eliminate the hold-up problem and be therefore neutral for competition. The source of the hold-up problem is related to the potential abuse of the supplementary market power gained after the standard is adopted. The ex-ante negotiation logic would attribute small royalties to the ex-ante replaceable patents, as their marginal contributions are not high. Therefore,

[353] See Farrell et al. (2007).
[354] Op Cit, §289.
[355] Op Cit, §290.

patent holders gaining supplementary market power would not be able to abuse it by charging excessive royalties.

FRAND terms relying on the ex-ante negotiation principle may stimulate innovation. While they attribute low returns to investments in replaceable technologies, they assure higher returns to investments leading to creation of irreplaceable technologies. Firms may hence be motivated to undertake innovation efforts aiming at inventing the irreplaceable patents. Even if they invent replaceable patents from time to time, returns to their irreplaceable patents may be still sufficient to allow them to recover all their investments in innovation.

As well designed FRAND terms may eliminate the potential hold-up problem, it would seem adequate to exempt standard setting agreements using FRAND terms from Article 101 (1) TFEU. This exemption could apply as long as FRAND terms are used, no matter whether they are required from all the concerned patent holders or only from holders of replaceable patents. Whether FRAND terms apply to all the relevant patent holders or only to those who have invented replaceable technologies, the potential anticompetitive effects of standard setting agreements should be eliminated. From the competition point of view, it seems to be no reason to forbid standard setting agreements obliging all the involved patent holders to respect FRAND terms or standard setting agreements implying FRAND terms on only firms holding patents on replaceable technologies.

3. APPLICATION OF ARTICLE 102 TFEU TO STANDARD SETTING AGREEMENTS

Standard setting agreements may lead to the violation of the Article 102 TFEU if they result in excessive pricing. Article 102 (2a) TFEU prohibits a company in a dominant position to directly or indirectly impose unfair purchase or sell prices or other unfair trading conditions. The EU national competition authorities may treat excessive royalties charged by a licensor holding a dominant position as excessive pricing employed by a dominant firm and hence as the violation of Article 102 (2a) TFEU.[356]

While there have not been many cases investigating potential excessive royalties charged after reaching a standard setting agreement, there are two recent relevant cases: the *Rambus* case and the *Qualcomm* case. The *Rambus* case started in August 2007, when the European Commission sent a Statement of Objections accusing Rambus, a technology licensing company, of breaching Article 102 TFEU by claiming unreasonable royalties for the patents used in the adopted standard related to computer memory chips.[357] Rambus did not commit to any type of FRAND terms in the standard setting process and was accused of manipulating the standard setting process so that the emerging standard would rely on patents held by Rambus without disclosing those patents in the process. This alleged deceptive strategy could have potentially helped Rambus to gain a dominant position without committing to FRAND terms. If the involved parties had known about the existence of the patents held by Rambus, they might have had potentially impose the FRAND terms on Rambus. Not having

[356] See Geradin (2008).
[357] EC Press Release MEMO/07/330 of 23/08/2007. For a detailed discussion of the *Rambus* case see Killick and Berghe (2010).

committed to FRAND terms, Rambus had allegedly more flexibility to charge higher royalties and allegedly abused this power.

The *Rambus* case ended with commitments. In June 2009, Rambus announced that it had reached a tentative settlement with the European Commission.[358] Under this settlement, the European Commission would not find Rambus liable and Rambus would commit to offer licenses with maximum royalty rates for certain memory types and memory controllers. The settlement was formally accepted by the European Commission in December 2009.[359]

The royalty policy implemented by Rambus after the standard was set might have fallen under Article 102 TFEU. After the standard was adopted, Rambus might have held a dominant position. Then, excessive royalties may be interpreted as abuse of dominance prohibited by Article 102 TFEU.

It appears less clear whether the alleged deception strategy of Rambus is forbidden by Article 102 TFEU. Article 102 TFEU prohibits abusing a dominant position, but does not necessarily prohibit gaining a dominant position. The alleged deception strategy relying on not disclosing the relevant patents may be used to gain a dominant position, but does not seem to be an abuse of the existing dominant position. It hence does not appear very clear why Article 102 TFEU would apply in this case. The Rambus case did not shed any light on this potential uncertainty, as it ended after the Commission accepted the commitments proposed by Rambus,

Excessive royalties have been also investigated in the *Qualcomm* case. Qualcomm holds essential patents in the WCDMA standard, a part of the 3G (third generation) standard for European mobile phone technology (also referred to as "UMTS"). After the formal complaint of Ericsson, Nokia, Texas Instruments, Broadcom, NEC and Panasonic, all mobile phone and/or chipsets manufacturers, accusing Qualcomm of not respecting FRAND terms, the European Commission initiated formal antitrust proceeding against Qualcomm in October 2007.[360] The investigation aimed at establishing whether Qualcomm held a dominant position in the WCDMA licensing market and whether it had breached its FRAND commitment. In its press release, the European Commission seemed more focused on abusing supplementary market power gained as a result of standard setting than on abusing previously held market power: "[*t*]*he complaints are based on their understanding that the economic principle underlying FRAND commitments is that essential patent holders should not be able to exploit the extra power they have gained as a result of having technology based on their patent incorporated in the standard*." The investigation closed in November 2009 after all the complainants withdrew their complaints.[361]

Given that the above presented cases (*Rambus* and *Qualcomm*) did not ended with formal decisions, it is quite difficult to draw sharp conclusions from them. Yet, they tend to suggest that the application of Article 102 TFEU to excessive royalties may not

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[358] Press Release of Rambus dated 11/06/2009, http://www.rambus.com/us/news/press_releases/2009/090611.html.
[359] Press Release of Rambus dated 09/12/2009, http://www.rambus.com/in/news/press_releases/2009/091209.html.
[360] EC Press Release MEMO/07/389 dated 01/10/2007.
[361] EC Press Release MEMO/09/516 dated 24/11/2009.

depend on the history that has led to the given licensing policy. The fact that Rambus did not commit to FRAND terms, whereas Qualcomm had such a commitment did not seem to affect the allegations. In both cases, excessive royalties have been indicated as a potential antitrust concern. In general, from the perspective of Article 102 TFEU the potential anticompetitive effects of licensing policies do not seem to depend on whether there was a standard setting agreement in place and whether the parties committed to FRAND terms.

Application of Article 102 TFEU to standard setting agreements may imply the risk that no difference is made between the patent holders gaining the market power as a result of the standard setting agreement from those that would have the market power even in the absence of the standard setting agreement. By focusing on firms in dominant positions it treats equally the firms that could potentially benefit from the hold-up problem and the firms that do not improve their market positions by participating in a standard setting agreement. It thus may potentially eliminate the hold-up problem, but at the same time it may negatively affect inventors of new and unique technologies that do not contribute to the hold-up problem.

Even though European competition policy very often does not object high royalties charged by the patent holders[362], it is not clear whether the European Commission will follow the same approach in the case of the standard setting agreements. On one side, the *Rambus* case tends to suggest that the focus of the European Commission in dealing with standard setting agreements may be on the question of whether royalties are high. On the other side, the *Qualcomm* case may suggest that the European Commission may be more concerned by the question of whether by participating in a standard setting agreement the concerned patent holder reaches additional market power.

The competition policy restricting the level of royalties may affect innovation. The emerging possible approaches may yield different potential impacts for innovation. The first possible approach consists of restricting royalties of all the patents relevant to the standard. It may eliminate the possibility of sufficient returns to investments in innovation and by consequence discourage it. The second approach relies on eliminating returns to investments in innovation in technological solutions that face competition and leaving some rents for the innovators of unique irreplaceable technological solutions. It may be potentially effective in stimulating innovation efforts in the domains that face no potential or actual competition.

4. CONCLUDING REMARKS

There may be sometimes a tension between competition policy and innovation policy.[363] While innovation policy recognizes a dominant position as a reward to innovation efforts and hence one of the engines of technological progress, competition policy may prevent innovators to fully exploit their dominant positions. More in

[362] The application of the competition law to markets characterized by high innovation rate tends to play more important role after the patent expiry. For example, the European Commission appears to be more concerned about the behaviour observed around the period of the patent expiry in the pharmaceutical industry, when the generic producers consider an entry, rather than by the behaviour of the producer of the drug that will be still protected by the patent for quite some time.

[363] For an interesting discussion of the relation between the US antitrust laws and intellectual property ("IP") laws see Brumfield and Schepler (2010).

particular, high royalties may be perceived as perfectly normal from the point of view of innovation policy and be forbidden by the competition law.

Standard setting agreements complicate the traditional tension between the competition policy and the innovation policy by eliminating ex-ante competition. The traditional tension between competition policy and innovation policy concerns superior technologies without viable alternatives. Standard setting agreements may lead to the elimination of alternative technological solutions, increasing market power of the parties involved in the standard agreement. Competition policy may prohibit the abuse of this extra market power and try to limit potential licensing policies applying to the technological standards. On the other side, innovation policy may be opposed to such an approach, claiming that any restrictions imposed on the licensing policies may limit innovation efforts.

The recently published guidelines on the applicability of Article 101 TFEU and the recent cases concerning standard setting agreements may suggest that the European Commission may consider that standard setting agreements violate the competition law if they result in excessive royalties. The provisions of Article 102 TFEU prohibit different kinds of abuses including exploitative abuses such as excessive pricing and standard setting members may not be immune from such rules. This interpretation may cause certain tension with the European innovation policy. By decreasing the level of the expected royalties charged by the holders of patents relevant to a standard, competition policy may discourage investments in innovation. It may be therefore desirable to find a better method of assuring that standard setting agreements do not harm competition without discouraging too many investments in innovation. The real question lies hence in identifying tools providing the best balance between the two polices (i.e. the innovation policy and the competition policy) while ensuring the effectiveness of competition enforcement.

The overall policy goal could be to have competition policy forbid abusing additional market power generated by the standard setting agreement and allow exploiting market power that a patent holder would hold without participating in the standard setting agreement. Such a policy would treat differently holders of replaceable patents and holders of irreplaceable patents, forbidding the former to charge excessive royalties and leaving more freedom to the latter. It would hence leave sufficient rents for companies developing new technological solutions, without forcing the users of the emerging standards to pay for the technological solutions that are less innovative and face (at least ex-ante) competition.

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Like father like son –
The parental liability under the EU Competition law today

E. ISLENTYEVA, LL.M.[·]

In the last couple of years, the parental liability issue has become one of the central questions in the application of European Competition law. Hence, in this article, I would like to analyse fundamental case-law and recent developments in order to answer the essential question: when will the parent company be held liable for its subsidiaries' infringements of the EU Competition law? In the following I will tackle three main issues: first, the liability of the parent company for its 100%-owned subsidiary, the liability in case of a partially-owned subsidiary, and the recent proposals to use Company law approach while examining whether the parent should be held liable.

1. THE SINGLE ENTITY THEORY AND THE "WHOLLY-OWNED" PRESUMPTION

I shall start with the basic notions which are used while deciding whether the Commission or a National Competition Authority (NCA) may hold the parent company liable under EU Competition law. From very early on, the Court of Justice made clear that the notion of an "undertaking" is pre-eminently an economic one.[364] The focus on the *economic unit* rather than the legal entity is clearly set out, for example, in the case of *Hydrotherm* back in 1984[365]:

"In competition law, the term 'undertaking' must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question, even if in law that economic unit consists of several persons, natural or legal."[366] The definition of the particular set of legal entities as an "undertaking" is one of the crucial criteria of the EU Commission and ECJ's analysis while applying Articles 101 and 102 TFUE (former Articles 81 and 82 TCE), as these articles, at the core of EU Competition law, are directed at undertakings and apply to them regardless of their legal nature and how they are organised. However, it should be mentioned that, for effective enforcement purposes, infringement decisions can only be addressed to entities with legal personality.[367]

[·] PhD student, University of Luxembourg.
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[364]"An undertaking is constituted by a single organization of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long term economic aim". Case 19/61, *Mannesmann v. Haute Autorité*, [1962] ECR 675, at paragraph 705.
[365]Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11.
[366]See also Case T-11/89, *Shell International Chemical Company v Commission, [1992]* ECR II-757, at paragraph 311 and Case C-73/95 *P, Viho Europe BV v Commission* [1996] ECR I-5457, at paragraphs 50, 53. The Court of First Instance has in the meantime given its' own, more elaborate definition: cf. footnote 6. It seems to consider though that there is no difference between the substance of both definitions: Cf. Cases T-137/94 *ARBED v Commission* [1999] ECR II-303, paragraph 90, and T-145/94 *Unimétal v Commission* [1999] ECR II-585, paragraph 600 (both "Steel beams").
[367] Case C-97/08 *P Akzo Nobel and Others v Commission* [2009] ECR I-8237, at paragraph 57: "The infringement of Community competition law must be imputed unequivocally to a legal person on whom

Also in *General Química and Others* v *Commission* case[368] the Court described in a very precise manner the concept of an undertaking. First, it is restated that an "undertaking" is any entity engaged in economic activity, regardless of its financing and legal status[369], and that, furthermore, it must be constructed as an economic unit, which might comprise legally distinct persons. Hence, and given that any economic entity violating competition law must answer for that infringement under the principle of personal responsibility[370], it is logical that the parent company cannot eschew liability for the actions taken by its subsidiary when the parent and subsidiary make up one economic unit, in particular when, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links which tie those two legal entities[371], or, further to the wholly-owned presumption stated in *Akzo*.

Thus, the **EU Commission's approach comprises three steps**:

1) It identifies the specific entity that has engaged in the illegal conduct (for example, after establishing that employees[372] or a genuine agent[373] participated in collusive contacts (e.g. cartel meeting), their employer/principal will be held liable for their acts, regardless of whether the managers knew about the involvement in the infringement of the company representative or not);

2) The EU Commission establishes whether that legal entity is part of a broader corporate group that can be held *responsible* for the infringement *as a "single economic entity"*;

3) The EU Commission decides which entity or entities within the economic unit to hold *accountable* for the infringement when imposing the fine.

It is important to note that, where it is proven that the parent company gave instructions to the subsidiary participating in the cartel or knew about the illegal conduct (without intervening), the parent company will be considered itself as a direct participant in the

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fines may be imposed and the statement of objections must be addressed to that person (see, to that effect, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission*, [2004] ECR I-00123, paragraph 60, and Joined cases C-322/07 P, C-327/07 P and C-338/07 P *August Koehler and Others v Commission* [2009] ECR I-0000, paragraph 38). It is also necessary that the statement of objections indicate in which capacity a legal person is called on to answer the allegations". See also Richard Burnley, Article: Group Liability for Antitrust Infringements: Responsibility and Accountability, World Competition Journal, Volume 33, Issue 4, December 2010, p.596.

[368] Case C-90/09 P *General Química and Others* v *Commission* [2011] ECR I-0000, paragraphs 34 to 40.

[369] See Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustriand Others* v *Commission* [2005] ECR I-5425, paragraph 112; Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 107; and Case C-205/03 P *FENIN* v *Commission* [2006] ECR I-6295, paragraph 25.

[370] *Akzo Nobel and Others* v *Commission*, paragraph 56 and the cited case-law.

[371] *Akzo Nobel and Others* v *Commission*, paragraph 58 and the cited case-law.

[372] Joined Cases 100/80 to 103/80 *Musique diffusion française e.a. v Commission*, [1983] ECR 1825, paragraph 97; Case T-9/99 H*FB and others v Commission*, [2002] ECR II-1487, paragraph 275; Case T-15/99 Brugg Rohrsysteme v Commission, [2002] ECR II-1613, paragraph 58; Case T-236/01 *Tokai Carbon v Commission*, [2004] ECR p.II-1181, paragraph 277.

[373] Case T-66/99 – *Minoan Lines / Commission*, [2003] ECR II-5515, paragraphs 138-139.

cartel infringement, directly and independently liable. Furthermore, even the ultimate and intermediate parents can equally be held jointly liable for having exercised a decisive influence over the commercial policy of its infringing subsidiary, which reinforces the solidity of the Commission's conclusions in the subsequent Court review.

1.1 Single economic unit (the Knauf Gips case)

The conduct of a subsidiary, according to the ECJ and the EU Commission, may be imputed to the parent where the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, taking into consideration the economic, organisational and legal links between two legal entities. In such a situation, the parent company and its subsidiary constitute a single economic unit and therefore a single undertaking within the meaning of EU Competition law.[374]

The decision rendered by the ECJ in the *Knauf Gips* matter[375] provided interesting guidelines as to the criteria of the aforementioned single economic unit in a peculiar situation of sister companies owned by as single family. The Court reminded the appealing company (Knauf Gips) that "the existence of an economic unit may (…) be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such unit."[376] In the case at hand, the shareholders of the parent company and the other entities of the group are the same, viz. 21 individuals from the same family; the two managing shareholders of the parent company are also those of all the other companies; a family contract provides for the single management and direction of the companies in the group. More interestingly, the Court noted that all sales figures related to all companies of the group were communicated by the appellant and the appellant spontaneously provided the Commission with the turnovers of all group companies in the pre-judicial phase.[377]

The consideration of the parent company and its subsidiary as one undertaking gives the EU Commission and the Court the right to hold both of them liable for the cartel infringements committed only by the subsidiary. Furthermore, it has consistently been held that the Commission has the power to impute liability for unlawful conduct to the parent company, to the subsidiary, or to the parent company jointly and severally with its subsidiary.[378]

1.2 Decisive influence: like father like son

In accordance with the case law of the EU Courts, the parent company can exercise a decisive influence over the conduct of its subsidiary and there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary.

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[374] *Akzo Nobel and Others* v *Commission,* cited above, see also Erik H. Pijnacker Hordijk and Simone J. H. Evans, Article: The Akzo Case: Up a Corporate tree for Parental Liability for Competition Law Infringements, Journal of European Competition Law and practice, 2010, Vol.1, No. 2, p.127.
[375] Case C-407/08 P *Knauf Gips KG v Commission* [2010] ECR 00000.
[376] Ibidem, paragraph 65.
[377] Ibidem, paragraphs 66-71
[378] Case T-386/06 *Pegler v Commission* [2011] ECR 00000, paragraph 103, see also Joined cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others v Commission* [2006] ECR II-5169, paragraph 331.

The key criterion is the actual exercise of decisive influence of the parent company over its subsidiaries' conduct, which can be presumed in cases where the parent holds close to 100% of the shares of the subsidiary. If there is such an influence, the parent company may be held liable for the infringement by its subsidiary of EU Competition law, unless it demonstrates the complete autonomy of such subsidiary. While under EU merger control rules the possibility of control suffices to find a concentration, for the imputation of infringements of Article 101 or 102 TFEU one needs to establish the possibility of control and the actual exercise of such control rights (which can be presumed under the conditions defined by case-law).

The other important criterion in the equation is the relevant period of time. While analysing a particular case, the EU Commission will look at the relevant period when the parent company may or may not exercise decisive influence.

Thus, one may ask whether the parent company will be held liable for its subsidiary's cartel's involvement because the two companies may, in fact, represent a single economic entity and the actions of one of them will be simply the continuation of their general strategy. One could say, a bit ironically, that the ancient approach "like father like son" or in this particular case, maybe, "like son like father", represents the general attitude of the EU case-law in imposing fines on parent company for the competition rules' infringement made by the subsidiary[379]. Apparently, it is presumed very unlikely that the nearly fully owned subsidiary should be involved in a cartel without its parent's supervision ("like father like son"), therefore, the parent company should be punished for the conduct of its subsidiary ("like son like father").
In addition, the motivation of the EU Commission, when exercising its discretion to hold a parent company liable, is deterrence, which has at least two elements. First, the fine increases considerably by enlarging the scope of the undertaking, for example the 10% cap of the fine will be calculated on the total worldwide turnover of the parent (the group)[380] and deterrence multipliers can be applied to particularly large offenders. Second, the joint liability of a financially strong parent company ensures the payment of the fine in most cases and has a more disciplinary effect on the whole group than fining a small subsidiary.

Interestingly, in the United States, a parent company can only be held liable for the illegal conduct of its subsidiary if the parent was itself directly involved or if the apparent corporate separateness of parent and subsidiary is a sham.[381] Indeed, the cornerstone of corporate liability is the "presumption of separateness" between distinct legal entities,[382] which can be rebutted by "piercing" or "lifting" the corporate veil, but courts are reluctant to allow such exceptions.[383] Mere ownership, common control, and

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[379] This analogy is made for the purposes of illustration and does not suggest that the EU Commission would flout the presumption of innocence or that it would hold entities jointly liable without first establishing that they form one undertaking.
[380] See, for example, Joined cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others v Commission*, not published in the ECR, paragraph 390.
[381] Ibidem,[**12].
[382] See Peter Nygh, Article: The Liability of Multinational Corporations for the Torts of their Subsidiaries, European business Organization Law Review 2002/3: 51-81, page 65.
[383] See e.g. *A.M. Kashfi v. Phibro-Salomon*, Inc., 628 F. Supp.727; 1986 U.S. Dist. LEXIS 29337,[**11]. The case concerned seeking recovery for services that the plaintiff claimed to have rendered for the

active oversight of the subsidiary by the parent are not sufficient. It must be specified however, that the "plea bargaining" procedure results in many cases ending in a cooperation between the target entity and the antitrust authorities[384], which encompasses also an agreement on who the addressee will become from the group.

1.3 The Akzo case and the "wholly-owned" presumption

An important development in the modern case-law on parental liability is the ECJ judgment rendered in the *Akzo*[385] matter, which gave guidance on how to tackle cases where a parent is held liable based on a presumption of decisive influence over its (nearly) wholly owned subsidiary. At the same time it put an end to a long debate on the interpretation of previous case-law regarding the use of a presumption without supporting evidence.

In essence, this ruling confirmed the Commission's interpretation of a long line of case law before *Akzo*. The "(nearly) wholly-owned" presumption appeared first implicitly in *ICI*[386] where the Court put forward the notion of the "unity of the group" and was later formulated explicitly in *AEG*[387]. It has been confirmed by the Court of Justice, in *BPB Industries*[388] and *Stora*[389], and equally by the General Court in *Stora*[390], *Limburgse Vinyl,*[391] *Michelin II,*[392] *Tokai Carbon (II) – Specialty Graphites*,[393] *Sodium Gluconate*[394] and *DaimlerChrysler*,[395] among others. In none of these judgments did the Court require additional indicia of the exercise of decisive influence for the application of the presumption.

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defendant. The court came to the conclusion that the plaintiff had failed to adduce any evidence that would support piercing the corporate veil.

[384] See also cases *Walter E. Heller & Co .v. Video Innovations, Inc.,* 730 F.2d 50, 53 (2d Cir. 1984) and *Miles v. American Tel. & Tel*., 730 F.2d 193, 195-96 (5th Circ. 1983), and cases *Coastal States v. Zenith*, 446 F Supp. At 337, *Williams v. McAllister*, 534 F.2d at 21 and *Fidenas A.G. v. Honeywell, Inc*., 501 F. Supp. 1029, 1035-38 (S.D.N.Y. 1980).

[385] *Akzo Nobel and Others v Commission,* cited above.

[386] *ICI v Commission,* cited above, in particular, at paragraph 139.

[387] Case 107/82 *AEG v Commission* [1983] ECR 3151, at paragraph 50.

[388] Case C-310/93 P *BPB Industries and British Gypsum v Commission* [1995] ECR I-865, paragraph 11.

[389] Case C‑286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I‑9925, paragraph 29.

[390] Case T-354/94 *Stora Kopparbergs Bergslags v Commission* [1998] ECR II‑2111, paragraphs 78-84.

[391] Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94,T-325/94, T-328/94, T-329/94 and T-335/94 *LVM and others v. Commission (PVC II)*, [1999] ECR II-931, paragraph 961, where the Court held that «Montedison […] held all the capital of Montedipe and Montepolimeri, with the result that those companies must be regarded as necessarily following a policy laid down by the bodies which, under its constitution, determine the policy of the parent company». See also paragraphs 984 and 985.

[392] *Michelin II,* cited above, paragraph 290.

[393] Judgment of 15 June 2005, Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon Co. v. Commission (Tokai II – Specialty Graphites)*, not yet reported, paragraphs 58-60.

[394] Case T-43/02 *Jungbunzlauer v Commission*, not yet reported, paragraph 125, Case T-314/01 *Avebe v Commission*, not yet reported, at paragraph 136; Case T-330/01, *Akzo Nobel NV v Commission*, not yet reported, paragraph 83.

[395] Judgment of 15 September 2005, Case T-325/01, *Daimler Chrysler AG v. Commission*, not yet reported, at paragraph 221.

The *Akzo* decision held that:

" there is a rebuttable liability presumption of parent companies for their subsidiary's cartel offences in the case of a 100% shareholding"[396], for in such a case "the parent company does in fact exercise a *decisive influence* over the conduct of its subsidiary".[397]

The *Akzo* case concerned a cartel between the main European producers (and initially US producers)[398] of choline chloride (known as vitamin B4), an additive used in the animal feed industry. The European members of the cartel agreed on prices and price increases for particular national markets and for individual customers, allocated individual customers and market shares between themselves, and agreed to control distributors and converters of the product, in order to avoid outside competition. After receiving a leniency application, the EU Commission started an investigation. On 9 December 2004 the EU Commission, in its Decision, found that the cartel was a serious infringement of Article 81 of the Treaty (now article 101 TFUE) and imposed fines of € 66.34 million on the European members of the cartel (Akzo Nobel, BASF and UCB).[399] Akzo Nobel had been fined € 20.99 million. In setting the fine, for the purposes of the 10% cap, the EU Commission took into consideration the economic strength of *the whole undertaking*, rather than the direct involvement in the cartel of the four subsidiaries[400]

1.4 Rebutting the "wholly-owned" presumption

The parent company may not be aware of its subsidiaries' illegal conduct, or it may be involved only indirectly. If the first statement is true and the "nearly wholly-owned" presumption is applicable, the parent company has the possibility to rebut it by substantiating its claims and by using the following arguments:[401]

1) The parent company is a pure financial holding company. However, usually such a claim is not successful because most often it is made by industrial holdings which are involved in shaping the group strategy. In fact, a financial institution can and often does equally engage in defining the strategy of its portfolio companies (at least by appointing managers and approving business plans), and nowadays the early capitalistic image of a pure rent seeker, without any engagement with the business, is very rare. In the *Akzo* matter, "Akzo Nobel NV [was] not a simply an investment vehicle which serves merely to invest capital in companies whose commercial operations it then leaves to those companies, withdrawing capital as soon as it considers that an investment in other companies, possibly not belonging to the Akzo Nobel group, would provide a better return".[402] In such a case, there is no "single economic unit" pursuing one commercial policy.

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[396] Erik H. Pijnacker Hordijk and Simone J. H. Evans, Article: The Akzo Case:…, cited above, p.127. (Emphasis added).
[397] Case *Akzo Nobel NV and Others. v. Commission*, cited above, paragraph 60. (Emphasis added).
[398] The fines have not been imposed on the US producers participating in the cartel as they have stopped participating in the cartel more than 5 years before the Commission's investigation began.
[399] Frederique Wenner and Bertus Van Barlington, *European Court of Justice confirms Commission's approach on parental liability*, DG COMP Competition Policy Newsletter, 1/2010, p.23.
[400] Ibidem. (Emphasis added).
[401] Richard Burnley, Article: Group Liability for Antitrust Infringements…, cited above, pp. 606-607.
[402] Commission Decision, COMP/E-1/37.773, *MCAA*, paragraph 240.

2) The provisions of national law prevent the exercise of decisive influence by the parent company over its subsidiary (it can also be merger hold-separate obligations before divestments). In that case, the group liability principle will not apply as parent and subsidiary are not acting as a single "economic unit". One may note that the group liability principle will still be applicable in cases where a parent company, while able to exercise a decisive influence, cannot be held liable for the conduct of its subsidiary under national law.[403]

3) The subsidiary had acted against the instruction of the parent company[404], but the case law requires full autonomy in this regard. A few disregarded instructions e.g. on the compliance program, or even misleading the parent for a period, while the parent could and did exercise its decisive influence on other aspects of commercial policy (not necessarily related to the market in question) would not exculpate the parent company.
If a parent company was involved in a non-direct way in a cartel it is, of course, an infringement of EU Competition law. However, its liability is normally demonstrated by the EU Commission (in the case of partly-owned subsidiaries or joint ventures) or usually presumed (in the case of the "nearly wholly-owned" subsidiaries); if the liability is presumed can be rebutted.

It should be understood that the EU Commission makes decisions on a case-by-case basis;[405] however authors note that the following arguments have proved unsuccessful in the past: [406]

1) The parent company was not aware of the infringement, the subsidiary acted without its approval and without informing the parent company;[407]
2) The parent company and the subsidiary chose different legal counsels and sent independent submissions during the proceedings before the EU Commission;[408]
3) The subsidiary's turnover was insignificant in comparison with the group turnover;[409]
4) Entrustment of day-to-day business to the local management of the subsidiary;[410]
5) The parent company was not itself involved in the production and sale of the relevant product;[411]

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[403] Commission Decision, COMP/39.165, *Flat Glass*, paragraph 414.
[404] Joined Cases 32/78 and 36/78 to 82/78, *BMW Belgium and Others v. Commission* [1979] ECR 2435.
[405] *General Química SA and Others v. Commission*, cited above, paragraph 79.
[406] Richard Burnley, Article: Group Liability for Antitrust Infringements…, *cited above,* pp. 603-605.
[407] Commission Decision, COMP/37.980, *Souris Bleue/TOPPS*, paragraph165; Commission Decision, COMP/37.857, *Organic Peroxyde*, paragraphs 377-378.
[408] Commission Decision, *Souris Bleue*, cited above, paragraph 165; Case T-175/05 *Akzo Nobel NV and others v. Commission* [2009] ECR II-00184, paragraph 111.
[409] *Bolloré SA and others v. Commission* [2007] ECR II-947, paragraph 144; Commission Decision, COMP/38354, *Industrial Bags*, paragraph 592; Commission Decision, COMP/F/38.456, *Bitumen NL*, paragraph 201.
[410] Commission Decision, COMP/C.38.238/B.2, *Raw Tobacco Spain*, paragraph 381; Commission Decision, *Butimen NL*, cited above, paragraph200; Commission Decision, COMP/39.165, *Flat Glass*, paragraph 409.
[411] Commission Decision, *MCAA*, cited above; Commission Decision, *Butimen NL*, cited above, paragraph259; Commission Decision, *Flat Glass*, cited above, paragraph445; Case T-168/05 *Arkema SA v. Commission* [2009] ECR II-00180, paragraph159.

6) The role of the ultimate parent company was apparently very limited given the size of the corporate group and the fact that there were intermediary holding companies between the ultimate parent and the subsidiary participating in the cartel;[412]
7) Reporting obligations between the subsidiary and parent company were restricted to financial reports and forecast only;[413]
8) The subsidiary had its own production installations and its own staff, and it entered its turnover into its own annual accounts;[414]
9) The Commission did not hold the parent company liable for cartel infringement by the same subsidiary in a previous case;[415]
10) The subsidiary acquired a significant proportion of its raw material from a group competitor;[416]
11) Overall corporate object of the parent company, as that object is very broad and allows for the management and running of subsidiaries;[417]
12) The existence only of the general compliance programme for the corporate group. The EU Commission has shown that it may interpret the exercise of such a programme as an attempt by the parent company to exercise *decisive influence*.[418] According to Richard Burnley, Competition counsel at the European Broadcasting Union, "in terms of ensuring an effective cartel deterrence policy, this position is clearly problematic since it encourages parent companies to implement little or no compliance supervision over the corporate group"[419].

Given the lack of success in rebutting the presumption in numerous cases, the claim has arisen that the presumption is not rebuttable. However, this has been specifically rejected recently in case C-521/09 P *Elf Aquitaine v Commission*.[420] While it has been confirmed by the EU Courts that the presumption of decisive influence is a rebuttable one and there is no "probatio diabolica"[421], the reason why it is often difficult to rebut is common to presumptions that are applied by all legal systems to typical situations. The prudent approach of the EU Commission to apply the presumption to nearly 100%

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[412] Commission Decision, COMP/F/38.638, *Butadine Rubber and Emulsion Styrene Butadiene Rubber*, paragraph 410.
[413] Commission Decision, *MCAA*, cited above, paragraphs 238-239 ; Case T-175/05, cited above, paragraphs 94-95; Case T-168/05, cited above, paragraph159.
[414] Joined Cases T-109/02 etc., cited above, paragraph142.
[415] Case T-203/01*Manufacture française des pneumatiques Michelin v. Commission [2003]* ECR 4071, paragraph290 ; Commission Decision, *Raw Tobacco Italy*, cited above, paragraph 348 ; Commission Decision, *Butimen NL*, cited above, paragraph 203; Commission Decision, *Butadine Rubber*, cited above, paragraph411.
[416] Joined Cases T-109/02 etc., cited above, paragraphs 143-144.
[417] Case T-69/04 *Schunk GmbH and Schunk Kolnestoff-Technik GmbH v. Commission* [2008] ECR II-02567, paragraph 62; Commission Decision, COMP/E-2/38.359 *Electrical and Mechanical Carbon and Graphite Products*, paragraphs 259-260.
[418] Commission Decision, COMP/E-1/38.823, *PO/ Elevators and Escalators*, paragraph631; Commission Decision, COMP/37.857, *Organic Peroxyde*, paragraphs 377-378; Commission Decision, *Flat Glass*, cited above, paragraph413.
[419] Richard Burnley, Article: Group Liability for Antitrust Infringements…, cited above, p.605.
[420]Case C-521/09 P *Elf Aquitaine SA v European Commission* [2011] ECR 00000, see paragraphs 53-67.
[421] Ibidem.

owned entities makes it difficult for parents in normal situations to show that they did not have or exercise their influence. [422]

The EU Commission has set the following test for rebuttal: to rebut the presumption, it must be shown that under special circumstances of the case where the parent company was not in a position to exert a decisive influence on its "wholly-owned" subsidiary, the latter nonetheless determined autonomously its commercial policy (that is, the parent company, despite its controlling rights, did not actually exercise a decisive influence as regard the basic orientations of the subsidiary's commercial strategy and operations on the market).[423]

Recent developments

a) The General Química case

One of the most interesting recent cases concerning the rebutting the "wholly-owned" presumption is the judgement of the ECJ in the *General Química – Repsol*[424] matter.

According to the EU Commission[425] and the General Court[426] the infringement committed by General Química (GQ) (producer of certain rubber chemicals) could be attributed to the owner of the 100% of its shares: Repsol Química (RQ), and also to Repsol YPF, owner of the 100% of the Repsol Química shares.[427]

Focusing on the general application of the ECJ's decision on the case, one may summarise as follows: first, the application of the "wholly–owned" presumption shall not be dependent upon the existence of additional evidence on the exercise of decisive influence over the conduct of the subsidiary; conversely, it may be applied automatically in cases of 100% ownership (paragraphs 41 and 42); second, the presumption is applicable even though the 100% ownership in the subsidiary is held indirectly through other entities (paragraph 88)[428]; and finally, according to the ECJ (also supported by AG Mazak) the decision shall be taken on case-by-case basis and "the General Court committed an error of law in affirming (…), that the arguments raised in order to establish such independence could not succeed "in the light of the case-law cited", without carrying out a concrete examination of the factors raised by the appellants" (paragraph 79).

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[422] In the Joined Cases T-204/08 and T-212/08 *Team Relocations NV and al. v European Commission* the General Court stated again that "there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the commercial policy of its subsidiary [...]", paragraph 150, see also paragraphs 145-154.

[423] See, for example, Commission Decision, *PO/Elevators and Escalators*, cited above, paragraph 605.

[424] Case C-90/09 P *General Química SA, Repsol Química SA, Repsol YPF SA v European Commission* [2011] ECR 00000.

[425] COMP/F/C.38.443, JO 2006, L 353, p.50.

[426] *General Química SA, Repsol Química SA, Repsol YPF SA v European Commission*, T-85/06 [2008] ECR II-00338.

[427] The ECJ rules on parenthood (*General Química v Commission*), http://chillingcompetition.com/2011/01/21the-ecj-rules-on-parenthood-general-quimica-v-commission/ , 5.05.2011.

[428] See Antoine Winckler, *Parent's Liability: New case extending the presumption of liability of a parent company for the conduct of its wholly owned subsidiary*, [2011], Vol. 2, No. 3, Journal of European Competition Law and Practice, pp. 231-233.

The ECJ also stated that:

a) The evidence that RQ did not know of the infringement before inspecting GQ's premises and did not partake in the infringement does not suffice to establish that the two companies did not make up a single economic unit, or to rebut the presumption of decisive influence (paragraph 103).

b) While it was proven that several management and administrative competencies were delegated from GQ to its executives, other evidence hinted that RQ interfered heavily in GQ's strategic and commercial policy (paragraphs 104-108).

Furthermore, the Court underlined that RQ's board was greatly involved in the shareholding of, and sale of real estate by, the other companies of the group; that GQ's sole director, who was appointed by RQ, provided the latter company with commercial and financial information and thus served as a significant link between the two companies; and finally note that such a provision of information was admitted by the parties themselves.

Finally, the ECJ upheld the decision of the EU Commission stating in the paragraph 109 that "the Commission did not commit an error of assessment in considering that the evidence submitted by the appellants, first, the fact that RQ was not aware of the infringement at issue and did not participate in that infringement or encourage its subsidiary to commit it, and, secondly, the detailed rules for determining and implementing GQ's commercial policy, (…), does not show that GQ determined its conduct on the market independently and, therefore, does not make it possible to rebut the presumption that RQ exercised decisive influence over GQ's conduct".

b) Testing the presumption before the ECHR

An unnamed Dutch company has recently asked the European Court of Human Rights (ECHR) to review the "wholly-owned" presumption, believing it to violate certain provisions of the European Convention concerning presumption of innocence. Although the fate of this request is still unknown, it must be noted that previous instances of presumption of culpability were not automatically condemned by the Court, its position being however that "Article 6 para. 2 (art. 6-2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence".[429]

2. PARTIALLY-OWNED SUBSIDIARY

The situation of the subsidiaries held far below 100% remains unclear[430]. Recent case-law has given only partial guidance on how far the logic of presumption extends below a 100% shareholding. The General Court has expressly extended the presumption to a shareholding of 98%, upholding the EU Commission's application of the "wholly-owned" presumption in the *MCAA* case. According to the Court: "all or substantially all of the capital of the subsidiary is held by its parent company and, therefore, that the

[429] ECHR, 07.10.1988, *Salabiaku v. France*, 10519/83.
[430] The EU Commission applies the presumption to the most obvious cases, while normally under merger rules there can be sole control above even 50%.

latter is able to exert influence on the commercial policy of its subsidiary, it is up to the parent to rebut the presumption"[431]. This follows the General Court's earlier judgment in *Michelin v. Commission*[432], where the Court upheld the application of the presumption to a parent company with a shareholding of more than 99% but less than 100%. In the past, the EU Commission has applied the presumption to a majority shareholding as low as 96% (*Flat Glass*[433] and *Hydrogen Peroxide and Perborate*[434] but the General Court so far ruled on the cases of *Arkema* and upheld the presumption in that regard. It is worth examining some recent judgments related to Arkema and its parents.

2.1 Arkema and Elf Aquitaine cases

By the MCAA decision of 19 January 2005[435], the European Commission imposed fines on Elf Aquitaine SA and its subsidiary at that time Arkema SA (formerly Atofina SA) relating to a cartel on the market for monochloroacetic acid.

According to the Commission, from 1984 to 1999 the members of the cartel were parties to an agreement regarding the maintenance of their market shares through a volume and customer allocation system.[436] Thus, the Commission imposed a fine of €45 million, jointly and severally, on Elf Aquitaine and Arkema. In addition, it imposed an increase for repeated infringement on Arkema alone, by virtue of its participation in an earlier cartel, since, at the time of that first infringement, Arkema was not yet controlled by Elf Aquitaine. Hence, Arkema was also fined, individually €13.5 million.

The companies brought two separate actions before the General Court and later before the ECJ seeking annulment of the Commission's Decision or a reduction of the amount of the fines imposed.

As it was mentioned before, Arkema was at the time of the relevant facts owned by Elf Aquitaine, at first to the extent of 97.6%, then, from the acquisition of the Elf group by Total Fina SA, in 2000, of 96.48%. From that day on, and for the remaining of the relevant period, Elf Aquitaine itself has been owned to the extent of 99.43% by Total.

The General Court in its decision stated that "the parent company which owns the near entirety of its subsidiary's share capital is, in principle, in a situation that is similar to that of an exclusive owner, regarding its power to exert a decisive influence over its subsidiary's conduct, as regards the economic, organisational and legal links which relate it to said subsidiary. Therefore, the Commission may apply to such situation the same regime of evidence, namely, rely on the presumption that said parent company effectively uses its power to exert a decisive influence on its subsidiary's conduct. Admittedly, it is not unconceivable that in some cases, minority shareholders might

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[431] Case T-168/05 *Arkema v Commission*, cited above, paragraph70.
[432] *Michelin II*, cited above, paragraph 290.
[433] Commission Decision, *Flat Glass*, cited above, paragraph 451.
[434] Commission Decision, COMP/F/38.620, *Hydrogen Peroxide and Perborate,* paragraphs 428-429 (96.48%).
[435] Commission Decision, C (2004) 4876 final, Case COMP/E-1/37.773-MCAA.
[436] See also the article summarizing the facts by Ricardo Oliviera and Miguel Romão, European Union: Court of Justice Annuls General Court's, "*Elf Aquitane" and "Arkema*" Rulings, 26.10.2011, http://www.mondaq.com/x/150690/EU+Law+Regulatory/Court+Of+Justice+Annuls+General+Courts+Elf.

have rights towards the subsidiary whose existence challenges the aforementioned analogy" (paragraph 53)[437].

Hence, one may wonder how *low* the percentage of ownership could fall to until the Court decides that the aforementioned presumption is not applicable any more, insofar as the decision does not provide with any guidelines (whether numerical or others) as to the calculation of such threshold.

It is interesting to note that in the litigation concerning another cartel case (Methacrylates), Arkema partially won its challenge against a 219.1 million euro fine. The Court reduced the fine imposed by the European Commission in 2006[438] on Arkema and its units for participating in a cartel in the acrylic glass sector to € 113.3 million. [439] However this reduction of the fine was not related to the percentage of Total/Elf Aquitaine's control over Arkema.

The original fine had been calculated on the basis of the worldwide turnover of Total SA, which was the parent company at the time, along with Elf Aquitaine. Total was originally held liable for € 140.4 million, while Elf Aquitaine was liable for the payment of € 181.35 million. The merged Total-Elf Aquitaine group spun off the chemicals group Arkema in 2006.[440] Thus, the Court upheld the fines levied on the parent companies, Total and Elf Aquitaine, for their roles in the cartel that ran from 1997-2002, which shared pricing and sensitive information.

But the Court contended in a statement that the spin-off of Arkema, which took place shortly before the Commission decision, meant the large deterrent effect of the fine was not justified for the separated company (paragraphs 338 – 353). The General Court found the 200 percent increase excessive and that a 25 percent increase is adequate to ensure a sufficiently deterrent effect of the fine imposed on them.[441]

Very recently, the ECJ confirmed the General Court's position on the MCAA *Arkema* matter but provided us with new insight on parental liability on the occasion of its appeal judgment regarding Arkema's former parent, Elf Aquitaine. Although the ECJ affirms that rebuttal of the wholly-owned presumptions is not *per se* "probation diabolica", it quashes the General Court's decision against Elf Aquitaine to the extent that the Court did not express its motives sufficiently regarding the refusal to rebut the presumption against the backdrop of the arguments brought to the case by Elf Aquitaine. The grounds for the final decision is, interestingly, represented by the rights of defence.[442]

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[437] Case T-217/06 *Arkema France, Altuglas International SA, Altumax Europe SAS v Commission* [2011] ECR 00000.
[438] Commission Decision, C (2006) 2098 final, 31 May 2006, COMP/F/38.645 – Methacrylate.
[439] *EU court cuts Arkema acrylic glass cartel fine*, Reuters, http://www.reuters.com/article/2011/06/07/eu-cartel-arkema-idUSLDE7560OU20110607, 09.07.2011.
[440] Ibidem.
[441] Ibidem.
[442] Case V-521/09 P *Elf Aquitane SA v Commission* [2011], not published in the ECR. See also, Conclusions de l'Avocat Général M. Paolo Mengozzi Aff. C-520/09 P *Elf Aquitane SA c/ Commission européenne* [2011], paragraph 13, in which he mentions that the applicant does not dispute the application of the presumption by the EU Commission when the parent company holds 98% of capital of the subsidiary.

Thus, after the judgments related to Arkema and its parents, the question of where we could draw a clear line of the (non-)application of the "wholly-owned" presumption is still open, but this depends on the policy choices of the EU Commission, which so far has shown restraint in applying the presumption to situations of close to 100% ownership.

2.2 (Non) application of the "wholly-owned" presumption

However, on the basis of the EU Commission's practice and the EU case-law, and relying on the existing literature,[443] the following factors could be considered as relevant and taken into account for actually demonstrating (not presuming) the parent's decisive influence over a partially-owned subsidiary[444]:

Share capital. The closer the shareholding in the subsidiary is to 100%, the more likely decisive influence will be found (and very close to 100% this has even given rise to a presumption of actual exercise of decisive influence).

1. Rights for shares. In some cases, voting rights attached to minority shareholding will give parent company a decisive influence over strategic decisions.
2. Composition of Board and supervisory Board. The EU Commission may rely on interlocking directorships or senior management overlaps to support a finding a decisive influence.[445]
3. Activity on same/ adjacent markets could be one of the proofs of decisive influence.[446]
4. Instructions to the subsidiary or reporting lines going up from the subsidiary to the parent. Such instructions/reports do not have to be linked to the subsidiary's cartel activity, but only need to relate to the subsidiary's commercial activities or strategy.[447] For example, the Board minutes will be considered carefully for the evidence of the decisive influence.[448]
5. Ownership of business assets. If the parent company owns the production installations used by the subsidiary and/or directly employs the staff working for the subsidiary, those facts will be taken as evidence of the existence of the decisive influence of the parent company.[449]

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[443] Richard Burnley, *Group Liability for Antitrust Infringements*…, cited above, pp. 609-611, see also Erik H. Pijnacker Hordijk and Simone J. H. Evans, *The Akzo Case*…, cited above, Antoine Winckler, *Parent's Liability*…, cited above, and Frederique Wenner and Bertus Van Barlington, European Court of Justice confirms Commission's approach on parental liability, cited above.

[444] In cases of fully owned subsidiary, where a presumption is applied, the EU Commission often supports its presumption by additional indicia without assuming at the same time the full burden of proving actual exercise of decisive influence; however, the company's rebuttal of the presumption has to be take into account also such supporting evidence by the EU Commission.

[445] Case T-345/94 *Stora Kopparbergs Bergslags AB v. Commission* [2011] ECR II-2111, paragraph70; joined cases T-109/02 etc. *Bolloré v. Commission,* cited above, paragraphs 135-140.

[446] Case T-308/94 *Cascades SA v. Commission* [2002] ECR II-925, paragraph 158; *Stora*, cited above, paragraph 83.

[447] *Shell International Chemical Co. Ltd v. Commission*, cited above, paragraph 312.

[448] Case T-314/01*Cooperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe v. Commission* [2006] ECR II-3085, paragraph37.

[449] Case T-352/94 *Mo och Domsjo AB v. Commission* [1998] ECR II-1989, paragraphs 89-94, Case *Knauf Gips KG v. Commission*, cited above, paragraphs 101-102.

6. Intra-group sales. If the sales by the relevant subsidiary to another group entity are treated in that subsidiary's accounts as intra-group sales, this may be considered as evidence that the group is being run as one economic unit.[450]

Furthermore, the use of the same commercial name and/or trademark will be taken into consideration, as in that case the two companies are perceived by third parties and on the market as forming one and the same economic entity.[451]

a) Joint Ventures

When the illegal conduct was carried out by a joint venture, the EU Commission will examine all the facts in order to determine whether one or more of the parent companies exercised decisive influence over the joint venture at the relevant time.[452] So far in cases of jointly controlled entities the EU Commission has not applied the presumption but has demonstrated the exercise of decisive influence by the parents.

b) Sister Companies

Where the EU Commission can prove that sister companies acted in a coordinated way as one and the same economic unit, it may hold one liable for an infringement where the other participated directly.[453] This is logical, because several types of entities within an undertaking can have a link to the infringement and thus constitute an undertaking: usually the subsidiary which is selling the product attends the cartel meetings, but the cartelised product is produced by the other subsidiary, and both are under the supervision of the managing company.

Thus, in order to conclude this discussion one may describe the **"nearly wholly-owned"** presumption in the following way: *if close to 100% of shares of the subsidiary are owned by parent company, it may be presumed under EU Competition law, that the parent company has exercised decisive influence over the subsidiary and may be held liable for the cartel infringement by its subsidiary.* However, the parent company can rebut this presumption by proving that it did not exercise decisive influence at the relevant period of time.

2.3 Recent developments in a Member State: The Durkan case

We have observed recently a remarkable case judged in the UK. *Durkan*[454] is the first case where the Competition Appeal Tribunal (CAT) did not apply a presumption that a parent controls subsidiary, but examined the issue as a factual matter. The contestable decision delivered by the Office of Fair Trading "concerns the practice of cover pricing

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[450] Case *Knauf Gips KG v. Commission,* C-407/08P, cited above, paragraph78.
[451] Commission Decision, COMP/F/38.620, *Hydrogen Peroxide and Perborate*, paragraphs 404-405, Case C-407/08P, cited above, paragraph104.
[452] Case *Avebe v Commission*, cited above, paragraphs 135-141, Commission Decision, COMP/38.899, *GIS Switchgear*, Commission Decision, COMP/F/38.433, *Rubber Chemicals*, paragraph 263, see also Commission Decision, COMP/38.628, *Chloroprene Rubber.*
[453]Case T-9/99 *HFB Holding für Fernwärnetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v. Commission* [2002] ECR II-2429, paragraphs 66 and 75; Case T-43/02 *Jungbunzlauer AG v. Commission* [2006] ECR II-3435; *Knauf Gips*, cited above; Case C-196/99 P *Siderurgica Aristrain Madrid SL v. Commission* [2003] ECR I-11005.
[454] CAT, *Durkan Holdings Ltd et al. v Office of Fair Trading*, Case No. 1121/1/09, 22.03.2011.

which, […], was for many years endemic in the construction industry in England" (paragraph 2).

Actually, this case is mostly known for the fact that Durkan is the first company to appeal on cover pricing and win. The CAT has reduced the fines imposed by the OFT on Durkan and Concentra (formerly Durkan Pudelek) by 64% following a ruling that the companies were not liable for all areas alleged by the OFT.[455] However, I am more interested in the fact that, in this case, the CAT quoted, followed and reproduced the ECJ's approach concerning the parental liability issue. Durkan Holdings owned 51 per cent of shares in Durkan Pudelek (1992-2007), thus, the OFT held them jointly and severally liable for the infringements concerning prohibition in relations to three tenders. Hence, as Durkan Pudelek was not 100% owned by Durkan Holding it was necessary to establish the existence of the decisive influence in order to hold them jointly liable, which has been done consequently, by applying the "decisive influence" test following the *Akzo* judgement.

3. COMPANY LAW NOTIONS VS. COMPETITION LAW NOTIONS IN PARENTAL LIABILITY

Consistently, the EU Courts and the EU Commission use notions which originate in Company law (for example: share capital, right to shares, composition of Board etc.) in order to establish or deny the existence of decisive influence[456]. Nevertheless, it is important to highlight that the EU Courts and the EU Commission do not follow the Company law approach as such when it comes to defining an undertaking.

However, some suggest that the logic used by the Court when deciding on a parental liability case in competition matters should be the one proper to Company law.[457] It is hard to agree with such a proposal, as it is likely to raise many difficulties.

The biggest issue will be the absence of a harmonised European Company law, where – as opposed to competition law - each Member State has its own, often quite particular and specific rules. Only some of the aspects of the Company law have been harmonised (such as certain aspects of the taxation, disclosure requirements, mergers, takeover bids, rights of shareholders in listed companies).[458]

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[455] Luke McLeod-Roberts, *Durkan's OFT fine cut by £4m*, Building.Co.UK, 21.03.2011, http://www.building.co.uk/news/breaking-news/durkans-oft-fine-cut-by-£4m/5015358.article , 13.06.2011

[456] See the list of factors that will be considered as relevant and taken into account in assessing the status of a part-owned subsidiary.

[457] Philipp VOET van VORMIZEELE, *Die EG-kartellrechtliche Haftungszurechnung im Konzern im Widerstreit zu den nationalen Gesellschaftsrechtsordnungen*, WuW vom 10.10.2010, Heft 10, Seite 988-989.

[458] We do have the "European company", governed by European law and no longer subject to different legislative systems simultaneously and thus better suited to the dimensions of enterprises established in several Member States. Likewise, the "European cooperative company" allows cooperatives to develop their business on a European scale. European enterprises not wishing to merge or set up subsidiaries also have a transnational cooperation instrument at their disposal - the European Economic Interest Grouping (EEIG).http://europa.eu/legislation_summaries/internal_market/businesses/company_law/index_en.htm, 12.07.2011.

Thus, if it were decided to use more Company law, shall we refer to the French one or to the English one, or to any other? It seems almost impossible to envision the creation of the EU Company law, as it has always been a sphere belonging more to the Member States' competence.

Hence, if we want to switch to the Company law approach, at first we have to create it. We cannot apply the EU Company law together with different national Company laws – it will be running the risk of inconsistency and complete loss of harmonisation in both spheres.

For example, the understanding of the term "undertaking" which is crucial for the EU Competition law (as only the "undertaking" can be a subject of the EU Competition law) will vary significantly in EU Competition law and the Company law of Member States. Under the EU law we must apply economic criteria, and the exact legal form of the enterprise is irrelevant[459], while in national Company law in most cases the very legal form is crucial if we want to apply the law[460].

For instance, in the UK, partnerships are not regarded as companies and are subject to Contract law instead of Company law; whereas in France similar entities (*commandites*) are considered not only as legal persons, but even more as companies, and are hence subjects to French Company law. Thus, if we were applying EU Competition law based on Company law notions we would have a case-law that differs considerably, depending on the nationality of the enterprises.

One may say that in Competition law, we use what we may call an "organisational", "dynamic" approach, while deciding whether to hold the parent company liable. Thus, we do use Company law notions, such as shareholding, composition of the board of directors etc., but only in order to establish the actual decisional processes. The Company law approach is much more static and formal. Under the Company law we cannot hold a parent company liable unless we are able to pierce the corporate veil. Under this approach, legal acts, and not the actual processes at working the company, play the crucial role.

According to AG Warner, "It would be inappropriate to apply rigidly in the sphere of competition law the doctrine referred to by English lawyers as that of *Salomon v. Salomon & Co. Ltd*. (1987) A.C. 22 – i.e. the doctrine that every company is a separate legal person that cannot be identified with its members. Basically that doctrine exists in order to preserve the principle of limited liability. It is concerned with the rights of creditors in the context of company law. It has been applied, with more or less happy results, in other spheres, such as those of convenyancing, of contracts and of liability for tort. But to export, it blindly into branches of the law where it has little relevance, could, in my opinion, ***serve only to divorce the law from the reality***".[461]

It is undeniable that we use some Company law terms and notions. However, it seems inconsistent to apply the Company law approach as its purposes are fundamentally distinct from those of Competition law; indeed we would like to draw attention to the

[459] *HFB v Commission*, cited above, paragraph 54.
[460] At the same time there are notable exceptions of tax or bankruptcy fraud when even national corporate legal concepts could not prevent the piercing of the corporate veil in the laws of several Member States.
[461] Opinion of AG Warner, *Commercial Solvents v Commissio*n, 22.01.1974.

fact the Company law is mostly private law, whereas Competition law is mostly public law. They regulate the same entities, but Company law has more of a microeconomic approach, when the Competition law is interested in bigger picture (the market).

Very recently, in the *Knauf Gips* case, the Court has restated that its approach was not subject to the methods goals of company law, but rather to the necessities of its dynamic viewpoint in unambiguous fashion: "the legal structure particular to a group of companies (…) is not decisive where that structure does not reflect the effective functioning and actual organisation of that group" (paragraph 108). Obviously, its position could not be clearer.

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Examining the effectiveness of sanctions in order to deter cartel conduct in Australia

JADE WINTERTON*

Australia recently enacted legislation greatly increasing civil penalties and introducing criminal sanctions for engaging in cartel conducts. Through an analysis of the deterrence theory and cartel regimes in countries other than Australia, this article argues that these sanctions do not optimally achieve their stated objective of deterring cartel conducts.

1. INTRODUCTION

On 2 November, 2007 the Australian Federal Court delivered its judgment in one of the most serious cartel cases before the Court, the *Cardboard Box Cartel Case*.[463] In this case, the cartel between Amcor Ltd (**Amcor**) and Visy Industries Holding Pty Ltd (**Visy**), who together held 90% market share in the cardboard packaging industry in Australia, had continued for almost five years.

At the time Amcor and Visy engaged in the cartel conduct, they were subject to civil prohibitions. Despite this, cartels were pervasive. They were found to exist in all sectors of industry,[464] including the airline,[465] paper manufacturing,[466] taxi,[467] and even kart-racing[468] industries. Many companies became members of cartels, and some companies repeatedly engaged in cartel conducts. This suggested that, for these companies, the economic benefits of cartel conduct far outweighed the sanctions imposed for being caught.[469]

In the *Cardboard Box Cartel Case*, Visy received a civil penalty of $36 million,[470] more than twice what was previously imposed by the Court in any cartel case.[471] However,

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* Adjunct teaching fellow at University of Western Australia, Perth.

[463] *ACCC v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673.

[464] Ken Hendricks, Robert Porter and Guofu Tan, 'Bidding Rings and the Winner's Curse' (2008) 39(4) *Rand Journal of Economics* 1018; Explanatory Memorandum, *Trade Practices (Cartel Conduct and Other Measures) Bill 2008* (Cth) 6; New Zealand Ministry for Economic Development, *Cartel Criminalisation Discussion Document* (2010) 9.

[465] *ACCC v Qantas Airways Limited* [2008] FCA 1976; *ACCC v British Airways PLC* [2008] FCA 1977; *ACCC v Martinair Holland NV* [2009] FCA 340; *ACCC v Societe Air France* [2009] FCA 341; *ACCC v Cargolux Airlines International SA* [2009] FCA 342.

[466] *ACCC v April International Marketing Services Australia Pty Ltd (No 5)* [2010] FCA 17.

[467] *ACCC v White Top Taxis Ltd* [2009] FCA 88.

[468] *ACCC v Australian Karting Association (NSW) Incorporated* [2009] FCA 1255.

[469] *Submission to the Trade Practices Act Review,* ACCC Report (2002) 19; *ACCC v ABB Transmission & Distribution Ltd* (2001) ATPR 41-815 at 42-938; David Round and Leanne Hanna, 'Curbing Corporate Collusion in Australia: The Role of Section 45A of the *Trade Practices Act*' (2005) *Melbourne University Law Review* 242, 267; Yuliya Bolotova, John M. Connor and Douglas J. Miller, 'Factors Influencing the Magnitude of Cartel Overcharges: An Empirical Analysis of the U.S. Market' (2009) 5(2) *Journal of Competition Law & Economics* 361, 361.

[470] The parties negotiated the quantum of the civil penalty, which was accepted by the Court: *Cardboard Box Cartel Case* at 709.

[471] *Cardboard Box Case* at 711. The highest penalty previously imposed was $15 million in *ACCC v Roche Vitamins Australia Pty Ltd* (2001) ATPR 41-809. An individual penalty imposed in this case was also a new record. The court imposed a penalty of $1.5 million on Visy Board's former CEO, Harry

this penalty record was miniscule compared to the harm that the Amcor-Visy cartel inflicted on society, which is now estimated to be $700 million.[472] In his decision, Justice Heerey called for a change to the regulation of cartel conducts, stating:

> The law, and the way it is enforced, should convey to those disposed to engage in cartel behaviour that the consequences of discovery are likely to outweigh the benefits, and by a large margin. … Heavy penalties are appropriate for corporations, but it is only individuals who can engage in the conduct. Many countries…have recognised this reality by enacting laws which make cartel conduct by individuals subject to criminal sanctions.[473]

In response to the decision in, and media interest generated by, the *Cardboard Box Cartel Case*,[474] Graham Samuels, chairman of the Australian Competition and Consumer Commission (**ACCC**),[475] called for Australia to 'fall in line with other jurisdictions by imposing criminal sanctions…for executives who engage in cartel activities.'[476] On 24 July 2009, the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth) (**Cartel Amendments**) was enacted to impose sanctions that would deter both corporations and individuals from engaging in cartel conducts by imposing 'sufficiently detrimental sanctions'[477] (**Cartel Sanctions**).

2. AN OVERVIEW OF THE CARTEL SANCTIONS

Australia's new regime for eradicating cartels is tripartite. The *Competition and Consumer Act 2010* (Cth)[478] (**CCA**) allows for private civil actions instigated by individuals,[479] actions for civil penalties instigated by the ACCC,[480] and criminal

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Debney, which is almost 67% more than the previous record penalty of $225 000 imposed on an individual in *ACCC v ABB Transmission & Distribution Ltd (No 2)* (2002) 190 ALR 169.

[472] Graeme Samuels, 'Opening Remarks' (Speech delivered at the Law Council of Australia Trade Practice Committee Workshop, Gold Coast, 21 August 2010).

[473] *Cardboard Box Cartel Case* at 709.

[474] See generally Matthew Drummond, 'Pratt to Pay Record $40m fine', [8 October 2007], *Australian Financial Review* (Sydney), 1; Matthew Drummond, 'Checkmate as the King is Cornered', [8 October 2007], *Australian Financial Review* (Sydney) 10; Editorial, 'Boxed into Making a Tough Decision' , [9 October 2007], *The Australia* (Sydney); Editorial, 'Cartel Behaviour Should be Criminal', [9 October 2007], *Australian Associated Press General News Wire* (Sydney); Leonie Wood, 'Confessions of a Billionaire', [9 October 2007], *The Age* (Melbourne) 1; Malcom Maiden, 'Visy joins Vizard in Misery', [9 October 2007], *The Age* (Melbourne) 1; Craig Binnie, Ian Royall, Ellen Whinnett and Peter Mickelburough, 'Pratt Cardboard Deal may have Cost $700m', [10 October 2007], *Herald Sun* (Melbourne), 1; Editorial, 'ACCC Wants Criminal Sanctions on Cartels', [25 October 2007], *Australian Associated Press General News Wire* (Sydney); Editorial, 'ACCC Boss Wants Jail for Tycoons', [3 November 2007], *The Courier Mail* (Bribane); Graham Samuels, 'Cartel Ringleaders are Well-Dressed Criminals, so Why Not Send Them to Jail?', [3 November 2007], *The* Age (Melbourne) 2; Andrew Christopher and Georgina Foster, 'Cartel Instigators Belong Behind Bars', [6 November 2007], *Australian Financial Review* (Sydney).

[475] The ACCC promotes competition and fair trade in the market place for the benefit of consumers, business and the community. Its primary responsibility is to ensure that individuals and businesses comply with the Commonwealth of Australia's competition, fair trading and consumer protection laws. For further information regarding the ACCC, see their website: http://www.accc.gov.au

[476] Graham Samuels, 'Visy News Conference: Opening Statement' (Press Release, 2 November 2007) 3.

[477] Explanatory Memorandum, *Trade Practices (Cartel Conduct and Other Measures) Bill 2008* (Cth) 25 & 41.

[478] Formerly known as the *Trade Practices Act 1974* (Cth) (**TPA**).

[479] CCA section 82.

prosecutions instigated by the Commonwealth Director of Public Prosecutions (**CDPP**).[481]

2.1 PRIVATE CIVIL ACTIONS

Private civil actions are available for persons to recover compensation for any loss or damage they have suffered as a result of a cartel conduct.[482] Private civil actions may be instigated against any individual or corporation who was involved in the cartel conduct, up to 6 years after the cartel conduct has occurred. Additionally, where the ACCC or the CDPP have succeeded in a legal action against a cartel party, each can apply to recover damages, on behalf of persons who 'have suffered, or are likely to suffer, loss or damage' as a result of the cartel conduct.[483] Despite this, most private civil actions are brought as representative actions,[484] or by large corporate customers who have suffered significant damage.[485]

Private civil actions are primarily concerned with compensating individuals for any loss or damage suffered.[486] While it is recognised that private civil sanctions can have a deterrent effect,[487] as the primary goal of private civil sanctions in Australia is compensation rather than deterrence,[488] it is not appropriate to assess whether private civil sanctions achieve 'optimal deterrence.'

2.2 ACTIONS FOR CIVIL PENALTIES

The CCA imposes a maximum civil penalty of $500,000 on individuals[489] and prohibits corporations and related bodies from indemnifying an individual against this penalty.[490]

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[480] CCA sections 44ZZRJ and 44ZZRK.
[481] CCA sections 6AA, 44ZZRF, 44ZZRG and 79.
[482] CCA section 82.
[483] CCA section 87(1B).
[484] Representative actions are more commonly known as class actions: Alistair Little, *Product Liability and Class Actions – Will We Go All the Way With the USA?* TressCox Lawyers <http://www.tresscox.com.au/file/document/ resource/61/Public%20Liability%20and%20Class%20Actions.pdf> 26 May 2011. Representative actions can be brought by an individual on behalf of others where there are seven or more persons having claims against the same person which arise out of the same, similar or related circumstances and give rise to a substantial common issue of law or fact: *Federal Court of Australia Act 1976* (Cth) section 33C.
[485] Much of this loss is often mitigated through passing some or all of the cartel overcharge onto subsequent purchasers. This defence of passing on has not yet been definitively considered by Australian courts: Matthew Eglezos, 'Recovering Cartel Damages: The Passing-On Defence Under the Trade Practices Act' (2010) 38 *Australian Business Law Review* 174. However, the existence of passing on as a defensive and offensive tool has been well examined in United States antitrust cases: see e.g. *Hanover Shoe Inc v United Shoe Machinery Corp* 392 US 481 (1968); *Illinois Brick Co v Illinois* 413 US 720 (1977).
[486] Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974,* Report 68 (1994) [4.18]; UK Department of Trade and Industry, *A World Class Competition Regime* (2001) Chapter 8; Jeremy Bentham, 'Punishment and Deterrence' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd ed, 2009) 53.
[487] They can have this effect because they impose an additional monetary liability on persons who have engaged in cartel conducts.
[488] Cf treble-damages litigation in the United States.
[489] CCA section 76(1B). Section 76(1B) imposes accessorial liability on individuals involved in the contravention, while Schedule 1 items 44ZZRJ and 44ZZRK impose direct liability on individuals. CCA sections 75B and 76 state that a person is involved in the contravention where they have aided, abetted,

The maximum civil penalty that can be imposed on a corporation for each contravention[491] is the greatest of:

(i) $10 million;
(ii) three times the value of the benefit obtained by one or more persons that is reasonably attributable to the cartel conduct, if the court can determine the benefit; or
(iii) if the court cannot determine the benefit, 10% of the annual turnover of the corporation for the 12 months concluding at the end of the month in which the contravention occurred.[492]

This is a slight deviation from the corporate civil penalties available for the contravention of most other sections of Part IV of the CCA (which regulates restrictive trade practices) as it extends the penalty's ambit beyond the benefit obtained by the corporation and any related body corporate[493] to 'one or more persons.' As a result, it could allow the Court to take into account the benefit obtained by all parties in the cartel when imposing a penalty on just one party.

When imposing civil penalties on individuals or corporations, the Court may make related orders under sections 80, 86C, 86D, 86E and 87. Section 80 allows the Court to grant injunctions, section 86D gives the Court the power to make adverse publicity orders, and section 86E gives the Court the power to make an order disqualifying a person from managing corporations. Section 86C allows the Court to make:

(i) community service orders;
(ii) probation orders for periods of no longer than three years;
(iii) orders requiring the disclosure of information; and/or
(iv) orders requiring the person to publish an advertisement.[494]

Section 87 gives the Court the power to make orders compensating any person in whole or part for any loss or damage suffered.[495]

2.3 CRIMINAL PROSECUTIONS

The most controversial aspect of the new regime is the criminalisation of cartel conduct for both corporations and individuals. In Australia, it is now an indictable offence for a corporation or individual to know or believe they are making or giving effect to a cartel agreement.[496] While the offence of making a cartel agreement does not apply to

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counseled, procured or induced the contravention, have been knowingly concerned in the contravention, or have conspired with others to effect the contravention.

[490] CCA section 77A.

[491] The civil prohibitions are contained in CCA sections 44ZZRJ and 44ZZRK.

[492] CCA section 76(1A)(aa).

[493] CCA section 76(1A)(b).

[494] CCA section 86C(2). An order to publish an advertisement is usually imposed when there has been a breach of the consumer protection provisions, and will generally be an order to publish a corrective advertisement.

[495] Provided that the ACCC applies for compensation: CCA section 87(1B).

[496] CCA sections 44ZZRF, 44ZZRG, 79 and Schedule 1items 44ZZRF and 44ZZRG. In these provisions, a cartel agreement is 'an agreement containing a cartel provision.'

agreements made before the commencement of the Cartel Amendments, the offence of giving effect to a cartel agreement applies to any agreement, including those made before the commencement of the Cartel Amendments, provided that the agreement has given effect to after the commencement date.[497]

A person can be found guilty of the criminal offence even where all other parties to the agreement have been acquitted,[498] unless a finding of guilt would be inconsistent with the acquittal of the other parties.[499]

The CCA imposes a maximum jail term of 10 years and a maximum fine of $220,000 on individuals,[500] while the maximum fine for a corporation is the same as the maximum civil penalty.[501] The Court can also make the same related orders when an individual or corporation is convicted as those that it can make when imposing a civil penalty.[502]

3. IMPOSING SANCTIONS FOR DETERRENCE

Sanctions imposed to deter conduct[503] are justified on the basis that they prevent conduct from occurring or re-occurring, and consequently reduce the net social cost of the conduct.[504] This involves putting a price on contravention that is sufficiently high to make engaging in cartel conduct seem wholly unattractive,[505] so as 'to deter not only the particular offender, but [also] others who may be disposed to engage in' a cartel conduct.[506]

There are three components of deterrence: certainty, severity and celerity.[507] This means sanctions 'should be relatively certain to be imposed, sufficiently severe as to prove aversive and [be] imposed sufficiently soon after the [conduct] occurs.'[508] While celerity relies on the prompt and efficient operation of all the mechanisms for the administration of justice, certainty and severity can be built into the sanctions for cartel conduct.

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[497] CCA section 44ZZRG(4).
[498] CCA section 44ZZRH(1) and Schedule 1item 44ZZRH(2).
[499] CCA section 44ZZRH(2) and Schedule 1item 44ZZRH(2).
[500] CCA section 79(1)(e) and Schedule 1items 44ZZRF(4) and 44ZZRG(4) impose a maximum fine of 2,000 penalty units. *Crimes Act 1914* (Cth) section 4AA currently places a value of $110 on a penalty unit.
[501] CCA sections 44ZZRF(3) and 44ZZRG(3).
[502] However, the CDPP, not the ACCC, must apply for compensation under section 87(1B) in criminal proceedings.
[503] There are a number of other bases for imposing punishment, including retribution and rehabilitation: see generally Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (2005); Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd ed, 2009).
[504] Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 34-35.
[505] *TPC v CSR Ltd* (1991) ATPR 41-076; Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 32; New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [3.5].
[506] *TPC v Mobil Oil Australia Ltd* (1985) 4 FCR 296 at 298 per Toohey J.
[507] Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd ed, 2009) 40.
[508] Ibid.

4. A REGIME OF SANCTIONS WHICH ARE CERTAIN TO BE IMPOSED

4.1 LIABILITY MUST BE IMPOSED ON CORPORATIONS AND INDIVIDUALS

Corporations are constructions of the law,[509] 'incapable of feeling shame, guilt or remorse',[510] and can only engage in cartel conducts through actions of the individuals.[511] As a result, individuals should be held liable when a corporation engages in a cartel conduct. This is because the imposition of individual liability turns the minds of executives 'away from the company's financial losses to their own personal futures.'[512] In recognition of this, Justice Heerey, in the *Cardboard Box Cartel Case*, stated that individual sanctions are 'critical to any anti-cartel regime.'[513]

Liability should also be imposed on corporations, as deficient organisational policies[514] often encourage, reward, condone, or, at the very least, tolerate cartel conduct.[515] Consequently, the imposition of corporate liability establishes 'acceptable boundaries of corporate conduct'[516] and can result in 'preventative programs [that] foster an environment of compliance.'[517] Furthermore, if liability is not imposed on corporations, they may be able to distance themselves from the individuals found liable for cartel conduct and escape any detrimental effects, such as adverse publicity.[518]

4.2 CIVIL PENALTIES MUST BE IMPOSED

A sanction regime that imposes only criminal liability is deficient. As a criminal conviction requires a jury to unanimously determine[519] beyond reasonable doubt that a party knew or believed they engaged in a cartel conduct, a criminal conviction will often be difficult to obtain.[520] As a result, people may perceive the probability of a criminal conviction as too low to deter them from engaging in cartel conduct where only criminal sanctions are available. Consequently, actions for civil penalties should also be available, as a contravention of a civil prohibition is much more likely to be made out.[521]

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[509] Ibid.
[510] New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.39].
[511] Donald Baker, 'Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging' (2001) 69 *George Washington Law Review* 693, 698; *Cardboard Box Cartel Case* at 709.
[512] Graeme Samuels, 'The Relationship between Private and Public Enforcement in Deterring Cartels' (Speech delivered at the International Class Action Conference, Sydney, 25 October 2007).
[513] *Cardboard Box Cartel Case* at 709.
[514] New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.39].
[515] Donald Baker, 'Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging' (2001) 69 *George Washington Law Review* 693, 699.
[516] New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [3.8].
[517] Ibid [2.54].
[518] New Zealand Ministry for Economic Development, *Cartel Criminalisation Discussion Document* (2010) 77.
[519] *Commonwealth of Australia Constitution Act* (Cth) section 80 provides that the trial of any indictable Commonwealth offence shall be by jury, and the offence of engaging in cartel conduct is an indictable offence.
[520] New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.41].
[521] Ibid [2.42].

This is because:

(i) the standard of proof is lower;
(ii) civil provisions[522] impose strict liability; and
(iii) a judge decides the outcome.

4.3 CRIMINAL SANCTIONS MUST BE IMPOSED

Imposing criminal sanctions for engaging in a cartel conduct is essential to express the society's disapproval of cartels.[523] It can result in a process of 'public blaming and shaming'[524] which, in turn, causes reputational damage,[525] especially given that cartel cases generally receive substantial media attention.[526] For both corporate and individual offenders, this will generally have adverse reputational consequences.[527] This is particularly so for individual offenders, as executives (who are generally the individuals liable for the cartel conduct) 'belong to a social group that is exquisitely sensitive to status deprivation and censure'[528] and thus have much more to lose from a criminal conviction than 'street offenders'.[529]

Criminal sanctions also have a procedural benefit in Australia. While actions for civil penalties have a limitation period of six years,[530] a criminal prosecution has no limitation period.[531] As a result, imposing criminal sanctions means that an action can be brought 'no matter how old the conduct',[532] as long as the conduct occurred after the Cartel Amendments entered into force.[533]

Criminalising cartel conduct also brings Australia in line with other jurisdictions,[534] such as the United Kingdom,[535] the United States[536] and Canada.[537] An internationally coherent approach to criminalisation is desirable as:

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[522] At least, the civil provisions in the Cartel Amendments impose strict liability. The civil provisions in other jurisdictions also often impose strict liability.

[523] *Cartel Sanctions Against Individuals,* OECD Roundtable Report (2003) 99; New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.35]; OECD Secretariat, 'Cartels: Sanctions Against Individuals' (2007) 9(3) *OECD Journal of Competition Law and Policy* 7, 20. The Treasury believes that the implications of 'wrong doing' inherent in a criminal offence are the key reason that cartel conducts should be criminalised: Department of the Treasury, *Discussion Paper: Criminal Penalties for Serious Cartel Conduct* (2008).

[524] Caron Beaton-Wells and Neil Brydges, 'The Cardboard Box Cartel Case: Was All the Fuss Warranted? ' (2008) 36 *Australian Business Law Review* 1, 16.

[525] New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.35].

[526] Elizabeth Szockyj, 'Imprisoning White Collar Criminals? ' (1999) 23(2) *Southern Illinois University Law Journal* 485, 492.

[527] New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.35].

[528] Gilbert Geis, 'Deterring Corporate Crime' in Ralph Nader and Mark Green (eds) *Corporate Power in America* (1973) 182.

[529] Elizabeth Szockyj, 'Imprisoning White Collar Criminals? ' (1999) 23(2) *Southern Illinois University Law Journal* 485, 492.

[530] CCA section 77(2).

[531] Graeme Samuels, 'The Relationship between Private and Public Enforcement in Deterring Cartels' (Speech delivered at the International Class Action Conference, Sydney, 25 October 2007).

[532] Ibid.

[533] CCA sections 44ZZRF and 44ZZRG.

[534] Graham Samuels, 'Visy News Conference: Opening Statement' (Press Release, 2 November 2007) 3.

[535] *Enterprise Act 2002* (UK) section 188.

(i) cartel conduct often occurs on an international basis, not within national borders;[538]
(ii) it allows for the establishment of a criminal cooperation agreement with these countries, which can 'provide for overseas competition authorities to undertake formal investigations';[539] and
(iii) dual criminality is required for extradition procedures to operate.[540]

Additionally, Australia should be looking at the United Kingdom, the United States and Canada for lessons on optimal regulation of cartels, as these countries have a much greater history of prohibiting cartels.[541]

4.3.1 Imposition of Criminal Sanctions on Individuals

Where only civil penalties are imposed on individuals, the corporation can absorb the cost of this penalty.[542] This is the case even where it is an offence to indemnify the individual against the penalty, as compensation for the penalty can easily be built into a salary or bonus payment, which avoids contravening the indemnity provisions .[543] As a result, the individual civil penalty simply becomes a part of the corporations 'cost' of engaging in cartel conducts. Imposing criminal sanctions on individuals forces them to view cartel conducts as serious illegal activity[544] as opposed to a reasonable risk taking exercise involving an economic cost/benefit analysis.[545]

Criminal sanctions also increase the incentive for executives to self-report involvement in cartels, so they can take advantage of immunity policies.[546] This, in turn, increases the probability of actions being successfully brought by the ACCC and the CDPP against the other individuals and corporations who have engaged in, or who are engaging in, cartel conducts.[547]

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[536] *Sherman Act,* 15 USC §§ 1-2 (1890); *Antitrust Criminal Penalty Enhancement and Reform Act of 2004,* Pub L No 108-237 (United States).
[537] *Competition Act* (Canada)*,* RSC 1985, c C-34, section 45(1).
[538] Anthony Gray, 'Criminal Sanctions for Cartel Behaviour' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 364, 367.
[539] New Zealand Ministry for Economic Development, *Cartel Criminalisation Discussion Document* (2010) 31.
[540] Ibid 31.
[541] For England's history of prohibiting cartels see: *Dyer's Case* (1414) YB 2 Hen 5, vol.5 (illustrating that the common law prohibited any contracts in restrain of trade); *Mitchel v Reynolds* (1711) 24 ER 347 (where the Court held that the common law permitted a 'reasonable' restraint of trade); *R v Norris* (1759) 96 ER 1189 (where an agreement to fix prices was found to be unlawful). For the United States' history of prohibiting cartels see: *Morris Run Coal Co v Barclay Coal Co 68 Pa 173* (1871); *Craft v McConoughy* 79 Ill 346 (1875) (both illustrating that the common law generally prohibited price fixing); *Sherman Act,* ch 647, 26 Stat. 209 (1890). For Canada's history of prohibiting cartels see: *Competition Act* (Canada)*,* RSC 1889.
[542] Julie Clarke and Mirko Bagarie, 'The Desirability of Criminal Penalties for Breaches of Part IV of the Trade Practices Act' (2003) 31(3) *Australian Business Law Review* 192, 206.
[543] *Cartel Sanctions Against Individuals,* OECD Roundtable Report (2003) 17.
[544] OECD Secretariat, 'Cartels: Sanctions Against Individuals' (2007) 9(3) *OECD Journal of Competition Law and Policy* 7, 18.
[545] New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.45]; Anthony Gray, 'Criminal Sanctions for Cartel Behaviour' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 364, 368.
[546] Graeme Samuels, 'The Relationship between Private and Public Enforcement in Deterring Cartels' (Speech delivered at the International Class Action Conference, Sydney, 25 October 2007).
[547] Donald Baker, 'Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging' (2001) 69 *George Washington Law Review* 693, 698. This will be paralleled by a rise in private civil actions, as

Creating a criminal offence that applies to individuals also brings cartel conducts in line with other similar corporate activities that attract criminal sentences in Australia,[548] which the Australian Federal Government sees as desirable.[549] Individuals who engage in corporate activities such as insider trading,[550] financial market manipulation,[551] and financial market rigging[552] are subject to criminal liability. These offences result in an individual obtaining an unfair advantage through distorting markets, and have a sense of fraudulence.[553] As cartel conducts (i) also results in an unfair advantage being achieved through market distortion and fraudulence and (ii) causes at least as much, if not more harm, than other economic crimes,[554] individuals involved in cartel conduct should be subject to criminal offences.

4.3.2 Imposition of Criminal Sanctions on Corporations

As corporations cannot be imprisoned, criminal sanctions in the corporate context take the form of a fine.[555] However, the difference between civil pecuniary penalties and fines is often difficult to appreciate.[556] This raises the question of whether corporate criminal liability has any utility, given that civil sanctions can be more easily obtained.

Corporate criminal liability is imposed in a number of countries in lieu of civil penalties, including the United States[557] and Norway.[558] In such circumstances, many companies will not receive sanctions for cartel conduct that is detected, as a result of the higher standard of proof.

Canada imposes both civil and criminal liability on corporations, with the legislation clearly delineating the conduct that contravenes the civil prohibitions and the conduct being criminal offence.[559] While a criminal conviction carries high sanctions,[560] a civil

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more information becomes available for such actions to be maintained, because private civil actions are often instigated as a result of information obtained through successful actions under the civil penalty provisions, successful prosecutions and immunity applications: Andrew Morrison, Ross McInnes and Jennifer Thomas, *Enforcement of Cartel Conduct – A New Era of Private Enforcement?* (2006) Clayton Utz <http://www.claytonutz.com/publications/newsletters/litigation_and_dispute_resolution_insights/20060802/enforcement_of_cartel_conduct-a_new_era_of_private_enforcement.page> at 20 September 2010.

[548] Graeme Samuels, 'The Relationship between Private and Public enforcement in Deterring Cartels' (Speech delivered at the International Class Action Conference, Sydney, 25 October 2007).

[549] The Minister for Justice and Customs, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2004) 35 (**Penalty Guide**).

[550] *Corporations Act 2001* (Cth) section 1043A.

[551] *Corporations Act 2001* (Cth) section 1041A.

[552] *Corporations Act 2001* (Cth) section 1041C.

[553] Commonwealth of Australia, *Parliamentary Debates*, Senate, 15 August 1974, 984–5.

[554] Julie Clarke and Mirko Bagarie, 'The Desirability of Criminal Penalties for Breaches of Part IV of the Trade Practices Act' (2003) 31(3) *Australian Business Law Review* 192, 197.

[555] New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.33].

[556] This is despite the fact that there can be flow on effects from a criminal conviction, such as exclusion from public procurement processes: New Zealand Ministry for Economic Development, *Cartel Criminalisation Discussion Document* (2010) 77.

[557] *Sherman Act,* 15 USC §§ 1-2 (1890); *Criminal Fine Improvements Act,* 18 USC (1987); *Clayton Act,* 15 USC § 4 (1914).

[558] *Cartel Sanctions Against Individuals,* OECD Roundtable Report (2003) 81.

[559] *Competition Act* (Canada), RSC 1985, c C-34, section 45. The criminal offence is for 'hard-core' cartel behaviour, while the civil prohibition governs all other agreements: Jim Dinning and Mark Katz, 'Canada:

contravention only allows the Court to impose an order 'prohibiting any person...from doing anything under the agreement' or 'requiring any person...to take action.'[561] The clear delineation of civil and criminal conduct means that, where the conduct is only subject to the criminal offence, but there is only enough evidence to show that a corporation engaged in cartel conduct on a civil standard, no sanctions will be imposed.

John Coffee Jr has suggested that both civil penalties and fines should be imposed, with civil penalties representing the 'price' of the conduct, and fines representing the 'punishment' for acting in a morally reprehensible way.[562] However, where the aim is deterrence, this is effective only if the corporation has concurrent civil and criminal liabilities. Such a situation exists in Austria in relation to bid-rigging,[563] where corporations face additional fines of up to $10 million if convicted based on criminally.[564] This is currently not practicable in Australia, as the ACCC believes concurrent civil and criminal liabilities would give rise to issues of 'double jeopardy.'[565] While the principle of double jeopardy only applies to parallel criminal offences and, as a result, there is no general prohibition on imposing both a civil penalty and a criminal sanction,[566] it is perhaps better to impose only a civil penalty or only a criminal sanction on corporations, as criminal sanctions that build in both the "price" and the "punishment" of the cartel conduct saves court resources from being wasted on parallel criminal and civil proceedings.

Criminal sanctions do not apply to corporations in the United Kingdom, because the United Kingdom Government believes that corporate criminal sanctions add little deterrent effect due to the significant difficulties in obtaining corporate criminal convictions.[567] However, this ignores the additional benefits of imposing criminal liability, as discussed above.

4.4 A Summary of the Optimal Sanction System for Certainty in Deterrence

In order to deter optimally a cartel conduct, liability should be imposed on both corporations who engage in cartel conduct and the individuals who enter into cartel agreements on their behalf.

Optimal sanctions must impose criminal liability for cartel conducts, with the option to fall back on civil penalties whenever the criminal prosecution fails or is not viable,[568]

Cartels' in Global Competition Review, *The Asia-Pacific Antitrust Review* (2010) <http://www.globalcompetitionreview.com/reviews/25/sections/88/chapters/937/introduction/> at 21 September 2010

[560] *Competition Act* (Canada), RSC 1985, c C-34, section 45(2) imposes a maximum fine of $25 million.

[561] *Competition Act* (Canada), RSC 1985, c C-34, section 90.1.

[562] John C. Coffee Jr, 'Paradigms Lost: The Blurring of Criminal and Civil Law Models – And What Can Be Done About It' (1992) 101(8) *Yale Law Journal* 1875, 1876.

[563] Dawson Review, Chapter 10.

[564] *Hard Core Cartels,* OECD Report (2000) 49.

[565] *Submission to the Trade Practices Act Review,* ACCC Report (2002).

[566] Ministerial Council for Consumer Affairs, *Civil Penalties for Australia's Consumer Protection Provisions* (2005) 15.

[567] *Submission to the Trade Practices Act Review,* ACCC Report (2002) 40.

[568] This is despite the fact that the Federal Government has stated that civil penalties should only be imposed where criminal offences are not: Penalty Guide, 56. However the Federal Government clearly

making it more probable that a sanction will be imposed. Consequently, the criminal offences and civil prohibitions should cover the same conduct, with the legislation or a corresponding government policy setting out conduct that will only be subject to actions for civil penalties.[569]

4.5 COMPARING THE CARTEL SANCTIONS TO THE OPTIMAL SANCTIONS

The Cartel Sanctions are optimal from a certainty perspective, as they impose parallel civil and criminal liability on corporations and individuals, and provide a policy indicating when criminal proceedings will result. Additionally, civil proceedings will be considered for cartel conducts only if the possibility of a criminal conviction has been ruled out.[570]

The *ACCC Approach to Cartel Investigations* (**Cartel Guidelines**)[571] provides that a cartel conduct is to be prosecuted criminally 'wherever possible.'[572] However, criminal proceedings will only be initiated when:

(i) the CDPP forms the opinion that there is enough evidence to prosecute;
(ii) the CDPP believes it is in the public interest to prosecute; and
(iii) the conduct is assessed as serious.[573]

Despite Justice Finkelstein stated that '[c]onduct that affects the public, such as the anticompetitive behaviour that is outlawed by the TPA [now the CCA], can never really be considered as anything other than serious',[574] and despite the definition of cartel conduct in the Cartel Sanctions only encompassing conduct that the OECD defines as serious,[575] the ACCC does not view all cartel conducts as serious.[576] The ACCC provides a non-exhaustive list of factors to be used while assessing cartel conduct. [577]

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believe civil liability can be imposed where there is also a civil offence, as there are a number of statutes that impose parallel civil and criminal liablity: see eg CCA, *Corporations Act 2001* (Cth).

[569] Ministerial Council for Consumer Affairs, *Civil Penalties for Australia's Consumer Protection Provisions* (2005) 16.

[570] Ministerial Council for Consumer Affairs, *Civil Penalties for Australia's Consumer Protection Provisions* (2005) 15; Marcus Bezzi, 'The Conduct of Cartel Litigation: The ACCC Enforcement Perspective on Serious Cartels – Some Key Issues and Practical Considerations' (Speech delivered at the Competition Law Conference, Sydney, 23 May 2009); *ACCC Approach to Cartel Investigations* (2009) [32] – [35]; CCH, *Australian Trade Practices Commentary*, 'Cartel Amendments in Force' (at 13 September 2010) ¶30-500.

[571] (2009).

[572] Cartel Guidelines, [10]; Graeme Samuels, 'Opening Remarks' (Speech delivered at the Law Council of Australia Trade Practice Committee Workshop, Gold Coast, 21 August 2010).

[573] Marcus Bezzi, 'The Conduct of Cartel Litigation: The ACCC Enforcement Perspective on Serious Cartels – Some Key Issues and Practical Considerations' (Speech delivered at the Competition Law Conference, Sydney, 23 May 2009); Cartel Guidelines [19].

[574] *ACCC v ABB Transmission & Distribution Ltd (No. 2)* (2002) 190 ALR 169 at 173.

[575] CCA section 44ZZRD; *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels,* OECD Report (1998).

[576] Marcus Bezzi, 'The Conduct of Cartel Litigation: The ACCC Enforcement Perspective on Serious Cartels – Some Key Issues and Practical Considerations' (Speech delivered at the Competition Law Conference, Sydney, 23 May 2009); Cartel Guidelines, [10].

[577] See Cartel Guidelines, [14]; ACCC and CDPP, *Memorandum of Understanding regarding Serious Cartel Conduct* (2009) [4.4].

5. IMPOSING SUFFICIENTLY SEVERE SANCTIONS

For optimal deterrence, the same conduct must be subject to both civil penalties and fines (**monetary sanctions**). Optimal monetary sanctions should encompass the dimension of severity, and consequently be so high that engaging in cartel conduct is seen to be wholly unattractive.[578]

6. A REGIME OF OPTIMALLY SEVERE SANCTIONS FOR CORPORATIONS

6.1 THE THEORY OF OPTIMAL DETERRENCE

The theory of optimal deterrence is the natural starting point in determining optimal sanctions to deter corporations from engaging in cartel conducts. This theory states that the penalty for corporations who engage in cartel conducts should be set at a level equal to the net social harm caused by the conduct, multiplied by the probability of detection.[579]

6.1.1 Defining Net Social Harm

The social harm of a cartel conduct includes the excess profits earned by all parties,[580] as well as any deadweight loss, the umbrella effects of the conduct,[581] and the costs of enforcing the law.[582] However, Posner states that umbrella effects[583] should not be part of a penalty, as the cartel parties have also conferred benefit on the non-cartel sellers, in the form of higher profits, and hence the gain to the non-cartel sellers offsets the loss to consumers.[584] Additionally, the Australian Federal Government does not believe that investigation costs should be included in a monetary sanction.[585] Accordingly, in calculating optimal monetary sanctions for Australia, the social harm of a cartel conduct should include only the excess profits earned by all cartel parties and any deadweight loss.

However, the net social harm must also take into account any social benefit resulting from the cartel conduct. Some commentators have suggested that a cartel conduct has

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[578] *TPC v CSR Ltd* [1991] ATPR 41-076; Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 32; New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [3.5].

[579] Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 36; *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes,* OECD Report (2002) 72; Dawson Review, 164; Brendan Sweeney, 'The Role of Damages in Regulating Horizontal Price-Fixing: Comparing the Situation in the United States, Europe and Australia' (2006) 30 *Melbourne University Law Review* 838, 840; Nicole Rich and Neil Ashton, *Submission to the Senate Economics Committee – Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008,* Consumer Law Action Centre (2009) 2.

[580] John M. Connor and R. Lande, 'How High do Cartels Raise Prices? Implications of Optimal Cartel Fines' (2005) 80(2) *Tulane Law Review* 513, 517.

[581] Such as an increase in the price of substitute products.

[582] John M. Connor and R. Lande, 'How High do Cartels Raise Prices? Implications of Optimal Cartel Fines' (2005) 80(2) *Tulane Law Review* 513, 517 – 518; Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 35; Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd ed, 2009) 41.

[583] Such as the increase in the price of non-cartel products in the same market and substitute products.

[584] Richard A. Posner, *Economic Analysis of Law* (7th ed, 2007) 336.

[585] Penalty Guide, 42.

no redeeming social qualities.[586] However, it is entirely possible that there may be some benefit reasonably attributable to cartel conducts. For example, if a certain percentage of excess profits is used to enhance the image of the company by engaging in social responsible activities, these activities are a social benefit reasonably attributable to a cartel conduct.[587] Additionally, an overview of the cases show that cartelists raise many arguments regarding the benefits of cartel conduct, including that cartels prevent destructive price wars, preserve the capacity of an essential supply industry, reduce uncertainty and increase investment, provide orderly and timely supply responses, help the preservation of domestic small firms at times of economic fluctuations and uneven demand, fund desirable collaboration, fund activities such as research and development, increase countervailing power against rapacious suppliers, and provide protection against quality debasement.[588] While these benefits are usually raised by cartelists to escape from liability and are generally not accepted by the Court, [589] these benefits may arise from time to time.

6.2 PROBLEMS WITH THE THEORY OF OPTIMAL DETERRENCE

In *ACCC v ABB Transmission & Distribution Ltd (No 2),*[590] Justice Finkelstein noted that the theory of optimal deterrence has 'come under sustained attack by many commentators.'[591] He provides several good reasons for this. Firstly, determining the probability of detection is an arbitrary and costly exercise[592] which returns lower fines for repeat offenders.[593] Secondly, the theory of optimal deterrence relies on the variable of net social harm, which is hard to prove as a matter of fact.[594] This means that social harm is generally drastically underestimated, and costly to prove.[595] Thirdly, monetary sanctions are disproportionately low for corporations who have simply made a cartel agreement, as no social harm results from an agreement that has not been given effect to, making the deterrent effect virtually non-existent.[596]

A final reason given by Justice Finkelstein is that the theory of optimal deterrence does not take into account the economic position of the cartel parties.[597] However, it is submitted that a monetary sanction based on net social harm does take into account the economic position of the cartel parties, as the amount of social harm that can be perpetrated by a corporation is directly referable to its economic position.

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[586] Anthony Gray, 'Criminal Sanctions for Cartel Behaviour' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 364.
[587] This then becomes a problem of proof, as it must be proven that the company would not have engaged in those socially responsible activities, but for the excess profits obtained through engaging in a cartel conduct.
[588] Trevor Lee and Hank Spier, 'Abuser Pays – Compensating the Victims of Cartel Conduct' (2008) 16 *Trade Practices Law Journal* 285, 290.
[589] Ibid.
[590] (2002) 190 ALR 169.
[591] *ACCC v ABB Transmission & Distribution Ltd (No 2)* (2002) 190 ALR 169 at 175.
[592] Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 41; *ACCC v ABB Transmission & Distribution Limited (No 2)* (2002) 190 ALR 169 at 175 per Finkelstein J; ICN Working Group on Cartels, *Building Blocks for Effective Anti-Cartel Regimes (Vol. 1)*, International Competition Network (2005) 74.
[593] Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 41.
[594] Ibid 40; *ACCC v ABB Transmission & Distribution Limited* (2002) 190 ALR 169 at 175 per Finkelstein J.
[595] *ACCC v ABB Transmission & Distribution Limited (No 2)* (2002) 190 ALR 169 at 175.
[596] Ibid.
[597] Ibid 176.

On the basis of these reasons, Justice Finkelstein comes to the conclusion that the theory of optimal deterrence should not be accepted as the basis to calculate monetary sanctions in Australia.[598] However, these objections to the use of optimal deterrence theory as the basis for monetary sanction calculation can be overcome.

To overcome the problems with proving and calculating the probability of detection on a case by case basis, a multiple can be imposed on social harm to reflect the average probability of detection. To overcome the problem that proving social harm is inaccurate and costly, a formula can be used that is referable to net social harm, but that provides an easier and more accurate basis for calculation. An alternative basis for calculation should also be provided in order to create a deterrent effect where no social harm has yet resulted. [599] However, in order for the deterrent effect to be optimal, the alternative sanction should not be so low as to be insignificant.

6.3 OVERCOMING THE PROBLEMS WITH OPTIMAL DETERRENCE THEORY

6.3.1 Valuing the Probability of Detection

Across the world, three is the most common multiple imposed on social harm.[600] This multiple is also being cited as appropriate most often by commentators.[601] However, introducing a penalty simply because it is consistent with other countries is not optimal or desirable, as the other countries 'may simply have missed the mark.'[602] In this case, the Bolotova study suggests that they have. This study suggests that only 13% to 17% of illegal cartels are caught.[603] As a result, an inverse of the percentage in this range should be used, and therefore a multiple of between six and eight should be imposed.

Some commentators have suggested that a multiple of this magnitude would mean that 'more than half of firms convicted would go into liquidation if required to pay' the monetary sanction, and, as a result, innocent employees, shareholders and creditors would be damaged.[604] If this did in fact result, the sanction would be counter intuitive as, by imposing monetary sanctions that seek to promote competition, competition would be damaged through the removal of competitors.

It has also been said that even if the corporation did not go into liquidation, the fine would most likely cripple the corporation competitively, 'causing it to reduce its investments in innovation.'[605] As a reduction in innovation is one of the reasons that

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[598] Ibid 175.
[599] David Round, 'Consumer Protection: At the Merci of the Market for Damages' (Paper presented at Current Issues in Regulation: Enforcement and Compliance, Melbourne, 2–3 September 2002), 5.
[600] *Submission to the Trade Practices Act Review,* ACCC Report (2002) 55.
[601] *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes,* OECD Report (2002) 73; Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd ed, 2009) 41.
[602] Julie Clarke and Mirko Bagarie, 'The Desirability of Criminal Penalties for Breaches of Part IV of the Trade Practices Act' (2003) 31(3) *Australian Business Law Review* 192, 192.
[603] Yuliya Bolotova, John M. Connor and Douglas J. Miller, 'Factors Influencing the Magnitude of Cartel Overcharges: An Empirical Analysis of the U.S. Market' (2009) 5(2) *Journal of Competition Law & Economics* 361, 367.
[604] UK Department of Trade and Industry, *A World Class Competition Regime* (2001) [7.15].
[605] Maurice Stucke, 'Morality and Antitrust' (2006) *Columbia Business Law Review* 443, 481.

cartels are sought to be deterred, imposing monetary sanctions that cause corporations to reduce investments in innovation would, again, be counter intuitive.

However, this line of argument fails to recognise that maximum sanctions are rarely, if ever, imposed.[606] Maximum sanctions are intended to indicate to the Court how seriously the conduct should be viewed, and are illustrative of the sanctions that should be imposed in the worse possible case.[607] It also fails to recognise that the Court considers factors beyond simply the value of the maximum monetary sanction, such as the offender's ability to pay, when deciding the magnitude of the monetary sanction to impose. [608] As a result, the use of a multiple of six[609] to denote the probability of detection is appropriate to optimally deter cartel conduct.

6.3.1.1 Should the multiple of six be used for both fines and civil penalties?

To determine this, the rationale for the imposition of fines and civil penalties should be examined. Civil penalties should achieve mere deterrence. Mere deterrence puts a 'price' on the cartel conduct so that it is not economically viable to engage in such a conduct.[610] However, criminal sanctions should go beyond mere deterrence, and also incorporate 'punishment' to reflect the deliberate, calculated nature of – and the element of moral turpitude inherent in – a criminal cartel offence.[611] As corporations cannot be imprisoned, the only way to illustrate this is through a higher monetary penalty for a criminal offence. As a result, maximum fines should be significantly more severe than maximum civil penalties.

Another reason why criminal sanctions should be harsher than civil sanctions is that the standard of proof required in an action for civil penalties, while generally thought to be on the balance of probabilities, is actually a flexible standard that increases 'in proportion to the severity of the penalty sought.'[612] As a result, civil penalties should not be so high as to almost warrant proof beyond a reasonable doubt.

As maximum fines must be more severe than maximum civil penalties, it must be determined whether the multiple of six should apply to criminal or civil sanctions. As the multiple of six is calculated by using a formula for mere deterrence, it is appropriate to impose the multiple on the civil penalty.

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[606] Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [2.112].

[607] Ibid [26.13]. The 'worse possible case' for cartel conduct is generally accepted to occur when the cartel has been sustained for an extended period, and where the corporations involved obtained large gains and had a large market share: [26.10]. However, if this is the case, significantly higher penalties should have been imposed in the *Cardboard Box Case,* as the Amcor-Visy cartel was sustained for an extended period of time, and Amcor and Visy obtained large gains and had 90% market share.

[608] CCA section 76; *TPC v CSR Ltd* (1991) ATPR 41–076 at 52,152–3 per French J; *ACCC v NW Frozen Foods Pty Ltd* (1996) ATPR 41-515 at 42,442-5 per Heerey J.

[609] Erring on the side of caution by accepting the higher bound of the probability of detection.

[610] *TPC v CSR Ltd* [1991] ATPR 41-076; John C. Coffee Jr, 'Paradigms Lost: The Blurring of Criminal and Civil Law Models – And What Can Be Done About It' (1992) 101(8) *Yale Law Journal* 1875, 1876.

[611] John C. Coffee Jr, 'Paradigms Lost: The Blurring of Criminal and Civil Law Models – And What Can Be Done About It' (1992) 101(8) *Yale Law Journal* 1875, 1876; Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 39.

[612] Ministerial Council for Consumer Affairs, *Civil Penalties for Australia's Consumer Protection Provisions* (2005) 13.

There is, however, an argument that it would be more appropriate to apply this multiple to fines. This is because the multiple of six is grounded in the assumption that, when such a multiple is imposed, corporations will seek to avoid cartel conducts.[613] This assumption does not match with the civil prohibitions for cartel conducts, as the civil prohibitions can be contravened in the absence of any intention of the corporation. However, this argument is fundamentally flawed as it fails to recognise that actions may be pursued for civil penalties when a criminal prosecution fails. This may occur when a jury cannot unanimously decide that the party knew or believed they had engaged in cartel conduct *beyond a reasonable doubt*. It does not necessarily mean that the corporation had no knowledge or belief, but that the knowledge or belief could not be proven at a very high standard. The multiple of six should therefore be imposed on the maximum civil penalty, and the appropriate penalty in each case can be reduced where the contravention was not deliberate.[614]

The magnitude of the increase in fines over civil penalties is difficult to determine, given that no other jurisdiction imposes parallel criminal and civil penalties. A similar situation does exist in Austria, as Austrian courts are able to impose both civil penalties and fines on bid-rigging. However, their legislation provides for a maximum civil penalty of 10% of turnover[615] and maximum fines of up to $10 million.[616] This means that the criminal penalty could be an excessive addition to the civil penalty,[617] or be very small in comparison to the penalty already imposed.[618] As a result, the experience in Austria is not illustrative of the value of be placed on optimal fines.

Consequently, the only conclusion that can be drawn is that maximum fines must be substantially greater than maximum civil penalties in order to optimally deter cartel conduct. By how much is a matter that can only be determined through experience.

6.3.2 Formula for Calculating Net Social Harm

In recognition of the difficulty in calculating net social harm on a case by case basis, the United States Sentencing Commission (**USSC**) specifies a generic percentage of commerce affected.[619] This is to 'avoid the time and expense that would be required for the court to determine the actual' harm.[620] This generic percentage is based on the presumption that:

(i) a cartel conduct 'typically results in price increases that [harm] the consumers in a range of 10% of the price';[621] and
(ii) the probability of detection is 50%.[622]

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[613] Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001) 40.
[614] *TPC v CSR Ltd* (1991) ATPR 41–076 at 52,152–3.
[615] Preslmayr Rechtsanwälte OG, 'Austria' in Global Legal Group (ed) *The International Comparative Legal Guide to Cartels & Leniency 2010* (2010) 24.
[616] *Hard Core Cartels,* OECD Report (2000) 49.
[617] For small corporations.
[618] For very large corporations.
[619] USSC, *Guidelines Manual* (2009) §2R1.1(d)(1). These sentencing guidelines are not compulsory. Other bases for calculating penalties are provided for in the *Criminal Fine Improvement Act,* 18 USC (1987).
[620] USSC, *Guidelines Manual* (2009) §2R1.1.
[621] Douglas H. Ginsburg, Statement to the United States Sentencing Commission 13-14 (July 15, 1986).
[622] John M. Connor and R. Lande, 'How High do Cartels Raise Prices? Implications of Optimal Cartel Fines' (2005) 80(2) *Tulane Law Review* 513, 523.

As a result, the base fine is specified as 20% of affected commerce, by multiplying the average harm by the inverse of the probability of detection. However, as the average cartel overcharge is now estimated to be 18%, and the probability of detection results in a multiple of at least 6, the relevant fine would be 108% of affected commerce, a maximum sanction that ventures far beyond mere deterrence.

As a result, it is better to employ a variation of social harm that focuses only on the redistribution of wealth from consumers to producers,[623] being the excess profits. Net social harm is then calculated as the excess profits obtained by all parties, minus any social benefit. However, as a cartel conduct generally has no redeeming social qualities, [624] perhaps the best way to calculate net social harm is to provide a formula based solely on excess profits, so that the absence of social benefit is not required to be proven by the ACCC or the CDPP in each case. However, both parties must have the ability to provide evidence that there are social benefits flowing from the cartel conduct. If they can succeed in proving this, then the value of the social harm should be reduced by the Court accordingly.

Calculating sanctions based on excess profits is in line with Dawson Review recommendation,[625] the OECD recommendation,[626] the views of the Australian Law Reform Commission,[627] the model of absolute deterrence,[628] the Penalty Guide[629] and the *Proceeds of Crime Act 2002* (Cth). Additionally, excess profits can be effectively calculated, as shown by many studies prepared by experts in treble damages litigations in the United States.[630]

A formula that calculates social harm based on excess profits must ensure that it incorporates the social harm caused by all parties, as the harm caused by cartel conduct only arises from the combined efforts of all parties. However, it will often be difficult to prove the excess profits obtained by cartel parties who are not the subject of the legal proceedings, as the ACCC's power to obtain evidence under section 155 is limited to that which 'constitutes, or may constitute, a contravention' of the CCA. As evidence of excess profits, it is required to calculate the penalties, as opposed to prove a contravention and the ACCC must rely on the cooperation of the other cartel parties – something they are not likely to receive, as such evidence would tend to incriminate the cartel party not subject to the legal proceedings. As a result, the excess profits of the other cartel parties must be determined from the excess profits of the defendant

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[623] Katalin Cseres, Maarten Pieter Schinke and Floris O.W. Vogelaar, *Criminalization of Competition Law Enforcement* (2006) 227.
[624] Anthony Gray, 'Criminal Sanctions for Cartel Behaviour' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 364.
[625] Dawson Review, 164.
[626] *Cartel Sanctions Against Individuals,* OECD Roundtable Report (2003) 19.
[627] Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [26.14].
[628] Ibid [25.10].
[629] Penalty Guide, 38.
[630] ICN Working Group on Cartels, *Building Blocks for Effective Anti-Cartel Regimes (Vol. 1)*, International Competition Network (2005) 54. This is notwithstanding that calculating "excess profits" requires determining the price the members of the cartel would have charged in the absence of the cartel, which is a notoriously difficult task.

corporation. In addition to this being necessary, it may also be preferable in practice, as it reduces enforcement costs.[631]

To calculate net social harm from the excess profits of the defendant corporation, the market share of the other cartel parties relative to the defendant corporation must be taken into account. As a result, the formula should be:

P + [P × (S/M)]

where:

(i) ***P*** represents the excess profits obtained by the defendant corporation;
(ii) ***S*** represents the combined market share of all other cartel parties; and
(iii) ***M*** represents the market share of the defendant corporation.

For example, to determine the social harm where the defendant corporation has obtained $1 million in excess profits and has 20% market share, and all other cartel parties have a combined market share of 40%, the formula would be applied as follows:

$100,000,000 + [$100,000,000 × (40/20)]

to return a value of $3 million for social harm.

6.3.3 Determining the Alternative Basis

An alternative basis for maximum monetary sanctions is required for where no social harm has resulted. This alternative basis should be tied to the economic position of the corporation instead of imposing a specific monetary value.[632] This is because a specified monetary value may be enough to ruin a small corporation, but may be completely insignificant to a larger corporation, causing the sanction to 'be little more than a "licence fee" for engaging in' a cartel conduct.[633] As a result, the alternative basis should have a reference the corporation's turnover.

Other countries using turnover to calculate the extent of civil or criminal liability usually impose a maximum monetary sanction of 10% of the corporations' annual turnover.[634] This percentage has generally been effective in deterring cartel conducts,[635] and therefore the percentage should be used for optimal deterrence.

6.4 SUMMARISING OPTIMAL SANCTIONS FOR CORPORATIONS

For civil contraventions, the sanctions should impose a maximum penalty of six times the social harm caused by the cartel conduct or, where there has been no social harm, 10% of the corporation's annual turnover. The fine imposed for engaging in a criminal

[631] Katalin Cseres, Maarten Pieter Schinke and Floris O.W. Vogelaar, *Criminalization of Competition Law Enforcement* (2006) 228.
[632] *ACCC v ABB Transmission & Distribution Limited (No 2)* (2002) 190 ALR 169 at 176.
[633] Ibid.
[634] Dawson Review, Chapter 10; ICN Working Group on Cartels, *Building Blocks for Effective Anti-Cartel Regimes (Vol. 1)*, International Competition Network (2005) 69.
[635] ICN Working Group on Cartels, *Building Blocks for Effective Anti-Cartel Regimes (Vol. 1)*, International Competition Network (2005) 69.

cartel conduct should be calculated in the same way. However, the multiple of social harm and the percentage of turnover should be significantly higher for the fine.
Social harm should be calculated, in the absence of any proof of social benefit, as

P + [P × (S/M)]

where:

(i) ***P*** represents the excess profits obtained by the defendant corporation;
(ii) ***S*** represents the combined market share of all other cartel parties; and
(iii) ***M*** represents the market share of the defendant corporation.

6.5 COMPARING THE CARTEL SANCTIONS TO THE OPTIMAL SANCTIONS

The Cartel Sanctions impose on corporations, as a civil penalty or fine, the maximum of:

(i) $10 million;
(ii) triple the value of the benefit obtained by one or more persons that is reasonably attributable to the cartel conduct; or
(iii) if the court cannot determine the benefit, 10% of the annual turnover of the corporation;[636]

The Cartel Sanctions are optimal in three ways. Firstly, they provide a number of alternatives to calculate the monetary sanctions. Secondly, they provide for monetary sanctions on the basis of turnover and the excess profits obtained by the corporation. Thirdly, they provide for a sanction of 10% of turnover. However, there are many reasons why the Cartel Sanctions fall far short of being optimal to deter corporations from engaging in cartel conducts.

6.5.1 Strike One: Maximum Fines Equal to Maximum Civil Penalties

The Cartel Sanctions impose maximum fines of equal value to maximum civil penalties for the same conduct. As a result, the availability of corporate criminal sanctions appears to be redundant.

6.5.1.1 Is there any utility in maximum fines equal in value to maximum civil penalties?

The Department of Treasury has noted that corporate criminal sanctions may be necessary to support the creation of individual criminal sanctions, as there 'may be constitutional difficulties in the creation of a Commonwealth offence for individuals but not for corporations if the corporations power is relied on to support the provision.'[637] As a result, the criminal sanctions may have been imposed on corporations in an attempt to validly impose criminal liability on individuals. However, a Commonwealth head of power is only required for the validity of the accessorial liability provisions contained in section 79, which, as it creates accessorial liability, requires a corporate offence for it to be valid in any case. The direct individual offence does not require a Commonwealth head of power to be valid, as it is contained in Schedule 1 of the CCA, which applies in each State and Territory as a law of that jurisdiction.[638] Even if the direct individual

[636] CCA section 76(1A)(aa).
[637] Department of Treasury, *Trade Practices Act Review* (2003) Chapter 10.
[638] *Competition Policy Reform Act (Western Australia) 1996* (WA); *Competition Policy Reform Act (Northern Territory) 1996* (NT); *Competition Policy Reform Act (Queensland) 1996* (Qld); *Competition*

offence was part of the CCA, and therefore relied on a Commonwealth head of power for its validity, it would be supported by the corporations' power, as it extends to laws regulating persons by and through whom the corporation carries out its functions and activities.[639] Additionally, the external affairs power may support the creation of a Commonwealth cartel offence for individuals, if it is accepted that the Commonwealth can legislate on matters of international concern,[640] as regulating cartel conduct is a matter of international concern.

There are, however, two features of a criminal conviction that give utility to the corporate criminal offence, as it currently stands. Firstly, an action for civil penalties has a limitation period of 6 years, while a criminal prosecution has no limitation period. However, limitation periods are simply creations of the statute[641] that were developed with reference to private civil actions rather than actions instigated by authorities. As actions for civil penalties are more closely related to criminal prosecutions than private civil actions, there is no reason that the limitation period for actions for civil penalties could not be removed or increased, if it was thought to be in the interests of justice.[642] Secondly, there can be flow on effects, such as exclusion from public procurement processes,[643] which may deter corporations where simply a civil penalty could not.

Accordingly, the current corporate criminal offence does have some utility.

6.5.1.2 Is there any reason why maximum fines should not be greater in value than maximum civil penalties?

The Explanatory Memorandum of the Cartel Bill[644] provides no reason for imposing maximum fines equal in value to maximum civil penalties, apart from stating that the monetary sanctions were imposed to give effect to recommendation 10.2 of the Dawson Review.[645] However, recommendation 10.2 deals with civil penalties, not fines. As such, there is no reason why for the maximum fines to be equal in value to maximum civil penalties.

Policy Reform Act (New South Wales) 1995 (NSW); *Competition Policy Reform Act 1996* (ACT); *Competition Policy Reform Act (Victoria) 1995* (Vic); *Competition Policy Reform Act (Tasmania) 1996* (Tas); *Competition Policy Reform Act (South Australia) 1996* (SA).

[639] *New South Wales v Commonwealth* (*Workchoices case*) (2006) 231 ALR 1 at [54].

[640] The existence and extent of the international concern doctrine remains undetermined: see *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 per Stephen, Mason and Murphy JJ; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Polyukovich v The Commonwealth* (1991) 172 CLR 501; *Soulitopoulos v La Trobe University Liberal Club* (2002) 120 FCR 584; *XYZ v Commonwealth* [2006] HCA 25; *Pape v Commissioner of Taxation* [2009] HCA 23.

[641] Terrence Prime and Gary Scanlan, *The Law of Limitation* (2nd ed, 2001) 1; Andrew McGee, *Limitation Periods* (5th ed, 2006) 2. The doctrine of laches imposes a quasi limitation period in equity, as actions are not able to be brought if there has been unreasonable delay: Terrence Prime and Gary Scanlan, *The Law of Limitation* (2nd ed, 2001) 1.

[642] The *Submission to the Trade Practices Act Review* (ACCC Report (2002) 19) recommended that the limitation period be increased to 10 years for cartel conduct.

[643] New Zealand Ministry for Economic Development, *Cartel Criminalisation Discussion Document* (2010) 77.

[644] Explanatory Memorandum, *Trade Practices (Cartel Conduct and Other Measures) Bill 2008* (Cth).

[645] Julie Clarke, *Dawson Report 2003*, Australian Competition Law <http://www.australiancompetitionlaw.org/ reports/2003dawson.html> at 30 September 2010.

6.5.2 Strike Two: Multiple for 'Benefit' Too Small

The Cartel Sanctions impose a multiple of three on the benefit obtained by one or more parties to the cartel conduct. This multiple is only half that should be imposed for a civil penalty, and less than half than the one imposed imposed for a fine.

6.5.3 Strike Three: No Formula for Benefit

The Cartel Sanctions do not provide an explanation of how to calculate the "benefit" obtained by the corporation from the cartel conduct. As a result, the maximum liability of a corporation is uncertain.

6.5.4 Strike Four: Specified Monetary Maximum

The Cartel Sanctions provide for a minimum monetary sanction of $10 million. This minimum amount will be the maximum penalty for making a cartel agreement, as the 'benefit' is zero, and the turnover provision will not apply, as the benefit is able to be calculated. As previously discussed, this is not optimal as $10 million is an insufficient deterrent for corporations with high turnover.

7. ESTABLISHING A REGIME OF OPTIMAL SANCTIONS FOR INDIVIDUALS

7.1 EXPLORING OPTIMAL CIVIL PENALTIES FOR INDIVIDUALS

For optimal deterrence, the maximum civil penalty should be high.[646] However, the optimal value of the penalty is extremely hard to determine, as it is not always clear to what extent an individual is liable for the harm perpetrated by the corporation, or to what extent he benefited from the excess profits obtained by the corporation.[647] He may have benefited, by a fixed percentage,[648] or perhaps he did not at all, except in so far as he continues to be an executive of the corporation.

As a result, perhaps the best way to establish the optimal civil penalty for an individual is to aim for consistency with the penalty imposed for contraventions of a similar kind and seriousness.[649] The other provisions of Part IV of the CCA are similar, as they apply to other restrictive trade practices. Insider trading is also similar, as a benefit is achieved by an individual through market distortion. A contravention of any other provision of Part IV carries a maximum civil penalty of $500,000,[650] while insider trading carries a maximum civil penalty of $200,000.[651] As a cartel conduct is at least as serious as any other contravention of Part IV, a maximum civil penalty of $500,000 could be imposed

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[646] Caron Beaton-Wells and Neil Brydges, 'The Cardboard Box Cartel Case: Was All the Fuss Warranted? ' (2008) 36 *Australian Business Law Review* 1, 16.
[647] Maurice Stucke, 'Morality and Antitrust' (2006) *Columbia Business Law Review* 443, 484; OECD Secretariat, 'Cartels: Sanctions Against Individuals' (2007) 9(3) *OECD Journal of Competition Law and Policy* 7, 19.
[648] Maurice Stucke, 'Morality and Antitrust' (2006) *Columbia Business Law Review* 443, 484.
[649] Penalty Guide, 35; Explanatory Memorandum, *Trade Practices (Cartel Conduct and Other Measures) Bill 2008* (Cth) 34.
[650] CCA section 76(1A)(b).
[651] *Corporations Act 2001* (Cth) sections 1317E, 1317G.

on individuals who engage in cartel conduct, notwithstanding the penalty imposed on insider trading.

However, the New Zealand Ministry for Economic Development notes that while $500,000 may appear to be a large sum, it may not have a sufficient deterrent effect on individuals who have a high net worth.[652] They suggest that a higher maximum should be imposed, as monetary sanctions can always be adjusted downwards to take into account an individual's capacity to pay, but 'cannot be adjusted above the maximum to have an effect on the very wealthy.'[653] As a result, the New Zealand Ministry for Economic Development recommend a maximum civil penalty of $5 million for individuals.[654] However, when attempting to impose an effective deterrent for individuals for high net worth, a civil penalty calculated as a percentage of an individual's net worth would be a more effective deterrent.[655] In line with the civil penalties for corporations, a maximum civil penalty of 10% of an individual's net worth should be imposed. The net worth should be assessed when the conduct was engaged in and when the judgment is delivered, and the highest net worth should be used to calculate the civil penalty, so as to overcome any problems of individuals divesting assets to obtain a low penalty.

7.2 EXPLORING OPTIMAL CRIMINAL SANCTIONS FOR INDIVIDUALS

While fines are useful as part of a regime to deter individuals,[656] imprisonment is the most powerful and effective deterrent for executives.[657] This is illustrated by the fact that some global cartels have 'specifically excluded the United States from their operations' due to the substantial risk of imprisonment for engaging in cartel conducts.[658]

Imprisonment is such a powerful deterrent because '[n]o price can be given to the loss of one's liberty.'[659] This is true even despite the fact that few white collar criminals are successfully prosecuted.[660] The reason for this is simple: executives fear the prospect of jail so much that even the slight probability of imprisonment, even if it is only for a short period of time, will deter them from engaging in the conduct in the first place.[661] As a result, optimal deterrence requires imposing imprisonment terms on individuals

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[652] New Zealand Ministry for Economic Development, *Cartel Criminalisation Discussion Document* (2010) 25.
[653] Ibid.
[654] Ibid 26.
[655] *Cartel Sanctions Against Individuals,* OECD Roundtable Report (2003) 20.
[656] Due to reputational damage, and the way a criminal conviction looks to potential employers.
[657] OECD Secretariat, 'Cartels: Sanctions Against Individuals' (2007) 9(3) *OECD Journal of Competition Law and Policy* 7, 18-19; *Cardboard Box Case* at 709; Anthony Gray, 'Criminal Sanctions for Cartel Behaviour' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 364, 369.
[658] New Zealand Ministry for Economic Development, *Cartel Criminalisation Discussion Document* (2010) 28.
[659] Marcus Bezzi, 'The Conduct of Cartel Litigation: The ACCC Enforcement Perspective on Serious Cartels – Some Key Issues and Practical Considerations' (Speech delivered at the Competition Law Conference, Sydney, 23 May 2009).
[660] This is due to the resources at their disposal, such as top legal counsel, political connections and deep pockets: Elizabeth Szockyj, 'Imprisoning White Collar Criminals?' (1999) 23(2) *Southern Illinois University Law Journal* 485, 487-488.
[661] Arthur Liman, 'The Paper Label Sentences: Critique' (1977) 86 *Yale Law Journal* 619, 631; *Cartel Sanctions Against Individuals,* OECD Roundtable Report (2003) 20; Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (2005) 112.

who engage in cartel conducts by pursuing a criminal offence[662] because, if executives know they may be subject to imprisonment if caught, then they are significantly less likely to engage in the conduct.

7.2.1 Optimal Prison Sentences

There is a strong argument that short prison sentences are the most cost effective deterrent to cartel conduct, as the marginal gains in deterrence from imposing longer sentences are outweighed by the marginal cost.[663]

However, having shorter maximum sentences for cartel conduct simply because it is executives who will be serving them is hard to reconcile with the principles of equality and justice.[664] Additionally, longer maximum sentences reinforce society's condemnation of the conduct.[665] If maximum sentences are short, cartel conducts may not be seen as serious offences.[666] This is unacceptable, as they should be seen as serious violations of the law.[667] Additionally, where the public perception is that cartel conduct is not 'criminal', the best way to change this perception is to impose frequent, significant jail terms on individuals found to engage in cartel conduct.[668]

As a result, maximum imprisonment terms should at least bring the sanctions for cartel conducts in line with other white-collar offences, and optimally bring cartel conducts in line with other offences viewed as 'serious' offences. A 10-year maximum term for a cartel conduct is consistent with other white-collar offences,[669] and other 'serious' Commonwealth offences, such as theft,[670] obtaining financial advantage by deception,[671] conspiracy to defraud,[672] and insider trading.[673] Additionally, the United States, a country known for its ability to deter individuals from engaging in cartel conducts, has a maximum jail term of 10 years.[674] As a result, the maximum imprisonment sentence for individuals who engage in cartel conducts should be 10 years.

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[662] There appears to be too slight a probability of an executive to be imprisoned as a result of the probability of detection and conviction being low.
[663] *Cartel Sanctions Against Individuals,* OECD Roundtable Report (2003) 8 & 20.
[664] Ibid 80.
[665] Ibid 8.
[666] Ibid 20.
[667] Ibid 51.
[668] Ibid 101.
[669] Nicole Rich and Neil Ashton, *Submission to the Senate Economics Committee – Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008,* Consumer Law Action Centre (2009) 2; *Criminal Code Act 1995* (Cth) section 141.1.
[670] *Criminal Code Act 1995* (Cth) section 131.1(1).
[671] *Criminal Code Act 1995* (Cth) section 134.2(1).
[672] *Criminal Code Act 1995* (Cth) section 135.4.
[673] *Corporations Act 2001* (Cth) sections 1043A, 1311(1) and Schedule 3.
[674] *Sherman Act,* 15 USC §§ 1-2 (1890); *Antitrust Criminal Penalty Enhancement and Reform Act of 2004,* Pub L No 108-237 §§ 215 (United States). Interestingly, Canada imposes a higher maximum prison sentence of 14 years: *Competition Act* (Canada), RSC 1985, c C-34, section 45(2).

7.2.2 Optimal Fines

The Penalty Guide directs the maximum fine to be calculated as '5 penalty units multiplied by the maximum prison term in months.'[675] As 10 years is the equivalent of 120 months, the maximum fine should be the equivalent of 600 penalty units; or $66,000. However, this is insufficient to deter high (or even medium) net worth individuals. As a result, the maximum fine should be specified, and be based on turnover. For individuals, like corporations, the maximum fine must be higher than the maximum civil penalty to incorporate the element of 'punishment'.

7.3 SUMMARISING OPTIMAL SANCTIONS FOR INDIVIDUALS

The maximum civil penalty for an individual should be 10% of an individual's net worth at the time of judgement or contravention, whichever is greatest. The maximum fine should be greater than this. Individuals should also be subject to imprisonment, with a maximum term of 10 years.

7.4 COMPARING THE CARTEL SANCTIONS WITH THE OPTIMAL SANCTIONS

The Cartel Sanctions impose a maximum civil penalty on individuals of $500,000, a fine of $220,000 and/or a maximum jail term of 10 years. The term of imprisonment imposed by the Cartel Sanctions is optimal. However, the individual sanctions fall short of being optimal for a number of reasons.

7.4.1 Strike One: Maximum Value of Civil Penalties and Fines

The maximum monetary sanctions imposed are represented by a specified monetary value, as opposed to a percentage of net worth. The Explanatory Memorandum to the Cartel Bill provides no reason for imposing monetary sanctions for individuals at such a level. However, imposing penalties for consistency fails to recognise that cartel conduct is one of the most serious violations of competition law, and thus it should be subject to higher penalties.

7.4.2 Strike Two: Maximum Fine lower than Maximum Civil Penalty

By having a lower fine than civil penalty, the Cartel Sanctions fail to recognise that criminal sanctions should be more severe than civil penalties. While it could be argued that they recognise this by making imprisonment a sentencing option, a fine is also an alternative to imprisonment, and so the maximum fine should be higher than the maximum civil penalty.

8. CONCLUSION

If the key goal of the Cartel Amendments was to effectively deter cartel conduct in Australia, then they should have created a suite of sanctions which are optimal to deter cartel conduct.

[675] Penalty Guide, 37-38.

Even if optimal sanctions were created, a number of other supplementary issues may represent that the Cartel Amendments fail to achieve their goal. Firstly, the Court, in conjunction with the ACCC, must impose sanctions sufficient enough to deter a cartel conduct.[676] Just because a sanction regime is optimal, does not mean that the sanctions imposed will be optimal in every case.[677] As an illustration of this, the *Cardboard Box Cartel Case* involved a cartel conduct that can be said to be close to the 'worst possible case', and thus sanctions close to the maximum should have been imposed. However, the civil penalties imposed by the Court, after being agreed to by the ACCC, were less than 10% of the statutory maximum. Secondly, it is important that an effective immunity policy exists, which encourages businesses and individuals to disclose cartel agreements to the ACCC.[678] This deters cartel formation as it contributes to the certainty dimension of deterrence, because the potential participants perceive a greater risk of detection and, consequently, sanctions.[679] Thirdly, the provisions that prohibit cartel conducts, and their exceptions, must be clear so that corporations and individuals know what conduct should be avoided.[680] If they are not, over-deterrence can result, with people foregoing socially desirable activities because they are unsure what conduct is prohibited.[681] Under-deterrence can also result, as people may not avoid corporate activities that are inherently profitable and only possibly prohibited. Lastly, the ACCC must be vigilant in investigating and enforcing contraventions of the Cartel Amendments, as this contributes to the certainty and celerity dimensions of deterrence.[682] While these issues are important in determining whether the Cartel Amendments achieve their goal of deterring cartel conduct, they are beyond the scope of this article.

This article has argued that for the Cartel Sanctions to achieve their goal, the sanctions must have sufficient certainty and severity. It can be seen that the Cartel Sanctions have sufficient certainty, as they impose parallel civil and criminal liability on corporations and individuals. However, the Cartel Sanctions are not sufficiently severe as they:

(i) impose a specified maximum value for monetary sanctions;
(ii) impose maximum fines on corporations that are equal to the maximum civil penalties;
(iii) fail to provide an appropriate formula for calculating benefit; and

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[676] *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes,* OECD Report (2002) 87;
[677] David Round, 'Consumer Protection: At the Merci of the Market for Damages' (Paper presented at Current Issues in Regulation: Enforcement and Compliance, Melbourne, 2–3 September 2002) 10.
[678] *ACCC Immunity Policy Interpretation Guidelines* (14 July 2009) 1.
[679] ICN Working Group on Cartels, *Building Blocks for Effective Anti-Cartel Regimes (Vol. 1)*, International Competition Network (2005) 74; *ACCC Immunity Policy Interpretation Guidelines* (14 July 2009) 1.
[680] *Cartel Sanctions Against Individuals,* OECD Roundtable Report (2003) 9.
[681] Richard Posner, 'Optimal Sanctions: Any Upper Limits? ' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd ed, 2009) 65.
[682] The ACCC has a reputation of 'being one of the most vigilant competition law enforcement authorities in the world, [and] defending consumer interests vigorously.' As a result, it is likely that their enforcement of contraventions of the Cartel Amendements contributes significantly to the deterrence of cartel conduct: Peter Armitage and Wolfgang Hellman, 'Australia: Overview' in Global Competition Review, *The Asia-Pacific Antitrust Review* (2010) <http://www.globalcompetitionreview.com/reviews/25/sections/90/chapters/940/australia-overview/> at 21 September 2010.

(iv) impose maximum fines on individuals that are less than maximum civil penalties.

The implication of this is clear. Without further reform, the Cartel Amendments do not optimally achieve their stated objective of deterring cartel conduct.

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To what extent can cooperative procedures (leniency, commitment and settlement procedures) before the French Competition Authority limit the risks associated with a competition law infringement?

ROMAIN MAULIN[·]

Preliminary thoughts

The purpose of this article is to discuss the advantages and disadvantages that cooperative procedures (i.e. leniency, commitment and settlement procedures) may represent for companies that are or may be under investigation by the French Competition Authority in terms of more effective management of the risks arising from a potential infringement of competition law.[684] *Each procedure offers certain opportunities to candidate companies but they also have their limits, all of which must be thoroughly assessed prior to making an application.*

The French Competition Authority (hereafter the "**FCA**") has the power to impose fines on companies that infringe Articles L. 420-1 and L. 420-2 of the French Commercial Code (i.e. the French equivalent of Articles 101 and 102 TFEU). Since the implementation of the New Economic Regulations Law of 15 May 2001, the maximum amount of the fine is 10% of the consolidated worldwide turnover of the group to which the addressee of the statement of objections belongs.[685] Fines have recently reached unprecedented levels in France.[686]

A company suspected to have infringed competition law can choose to cooperate with the FCA and abstain from challenging its findings. It generally does so in the hope of receiving some benefit or reward.[687] Accordingly, the company may try to apply for one or more of the cooperative procedures available before the FCA, namely leniency, commitment or settlement.[688]

[·] Associate in the competition law department of Allen & Overy LLP, Paris. I am grateful to Muriel Chagny, Professor of Law at the University Versailles-Saint-Quentin-en-Yvelines, Director of the Contract and Competition Law Master, and Dominique Brault for their comments on an earlier draft of this paper. All views expressed in this paper are strictly personal.

[684] This paper will not discuss alternative enforcement techniques available before the European Commission or other NCAs. For a detailed analysis of these procedures see in particular: Wouter P.J Wils, *The use of settlements in public antitrust enforcement: objectives and principles*, available at: www.http//papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=456087 and Denis Waelbroeck, *Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions) : que va-t-il rester aux juges?*, GCLC Working Paper, 01/08.

[685] Article L. 464-2, I, para. 4, of the French Commercial Code. Under the previous system, the maximum fine that could be imposed on a company was 5% of the turnover generated in France by the company to which the statement of objections was addressed.

[686] The highest fines imposed by the FCA are as follows: 1. €534 million in case 05-D-65 (mobile telephony cartel), 2. €384.9 million in case 10-D-28 (interbank fees), 3. €174.5 million in case 00-D-28 (property loans to private individuals), 4. €94.4 million in case 09-D-05 (temporary employment sector), etc.

[687] Wouter P.J Wils, The use of settlements in public antitrust enforcement: objectives and principles, p. 4.

[688] For an in depth study of these cooperative procedures see in particular: FCA, annual report 2005, pp. 134-178, Arnaud Vialfont, *Le droit de la concurrence et les procédures négociées*, 2007-2, p. 157-184, available at www.cairn.info/revue-internationale-de-droit-economique-2007-2.htm , and Lucie Carswell-Parmentier, *Recent developments in French competition law – commitments, leniency and settlement procedures – the French approach*, ECLR, 2006, pp. 616-630.

In France, where until recently Article L. 464-2 of the French Commercial Code[689] provided the only body of rules to be used by the FCA to set the amount of fines, it is widely agreed among competition law practitioners that there is a lack of predictability of antitrust risks and more precisely antitrust fines, especially in times of crisis.[690] In this context, cooperative procedures represent a very important tool to control, to a certain extent, the risks arising from a possible infringement of competition law.

In fact, parties targeted by a FCA inspection have little idea of the likely level of the fine based on the content of statement of objections or of the report[691] and can only estimate the amount based on past FCA decisions.

The FCA is well aware of this lack of predictability and recently chose to follow the path of a number of other competition authorities,[692] starting with the United States and echoed by the European Commission, by setting out its methodology in the recent Notice on the method relating to the setting of financial penalties (hereafter the "**Fining Guidelines**"),[693] the purpose of which is to enhance transparency and enable stakeholders "to better understand how financial penalties are set".[694] The calculation method shown in the Fining Guidelines is, to a large extent, similar to that used by a number of other NCAs: the calculation sets a basic amount relating to the nature of the particular infringement that can then be adjusted to reflect various factors such as the duration of the infringement, aggravating or mitigating circumstances, recidivism, the damage caused to the economy and the need to set a deterrent fine in each case. One of the main goals of the Fining Guidelines was also to give parties more guidance as to the elements taken into account for the calculation of the fine.[695]

However, the recent release of the Fining Guidelines has not completely changed the situation since the FCA is still entitled, in certain circumstances, to depart from its method[696] and enjoys, at every step of this method, considerable latitude as to its implementation. The FCA considers that maintaining a certain amount of discretion in

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[689] Article L. 464-2, I, para. 3, of the French Commercial Code: "The financial penalties are proportionate to the seriousness of the charges brought, to the scale of the damage caused to the economy, to the financial situation of the body or company penalised or to the group to which the latter belongs, and to the likelihood of any repetition of practices prohibited by the present Part. They are individually determined for each company or body penalised, with reasons given for each penalty."

[690] See in particular the report on the assessment of the financial penalties for anticompetitive practices requested by the French minister of the economy, p. 6, available at: www2.economie.gouv.fr/services/rap10/100920rap-concurrence.pdf .

[691] Contrary to the EU procedure, the French fully adversarial procedure is based on two different stages: (i) a statement of objections is sent to the parties, which have two months to submit their comments and (ii) a report, in which the case handler assesses and replies to the parties' comments, is sent to them. Here again the parties have two months to submit any comments. Then a hearing is scheduled and a final decision is ultimately adopted by the *collège* of the FCA.

[692] It should be noted that other NCAs recently adopted fining guidelines, namely Spain (2009), Germany (2006) and the UK (2004).

[693] FCA, Notice of 16 May 2011 on the method relating to the setting of financial penalties, available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=260&id_article=1601 .

[694] Fining Guidelines, para. 14.

[695] Fining Guidelines, para. 14.

[696] Fining Guidelines, para. 7: "The notice commits the Autorité, which must set the financial penalties that it imposes in a consistent way. It is therefore opposable to it, to the extent that the Autorité does not set forth, in the reasoning of decision, the specific circumstances or the motives of general interest that lead it to depart from it in a given case."

penalty setting is crucial to ensure that the level of penalty imposed reflects the particular circumstances of the case and the individual party, thereby ensuring that it is proportionate to the infringement.[697] This approach is shared by most NCAs and particularly the OFT, for which "[a]n excessively rigid approach to penalty setting (for example through detailed ex ante specification of the appropriate amount of penalties) could lead to fining decisions that are incompatible with the principle of proportionality."[698]

Moreover, a prescriptive approach (i.e. for a competition authority to commit to following an automatic or arithmetical calculation method) may have unintended consequences on deterrence. Companies considering the possibility of committing an infringement could then carry out a cost-benefit analysis of the situation by calculating the anticipated amount of the potential penalty and weighing this against the anticipated benefit of the infringement, taking into account the probability of detection.[699] Along the same lines, the General Court held that "to avoid excessive prescriptive rigidity and to enable a rule of law to be adapted to the circumstances, a certain degree of unforeseeability as to the penalty which may be imposed for a given offence must be permitted".[700]

Under these conditions, cooperative procedures are emblematic of the current trend followed by many competition authorities of maintaining an effective level of deterrence while providing incentives for cooperation. They can, depending on the circumstances of the case and on the stage of the proceedings, be a useful way of ensuring a higher level of predictability as to the risks arising from an infringement of competition law rules either by providing an immunity from fines (**section I**) or by lowering the level of uncertainty as to the amount of the fine (**section II**).

1. COMMITMENT PROCEDURE AND FIRST RANK LENIENCY: HOW TO ACHIEVE PERFECT CERTAINTY THROUGH IMMUNITY FROM FINES

The underlying idea of these two procedural tools is that they are available at a very early stage of the proceedings, namely well before the statement of objections is issued. The candidate companies can expect perfect certainty since they know that, when these procedures are applicable, they will not incur a fine.

1.1 Commitments procedure: the way to avoid a finding of guilt and the imposition of a fine

This procedure,[701] which was introduced in 2004, is set out in Articles L. 464-2, I, paragraph 1, and R. 464-2, paragraph 1, of the French Commercial Code and has proven

[697] Fining Guidelines, para. 16, and OFT, *Communication on draft notice for determining antitrust fines*, 11 March 2011, p. 2.
[698] OFT, *Communication on draft notice for determining antitrust fines*, 11 March 2011, p. 2.
[699] Fining Guidelines, para. 16, OFT, *Communication on draft notice for determining antitrust fines*, 11 March 2011, p. 2 and ECA Working group on sanctions, *Pecuniary sanctions imposed on undertakings for infringements of antitrust law - Principles for convergence*, p. 2.
[700] General Court, 27 September 2006, case T-43/02, *Jungbunzlauer AG v. Commission*, para. 84.
[701] For a detailed analysis of this procedure see in particular Bruno Lasserre, *La politique des engagements en matière de pratiques anticoncurrentielles : premier pas d'un bilan en France*, available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=218 .

very successful.[702] The purpose of this procedure, which has been explained by the FCA in a procedural notice (hereafter the "**Notice on Competition Commitments**"[703]), was to implement into French law the commitments procedure introduced in Regulation 1/2003.[704]

1.1.1 Field of application: abuse of dominant position and vertical restraints

Neither the French Commercial Code nor the Notice on Competition Commitments, contrary to the OFT enforcement guideline,[705] defines the circumstances (i.e. the kind of anticompetitive practices) in which it may be appropriate to accept commitments.[706] However, it is possible, on the basis of past FCA decisions, to identify situations in which this procedure is particularly appropriate.

The commitments procedure seems particularly suited to practices that may be qualified as an abuse of dominant position or to vertical restraints.[707]

1.1.2 Timing of the commitments procedure: prior to the statement of objections

Article R. 464-2 of the French Commercial Code provides that commitments are given pursuant to a "preliminary assessment of the practices in question" made by the case handlers and which is sent to the party(ies) prior to any statement of objections. It follows that commitments can no longer be submitted once the statement of objections has been issued.[708]

It should also be noted that once a company becomes aware that a complaint has been lodged with the FCA in relation to its practices (generally when it is invited by a case

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[702] It has been applied in 38 cases since its introduction and in 7 cases in 2010.

[703] Notice on Competition Commitments, 2 March 2009, available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=309 .

[704] Articles 5 and 9 of Regulation 1/2003. For a detailed analysis of this procedure see: Heike Schweitzer, *EUI working papers – Commitment decisions under Art. 9 of Regulation 1/2003: The developing EC practice and case law*, accessible at http://ssrn.com/abstract =1306245 , Wouter P.J. Wils, *Settlements of EU antitrust investigations: commitment decisions under article 9 of Regulation 1/2003*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900801 and John Temple Lang, *Commitment decisions under regulation 1/2003*, pp. 121-146, in Alternative enforcement techniques in EC competition law – settlements, commitments and other novel instruments, edited by Charles Gheur and Nicolas Petit, Bruylant, 2009.

[705] OFT, Enforcement guideline, para. 4.3: "The decision whether to accept binding commitments is at the discretion of the OFT. The OFT is likely to consider it appropriate to accept binding commitments only in cases where: (i) the competition concerns are readily identifiable, (ii) the competition concerns are fully addressed by the commitments offered, and (iii) the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time" and para. 4.4 : "The OFT will not accept, other than in very exceptional circumstances, binding commitments in cases involving secret cartels between competitors which include: (i) price-fixing, (ii) bid-rigging (collusive tendering), (iii) establishing output restrictions or quotas, (iv) sharing markets, and/or (v) dividing markets. Nor will the OFT accept binding commitments in cases involving serious abuse of a dominant position."

[706] It should be noted that Regulation 1/2003 indicates, at recital 13, that "Commitment decisions are not appropriate in cases where the Commission intends to impose a fine." This might be construed as excluding cartels and horizontal agreements from the field of application of this procedure.

[707] Notice on Competition Commitments, para. 12.

[708] Notice on Competition Commitments, para. 13. It should however be noted that the relevant provision of the French Commercial Code remains silent as to the timing of applications for the commitments procedure.

handler to attend an interview or to reply to a request for information), it can approach the Investigation Services to explore the possibility of submitting commitments.[709]

1.1.3 Advantages of the commitments procedure

The commitments procedure brings the case to an end with no statement of objections or charges issued. Accordingly, the investigation is closed with no fine for the investigated company.[710]

In addition to ruling out financial penalties, the commitments procedure allows companies to avoid a decision assessing the legality of its practices in light of competition law rules as the decision making commitments binding is adopted based on "competition concerns". As a result, it does not constitute an infringement decision since it does not take a position on the liability of the company and therefore cannot be used as the first term of the reiteration of the facts.[711] This can prove very interesting in the context of potential follow-on actions since it will be very difficult for alleged victims of such practices to rely upon the FCA's decision to establish an infringement of competition law and therefore a fault giving rise to an award of damages.[712]

It is also important to note that voluntarily submitting of commitments can be a means for a company to ensure the legality of its commercial and price policy and therefore to limit the risk of potential enforcement actions in the future. A company whose commitments have been rendered binding by the FCA can legitimately expect its commercial practices to be fully compliant with competition law.

1.1.4 Disadvantages of the commitments procedure

Companies cannot benefit from the commitments procedure before the FCA has opened an investigation. This means that a company willing to submit, on its own initiative, commitments to the FCA in order to ensure the legality of part of its commercial practices cannot approach the FCA before an investigation has been opened.

Although the commitments procedure can allow companies to control antitrust risk by avoiding an infringement decision and therefore a potential fine, it can also lead to the submission and adoption of commitments that are disproportionate and that exceed the measures necessary to remedy the competition concerns identified by the FCA.[713] This risk is particularly high since companies have not yet been given full access to the file[714] when they apply for the commitments procedure and cannot fully determine whether

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[709] Notice on Competition Commitments, para. 15.
[710] Notice on Competition Commitments, para. 7.
[711] Notice on Competition Commitments, para. 43.
[712] For an in-depth study of actions for damages in France following an infringement of competition law see National report for France prepared by Chantal Momège and Nicolas Bessot, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/study.html .
[713] In this regard, it should be noted that, in her opinion delivered in case C-441/07 P, *Commission v. Alrosa Company Ltd*, advocate general Kokott considered, at para. 43, that "If commitments offered by one or more undertakings prove to be disproportionate having regard to the Commission's aim of ensuring that competition is not distorted, it must not make those commitments binding. Instead, it must point out to the undertaking(s) that the commitments are disproportionate and, if necessary, suggest changes. If a package of commitments is divisible, there is also nothing to prevent the Commission making the commitments binding only in part" (emphasis added).
[714] Article R. 464-2 of the French Commercial Code and Notice on Competition Commitments, para. 13.

their proposed commitments are appropriate and proportionate in terms of addressing the FCA's competition concerns.

Moreover, once the commitments have been rendered binding by the FCA, the company in question must comply with them. Pursuant to Article L. 464-3 of the French Commercial Code, any failure to comply with the commitments can lead to a fine of up to 10% of the company's worldwide consolidated turnover.[715]

Companies willing to submit commitments cannot rule out the risk that the FCA will consider their proposed commitments insufficient to address the competitive concerns that have been identified and will therefore choose to return to the fully adversarial procedure, which can ultimately lead to a fine and/or injunctions.

1.2 First rank leniency: how to avoid a fine

The French leniency procedure was introduced in 2001 and is set out in Articles L. 464-2 and R. 464-2 of the French Commercial Code.[716] In 2009, the FCA adopted a new version of its procedural notice relating to the French leniency programme[717] (hereafter the "**Leniency Notice**"). Since its introduction, fifty leniency applications (including first and subsequent ranks) have been submitted to the FCA.[718]

1.2.1 Field of application: cartels and horizontal agreements

The French Commercial Code expressly provides that the leniency procedure is only applicable to "anticompetitive practices falling within the ambit of article L. 420-1" (i.e. the French equivalent of Article 101 TFEU). It should also be noted that, at EU level, the Commission Notice on immunity from fines and reduction of fines in cartel cases (the "**EU Leniency Notice**") indicates that it "sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community" (emphasis added).[719] This means for

[715] FCA, case 10-D-21 of 20 June 2010: in this case, two companies were fined EUR 100,000 for failing to comply with the commitments they had submitted in the context of a settlement procedure. It seems that the FCA is also entitled to fine a company for not complying with commitments submitted in the context of a commitments procedure. In this respect it should be noted that in this decision the FCA considered that "As is the case for non-compliance with injunctions, failing to comply with commitments constitutes a serious infringement. This situation is all the more serious given that commitments are made on the initiative of the infringing parties, who propose them, and that in exchange for making commitments, they can benefit from significant fine reductions", French translation from the French, paras. 103 and 104).

[716] François Mélin, *Les programmes de clémence en droit de la concurrence: Droit français et droit communautair*e, Editions Joly, 2010, Chantal Momège, *Le programme de clémence français, Concurrences 2-2006*, pp. 144-146 and Véronique Sélinsky & Sylvie Chole, *Invoquer la clémence : un avantage stratégique pour les entreprises, Revue Lamy droit des affaires*, June 2006, no. 6, pp. 55-63.

[717] FCA, Leniency Notice, 2 March 2009, available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=292&id_article=713 .

[718] FCA, overview of the annual report for 2010, p. 18. It should nonetheless be indicated that, to date, only four infringement decisions have been adopted by the FCA following a leniency application: cases 06-D-09, 07-D-48, 08-D-12 and 08-D-32. No infringement decisions following a leniency application were adopted in 2010.

[719] Commission Notice on Immunity from fines and reduction of fines in cartel cases, 8 December 2006, para. 1.

instance that abuses of dominant position do not qualify for the leniency procedure.[720] In practice, leniency is mostly applicable and applied in cartel cases.[721]

1.2.2 Timing of the leniency application: before inspections or immediately after them

The role played by first rank leniency is twofold: (i) to enable the FCA to carry out targeted and surprise inspections ("Type 1 A Leniency") or (ii) to enable the FCA to establish the existence of an infringement ("Type 1 B Leniency"). Although the benefits for the candidate company are identical for both types of leniency, namely full immunity from fines, the former is only available before the FCA has conducted its inspection. Once the inspection has taken place, Type 1 B Leniency is the only remaining option.

1.2.3 Conditions to be met for a successful first rank leniency application

To be a successful first rank leniency applicant and thus to benefit from a fine immunity, a given company must be the first (i) to file a leniency application before the FCA,[722] (ii) to meet certain eligibility conditions and (iii) to meet certain substantive conditions.

As far as eligibility conditions are concerned,[723] leniency applicants must provide the FCA with sufficient evidence of anticompetitive practices so as to either allow it to conduct targeted inspections (Type 1 A Leniency) or to establish the existence of an infringement of competition law (Type 1 B Leniency). These conditions are equivalent to those set out in the EU Leniency Notice.[724] Applicants not capable of fulfilling the eligibility conditions for first rank leniency may nonetheless be eligible for subsequent ranks and therefore for a reduction of fine of up to 50 per cent.
As far as substantive conditions are concerned,[725] first rank leniency applicants must (i) end their involvement in the alleged cartel immediately and at the latest as from the notification of the FCA's leniency opinion [*avis de clémence*], which sets out the conditions under which leniency will be granted; (ii) fully and genuinely cooperate with the FCA throughout the proceedings; (iii) refrain from destroying or concealing relevant information;[726] and (iv) refrain from disclosing the existence or content of their leniency application before the FCA has issued a statement of objections.

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[720] François Mélin, *Les programmes de clémence en droit de la concurrence: Droit français et droit communautaire*, para. 225, p. 139.
[721] Leniency Notice, 2 March 2009, para. 9: "[…] In principle, the agreements concerned are cartels between undertakings consisting in the fixing of prices, the allocation of production or sales quotas or the sharing of markets, including bid-rigging, or any other similar anticompetitive behaviour between competitors. These infringements are all covered by provisions of article L. 420-1 of the code de commerce and, where applicable, of article 81 of the EC Treaty."
[722] FCA, Leniency Notice, para. 25.
[723] FCA, Leniency Notice, paras. 12-19.
[724] EU Leniency Notice, para. 8(a) and (b).
[725] FCA, Leniency Notice, paras. 20-21.
[726] The FCA recently rejected a leniency application on the grounds that the applicant (Shell/Butugaz) had falsified certain pieces of evidence and therefore breached its obligation of full and honest cooperation with the FCA: case 10-D-36 of 17 December 2010, para. 22.

1.2.4 Advantages of first rank leniency

The first company to come forward and provide the requisite information relating to the alleged cartel will be granted full immunity from fines. Accordingly, it could be argued that, under this system, a company can break the law, profit from the illegal activity, cause harm to customers, competitors and the wider market and then not be fined for this behaviour.[727]

Moreover, the employees of the successful leniency applicant who were personally involved in the cartel will not theoretically incur any criminal penalties.[728]

It therefore appears that first rank leniency, when available, is the most secure and appropriate way to cease anticompetitive practices revealed, for instance, by due diligence carried out prior to an acquisition[729] or through the implementation of a compliance programme or a whistle-blowing system.

1.2.5 Disadvantages of first rank leniency

Apart from the risks of retaliatory measures that a leniency applicant may suffer from its unhappy competitors or of procedural fines imposed by the FCA for submitting misleading or false information,730 it seems that the main disadvantages of first rank leniency are the risk of private enforcement claims and the risk of criminal penalties for employees involved.

The risk of private enforcement actions

It may be argued that a system that simultaneously promotes leniency programmes and private enforcement claims is a contradiction in terms.731 The Leniency Notice indicates that obtaining full or partial immunity from fines does not protect the leniency applicant from any civil law consequences that may result from its participation in a cartel.732 Leniency only relates to administrative proceedings before the FCA and to a possible fine reduction or immunity and not to any awards for damages over which the FCA does not have jurisdiction. Since a leniency application constitutes an admission of

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[727] David Anderson & Rachel Cuff, *Cartels in the EU: procedural fairness for defendants and claimants*, p. 8, Fordham Competition Law Institute, 37th Annual Conference on International Antitrust Law and Policy.

[728] FCA, Leniency Notice, para. 48.

[729] Pierre Desbrosse, *Les programmes de clémence à l'épreuve de la globalisation des marchés*, Revue Internationale de Droit Économique, 2010, p. 228.

[730] Article L. 464-2, V of the French Commercial Code entitles the FCA to impose a fine of up to 1% of the worldwide turnover of a company for submitting misleading or false information to the FCA. It should be noted that the FCA may use this power for the first time against the leniency applicant in case 10-D-36 (see para. 23 of the decision).

[731] This contradiction is evident in France, where the FCA is endeavouring to promote its leniency programme to detect the most serious and secret infringements of competition law and, at the same time, encouraging potential victims to sue cartelists for damages through its press releases following the adoption of infringement decisions. It can also be seen at European level, where the European Commission has issued substantive works and consultations on how to further develop private enforcement claims within the Member States.

[732] Leniency Notice, para. 47. This position is also expressed in the EU Leniency Notice, according to which: "The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil consequences of its participation in an infringement of Article 81 EC" (para. 39).

guilt, it is possible that the courts may award damages against a company on the basis of the FCA's decision irrespective of the fact that the company was fully exempted from fines as a result of a successful leniency application.

This risk could be extremely high if the witness or corporate statements or any other incriminating materials submitted in support of the leniency application are disclosed to potential victims. This is a particularly sensitive issue in France given that, particularly in the context of private enforcement claims, the court may order the production of all documents held by third parties (such as the FCA) pursuant to Article 11 of the French Civil Procedure Code,[733] unless there is a legitimate reason preventing documents from being disclosed.

However, the FCA has taken the view that, should it be ordered by a court to disclose information submitted voluntarily by a successful leniency applicant, it would refuse on the grounds that doing so could damage the effectiveness and implementation of its leniency programme.[734] It is also worth noting that the FCA allows statements to be made orally.[735] As a result, the leniency applicant does not retain a written statement for its records and therefore cannot be asked to produce a statement in the event of a discovery order.

Companies considering the possibility of applying for leniency should however remain aware of the fact that private enforcement risks are particularly high. Indeed, through its application, the leniency applicant necessarily acknowledges its participation in anticompetitive practices. By doing so, it may make it easier for potential victims of the cartel to prove their case, in relying upon the FCA's decision to bring a claim for damages.[736] Indeed, even if victims will not, in principle, have access to corporate statements and incriminating materials submitted by the leniency applicant, the final decision of the FCA – which is public[737] – will contain sufficient information to demonstrate its involvement in a cartel and therefore its wrongdoing.

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[733] English version of Article 11 of the French Civil Procedure Code: "Where a party holds evidence material, the judge may, upon the petition of the other party, order him to produce it, where necessary under a periodic penalty payment. He may, upon the petition by one of the parties, request or order, where necessary under the same penalty, the production of all documents held by third parties where there is no legitimate impediment to doing so." (source: www.legifrance.gouv.fr)

[734] FCA, annual report for 2005, p. 175 and FCA, Opinion of 21 September 2006 relating to the introduction of a group action in relation with anticompetitive practices, para. 73.

[735] Article R. 464-5 of the French Commercial Code and Leniency Notice, para. 26. This possibility was first introduced before the European Commission (para. 32 of the EU Leniency Notice).

[736] François Mélin, *Les programmes de clémence en droit de la concurrence: Droit français et droit communautaire*, Editions Joly, 2010, para. 297, p. 171. For an in depth assessment of interaction between leniency programmes and private enforcement see *Final report on making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*, 21 December 2007, pp. 492-532 accessible at http://ec.europa.eu/competition/antitrust/actionsdamages/index.html .

[737] Article D. 464-8-1 of the French Commercial Code.

The risk of criminal penalties[738]

This question is highly controversial since Article L. 420-6 of the French Commercial Code provides that individuals who personally and decisively take part in designing, organising or implementing anticompetitive practices with fraudulent intent can receive a prison sentence of up to four years and a fine of EUR 75,000. Under Article L. 462-6, paragraph 2, of the French Commercial Code, the FCA has the option of referring these matters for prosecution to the State Prosecutor [*Procureur de la République*].

However, the FCA has undertaken not to make referrals concerning the employees of a company that has been granted leniency.[739] The Leniency Notice states that where a company has been granted leniency, the FCA will not pass on the case to the State Prosecutor for criminal proceedings.[740] This statement may nonetheless appear weak when weighed against the risk of criminal prosecution and penalties.[741] This is particularly true in comparison to the situation in the UK, where the OFT grants immunity from prosecution (so called "no-action letters") to individuals who inform it of cartels and who then cooperate in full, the difference being related to the fact that, in France, the FCA is not in charge of criminal proceedings. As some legal commentators have rightly pointed out, the FCA's position does not guarantee employees involved in the conception and implementation of a cartel that they will not face prosecution, especially since cases can be brought by other procedural means than an FCA referral of the case to the State Prosecutor (i.e. claimants can lodge a complaint before a criminal court on their own initiative) and before or by foreign courts in the case of worldwide cartels.[742]

The difficulties arising from the interaction between leniency and criminal proceedings should not be overestimated since precedents of criminal penalties being applied in France are, given the very restrictive conditions set by Article L. 420-6 of the French Commercial Code, very rare.[743] However, although criminal penalties and fines against individuals for competition law infringements are at present relatively rare under French law, this situation could change in the near future.

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[738] For a detailed analysis of this question see in particular: Éric David, *Les poursuites pénales contre les auteurs de pratiques anticoncurrentielles : L'exemple de la France depuis l'ordonnance du 1er décembre 1986*, Concurrences 2-2006, pp. 175-182 and *La sanction des pratiques anticoncurrentielles par recours à l'article L. 420-6 du Code de commerce*, Concurrences 1-2008.

[739] FCA, annual report for 2010: it should be noted that the FCA did not refer a single case to the State Prosecutor in 2010.

[740] Leniency Notice, para. 48: "The [FCA] considers that leniency is one of the legitimate reasons which justifies not to pass on to the State Prosecutor a case file in which individuals, belonging to the undertaking which has been granted leniency, would be liable to such proceedings."

[741] OFT, Cartel offence: guidance on the issue of no-action letters for individuals, para. 3.6, available at: www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft513.pdf .

[742] François Mélin, *Les programmes de clémence en droit de la concurrence: droit français et droit communautaire*, *ibid.*, para. 310, p. 180.

[743] Cases in which the courts have imposed criminal penalties have chiefly concerned illegal cartels between companies involved in the bid rigging of public or private tender offers and which also involved other types of corruption or fraud.

2. SETTLEMENT PROCEDURE AND SUBSEQUENT RANKS OF LENIENCY: LIMITED CERTAINTY ON FINE AMOUNTS

These two procedural options are only available when the FCA investigation is well-advanced and the statement of objections has been sent. At this stage of the proceedings, the FCA is only willing to grant a potential fine reduction. Since this reduction is expressed as a percentage, it is very difficult for the parties to predict the amount of the fine reduction from which they will benefit and the final amount of the fine. This can raise serious issues in terms of legal certainty.

2.1 Subsequent ranks of leniency: how to reduce fine exposure following an inspection

2.1.1 Field of application and timing

As explained earlier in this paper, companies that are not the first to come forward to the FCA are not eligible for full immunity. However, a company that is second (or later) to apply for leniency may be eligible for a fine reduction if it can provide the FCA with evidence of the alleged cartel that represents "significant added value" and meets the four cumulative substantive conditions mentioned earlier.[744]

2.1.2 Conditions for a successful application for a subsequent rank of leniency

Any company providing evidence of "significant added value" with respect to the evidence already in the possession of the FCA and which meets the four cumulative substantive conditions mentioned above may benefit from a fine reduction of up to 50%, irrespective of the time at which it decides to cooperate with the FCA.

Under the French leniency programme, the concept of the "significant added value" contributed by a party's evidence is essential. This concept is defined as "the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the ability of the FCA to prove the existence of the alleged infringement".[745] Nevertheless, it can be difficult, in practice, for parties to assess exactly what will be required in order to meet this standard. What evidence constitutes "significant added value" remains extremely case-specific.

The FCA takes the view that written evidence contemporaneous with the alleged agreement has greater value than any evidence that may be subsequently established, incriminating evidence directly relevant to the facts at stake has greater value than evidence of indirect relevance and compelling evidence has greater value than evidence that requires corroboration if challenged (e.g. witness statements).[746]

[744] See para. 27 of this paper.
[745] FCA, Leniency Notice, para. 17.
[746] FCA, Leniency Notice, para. 17.

2.1.3 Advantages of subsequent ranks of leniency

The most evident advantage lies in the fact that the successful applicant will benefit from a fine reduction of up to 50%.[747] In this respect, it should be noted that the French leniency programme differs from the EU programme, which sets a sliding scale of fine reductions of 20 to 50% depending on the order of application.[748]

It is also important to note that, following the European Commission's example,[749] the FCA is now willing to grant fine reductions pursuant to leniency (second or subsequent ranks[750]), on the one hand, and pursuant to settlement, on the other, to a single company in the same case.[751] In its Fining Guidelines, the FCA seems to suggest that the two procedures can be combined to benefit the same company.[752] To date, this possibility remains theoretical as it has never been applied by the FCA.

2.1.4 Disadvantages of subsequent ranks of leniency

One of the main disadvantages of obtaining a subsequent rank of leniency lies in the fact that the applicant, from the date of its application to the date of the final infringement decision of the FCA, is not in position to determine (i) whether it could submit any additional information not already in the FCA's possession or (ii) the fine reduction it can expect in return for its cooperation. This uncertainty remains at every stage of the proceedings:

- when considering whether it would be opportune to apply for second or subsequent rank leniency, companies can hardly determine whether the information they have gathered represents "significant added value" within the meaning of the Leniency Notice;
- once the application has been submitted, companies cannot determine the fine reduction (expressed in percentage) that the case handler will propose;
- even when the case handler has proposed a certain percentage fine reduction, there is no guarantee that the *collège* of the FCA will follow the case handler's recommendations as to the advisability of granting second or

[747] FCA, Leniency Notice, para. 20: "The partial immunity granted to an applicant having provided a significant added value shall not in principle exceed 50 % of the fine which would have otherwise been imposed, had it not been granted leniency" (emphasis added).
[748] EU Leniency Notice, para. 26.
[749] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, 2 July 2008, para. 33: "When settled cases involve also leniency applicants, the reduction of the fine granted to them for settlement will be added to their leniency reward." For recent examples, see Commission decisions, 19 May 2010, *DRAMs*, (COMP/38.511) and 20 July 2010, *Animal feed phosphates*, (COMP/38.866).
[750] The possibility of combining fine reductions pursuant to leniency and pursuant to a settlement can only be worthwhile for a second or subsequent rank leniency applicant, in so far as the first leniency applicant, when successful, is already exempt from any fine.
[751] On this issue, see in particular AFEC (p. 21) and Herbert Smith LLP (para. 36, p. 8) comments on the draft fining guidelines of the FCA, available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=402&id_article=1595 .
[752] FCA, Notice on the Method Relating to the Setting of Financial Penalties, 16 May 2011, para. 61: "If applicable, the [FCA] adjusts the amount of the financial penalty in order to take into account the total or partial immunity granted on account of leniency pursuant to Section IV of Article L. 464-2 of the Code of commerce, **and** the reduction granted on account of a settlement pursuant to Section III of the same article." (emphasis added).

subsequent rank leniency to the applicant or the appropriate percentage of fine reduction to be granted.

Moreover, as indicated earlier in this paper, a leniency application, irrespective of its rank, does not guard the leniency applicant against any civil law consequences that may arise as a result of its participation in a cartel.[753]

2.2 Settlement procedure: the last procedural option available to reduce the fine amount once a statement of objections has been issued

The French settlement procedure[754] is defined in Article L. 464-2, III of the French Commercial Code.[755] The FCA recently released its draft procedural notice in relation with this procedure and launched a public consultation[756]. The final version of the procedural notice should be published in the beginning of 2012. Under the settlement procedure, when a company acknowledges its participation in an infringement, the theoretical maximum amount of the fine incurred may be reduced by half, i.e. 5% of the consolidated worldwide turnover instead of 10%. Companies can also benefit from an additional fine reduction when suitable commitments are submitted. This procedure has proven to be very successful in France where approximately one out of five infringement cases is closed by way of a settlement.

2.2.1 Field of application: all anticompetitive practices

At first glance, the field of application of the settlement procedure seems to be particularly broad. In fact, in so far as Article L. 464-2, III, of the French Commercial Code does not restrict this procedure to any specific type of conduct, all anticompetitive practices are theoretically eligible. This is not the case for leniency applications[757] or commitments,[758] which are, as previously mentioned, much narrower in scope.

Another interesting point to note regarding the field of application of the settlement procedure is that it can apply in "hybrid cases", namely where at least one of the parties

[753] FCA, Leniency Notice, para. 47. See paras 32 to 35 of this paper.

[754] To date, the FCA has not released any procedural notices in relation to the settlement procedure ("*procédure de non-contestation des griefs*") but is expected to do so by the end of 2011. For a detailed analysis of this procedure, see Dominique Brault & Romain Maulin, *La procédure de non-contestation des griefs: un succès non contestable*, Concurrences, no.2-2011, pp. 80-92; Bruno Lasserre, *La non-contestation des griefs en droit français de la concurrence : bilan et perspectives d'un outil pionnier*, Concurrences, no.2-2008, pp. 93-100; and Fabien Zivy, *La procédure de non-contestation des griefs en droit français de la concurrence : chronique d'un retour en force*, Revue juridique de l'économie publique, March 2008, pp. 3-10.

[755] English version of Article L. 464-2, III of the French Commercial Code: "When a body or a company does not contest the truth of the allegations made against it, the general rapporteur may recommend that the Competition Authority, which hears the parties and the government representative without a report being drawn up in advance, impose the financial penalty referred to in I and take into account the fact that no challenge was raised. In such cases, the maximum amount of the penalty incurred is reduced by half. When the body or the company commit in addition to alter its behaviour for the future, the general rapporteur may recommend that the Competition Authority take that fact into account when setting the amount of the fine." (source: www.legifrance.gouv.fr)

[756] The draft procedural notice relating to the settlement procedure (only available in French) is available at the following address: http://www.autoritedelaconcurrence.fr/doc/projet_communique_ncg_oct11.pdf .

[757] See para. 23 of this paper.

[758] See paras 11 to 12 of this paper.

involved in the proceedings chooses to contest the objections.[759] This is very important since, especially in cartel proceedings, it is very rare and unlikely that all parties will choose to enter into a settlement procedure.

2.2.2 Timing of the settlement application: after the statement of objections and before the report

Like the commitments procedure, settlement applications cannot be submitted before a complaint has been filed with the FCA or before the FCA has decided to open *ex officio* an investigation. Once the statement of objections has been issued, candidate companies can file a settlement application at any time within two months of receiving the statement.

Accordingly, once a company has received the statement of objections, reaching a settlement with the FCA is the very last procedural option available to it to obtain a reduced fine.

2.2.3 Conditions to be met in order to benefit from the settlement procedure: a clear, complete and unambiguous acknowledgment of the offence

In so far as Article L. 464-2, III, of the French Commercial Code no longer requires that candidate companies submit commitments, the only remaining condition applicable is that companies must abstain from contesting the statement of objections.

To establish that a company does not contest the objections, the FCA requires it to acknowledge the practices described in the statement of objections, their assessment in connection with the relevant provisions of the French Commercial Code and the liability for these practices attributed to the legal entity applying for settlement.[760]

2.2.4 Advantages for the company

The advantages for the settling company are twofold since it can expect in certain circumstances,[761] to speed up the proceedings and in any case, a fine reduction.[762] It may also be worthwhile for a company initially wishing to apply for second or a subsequent rank of leniency but whose information did not qualify as "added value information" to apply for a settlement.

In any case, the company will benefit from a 50% reduction of the theoretical maximum amount of the fine. This is particularly significant given that, as indicated earlier in this

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[759] An analysis of past FCA decisions shows that at the time of writing, i.e. 1 August 2011, 16 of the 31 cases in which the settlement procedure has been applied were hybrid cases.

[760] FCA, case 04-D-42, para. 15.

[761] When all parties concerned agree to settle - which is not common in practice - the case handler does not issue a report following the parties' observations in response to the statement of objections, i.e. the proceedings can be shortened by 6 to 12 months.

[762] The wording of Article L. 464-2, III of the French Commercial Code makes it clear that, once the case handler has agreed to enter into a settlement procedure with a candidate company, the maximum amount of the penalty incurred is reduced by half and that an additional reduction may be granted on the basis of the commitments submitted.

paper, this theoretical maximum amount is set by Article L. 464-2, I, of the French Commercial Code at 10% of the worldwide turnover of the company.[763]

The FCA also considers that companies declining their right to contest the objections are entitled to a further fine reduction of 10%, although this is not foreseen by the relevant provisions of the French Commercial Code.[764] The purpose of this additional reduction is to reward the company's cooperation with the FCA, which facilitates the work of case handlers[765] and, in certain circumstances,[766] may shorten the proceedings.

Companies offering to submit commitments may also be entitled to an additional fine reduction. Since submitting commitments is now entirely voluntary, the FCA chairman has made it clear that the "extra" advantage represented by commitments should be rewarded by a further reduction.[767] Recent cases show that a fine reduction of more than 10% can be obtained with suitable commitments. In *Signalisation routière verticale*, those companies not challenging the objections and also proposing commitments received fine reductions ranging from 15 to 25%, depending on the quality of their commitments.[768]

By the same token, although the company's agreement not to contest the objections must be clear, complete and unambiguous, it still has the possibility of discussing the FCA's assessment of the factors taken into account to set the amount of the fine, namely the seriousness of the infringement, the damage caused to the economy, the duration of the practices, the company's ability to pay and when applicable, duration of the infringement. This is particularly important since by retaining the possibility of discussing these elements, the company can try, through its observations in response to the report, to limit the amount of the fine.

Lastly, as indicated earlier in this paper,[769] the settlement procedure can be combined with second or a subsequent rank of leniency by the same company.[770]

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[763] English version of Article L. 464-2, I, of the French Commercial Code: "If the offender is not a company, the maximum amount of the penalty is 3 million euros. The maximum amount of the penalty for a company is 10% of the highest worldwide turnover, net of tax, achieved in one of the financial years ended after the financial year preceding that in which the practices were implemented. If the accounts of the company concerned have been consolidated or combined by virtue of the texts applicable to its legal form, the turnover taken into account is that shown in the consolidated or combined accounts of the consolidating or combining company." (source: www.legifrance.gouv.fr).

[764] FCA, case 07-D-26, para. 150.

[765] In this regard, it should be noted that in a recent ruling the French Supreme Court held that when a company opts not to challenge the objections and the way in which the FCA assessed the practices described in the statement of objections in connection with the relevant provisions of French or European competition law, the only thing that needs to be established concerning those companies that have chosen to challenge the objections is their participation in the infringement. It may be argued that this ruling seems to introduce a presumption of guilt for these companies. For a more detailed analysis of this ruling, see Dominique Brault & Romain Maulin, *La procédure de non-contestation des griefs: un succès non contestable*, Concurrences, no.2-2011, para. 45, p. 86.

[766] When all parties agree not to contest the facts or when the only party concerned by the investigation (in the event of an abuse of dominant position) agrees to enter into a settlement procedure.

[767] Bruno Lasserre, *La non-contestation des griefs en droit français de la concurrence: bilan et perspectives d'un outil pionnier*, Concurrences, no. 2-2008, pp. 93-100.

[768] FCA, case 10-D-39.

[769] See para. 45 of this paper.

[770] FCA, Fining Guidelines, para. 61: "If applicable, the [FCA] adjusts the amount of the financial penalty in order to take into account the total or partial immunity granted on account of leniency pursuant to

2.2.5 Disadvantages of the settlement procedure

The settlement procedure does not bring the case to an end. The company will already have received a statement of objections and have been summoned to a hearing before the FCA. A decision on its guilt will be handed down and a fine may be imposed.[771] This can have prejudicial consequences in practice when it comes to potential claims for damages.

The principal disadvantage of the settlement procedure lies in the fact that companies have no means of predicting the level of fine reduction they can expect to obtain when considering whether or not to apply for a settlement. This is due to the organisational structure of the FCA: the settlement agreement and the proposed fine reduction are "negotiated" by the company with the chief deputy case handler [*rapporteur général*] whereas the actual fine reduction and fine amount are ultimately set by the *collège* of the FCA.

The FCA has made it clear that it does not intend to place companies in a position whereby they can determine, before the final decision is adopted, how large a fine reduction they could obtain in reward of applying for a settlement.[772] Accordingly, in the majority of cases, the reduction is expressed as an uncertain percentage of an unknown fine amount. The chief deputy case handler has only proposed a maximum amount of the fine that should not be exceeded by the *collège* in three cases.[773]

Under these conditions, the settling company is not able to determine the scale of the reduction that it can expect to receive from the *collège* of the FCA or the final amount of the fine that will be imposed.

As regards the risk of criminal penalties following a settlement decision, it is widely agreed that the referral for prosecution of a case in which a company agreed to settle and not to contest the facts would run counter to the goals of the settlement procedure.[774] In light of this point, the FCA has taken the view that a situation in which a company has opted not to contest the objections is not sufficient, in and of itself, to bring criminal charges against that company's employees.[775] However, and rather surprisingly, the FCA has already referred one case to the State Prosecutor for potential criminal charges and penalties even though the two companies involved had agreed to settle.[776] Evidently, the FCA will need to clarify its position in order to preserve the incentive for companies to enter into settlement, possibly in its forthcoming notice on the settlement procedure, as regards the interaction between this procedure and criminal proceedings.

Section IV of Article L. 464-2 of the Code of commerce, and the reduction granted on account of a settlement pursuant to Section III of the same article."

[771] Dominique Brault & Romain Maulin, *La procédure de non-contestation des griefs: un succès non contestable*, Concurrences, no.2-2011, para. 48, p. 86.

[772] OECD, Policy roundtables, Experience with direct settlements in cartel cases, 2008, p. 47.

[773] FCA, cases 07-D-33, 09-D-06 and 09-D-24.

[774] M. Koehler de Montblanc, K. Biancone, *La procédure de transaction devant le Conseil de la concurrence*, JCPE, no. 36, 1 September 2005, para. 32, p. 1378

[775] FCA, 2005 annual report, p. 138.

[776] FCA, case 08-D-29.

As far as the risk of private enforcement is concerned, the FCA considers that the fact that a company does not challenge the objections contained in the SO does not amount to an admission [*aveu*] or an acknowledgment of liability [*reconnaissance de culpabilité*].[777] This position has been confirmed by the French courts.[778] As a result, potential victims of the anticompetitive practices implemented by the settling company cannot, in principle, rely upon the fact that it entered into a settlement with the FCA or upon the FCA's decision to establish the existence of an infringement. However, it may be argued that the inculpatory elements contained in the FCA decision will be sufficient for the claimant to establish the wrongdoing giving rise to an award of damages.[779] The claimant will nonetheless be faced with the difficulty of establishing both the causal relationship and the exact amount of damage suffered as a result of the infringement.[780]

3. CONCLUDING THOUGHTS

To a certain extent, the different procedural options described in this paper allow companies better control over their exposure to fines when anticompetitive practices have been committed. They show the delicate balance that the FCA, and more generally competition authorities, must seek between deterrence and providing incentives to cooperate. These procedural options nonetheless remain useful tools for companies and their counsel, under certain conditions and depending on the stage of the proceedings.

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[777] FCA, annual report for 2005, p. 138.
[778] Paris Court of Appeal, 29 January 2008, *Le Goff Confort SA*, (appeal against FCA decision 06-D-03).
[779] Muriel Chagny, *L'articulation entre actions privées et actions publiques*, Revue Lamy de la concurrence, 2009, no. 18, no. 1321, p. 118. See also Dominique Brault & Romain Maulin, *La procédure de non-contestation des griefs: un succès non contestable*, Concurrences, no.2-2011, paras 91 and 93.
[780] Robert-Saint Esteben, Pour ou contre les dommages et intérêts punitifs, LPA, 25 January 2005, p. 55, and *Competition damage evaluation: a short state of play*, Concurrences, no. 3-2010.

Mexico – A few steps towards eliminating impunity

ANDREA KAISER JAIME[·]

The legal framework regulating antitrust matters in Mexico is limited to Article 28 of the Mexican Constitution, the Federal Law on Economic Competition (the "Law") and its Regulations.

In this regard, the Federal Law on Economic Competition (the "Law") was issued in 1992, and was first amended in 2006. Nevertheless, the amended wording quickly became insufficient to guarantee compliance of its purpose, and was unable to guarantee economic actors a fair and faithful competition within national markets. As a result, consumers have not been able to enjoy the benefits of healthy competition, thereby paying excessive prices for several products and services.

The aforementioned wording of the Law remained effective up until May 2011, when the executive and legislative powers in Mexico joined efforts in order to draft and approve several amendments to the Law and other related provisions (the "Amendment"). These modifications aim to create a legal framework that will allow fighting efficiently against anticompetitive conduct within national markets, and therefore increase competitiveness, productiveness and economic growth in Mexico.

The specific purposes of the Amendment may be summarized as follows: (i) to strengthen the Federal Competition Commission as the entity protecting competition and consumer welfare (the "Commission"); (ii) to achieve more transparency and constant evaluation within the Commission, as well as to simplify proceedings; and (iii) to regulate provisional remedies that may be sought during proceedings to avoid irreversible damages to competition, as well as to provide effective sanctions that dissuade economic agents from carrying out anticompetitive conduct.

Several important modifications are provided by the Amendment. Amongst them, we may find provision for the concept of "joint dominance", in order to address such situations where two or more economic agents may jointly hold a dominant position within a relevant market, without any of them holding such dominant position individually.

Likewise, we may now find a clear and logical structure regarding those transactions that require notification under merger review proceedings, transactions that are entitled to a simplified proceeding and transactions that shall not be subject to any notice whatsoever.

Notwithstanding the importance of the aforementioned changes, there are certain modifications that deserve more attention due to their relevance and impact in economic agents' and consumers' day-to-day activities and transactions. As a result thereof, and in the best interest of the reader, this article focuses exclusively on those modifications to provisions that regulate investigation and administrative proceedings, as well as modifications to those adjustments to the penalties that arise from breaching the Law.

[·] Lawyer with the law firm Santamarina Steta in Mexico City.

1. AIMING FOR A FAIRER AND MORE EFFICIENT PROCEEDING

Before addressing the importance of the modifications brought about by the Amendment, the following clarification shall be made: antitrust proceedings in Mexico may be divided into two stages: i) investigation, and ii) administrative proceeding. In this regard, once the investigation has concluded, and if there is evidence from which the probable responsibility of the economic agent may be assumed, the Commission starts an administrative proceeding against such economic agent where arguments and evidence deemed advisable are filed. This administrative proceeding concludes with a final resolution from the Commission that establishes the existence or inexistence of violations to the Law and, if applicable, provides the corresponding sanction.

The whole proceeding (investigation and administrative proceeding) has been and is still conducted, even after the Amendment, before the Commission, unlike other countries, where one authority is in charge of the investigation, and another decides upon (adjudges) the existence of anticompetitive conducts.

In this regard, the Amendment shows an effort to guarantee impartiality and legitimacy within the proceeding, by assigning (i) the investigation stage, as well as the filing of the administrative proceeding, to the Executive Secretary of the Commission; (ii) the preparation of a draft resolution to one of the Commissioners (appointed on a rotational basis); and (iii) the final resolution, to the Plenary Session of the Commission.

It has been said that this provision intends to avoid monopolization of decisions, and generates a healthy game of weights and counterweights (checks and balances). Nevertheless, this segregation is only partial, since officers in-charge belong to the same authority, and as a result, the purpose to achieve impartiality may not be adequately achieved through this modification.

1.1 Investigation

1.1.1 Dismissal of Complaints

Since the Law was issued in 1992, it has provided the Commission's (now the Executive Secretary's) authority to dismiss those complaints regarding monopolistic practices that are deemed as evidently unacceptable. Nevertheless, it was not until the publication of the Amendment that the resolution dismissing the complaint could be challenged before the Plenary Session of the Commission.

Even though the intention to provide claimants with an instance to challenge a decision that was previously unchallengeable is praiseworthy, it must not be disregarded that both the Executive Secretary and the Plenary Session of the Commission are part of the same authority, that is, the Commission, and in this regard, experience within administrative law has shown that authorities have a tendency of confirming their own decisions.

1.1.2 Inspection Visits

One of the most significant achievements of the Amendment refers to the new provisions regarding inspection visits or "dawn raids".

Prior to the Amendment, the Law provided that inspection visits could only refer to information and documents previously requested by the Commission, during an investigation proceeding. This meant that the only purpose of an inspection visit could be to obtain such documents and information that the Commission had already requested and was not furnished with; as a result, no additional documentation deemed relevant could be requested or obtained during an inspection visit.

This provision was quite absurd and deprived inspection visits from their purpose which consist of using the element of surprise, in order to obtain as much evidence as possible. Investigated parties had knowledge of which documentation the Commission had requested and therefore, of which documents it could obtain from an inspection visit. As a result, investigated parties could possibly carry out necessary adjustments to such documents in order to conceal any misconduct.

In this regard, the Commission had to guess, from the very onset, which documents would contain evidence of anticompetitive conducts and request for them during the course of the investigation, with no other assistance but the intuition of its officers, since such documents were the only ones it could use to try to figure out whether a breach to the Law existed or not. (suggest breaking this into two sentences)

The Amendment has eliminated this requirement, and inspection visits may now refer to any document or information related to the investigation, that the Commission deems relevant for such purposes. This modification is quite accurate, since the Law no longer represents an obstacle for the Commission to collect as much evidence as it possibly can, in order to determine the existence of anticompetitive conduct.

Before the Amendment was approved, inspectors carrying out an inspection visit could visit any of the investigated party's domicile(s) to notify them of the inspection visit, and in the event the investigated party or legal representative thereof was not present, the inspectors would leave a summons and the inspection visit would be carried out the next day. This was extremely unpractical, and an obstacle for the Commission to exercise its authority efficiently, since the investigated party was given a whole day to "clean up" before the inspection visit took place.

The Amendment suppresses the aforementioned notice, and now the inspectors may carry out inspection visits the moment they arrive, only by identifying themselves and showing the visitation order previously approved by the Plenary Session of the Commission.

Together with the Commission's power to request for any information deemed relevant, this is probably the most relevant modification brought about by the Amendment, since inspection visits will not serve as warnings for investigated parties as to when and which information will be requested by the authority; they will become a true vehicle to obtain accurate information that may help define whether the Law has been breached or not.

Also, with regard to inspection visits, the provision defining the scope thereof is clarified, and as a result, investigated parties are bound to grant inspectors access to premises, allow the inspection visit, and provide all documents and information related to its subject matter, for purposes of which, access to offices, computers, electronic devices, storage devices, files and any other real estate or media that may hold evidence regarding forbidden conducts shall be granted.

In addition, the Commission may now use the assistance of the police force to achieve its purpose, as well as to mark or stamp seals on information, documents, offices and other media, that may provide evidence of the practice of forbidden conducts, or order for it to remain in deposit, in order to assure availability of such information.

Prior to the Amendment, refusing access to inspectors would allow investigated parties to avoid the aforementioned consequence. The Amendment brings a great advance in this regard, which is quite praiseworthy. In order to dissuade investigated parties from refusing access to inspectors carrying out an inspection visit, several penalties, including fines, working days for the community, and even prison, now arise from the aforementioned refusal.

All of the aforementioned modifications have granted the Commission almost total access to the investigated parties' information and documents, in order to determine the existence of anticompetitive conducts. Access to information and documents is likely to be granted due to the consequences arising from refusing such access. In addition, in the event this should not be enough/sufficient, the Commission may use public force to get the information it needs.

These new powers given to the Commission seem to have strengthened it, in order to make its authority prevail, and most of all, to comply with its function as an entity that is protective not only of competition within markets, but also of consumer welfare. Efforts to draw an efficient legal framework, in this regard, appear to be quite effective, and will probably have a positive outcome, although assuring positive outcomes may be hasty, since the Law has been effective only for a few months.

1.2 Administrative Proceeding

1.2.1 Provisional Remedies

The Amendment granted the Commission several additional powers, including the authority to order during a proceeding, as a provisional remedy, the temporary suspension of acts that could imply a monopolistic practice or a forbidden concentration.

The addition of this provision seems to be a very good decision, since its implementation will prevent irreversible damages to competition arising from conducts deemed to be harmful and under review by the Commission, until a final resolution is issued by such authority.

In this regard, the executive and legislative powers in Mexico were conscious of the damages that the implementation of this kind of measure could cause to the economic

agent under investigation. As a result, they provided what seems to be an appropriate solution, which consists of the imposition of an obligation on investigated parties to secure payment of liability, in order to avoid suspension of the aforementioned acts, until a final resolution is issued. This way, if the Commission resolves against the investigated party, the guarantee offered by the latter will be used to compensate any damages caused.

1.2.2 Oral Hearing

Following the oral tendency that has been recently introduced in the Mexican legal system, and aiming for a transparent deliberation between the economic agent under investigation and the authority in charge of issuing a resolution, the Amendment provides a final stage within the competition proceeding where economic agents accused of breaching the Law may file orally, before the Plenary Session of the Commission, and immediately before the Commission issues a final resolution, any clarifications they deem convenient/relevant. This hearing may only refer to the arguments already made or to evidence already filed.

This may be a very useful resource for investigated parties, since the written tendency followed by Mexican laws up until a few years ago, did not always help the defendants to win credibility, relying only in what may be reflected in a piece of paper. In addition, we must not forget that it is indeed a new opportunity for investigated parties to try to convince the authority of their innocence, so it seems a beneficial provision, at least for defendants. Nevertheless, as mentioned throughout this article, we must not disregard that the investigation and the proceedings, including this final hearing, are all carried out before the same authority, and therefore, it is unlikely for the Commission to change its mind at the very end, after such authority has carried out the entire proceeding.

1.2.3 New specialized courts

Finally, the Amendment provides the creation of Courts specialized in Economic Competition, before which economic agents may file an appeal against resolutions issued by the Commission. In this regard, the Federal Court System has not created the aforementioned courts, nor has it issued the procedural rules applicable to the ordinary administrative trial; nevertheless, they should be issued and created respectively by November, 2011. In this respect, creating specialized courts seems to be a good choice, since a better appreciation of facts may be achieved as a result therefrom.

2. MORE SEVERE PENALTIES

The penalties provided before the Amendment were extremely low in comparison to those imposed by other countries, and, hence, they did not fulfil the purpose of dissuading economic agents from breaching the Law; the fine was a low price to pay, compared to the benefits that could arise from a corresponding breach. In order to address this matter, the Amendment significantly increased the amount of fines, which may now be of up to 10% of the taxable income of the economic agent during the previous year. Fines that are still calculated based upon minimum wages were significantly increased as well; namely, up to 700% thereof.

Increasing the amount of fines appears to be the right decision to dissuade economic agents from carrying out anticompetitive conducts and damaging consumers, since consequences arising therefrom may even bring a company to bankruptcy. The price to pay for committing such kind of practices will no longer be a low price to pay and benefits arising from such practices will probably no longer be as appealing as they were before the Amendment.

Finally, one of the most significant modifications brought by the Amendment is a modification to the Federal Criminal Code, that introduces a three to ten year prison penalty to any individual that carries out an absolute monopolistic practice (i.e. agreements between competitors to fix or increase prices) in addition to a penalization that may fluctuate between 1,000 and 3,000 "fine days" (equivalent to the daily net income received by the condemned party at the moment the felony took place).

From this author's particular point of view, this provision seems to overstep the mark. Penalties arising from a felony should be proportional to the felony itself, and even though damages arising from monopolistic practices may be quite significant, depriving an individual from his freedom seems quite severe, especially considering the poor situation of Mexico's criminal justice system. Nevertheless, it is likely that the Commission would only file a complaint under this provision in exceptional cases, and not as a general rule.

3. CONCLUSION

The Amendment has been in force for only three months, and no sanction has been imposed under the new wording thereof, since infractions and felonies committed prior to the Amendment, have been and will be resolved under the previous wording of the Law. Likewise, investigations, inspection visits and proceedings initiated before the Amendment came into force, are being concluded according to the prior wording of the Law. Regarding this matter, only three investigations have been initiated as of the date the Amendment entered into force, and even though they will be indeed subject to new procedural rules, they will probably be penalized according to the prior wording of the Law, since it is likely for such procedures to refer to conducts that took place before the Amendment came into force.

Consequently, and at least for the moment, there is no way to affirm whether the Amendment has succeeded in effectively addressing the realities of national markets and dissuading economic agents from carrying out anticompetitive conducts. Nor is it possible to ascertain whether the new authorities granted to the Commission have been useful in order for it to enforce its functions in a more efficient way.

Nevertheless, the Amendment implies a praiseworthy effort to have an effective legal framework that complies with the purpose of achieving fair competition and avoiding wrongful privileges and advantages in favour of certain groups. If applied correctly, there is a great possibility that the Amendment dissuades economic agents from carrying out monopolistic practices and forbidden concentrations, and that it will result in benefiting customers with more quality and better prices.

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Competition in Paradise:
A look at the competition law and enforcement activities of Mauritius

SIVEN PILLAY RUNGIEN[·]

This article is about the Competition Act 2007, the competition law of Mauritius, and its development over the last two years. In particular, the article focuses on cases that have been completed by the Competition Commission of Mauritius so far and the implications these have on the law.

1. INTRODUCTION

This article examines the Mauritian competition framework two years after its inception. The first part considers the Act, specific elements of its drafting and what competition law means to Mauritius. The second part considers the five investigations which have been completed by the Competition Commission of Mauritius (the "CCM") so far, as a means to drawing some conclusions about the development of this competition regime still in its infancy.

2. THE COMPETITION ACT 2007

The Competition Act 2007 (the "Act") came into force in November 2009. It is one of the pieces of legislation that the Mauritian Chamber of Commerce and Industry (the "MCCI") refers to as 'Local Trade Legislation'. This group of legislation also includes the Consumer Protection (Price and Supplies Control) Act 1998, the Fair Trading Act 1979, the Customs Act 1988 and the Value Added Tax Act 1998. Together, these measures regulate the Mauritian economy.

The Act is the second piece of competition law drafted by the Mauritian legislator. The first, the Competition Act 2003, never entered into force. An ensuing change in government resulted in the proposition that a fresh Competition bill would be drafted. This, later became the Act. It has been suggested that the changes brought by the Act are for the better, as the previous legislation lacked teeth: interference from private sector interests had undermined the statute.[783] Furthermore, the legislation may represent a natural evolution in the Mauritian economy which, in time, has gradually moved from reliance on the private sector to correct market failures, to a combination of de-regulation, trade liberation and competition policy.[784]

With reference to competition law, Mauritius has a number of relevant labels. It is a developing nation, a small market economy and an island economy. Each of these

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[·] Ph.D candidate, University of Southampton. The author would like to thank Pamela Rungien for her feedback on this work. Any errors are my own. Further comment and feedback will be welcome. Please e-mail spr1g10@soton.ac.uk.

[783] M. Sahebdin '*Competition Advocacy in Mauritius'* <www.cuts-ccier.org/Gaborone/ppt/S-2Mauritius.ppt> accessed 13 June 2011, slide 7.

[784] R. Peerun, S. Bundoo and K. Jankee, *'Mauritius' in Competition Regimes in the World: A Civil Society Report Consumer Unity and Trust Society* (May 2006) <competitionregimes.com/pdf/Book/Africa/48-Mauritius.pdf> accessed 6 June 2011, 256

classifications poses subtle questions for the construction and implementation of a competition regime. It might be suggested that there is an optimal political, legal and social environment in which a competition regime may flourish. Such an environment may have the following characteristics: significant resources for investing in competition policy, accessible information, an independent judicial system and a legal system based on upon the rule of law.[785] By contrast, a deficient environment may lack these elements and others, or have undesirable characteristics such as unreasonable opposition to economic reform.[786] However, Kovacic does not go so far as to say that the characteristics he has identified represent an ideal competition environment, merely that they are the conditions possessed by Western countries that allow their competition laws function.

It may be prudent to consider that the typical competition concerns posed by a small market economy apply to Mauritius. In general, the following characteristics of Mauritius: its political climate and economy are of note when considering its competition law. Firstly, there is the close proximity between the Mauritian political elite and its private sector. Not only has this resulted in the concentration of economic/political power in a few individuals, but it is also suggested that this proximity caused the failure of the 2003 Act. A second interesting feature of the Mauritian economy is its infiltration by foreign multinationals. In general, the entering of markets by foreign companies is considered to be beneficial. By opening its economy to global trade, Mauritius hopes to achieve a number of things in boosting its economy such as increasing employment and attracting foreign direct investment. However, in the current circumstances, the participation of foreign firms might be considered adverse to the Mauritian economy. The case study which appears to be most cited at present concerns the supermarkets Score, Jumbo, Continent, Super U (originating from France) and Spar, Shoprite (South Africa).[787] On one hand, there is the ensuing struggle between local firms and the multinationals. This tussle between local and foreign firms is not unusual; rather it is to be expected when a country liberalizes its trade. As the multinationals flex their financial muscle and use economies of scale to bring lower prices and greater choice to Mauritian consumers, the local retailers struggle. On the other hand, and this is perhaps the more interesting issue, it is suggested that the multinational firms are practising anticompetitive behaviors which they are prohibited from doing in their home State. Hitherto such practices have continued with impunity.[788] Whether such practices will eventually be caught by the Act remains to be determined. At this point it would appear that the Commission has other enforcement priorities at present. A third feature is that a number of sectors in the Mauritian economy have a high concentration of firms. A fourth feature is that certain sectors of the Mauritian economy have been sheltered from 'real' competition due to general trade barriers and certain preferential agreements such as those that operated in the sugar industry. A final notable element is the difficulty in easily obtaining relevant information such as that pertaining to market structures or shares.[789] One of the objectives of competition advocacy is to engage the public and consumers on matters of

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[785] William E. Kovacic, *'Getting Started: Creating New Competition Policy Institutions in Transition Economies'* (1997 - 1998) 23 Brook. J. Int'l L. 403, 409-413
[786] Kovacic, (n 4) 417-429.
[787] Peerun, Bundoo and Jankee, (n 3) Box 48.1.
[788] Peerun, Bundoo and Jankee, (n 3) Box 48.1.
[789] S. Gasparikova and R. Sengupta, *'Taking the right steps: Competition administration in Eastern and Southern Africa'* [2007], No 1/2008 CUTS Centre for Competition, Investment & Economic Regulation, <www.cuts-ccier.org/7up3/pdf/BriefingPaper01-2008.pdf> accessed 2 June 2011, 4.

law and show how they can be part of the process. Unnecessarily inhibiting the access of information, however, can only undermine this goal.

3. REGIONAL/INTERNATIONAL RELATIONSHIPS

The adoption of a competition law has also an external aspect with regards Mauritius' international relationships and obligations. As well as being a founding member of the WTO, Mauritius is also a member of two regional groups - the Common Market for Eastern and Southern Africa ("COMESA") and the Southern African Development Community ("SADC"). The frameworks for these regional organizations commit their members to adopt competition provisions as a means to achieve the chosen collective objectives. For example, SADC aims to establish (in sequence) a Customs Union, Monetary Union and finally a Free Trade Area. The implementation of appropriate competition policy and regulatory rules are seen as key components to reaching these goals. However, whilst membership of such organizations commits a State in principle to taking certain measures to meet its obligations; the ability of each State to satisfy its obligations will differ. Thus in 2004, for example, Mauritius felt that it was not yet ready to adopt a competition regime in line with its COMESA obligations. In particular, Mauritius has cited resource and capacity issues as main obstacles for implementation.[790] These significant issues have also led Mauritius to suggest the WTO that certain countries, small market economies in the main, will require 'special and differential treatment' when implementing competition policy.[791]

4. GOALS OF MAURITIAN COMPETITION LAW

Considering the idiosyncrasies of the Mauritian environment, one may consider that the goals of Mauritian competition law extend beyond the achievements of principal goals of economic efficiency or consumer welfare. However, it is difficult to pin down precisely the specific goals attributed to the Mauritian law. Whilst there is no overall statement of goals to be found in the Act, specific reference to achieving efficiency and protecting the interests of consumers is made in s.46 (3)(d) of the Act. According to this section, the CCM may consider the following when assessing monopoly cases:

> evidence of actions or behavior by an enterprise that is a party to the monopoly situation where such actions or behavior that have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius, or are or are likely to be detrimental to the interests of consumers.[792] (sic)

Whilst such considerations appear to be restricted to monopoly situations, the CCM has since extended the reach of these considerations to apply to its objectives 'more generally',[793] namely when investigating other breaches of the Act. Notwithstanding this extension, these statements of goals are relevant only to the actions of the CCM rather than the goals of Mauritian competition law per se.

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[790] Peerun, Bundoo and Jankee, (n 3) 255.
[791] Peerun, Bundoo and Jankee, (n 3) 255.
[792] Competition Act 2007, s.46(3)(d).
[793] Competition Commission of Mauritius 'Prioritisation principles' (June 2010) <http://www.gov.mu/portal/sites/ccm/pdf/Prioritization%20principles_For%20Consultation-17-06-2010.pdf> accessed 10 February 2011, para 4.5.

The Act is made of nine parts, the substantive clauses contained in Parts II - IX. Part I is the 'Preliminary' section, setting out the short title, the key definitions for the Act and the boundaries of its application. Part II contains the rules for establishing the Competition Commission. The rules state, inter alia, the function and powers of the Commission, how and for how long the Commissioners are to be appointed, and the role of the Commission's executive. Part III contains the substantive competition rules relating to the usual competition taxonomy of collusion, monopolies and mergers. Part IV sets out the criteria for when the Executive Director of the Commission may commence an investigation and the powers that he has, including when entry and search may be conducted. Part V concerns the hearings that may take place before the Commission following an investigation. Part VI contains the rules relating to the determination of cases, penalties and remedies by the Commission. Part VII requires memorandums of understanding to be drawn up in order to define the relationship between the Commission and other regulators. Part VIII sets out the right to appeal to the Supreme Court in the event that a party is dissatisfied with a decision made by the Commission. Finally, Part IX rounds off the Act, containing miscellaneous provisions including the rules of disclosure.

For those unfamiliar with competition statutes, the Mauritian Competition Act may seem oddly 'Commission-centric'. Its focus seems to be skewed towards the establishment of the Commission and its concomitant procedural and administrative rules, rather than declaring competition law per se. This impression may be conveyed when one considers the constituent parts of the Act as set out above. One may also consider the long title of the Act:

> [a]n Act to set up a Competition Commission, to make better provisions for the regulation of competition and for matters incidental thereto and connected therewith.

As it can be seen, the long title indicates that the Act has three clauses. The first is clear: to establish the Commission. The remaining clauses are vague and unspecific. One may compare this to the Australian competition statute - the Competition and Consumer Act 2010 (the "CCA"). The content and structure of its competition provisions may considered similar to the Mauritian act. However, its long title is quite different:

> An Act relating to competition, fair trading and consumer protection, and for other purposes.

Compared to the Mauritian long title, this title is more descriptive, stating the four areas of law with which the CCA is concerned. Furthermore, s.2 CCA sets out the object of the Act:

> to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

It is submitted that such drafting helps to legitimize and increase the relevance of law in the eyes of the Australian consumer. One may further compare the structure of the Act

to that of the UNCTAD Model Law on Competition (the "Model'').[794] Two points may be drawn from this comparison. First, the Model, as a template for a competition statute, proposes that such a statute should begin with an article clearly setting out the objectives or purpose of the law.[795] The example given by the Model states that the purpose of competition law is to control anticompetitive practices, that may harm access to markets, trade and the economy. It omits any reference to the establishment of a commission or competition authority. In providing this specific example of an objectives article, the Model refers to the UN Set of Principles and Rules on Competition (the "Set").[796] Section E(2) of the Set states that the objective of controlling anticompetitive behaviour for the benefit of markets, competition and economic development should form the basis or foundation for competition legislation. At the Fourth UN Conference to review the Set,[797] a resolution was passed calling on all members to implement the rules and principles contained therein.[798] One way of giving effect to this is for the statute to have an objectives article. The Mauritian act with its failure to include an objectives clause tying the Act to the consumer, and its imbalanced long title feels disconnected from those who might need it.

The second issue is the overall structure of the Act. To get to the substantive law elements, one must either read or skip to Part III of the Act, starting at section 41. One may feel that the law needs to be stated first, before one can consider who should enforce it. This is unlike the Model, which places its substantive provisions before the procedural/administrative ones. It is fair to say, however, that this drafting characteristic is not restricted to the Mauritian act. The CCA again provides an example.

Two further points be noted about the Act, both regarding abuse of dominance. The first concerns the test applied by s.46 of the Act - the monopoly provision. The second concerns enforcement.

S.46(2) of the Acts reads as it follows:

> (2) A monopoly situation shall be subject to review by the Commission where the Commission has reasonable grounds to believe that an enterprise in the monopoly situation is engaging in conduct that -
>
> (a) has the object or effect of preventing, restricting or distorting competition.

The wording of the section suggests that a dual-test, purpose and effect, is available to assess monopolistic behaviour. Why does this matter? To generalise, one might argue

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[794] United Nations Conference on Trade and Development, 'UNCTAD Model Law on Competition TD/RBP/CONF.7/8' (August 2010) <http://www.unctad.org/en/docs/tdrbpconf7d8_en.pdf> accessed 10 August 2011.

[795] United Nations Conference on Trade and Development, (n 13) page 3.

[796] United Nations Conference on Trade and Development 'The United Nations set of principles and rules on competition TD/RBP/CONF/10/Rev.2' (2000) <http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf> accessed 10 August 2011.

[797] Fourth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Palais des Nations, Geneva, from 25 to 29 September 2000.

[798] United Nations Conference on Trade and Development 'Report of the Forth United Nations Conference to review all aspects of the Set of multilaterally agreed equitable principles and rules for the control of restrictive business practices TD/RBP/CONF.5/16 including Corr.1' (September 2000) <http://www.unctad.org/en/docs/tdrbpconf5d16&c1.en.pdf> accessed 10 August 2011, page 5.

that only an effects-based test is applicable to abuse of dominance cases (and to competition law in general). One has to let the market and the actual competitive forces within play out to determine whether a monopolist's conduct has adversely affected the market. One may also argue however, that to act ex ante may lead to irreversible harm to the market and, therefore, a purpose-based test which captures behaviour before the anticompetitive effects come to pass is the better approach. It might be argued that the Mauritian legislation implements a pragmatic approach: that a test encompassing both purpose and effects elements provides much more flexible tool.

Section 60 of the Act sets out the directions that the Commission may give in the event that an enterprise abuses its position of dominance. The directions that may be given under the Act will be structural in nature. They may seek to either address the adverse effects suffered by competition[799] by consumers.[800] What the Commission cannot do, unlike with instances of collusion, bid-rigging or an anticompetitive vertical agreements,[801] is to impose a financial penalty upon enterprises who abuse a dominant position. Does this suggest that that monopoly is a 'better' anticompetitive behaviour than collusion? Does this suggest that monopolies can be controlled or encouraged to behave (more) competitively in the absence of financial penalties?

5. COMPLETED INVESTIGATIONS UNDER PART IV OF THE ACT

Following the proclamation of the Act, the Commission has hitherto completed five investigations. Four of these have been formal investigations into specific company behaviour: one investigation into abuse of dominance,[802] two investigations into collusive behaviour[803] and a merger review.[804] The Commission has also completed a market study.[805]

6. ABUSE OF A DOMINANT POSITION: THE IBL INVESTIGATION

The investigation examined the practices of IBL Consumer Goods ("IBL"), a foods distributor. In particular, the focus was upon IBL's distribution of Kraft Cheese and other Kraft products such as Philadelphia, Toblerone and Oreo cookies. The

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[799]Competition Act 2007, s.60(1)(b)(A).
[800] Competition Act 2007, s.60(1)(b)(B).
[801]Competition Act 2007, s.59.
[802]Competition Commission of Mauritius 'IBL Consumer Goods' sales contracts with retail store investigation CCM/INV/001' (June 2010) <http://www.gov.mu/portal/sites/ccm/pdf/Final%20Report%20-CCM-INV-001%20%20Kraft%20and%20General%20Rebates.pdf> accessed 4 November 2010.
[803] Competition Commission of Mauritius 'Travel Agents' service fees: Final Report INV 004' (July 2010) <http://www.gov.mu/portal/sites/ccm/pdf/INV004%20-%20Final%20Report.pdf> accessed 4 November 2010 and Competition Commission of Mauritius ' Importation of secondary school textbooks in Mauritius CCM/INV/006' (March 2011) <http://www.gov.mu/portal/sites/ccm/pdf/INV006%20-%20Final%20Report.pdf> accessed 10 August 2011.
[804] Competition Commission of Mauritius 'Review of completed merger of Event Strategy Ltd and LC Events Co. Ltd: Final Report' (February 2011) <http://www.gov.mu/portal/sites/ccm/pdf/INV008%20-%20Final%20Report%20Public%20Version.pdf> accessed 13 August 2011.
[805] Competition Commission of Mauritius 'Study of the market for cement in Mauritius CCM/MS/001' (October 2010) <http://www.gov.mu/portal/sites/ccm/pdf/Cement%20Market%20Study%20-%20Preliminary%20Report.pdf> accessed 6 March 2011.

investigation was concerned with IBL's 'Top Store Programme' ("TSP"). Two aspects of the TSP in particular were under consideration, i) volume discounts offered for a dominant product (Kraft Cheese) [806] and ii) shelf space requirements leveraging IBL's market power on the dominant product onto weaker products (other Kraft products) in other markets.[807]

Applying the s.46 test, it was suggested that there were three ways in which the discount programme could distort or otherwise adversely affect the market. First, the discount programme would either protect the market share of Kraft Cheese or reduce the market share of its competitors. Second, the shelf-space conditions contained within the discount programme would also have the effect of protecting market share or act to the detriment of others. Third, by offering discounts on a dominant product in return for shelf space for the non-dominant products, the programme would leverage IBL's dominant position in the cheese market into other markets, such as the confectionary and powdered juice markets.[808]

Narrowing its investigation, the Commission took into account the characteristics of the supply/distribution chain. In Mauritius, the chain may be dichotomised as traditional and modern. The traditional chain consists of the many small, independent shops on the island. The modern chain is made up by mainly foreign hypermarkets and supermarkets, that are now established.[809] It was established that the shelf space conditions of the discount programme was only negotiated with enterprises acting in the modern chain: the traditional stores were allowed to allocate shelf space themselves.[810]

One of the difficulties in this case is identifying when the practices of IBL might be classed as anticompetitive. In its decision, the Commission set out its rationale for why volume-related discounts, especially of a retroactive nature, might have an adverse effect on competition. Firstly, the Commission acknowledged the general competitive benefits and efficiency gains namely lower prices and increased demand, which may arise through such practices.[811] Retroactive volume discounts, however, may distort the market in a number of ways. The primary issue with such discounts is the way in which they protect market share if implemented by an enterprise with substantial market power. By tying the award of a discount of a certain product to a fixed number of purchases to be counted at the end of a reference period, a significant portion of the retailer's spending is locked to that product. By signing such an agreement for a financial year, for example, a retailer might not be free to purchase competing products as he chooses. Towards the end of the financial year (the reference period), the retailer has two products: the dominant product and a new product, both which has sold equally well. The retailer has enough money to buy ten of each product. If the retailer had not signed a programme such as the TSP, he would be free to analyse his market and decide which of the two items he would like to purchase. The TSP, however, would make the retailer more likely to buy the dominant product, even if the new product was competing very well, if to order but a few more of the dominant product would trigger a discount for his purchase of the dominant product over the whole year. Thus, when

[806] Kraft has a number of cheese products: the item in question is its block processed product.
[807] IBL (n 21) para 2.1.1.
[808] IBL (n 21) 2.1.2.
[809] IBL (n 21) 2.3.1.
[810] IBL (n 21) 2.3.2.
[811] IBL (n 21) 3.2.1.

exercised by firms with substantial market power, a competitor would have to offer substantial discounts in order to persuade the retailer to buy his products rather than trigger the discount available from the dominant firm. The Commission also set out the secondary effects that may flow from retroactive volume discounts such as retailer uncertainty over final prices due to the fact that the rebate in question will be triggered at the end of an agreed reference period only if the retailer has purchased the required volume of products.

The Commission also detailed its position on the buying of shelf space and the anticompetitive effects that may flow from such an arrangement. The usual case, as acknowledged by the Commission, is that of a dominant buyer i.e. the retailer demanding payment for shelf space from the supplier. In the case of IBL, however, the dominant supplier was offering to purchase shelf space.[812]

7. MARKET DEFINITION

In terms of legal analysis, the following points may be drawn from the Commission's investigation. In defining the relevant market, the Commission concluded the market share of Kraft Cheese to be of virtual monopoly in the processed cheese market (90%) or very high overall (70%) in the general cheese market.[813] The Commission also considered that the processed cheese market could be further divided into block cheeses and the chilled variety, but did not give a firm answer as to whether soft cheeses could be included in the same market.[814]

8. THE TOP STORE PROGRAMME (THE "TSP")

According to the Commission's investigation, the TSP was commenced by IBL in June 2009.[815] At its peak, the TSP had thirty participants.[816] However, other parties, which were not signed to the TSP and therefore not formally committed to the programme, nevertheless complied with the obligations required therein and received the ensuing discounts. The initial TSPs ran for six months, ending at the end of 2009. In 2010, IBL had signed TSPs with only two organisations. However, IBL considered the 'expired' TSPs to still be in force, with a view to renewal during that year.[817] As a result, the Commission held the thirty TSPs which were said to have expired as remaining effective.[818] In its defence, IBL offered four reasons for enacting the TSP. First, that volume discounts enacted per order were 'unsatisfactory'[819] as this led to sporadic orders from retailers. Second, the TSP was part of marketing campaign to boost the sales of Kraft Cheddar. The Commission noted that the TSP was but a small aspect of the campaign.[820] Third, the TSP was a method to promote lesser known brands under the Kraft label: placing the volume discount on the dominant tying product rather than the tied product was a safer strategy. Fourth, the TSP was enacted in response to a competitor's 'aggressive marketing campaign directed against Kraft products, possibly

[812] IBL (n 21) 3.6.2.
[813] IBL (n 21) 5.2.3.
[814] IBL (n 21) 5.2.4.
[815] IBL (n 21) 5.3.1.
[816] IBL (n 21) 5.4.1.
[817] IBL (n 21) 5.4.2.
[818] IBL (n 21) 5.4.3.
[819] IBL (n 21) 5.5.1.
[820] IBL (n 21), 5.5.1.

including the purchase of shelf space.'[821] However, as per the s.46 test, the Commission is able to consider both the object and effect of IBL's conduct. In theory, the TSP would create the incentive for retailers to promote the Kraft products over other rivals in order to obtain the volume discount.[822] However, examining the effects of the TSP in the short-term did not indicate that the market was being distorted. Competitors' figures for the time period which the TSPs were active prior to the investigation indicated that their sales had not reduced:[823] Kraft Cheese's overall sales however, taking into account stores signed to the TSP and those not, had increased.[824] Thus one of the objectives of the TSP offered by IBL had been met. The task of determining whether the TSP leads to market distorting effects - by assessing the counterfactual - was straightforward. Without the TSP, the Commission simply concluded that the distorting effects of the shelf space requirements or retroactive volume discounts would not exist.[825] Furthermore, there did not appear to be any anticompetitive effects caused by the TSP in the short-term. However, the Commission's concern was the long term development of the market should the TSP continue, in particular the adverse impact that may be suffered by new competitors. Retailers might be reluctant to buy new products if the additional expenditure means that they cannot purchase the required Kraft volume to obtain the TSP discount.[826] Furthermore, the shelf space requirements relating to both the dominant and non-dominant Kraft products may act as increased barriers to entry for new entrants to the market. As a result, the Commission held that IBL had breached s.46 of the Competition Act by implementing the TSP.[827]

There are several notable points about the IBL investigation. First, the investigation makes it clear that Mauritian competition law is about protecting competition, not competitors. If the processed cheese market is accepted as the relevant market, the only other competitor in the market, with only a share of 10%, is Chesdale. Based on the anticompetitive behaviour and the virtual monopoly enjoyed by IBL in this market, it would have been easy for the CCM to conclude that it should address the TSP due to its further distorting effects on the current market. However, the Executive Director effectively states that to do so would achieve little and not be in the spirit of competition law. As 'there is...little competition to be lost'[828] between the two products currently on the market, the CCM's focus should be on new entrants and whether any action taken by the CCM can encourage renewed competition in the market. A second notable aspect of the investigation might be to consider the role of Kraft in implementing the TSP. The evidence before the CCM was that Kraft does not 'participate in the trade or commercial negotiations with retailers for their products.'[829] However, it would appear that Kraft had some guiding role in the creation of the TSP.[830] If Kraft had had a stronger role than 'discussion' in the creating/implementing of TSP, would it (also) have been subject to

[821] IBL (n 21) 5.5.1.
[822] IBL (n 21) 5.6.1.
[823] IBL (n 21) 5.6.2.
[824] IBL (n 21) 5.6.3 - 5.6.6.
[825] IBL (n 21) 5.7.3.
[826] IBL (n 21) 5.7.6.
[827] Competition Commission of Mauritius 'Decision of the Commissioners of the Competition Commission: IBL Consumer Goods' Sales Contract with Retail Stores' (September 2010) <http://www.gov.mu/portal/sites/ccm/pdf/INV001%20-%20Commissioners_Decision.pdf> accessed August 2010, 3.8
[828] IBL decision (n 46) 5.7.6.
[829] IBL decision (n 46) 5.3.1.
[830] IBL decision (n 46) 5.3.2.

the investigation, rather than its distributor IBL? A final point of interest is that the shelf space specifications are a new practice,[831] and therefore might be considered an innovative practice, to Mauritius. On one hand, the CCM seeks to deter other dominant undertakings from implementing similar arrangements.[832] On the other hand, the CCM states that the question 'is whether they are particularly distortionary in a market which has not experienced such practices to date.'[833] Let us say then, that dominant undertakings cannot implement such agreements but new undertakings (assuming they have deep pockets) can; gradually the new practice becomes an established practice, would such practices then no longer be viewed as 'particularly distortive'?

9. COLLUSIVE BEHAVIOUR: TRAVEL AGENTS' FEES

On the 21 December 2009, the Executive Director commenced an investigation into a potential collusive arrangement between the Mauritius Association of IATA Travel Agents ("MAITA") and Air Mauritius Ltd. ("Air Mauritius") to fix service fee levels. Horizontal collusive agreements which have the object or effect of distorting the market are prohibited by s.41 of the Act.

Prior to 2008, Air Mauritius used to pay a commission to travel agents for selling Air Mauritius flights. As of 2008, this system was cancelled and replaced by that of the service fee, whereby travel agents could decide and charge their own fee.[834] The Executive Director's investigation revealed that there were two ways by which the price fixing was agreed. First, there were direct negotiations between Air Mauritius and MAITA to agree the pricing structure by haulage and flight class.[835] Afterwards a number of communications followed, by which Air Mauritius informed the travel agents of the service fee pricing structure it would be applying,[836] including one press article carrying a recommendation that fees charged by the travel agents remain within the same pricing range.[837] However, the pricing structure was agreed prior to the Act coming into force. Therefore, the question before the Commission was whether the collusive agreement continued to be acted upon post-November 2009.

One of the key factors relied upon by the Commission in determining whether the agreement was operative after November 2009 was to investigate evidence of 'clustering', e.g. a high number of service fees being charged around the prices agreed than might be expected if the agreement was not in force.[838] The data analysis for Air Mauritius showed that 65% of service fees charged clustered around the agreed price.[839] The data analysis for MAITA members showed that 45% of service fees were at the level of the agreement for economy flights to Johannesburg;[840] 22% of service fees for

[831] IBL decision (n 46) 5.7.8.
[832] IBL decision (n 46) 5.7.8.
[833] IBL decision (n 46) 5.7.8.
[834] Competition Commission of Mauritius 'Travel Agents' service fees: Final Report INV 004' (July 2010) <http://www.gov.mu/portal/sites/ccm/pdf/INV004%20-%20Final%20Report.pdf> accessed 4 November 2010, 2.10.
[835] Travel Agents' service fees (n 53) 3.2 - 3.8.
[836] Travel Agents' service fees (n 53) 2.13 - 2.15.
[837] Travel Agents' service fees (n 53) 2.13.
[838] Travel Agents' service fees (n 53) 3.15.
[839] Travel Agents' service fees (n 53) 3.19.
[840] Travel Agents' service fees (n 53) 3.24.

London economy class;[841] and just over 20% of service fees for London business class.[842] Applying statistical mode analysis, the Commission argues that this demonstrates a greater cluster of fees around the agreed prices than might be expected if the collusive agreement had not been in place.[843]

Several arguments disputing the existence of a collusive agreement were before the Commission. First, it was argued that the communications between Air Mauritius and MAITA were for information purposes only, not negotiation. This was rejected by the Commission, however, on the basis that the evidence constituted negotiation by 'proposal and counter proposals it was an understanding.'[844] Second, there has been no evidence, i.e. further communications since the Act came into force to suggest that the collusive agreement was still in place. The lack of 'explicit communication' was accepted in principle by the Director, but deemed insufficient to support the proposition that the agreement had ceased, particularly when the pricing statistics were taken into consideration.[845] The final argument put to the Director was that pricing behaviour constituted both independent pricing[846] and parallel pricing arising from competition.[847] This was rejected on the basis that a) a certain pricing structure was negotiated between the parties before the Act came into force - it would be illogical to claim that prices originally negotiated were now competitive;[848] b) if the industry was competitive, then market forces should drive down the price of the service fees; and c) as a starting point or 'first approximation',[849] the first set of prices proposed by Air Mauritius in its negotiations may have represented independent pricing,[850] nevertheless, the prices subsequently agreed were '30 - 75% higher than initially proposed.'[851] As a result of the findings, the Executive Director held that s.41 of the Act had been breached.

The defining factor in this investigation was that negotiations between the parties about price had taken place prior to the Act coming into force. Once the Act came into force, however, there was no communication, explicitly or otherwise, from either party to suggest that the horizontal agreement was no longer in force. Coupled with the continuing pricing around the negotiated price points, the CCM held that s.41 of the Act had been breached. Nevertheless, the investigation raises two points. The first concerned the use of statistical mode as method to analyse evidence. It might be argued that when used with a small sample, for example the 56 tickets available for business class flights to London,[852] statistical mode analysis is not entirely satisfactory in determining the strength of evidence. The second issue, which the CCM did not have to consider, but may become an issue if a similar investigation is appealed, was the precise details of the negotiations and the agreement.

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[841] Travel Agents' service fees (n 53) 3.32.
[842] Travel Agents' service fees (n 53) 3.35.
[843] Travel Agents' service fees (n 53) 3.37 and Table 6.
[844] Travel Agents' service fees (n 53) 4.2.
[845] Travel Agents' service fees (n 53) 4.3 - 4.4.
[846] Travel Agents' service fees (n 53) 4.7.
[847] Travel Agents' service fees (n 53), 4.5.
[848] Travel Agents' service fees (n 53) 4.5.
[849] Travel Agents' service fees (n 53) 4.8.
[850] Travel Agents' service fees (n 53) 4.8.
[851] Travel Agents' service fees (n 53) 4.7.
[852] Travel Agents' service fees (n 53) 3.35.

10. THE IMPORT OF SECONDARY SCHOOL BOOKS

The second completed investigation by the Executive Director regarding collusive behaviour involved the import of secondary school books into Mauritius by Editions Le Printemps ("ELP") and Editions de L'Ocean Indien ("EOI") and whether there was an agreement to fix wholesale trade discount rates. The information provided by ELP and EOI indicated that they generally gave the same discount percentages to both credit and cash purchasers.[853] However, there was no evidence to suggest an agreement falling under s.41 of the Act - collusive horizontal agreements - had been reached by the two parties. Investigating the market circumstances, the Commission made the following findings regarding collusive behaviour. First, both ELP and EOI use different formulas for calculating their rates.[854] Second, the mean discount rate offered by both importers against cash and credit sales was different.[855] Furthermore, the range of discount rate offered by EOI compared to that of ELP was greater.[856] Finally, under a Notice issued under s.52(1)(c) of the Act, both parties affirmed that there had been no communication, agreement or understanding to fix discount rates nor threats of retaliation relating to said pricing.[857]

The facts of this case may therefore be distinguished from the Travel Agents case. The behaviour between the Agents was considered to be 'concerted practice'[858] and therefore fell under the definition of agreement under the Act. This was due to the significant amount of communication and negotiation between the travel agents involved. As there was no proof of such contact between the book importers, the Executive Director considered whether tacit collusion was being committed: such behaviour would breach s.46 of the Act. Tacit collusion might be defined as the situation where companies deliberately avoid or reduce competition against each other 'to maintain profits or simply in the interest of a quieter life.'[859] There is a two-step evidentiary requirement to establishing tacit collusion. First, the CCM guidelines on monopoly situations[860] state that there are three conditions to be met in order to establish that tacit collusion is taking place: the firms in question must be able to reach an implicit agreement about price and monitor compliance with the agreement; it must be in the interest of each firm to participate in the behaviour; and competition from firms outside the arrangement must be weak.[861] If this first step is met, the CCM will take the second step of 'investigating the market outcomes in particular that enterprises are foregoing apparently profitable opportunities to undercut one another's prices and take one another's market share. For this purpose, the CCM may resort to evidence such

[853] Competition Commission of Mauritius 'Importation of secondary school textbooks in Mauritius CCM/INV/006' (March 2011) <http://www.gov.mu/portal/sites/ccm/pdf/INV006%20-%20Final%20Report.pdf> accessed 10 August 2011, 3.6.
[854] Importation of secondary school textbooks (n 72) 4.4.
[855] Importation of secondary school textbooks (n 72) 4.8.
[856] Importation of secondary school textbooks (n 72) 4.9.
[857] Importation of secondary school textbooks (n 72) 4.10 - 4.14.
[858] Competition Act 2007, s.2.
[859] Competition Commission of Mauritius 'Competition Commission of Mauritius Guidelines: Monopoly situations and non-collusive agreements CCM 4' (November 2009) <http://www.gov.mu/portal/sites/ccm/pdf/CCM4%20-%20Guidelines%20-%20Monopoly%20and%20NC%20agreements_Nov09.pdf> accessed 10 February 2011, 4.10.
[860] Monopoly Guidelines CCM 4 (n 78).
[861] Monopoly Guidelines CCM 4 (n 78) 4.12.

as price-cost comparisons, the stability of market shares or stable or parallel price levels over time.'[862]

Assessing the behaviour of ELP and EOI against the three criteria, the Commission found the following. First, relating to implicit agreements about price and monitoring of such agreements, ELP acknowledged that it was aware of the discounts offered by its competitors. However, this is to be taken in context: as well as importing books directly, ELP also bought books from other importers. EOI declared that it was unaware of the discounts offered by rivals or how its rivals calculated their offers.[863] Second, as the market conditions are such that if an agreement were in place and a participating firm unilaterally discounted further its prices, the Commission considered it 'credible' that a participating firm could initiate price wars to maintain discipline within the agreement.[864] Third, findings relating to barriers to entry were inconclusive. Barriers such as 'capital investment and consumer loyalty'[865] may exist: but this had not prevented new entrants entering the market in the past.[866] As a result of its findings, particularly in order to identify the necessary agreement, the first step to establishing tacit collusion was not met. Nevertheless, the Commission noted that the market conditions, for example 'the small size of the market and limited number of importers'[867] were capable of supporting tacit collusion arrangements.[868]

The first point to note about this investigation is the difficulty in establishing tacit collusion. The principles to be applied when investigating collusive agreements are elucidated in its 'Guidelines on Collusive Agreements' ("CCM 3").[869] As defined by the Act and expanded upon in CCM 3, the definition of agreement is broad. It includes agreements both enforceable and non-enforceable, a gentleman's agreement and also agreements reached by consensus or understanding.[870] Even under this wide definition of agreement, a finding of collusive behaviour could not be established. Looking at the first criteria in the primary step for establishing tacit collusion, an implicit agreement must be proven: how does one establish 'implicit agreement' under s.46 of the Act, when an 'understanding' could not be proved under s.41? If the concepts are not exclusive, does this mean such cases will fall under the same points? Further clarity about the relationship between the definition of agreement as per the Act and implicit agreement as per the tests for tacit collusion is required. Finally, the investigation revealed the lack of competition between retailers for secondary books: thus the market remains under the observation of the CCM.

11. MERGER: LC EVENTS AND EVENT STRATEGY

The investigation completed by the CCM so far considered the merger (by takeover) between LC Events Co Ltd. ("LCE") and Event Strategy Ltd ("ESL"). The investigation

[862] Monopoly Guidelines CCM 4 (n 78) 4.13.
[863] Importation of secondary school textbooks (n 72) 4.16.
[864] Importation of secondary school textbooks (n 72) 4.17.
[865] Importation of secondary school textbooks (n 72) 4.18.
[866] Importation of secondary school textbooks (n 72) 4.18.
[867] Importation of secondary school textbooks (n 72) 4.16.
[868] Importation of secondary school textbooks (n 72) 4.19.
[869] Competition Commission of Mauritius 'Competition Commission of Mauritius Guidelines: Collusive Agreements CCM 3' (November 2009) <http://www.gov.mu/portal/sites/ccm/pdf/CCM3%20-%20Guidelines%20-%20Collusive%20Agreements_Nov09.pdf> accessed 10 February 2011.
[870] Collusive Agreement Guidelines CCM 3 (n 88) 1.9.

was prompted by a complaint from LCE following the purchase of 33% of shares by ESL.[871] ESL is an events planning and services company providing, for example, lighting, rigging and staging for its customers. It is also a subsidiary of the Impact Production Group ("Impact"), forming one of the six subsidiaries providing a range of events services under the Impact banner.[872] LCE may be considered a direct competitor to Impact as not only it provides some of the services as done by ESL, but also Impact as a whole.[873] The two issues before the CCM were a) has a merger situation as per the Act taken place[874] and b) if it has, will the merger lead to the substantial lessening of competition.[875]

Sections 47 and 48 of the Act are the provisions dealing with mergers. S.47 states the criteria to be met in order to establish a merger situation; s.48 sets out which merger situations will be reviewed under the Act. The key test in establishing a merger situation under s.47 is 'common ownership or control'. Thus as, defined by the Act, if two or more companies, one of which operates in Mauritius, come under such ownership or control, the s.47 test will be met.[876] To be subject to review under the Act, s.48 requires that either the merged entity or one of the parties to the merger has 30% of the market share[877] and that there are reasonable grounds to believe that the merger will lead to a substantial lessening of competition (the "SLC test").[878] The SLC test is applied by 'considering how competitive the market was/is before the merger, and what is likely to happen after the merger.'[879] Thus the SLC test allows the Commission to consider the possible ex post effects and conditions of the merger, such as the possibility of new entry into the market, the continuation of rivalry from existing firms and product elasticity.[880]

12. ESTABLISHING THE MERGER SITUATION

According to the CCM, s.47(2) provides non-exhaustive examples of when 'enterprises are to be treated as being under common control,'[881] for example either through a subsidiary relationship,[882] or a person or group having control over all the participants.[883] S.47(3) sets out the three possible ways in which one may establish control - 'the ability to control or materially influence the enterprise but without having a controlling interest in it (de facto control); the acquisition of a controlling interest (de jure control); the ability to control a policy which already could be materially influenced.'[884]

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[871] ESL and LCE (n 23) 1.1.
[872] ESL and LCE (n 23) Figure 1.
[873] ESL and LCE (n 23) 2.9.
[874] ESL and LCE (n 23) 2.14.
[875] ESL and LCE (n 23) 2.14.
[876] Competition Act 2007, s.47(1).
[877] Competition Act 2007, §48(a) and (b).
[878] Competition Act 2007, s.48(c).
[879] Competition Commission of Mauritius 'Competition Commission of Mauritius Guidelines: Mergers CCM 5' (November 2009), <http://www.gov.mu/portal/sites/ccm/pdf/CCM5%20-%20Guidelines%20-%20Mergers_Nov09.pdf> accessed 13 August 2011, 3.16.
[880] ESL and LCE (n 23) 3.15 - 3.16.
[881] ESL and LCE (n 23) 4.12.
[882] Competition Act 2007, s.47(2)(a).
[883] Competition Act 2007, s.47(2)(b).
[884] ESL and LCE (n 23) 4.13.

As the merger took place via the purchase of shares, the CCM considered whether the purchase of a 33% shareholding was sufficient to establish the ability to materially influence policy. The CCM found that ESL had the ability to materially influence the policy of LCE on two grounds. The first ground was by virtue of the percentage of shares owned by ESL granting sufficient voting rights to be able to influence policy making.[885] The second ground was based upon possession of special voting rights or a veto. The possession of either would confer upon the possessor the ability to materially influence the policy of a company. The Companies Act 2001 requires that a majority of 75% or more shareholders are required for certain decisions, for example to approve a major transaction.[886] As a result of its percentage shareholding, ESL was deemed to have the right to veto such relevant decisions and therefore the power to materially influence the policy of LCE; accordingly the CCM found that a relevant merger situation had been created.

Having met s.47 of the Act, the CCM then had to consider whether the criteria under s.48, namely the 30% market share threshold and SLC test, had been met. First, the CCM analysed the relevant market and its structure, in particular to determine whether the ESL and LCE were competitors or not. Critical to this assessment was evidence provided by service users.[887] Regarding the first element of defining the relevant market - the product market - the CCM found that there were two aspects to the product market - the 'class of event' i.e. the type of event to be organised and 'type of event service' required, such as 'decor, light...fireworks'.[888]

Regarding the class of event, the evidence suggested that events could be classed into high and low class events. Thus the customers of ESL and LCE considered the two companies to be providers of 'high quality high class' events.[889] Such customers would not consider smaller companies or individual organisers to arrange their events. [890] The CCM found that the key characteristics of ESL, LCE and other like-organisations were reliability, timeliness and quality.[891] If a company organizing events can demonstrate these qualities and the requisite experience, it can command higher prices than might be expected under the market conditions:[892] those that cannot will not even be considered to organise such events.

The CCM then considered the services required for such events. It wished to establish whether the services were considered as separate, purchasable elements or as packages by the customer.[893] The following points may be drawn from the CCM's findings. First, customers generally see the individual services as packages to be bought from the organiser, rather than to be purchased singularly.[894] Thus, an events organiser, as long it can deliver the promised event, may outsource the services it cannot provide.[895] Second, events organisers offer a range of these services as part of the overall product they

[885] ESL and LCE (n 23) 4.14 - 4.16.
[886] Companies Act 2001, s.105(1)(c).
[887] ESL and LCE (n 23) 6.9.
[888] ESL and LCE (n 23) 6.16.
[889] ESL and LCE (n 23) 6.18.
[890] ESL and LCE (n 23) 6.17.
[891] ESL and LCE (n 23) 6.18.
[892] ESL and LCE (n 23) 6.18.
[893] ESL and LCE (n 23) 6.22.
[894] ESL and LCE (n 23) 6.23.
[895] ESL and LCE (n 23), 6.23.

provide.[896] Third, it was generally perceived that some organisers are better at providing certain services than others: where an organiser might be deemed weak in its service provision, outsourcing was seen as a solution to a) providing 'a better event' and b) ensuring that the organiser does not lose business.[897] As a result of its findings, the Executive Director deemed the product market to be 'high quality and high class event services provided as a package that are perceived to be reliable by corporate and "high-end" users.'[898] Having taken factors such as quality and reliability into account as a means of defining the product market, the Executive Director explored whether other 'functional' factors could further define the relevant market. User evidence suggested that two further factors played an important part in deciding what organisation(s) to use: event size and event importance.[899] If a customer placed a high value on these attributes, then he would be a) more cautious in selecting his provider, b) choose from a more limited pool of providers and c) be willing to or would pay a higher price for the quality of the event.[900] As such, the CCM was able to classify these functional factors as '"Big events of high Importance" (Big events), "Medium sized events of average importance" (Medium events) and "Small events" (Small events).'[901] While such categorisation might seem rudimentary, the CCM was in fact using terminology employed by the customers when describing the events that they might require.[902] Notwithstanding that the ESL and LCE operated across all three categories, customers perceived the two as providers for big and medium events.[903] The definition of the relevant market posited by the CCM was the 'market for packaged reliable high quality and high class event services and related services offered as a package to corporate and high-end users of big to medium sized events in Mauritius.'[904]

Establishing the relevant market provided the Commission with the framework for establishing the market share of the two companies. In assessing market share, the Commission took note of the following. First of all, the relevant market was based upon providing packaged services for events: thus it would be appropriate to consider the market share of Impact, ESL's umbrella organisation, rather than ESL alone.[905] If an event were to be organised by Impact, it would be provided by Impact using its six subsidiaries to meet the customer's needs. Second, customer evidence suggested that for big to medium sized events, Impact would be one of the organisations considered. This could not be used as a proxy for determining market share.[906] Third, the allocation of market shares would be variable as they are based on customer 'perception'.[907] For example, if one were to consider the extreme ends of the relevant market, the market shares for Impact would increase towards the 'big and important events' end of the market.[908] Moving towards the other end of the market, to relatively smaller and less important events, the market share of LCE would presumably increase, to the detriment

[896] ESL and LCE (n 23) 6.24.
[897] ESL and LCE (n 23) 6.25.
[898] ESL and LCE (n 23) 6.30.
[899] ESL and LCE (n 23) 6.36.
[900] ESL and LCE (n 23), 6.36.
[901] ESL and LCE (n 23) 6.39.
[902] ESL and LCE (n 23) 6.39.
[903] ESL and LCE (n 23) 6.40.
[904] ESL and LCE (n 23) 6.41.
[905] ESL and LCE (n 23) 6.43.
[906] ESL and LCE (n 23) 6.44.
[907] ESL and LCE (n 23) 6.42.
[908] ESL and LCE (n 23) 6.50.

of Impact. Furthermore, 20%-30% of customers saw LCE as competitors in terms of big to medium events.[909] Therefore, whilst the overall market shares allocated to Impact (ESL) was 50-60% and LCE 0-10%,[910] one would have to take into account this fluidity within the market. However, notwithstanding this fluidity, the CCM felt it had sufficient evidence to demonstrate that the 30% market share safe harbour had been breached and that LCE was a competitor to ESL.[911] The merger was therefore subject to review under s.48 of the Act.

In order to determine whether the merger would lead to an SLC, the CCM assessed the unilateral, coordinated and foreclosure effects of the merger. An example of unilateral effect caused by a merger is when one company merges with a competitor, thereby reducing the amount of competitors in the market and product elasticity.[912] The CCM asked customers to i) indicate their preferred service provider and ii) service providers that they would consider in the market. The findings suggested that after the merger, the majority of clients would continue to have choice, albeit reduced in the market: for 17% of customers however, who said that they would consider working only with Impact or LCE, the merger would be detrimental to their ability to choose one or the other.[913]
The CCM rejected the possibility that the merger would lead to coordinated effects e.g. collusive behaviour on two counts. First, after the merger, several companies similar in size to LCE would remain in the market. Second, Impact is the largest firm operating in the market, a merger would make it larger. Therefore the market structure would tend to lend itself to monopolistic/unilateral behaviour rather than coordinated effects.[914]

The CCM also deemed the merger would not lead to foreclosure on the market. The specific question before the CCM was whether losing LCE as an independent firm on the market would lead to foreclosure of its rivals, on the basis that the smaller players (LCE included) outsourced to each other in order to provide their services. Taking into account the low market share of LCE (0-10%) and that no competitors had expressed foreclosure concerns,[915] the CCM held that it did not have reasonable grounds for believing that foreclosure would result from the merger.

Finally, the CCM assessed barriers to entry. A merger that might lessen competition may be permitted to continue if 'entry is sufficiently timely, likely and effective that no long-term damage to competition will result.'[916] The assessment also took into account the ability of the current players to grow and compete in the market.[917] The CCM identified two key barriers to the market: the limited size of the market and, most importantly, client loyalty.[918] As noted, the ability of an event organisation to generate business in the relevant market is based upon the quality, reliability and class it can deliver. Thus new entrants may struggle to demonstrate or establish themselves to the

[909] ESL and LCE (n 23) 6.47.
[910] ESL and LCE (n 23) Table 5.
[911] ESL and LCE (n 23) 6.53.
[912] Competition Commission and Office of Fair Trading 'Merger Assessment Guidelines (September 2010) <http://www.oft.gov.uk/shared_oft/mergers/642749/OFT1254.pdf> accessed 13 August 2011, para 5.4.1
[913] ESL and LCE (n 23) Figure 7 and 7.13.
[914] ESL and LCE (n 23) 7.17.
[915] ESL and LCE (n 23) 7.21.
[916] Merger Guidelines CCM 5 (n 98) 3.21.
[917] ESL and LCE (n 23) 7.23.
[918] ESL and LCE (n 23) 7.24.

required level in a timely manner. Nevertheless, it was noted that whilst historically Impact would have been the only choice for a number of customers, new entrants have entered the market. Not only has this increased choice, but also reduced Impact's market share.[919] Finally, the CCM considered the ability of the former shareholders of LCE to set up a new entity and use their contacts and experience to set up a creditable competitor in the market.[920] Based on the findings, the Executive Director determined that there would be an immediate short-term SLC due to the unilateral effects of the merger.[921] However, this was to be balanced out against entrants who had recently entered the market and the possibility of new entrants in the future.[922]

The difficulty with merger analysis is that it involves predicting what the future outcomes of the market will be. Thus whilst the investigation found an immediate SLC should the merger take place, it predicted that, due to low barriers to entry, an appropriate level of competition through established players and new entrants would restore itself. Furthermore, the case demonstrated the complexity in defining the product market based on qualitative data e.g. the viewpoints of the customer rather than quantitative data. Nevertheless, it may be argued that the Commission's subsequent definition of the market, taking into account its fluidity, is a realistic and appropriate one. Ultimately, however, the Commission did not have to give a final decision as in a concurrent case brought before the Supreme Court, the transfer of shares between LCE and ESL was rendered null and void, meaning that a merger situation no longer existed.[923]

13. THE CEMENT MARKET STUDY

Hitherto, the CCM has completed one market study - the cement market - which it published in April 2011. Commenced in July 2010, the purpose of the study was two-fold. First, to understand the market conditions. Second, to make recommendations to Government that would increase competition in the market.[924] Mauritius does not produce its own cement; it imports all of its requirement, approximately 630,000 tonnes per year.[925] The annual amount of cement to be imported is set by the Government. Cement is key to a fundamental sector of the Mauritian economy - the construction industry.[926] A number of characteristics define the Mauritian cement market, its importance to the island and also the importance of the study. These characteristics are: the level of Government intervention; the regulatory framework; and the effects upon competition in the market.

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[919] ESL and LCE (n 23) 7.30.
[920] ESL and LCE (n 23) 7.31.
[921] ESL and LCE (n 23) 7.34.
[922] ESL and LCE (n 23) 7.35.
[923] Competition Commission of Mauritius 'Decision of the Commissioners of the Competition Commission: Possible collusion in the market for secondary school books CCM/DS/002' (May 2011) <http://www.gov.mu/portal/sites/ccm/pdf/Books-Com-DS-090511.pdf> accessed 13 August 2011.
[924] Cement market study (n 24) 1.3.
[925] Cement market study (n 24) 1.1.
[926] Cement market study (n 24) 1.1.

14. GOVERNMENT INTERVENTION AND THE STATE OF THE MARKET[927]

The structure of the market at the time of the study involved three key players and potentially three new entrants. The three incumbents are STC, Lafarge Mauritius ("Lafarge") and Holcim Mauritius ("Holcim"). The latter two are private firms whilst the first is a state-owned enterprise. All three import cement to Mauritius: STC imports 50%, Lafarge and Holcim share the remaining 50%.[928] Furthermore, two firms, Binani Cement Ltd ("Binani") and Oriental Group Industry Ltd. ("Oriental") have been granted licences to manufacture cement in Mauritius. A third potential entrant, the Mauritius Chemical and Fertilizers Industry Ltd. ("MCFI") is also considering plans to manufacture cement.[929]

Initially, Lafarge was the only importer to and distributor of cement in Mauritius. However, as it could not meet Mauritius' cement needs in the early 1980's, the Government set up STC in 1984 to meet that need and to ensure that the industry benefitted from competitive pricing.[930] Initially, STC met 25% of Mauritius' demand, with Lafarge meeting 75%.[931] Holcim entered the market in 2000, leading to the 50% (STC):50% (Lafarge/Holcim) split we see today.

Regarding the sourcing of cement imports, both Holcim and Lafarge import through their respective parent companies. STC sources its cement through international tenders, in which the parent companies of Holcim and Lafarge participate.[932] Whilst, the role of STC is to import cement and, at present, to sell its quantity in equal shares to the two firms, Lafarge and Holcim also have inland processing facilities to store, pack and bag the cement. Furthermore, Holcim 'is the only company to own and operate a...cement unloading facility...'[933] Once the cement has reached Mauritius it is split into two general products, bagged and bulk cement. The cement is then used for various construction purposes, such as housing, commercial and infrastructure.[934]

15. THE REGULATORY FRAMEWORK

The regulatory framework[935] governing the cement market has a number of purposes. It allows the Government not only to fix the wholesale and retail prices of cement and but also to regulate trade and supply.[936] The retail price of bagged cement, which constitutes 60% of all cement sold, is fixed, but the retail price of bulk cement is not. It is suggested that the fixing of the retail price of bagged cement caps that of bulk cement.[937] The retail price for bagged cement reflects transport costs incurred. This means that the retail

[927] Cement market study (n 24) 2.1 - 2.18.
[928] Cement market study (n 24) 2.3.
[929] Cement market study (n 24) 2.4.
[930] Cement market study (n 24) 4.3.
[931] Cement market study (n 24) 2.7.
[932] Cement market study (n 24) 2.8.
[933] Cement market study (n 24) 2.9.
[934] Cement market study (n 24) Table 3.
[935] e.g. Consumer Protection (Price and Supplies Control) Act 1998, Consumer Protection (Consumer Goods) (Maximum Price) Regulations 1998, Consumer Protection (Control of Price of Taxable and Non-Taxable Goods) Regulations 1998, Consumer Protection (Provision for Incidental Matters) Regulations 2006.
[936] Cement market study (n 24) 3.1.
[937] Cement market study (n 24) 3.3.

price of bagged cement varies across the country.[938] The final piece of government intervention is the provision of import and export licences.

16. COMPETITION ISSUES IN THE CEMENT MARKET

The general issue with such government intervention and frameworks is that they prevent market forces from determining supply and demand and potentially stifle efficiency and innovation. However, the CCM notes with caution that small market economies need large firms in order to achieve efficiencies. Thus, competition in Mauritius' cement sector cannot be completely deregulated.[939] Nevertheless, the Government intervention into the market takes three forms: price controls, import of cement and import controls.[940] The CCM acknowledged the initial rationale behind the price controls and import of cement: to ensure competitive pricing given the concentration in the market and to meet need. Notwithstanding this intervention, however, the market has been functioning somewhat, as a new entrant came to the market in 2000 (Holcim),[941] and three new firms are at various stages of planning to enter the cement market. Furthermore, it was argued that the price controls hamper quality and choice.[942] The fixed price of bagged cement relates to a particular strength (minimum quality OPC CEM 1); thus importers are limited to importing this type of cement because the price margins are already very tight.[943] Furthermore, the pricing policy and current course of dealing prevents Holcim and Lafarge taking advantage of economies of scale that they may gain from their infrastructures. For example, the current arrangement adopted by STC means that Holcim is limited to 25,000 tonnes per shipment. However, if the pricing was deregulated, Holcim could arrange for larger shipments and pay lower freight costs.[944] Finally, the CCM noted that the fixing of price means that sector is unresponsive to trends in world pricing, 'if the world price of cement is on a downward trend [...] price control will deprive local consumers of the resulting benefit of the lower cement price.'[945]

The study asks the Commission to consider the following: a competitive market would not require the prices of cement to be fixed. The prices would be determined by supply and demand. However, one has to account for the high concentration of the markets: deregulation of which may facilitate collusion and other anticompetitive practices.[946] Nevertheless, this concern can be set off against the fact that there are new firms wishing to enter the market. Therefore the question is whether price controls should be removed following entry, or before 'such entry relying on competition law to prevent' anticompetitive abuses.[947]

Having set out its considerations for price control, the Commission considered that the role of STC in the market should be reviewed. Taking into account the capacity of the

[938] Cement market study (n 24) 3.4.
[939] Cement market study (n 24) 4.2.
[940] Cement market study (n 24) 4.4.
[941] Cement market study (n 24) 4.6.
[942] Cement market study (n 24) 4.7.
[943] Cement market study (n 24) 4.7.
[944] Cement market study (n 24) 4.8.
[945] Cement market study (n 24) 4.10.
[946] Cement market study (n 24) 4.11 - 4.12.
[947] Cement market study (n 24) 4.14.

two private firms operating the market,[948] and the fact that STC has been purchasing its cement from the parent companies of the firms over the last few years,[949] it would appear that initial rationale for the role of STC, to safeguard supply, is no longer warranted. Furthermore, the STC's importing of one type of cement to meet 50% of demand is preventing the use of other types of cement in the market.[950] The Commission assessed the current role of import/export controls in the sector. It found that there was overall agreement of such controls to maintain the quality of cement coming to Mauritius.[951] However, the CCM found that import quotas no longer serve a useful purpose, if they ever did, in the cement market. The short-term effect of import quotas appears to be the propping up of the role of the STC, allowing it to sell the cement it has imported.[952] The long-term effect, if the quotas are to remain in force, could be the distortion of the market, artificially restricting demand and therefore increasing price.[953]

Finally, the CCM considered the regulatory and strategic barriers to entry. Regarding regulatory barriers, the CCM considered that the use of price and import controls may have been necessary in a market with 'high concentration and high barriers to entry'.[954] However, despite the regulatory framework and high concentration in the market, new entrants have and are willing to enter the market. Price control may therefore no longer be required. Nevertheless, there remains a role for import control in maintaining the quality of cement imported to Mauritius. The Commission identified three strategic barriers to entry - infrastructure, minimum efficient scale ("MES") and vertical integration. Concerning infrastructure, the CCM noted the large investment that would be required from firms wishing to enter the market and compete with the incumbents. In particular, if new entrants were unable to develop their own unloading facilities, they would be forced into a position of dealing with a competitor, Holcim, to use their facilities.[955] It is clear from the study that new entrants to the market are to be encouraged. Nevertheless, it appears that cement market in Mauritius is at or close to MES. Demand for the aggregate amount of cement has been stable, with almost half brought in by the STC. Given that a new entrant would need to import a minimum amount 'to cover operating cost [...] there may not be place for a third player' due the current demand.[956] The substantive part of the survey leaves a brief note about vertical integration. It records that both Holcim and Lafarge are vertically integrated with large buyers in the bulk cement part of the market.[957] This may also present a barrier to entry for firms willing to enter the sector.

In July 2011, the CCM published its advice to the Minister of Business, Enterprise, Commerce and Consumer Protection.[958] The following points may be drawn from the

[948] Cement market study (n 24) 4.16.
[949] Cement market study (n 24) 4.17.
[950] Cement market study (n 24) 4.51.
[951] Cement market study (n 24) 4.36.
[952] Cement market study (n 24) 4.39.
[953] Cement market study (n 24) 4.37.
[954] Cement market study (n 24) 4.55.
[955] Cement market study (n 24) 4.61.
[956] Cement market study (n 24) 4.62.
[957] Cement market study (n 24) 4.63.
[958] Competition of Commission of Mauritius 'Advice of the Commission to the Minister of Business, Enterprise, Commerce and Consumer Protection: Study of the cement market CCM/AS/001/MS001' (July 2011) <http://www.gov.mu/portal/sites/ccm/pdf/MS001-COMADVICE-BK-010711.pdf> accessed 13 August 2011.

statement. The Commissioners' agree that price liberalisation would lead to greater competition in the market and lower prices for the consumer.[959] Nevertheless, such liberalisation in the absence of competition, as is the current situation, may result in anticompetitive behaviour. As such, the Commission recommends price liberalisation once new entrants have entered the market. This outlines the difficult line that must be drawn. It might be argued that standard application of economic theory would mean that the market needs to be liberalised; that cement prices should be allowed to rise if as a result of market forces which, in turn, would potentially entice new entrants to the market. The Commissioners' also endorse a two-pronged approach to monitoring and controlling the newly liberalised market through the STC and CCM.[960] As part of its submissions to the market study, the STC suggested that it should withdraw as an importer and adopt a watchdog role.[961] This would be worth exploring. Given the particular characteristics of the cement market and its importance to the overall economy of Mauritius, having a two-tier system to monitor the market during its new developments may be beneficial. Furthermore, having a sector-specific regulator, who is able to respond quickly to anticompetitive behaviour in the market, may allow policy makers to reconsider the possibility of liberalising prices prior to new entry rather than after. Finally, the Commissioners noted that liberalisation of the market would require the physical infrastructure e.g. cement storage to be in place.[962] Without these facilities, the objectives and benefits of a more competitive cement industry would be rendered unattainable. Thus the recommendations founded in competition law must be supported by the appropriate measures in competition policy.

17. CONCLUSION

The Competition Act 2007 provides a much needed framework to manage the issues which may arise from trade liberalisation in Mauritius. However, further clarity about the law and its application is required. For example, an explicit statement about the goals of Mauritian competition law would be welcome. Such a statement would identify why the selected competition goals are relevant to Mauritius, and would also respect the distinction between the goals of competition law and the goals of competition policy. The law will continue to evolve as the Commission develops its experience and consumers become more familiar with the competition rules and principles. The process of evolution will be sharpened however, once cases are brought before the courts and the principles being applied by the Commission are tested before the judiciary. Nevertheless, the seed of a competition culture has been sown; if Mauritius is to benefit from it, the political will must continue to lend its support.

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[959] CCM advice on cement market study (n 178) para 5.
[960] CCM advice on cement market study (n 178) 9 and 10.
[961] Cement market study (n 24) 4.23.
[962] CCM advice on cement market study (n 178) 14.

Calculation of Fines in India – In search for some guidance

VAIBHAV CHOUKSE[·]

"Ronald Coase said he had gotten tired of anti-trust because when the prices went up the judges said it was monopoly, when the prices went down they said it was predatory pricing, and when they stayed the same they said it was tacit collusion[964]."

1. INTRODUCTION

The history of antitrust law reaches back to the Roman Empire from the enactment of the '*Lex Julia de Annona'*, to the formation of guilds in the middle ages, the enactment of the Sherman Act of 1890 during the industrial revolution, the competition policy guided by the General Agreement on Tariffs and Trade (GATT) and the World Trade Organisation (WTO) and the Treaty of Rome creating the European Economic Community (EEC) - progressive changes have been seen over time that have aided in creating today's global competition regime. In India, the Competition Act 2002 (Competition Act) remained in a state of a flux for a considerable time. However, on May 20, 2009, India notified the twin *ex post* dimensions of the Competition Act, including the prohibition of 'anti-competitive agreements' and the 'abuse of dominant position'. The provisions under the Competition Act are broadly analogous to the provisions on anticompetitive agreements and abuse of dominance under European Union Competition Law and United States Antitrust Law and so far the Competition Commission of India (CCI) has imposed monetary penalty in 4 out of 110 cases. While the Competition Act sets the maximum penalty for a cartel violation at three times a company's profit or 10% of its turnover, whichever is higher, the penalty for other anti-competitive agreements including the abuse of a dominant position should not exceed 10 % of the average turnover of the last three preceding financial years. However, it is unclear that on what basis CCI has calculated the fines. Accordingly, the orders and amount of the fines imposed by CCI in all four cases have come under heavy criticism by competition experts worldwide.

2. INTERNATIONAL FINING GUIDELINES

It should be noted at the outset that many competition authorities worldwide already issued guidelines on the method of setting fines in Competition Cases, which provides guidance as to how these Competition Authorities proceed when calculating fines.[965] Just recently the French Competition Authority has adopted the fining guidelines on May 16, 2011, after the Paris Court of Appeal has criticized it on the ground of lack of apparent methodology while calculating fines. The Belgian Competition Council on October 10, 2011 has launched a public consultation on its proposal for new fining guidelines for the calculation of fines for restrictive practices.

[·] Author is a Competition Lawyer working with a Law Firm, Vaish Associates, Advocates at New Delhi and holds LL.M in Commercial Law with focus on EU Competition Law from Kings College London. The author would like to thank Professor Richard Whish for all his guidance and support. The authors' views expressed in the article are personal and author is solely responsible for any errors that may remain in this article.

[964] William Landes, '*The Fire of Truth: A Remembrance of Law and Econ* at Chicago, (1981) , p.193

[965] ICN cartel working group 'Setting of fines for cartels in ICN jurisdictions' (2008)

The European Commission has adopted new Guidelines on the method of setting fines in 2006. These Guidelines revise those adopted in 1998, with a view to increasing the deterrent effect of fines. According to the past Competition Commissioner Neelie Kroes "*These revised Guidelines will better reflect the overall economic significance of the infringement as well as the share of each company involved*". The opening paragraph of EU guidelines states that '*the guidelines should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice"*. The European Court of First Instance has observed in 1995 in three of its judgments concerning the *Welded steel mesh*[966] cartel that it would be 'desirable' for the Commission to make more transparent its method for setting fines.

The fining process in the United States is governed by the application of the U.S. Sentencing Guidelines that provide a consistent structure for calculating fines. The U.S. courts consider the Guidelines to be advisory, not mandatory, and allow for judicial discretion. The US enforcement agencies do not have the legal authority to impose civil fines for monopolization violations (which are the counterpart to abuse of dominance violations)[967].

In most jurisdictions, the fine is calculated on the basis of some common factors:

1. Fines are proportionate to the severity of the alleged practices.
2. The importance of the damage to the economy.
3. The financial situation of the offender or the group to which it belongs and the likelihood of reiteration.
4. Undertaking's intent or negligence.
5. The gravity and duration of the infringement.
6. Illegal profit resulting from the infringement.
7. Mitigating Factors[968].

3. CALCULATION OF FINES IN INDIA – CARTEL CASES

In its first fining decision, CCI in *Multiplex Association of India v. United Producers/ Distributors Forum & Ors*[969] imposed a fine of Rs. 1 lakh (approx. US$ 2100) on each of the 27 film producers and distributers after the Multiplex Association of India approached the CCI alleging that the former formed a cartel and colluded against cinema hall owners and stopped the distribution of films to theatres between April and June 2009. In the second fining decision *Uniglobe Mod Travels Pvt. Ltd. vs Travel Agents Association of India & Ors*[970] the CCI on 04.10.2011 imposed a symbolic penalty of Rs. 1 lakh (approx. US$ 2100) after it found that the three largest travel agent associations of India formed a cartel and colluded against a single travel agent by collectively boycotting him from trade association.

In most jurisdictions, cartel fines imposed are higher than fines imposed for other anti-trust violations and in a number of jurisdictions more severe sanctions can be imposed on hardcore cartels than for other infringements of competition law, reflecting the consensus that hardcore cartels are the most pernicious competition law violations and

[966] *Cases T-148/89 Tréfilunion v Commission (Welded steel mesh)*
967 OECD policy brief 'Remedies and Sanctions for Abuse of Market Dominance' (2008)
[968] European Commission 'Guidelines on the method of setting fines' (2006)
[969] Case No. 01/2009
[970] Case No. 03/2009

should be sanctioned as such[971]. Basically the gravity of the infringement should be determined by a case to case basis and hard core cartels infringements are likely to be at the top end of the scale[972] whereas CCI has merely imposed a symbolic penalty on producers and travel agent associations which itself is an exceptional phenomena in cartel cases and that too without giving any rationale for the same.

4. CALCULATION OF FINES IN INDIA - ABUSE CASES

In *MCX Stock Exchange Ltd. & Ors. v. National Stock Exchange of India Ltd. & Ors*[973], CCI charged National Stock Exchange (NSE) with abuse of dominant position in the currency derivatives market to scuttle competition and imposed a penalty of Rs. 55.5 crore (approx US$ 12.3 million). In this case, though CCI may be right in asking the NSE to 'cease and desist' in the waiver of transaction costs but the monetary penalty seems a little excessive. While calculating the turnover of NSE, based on which the penalty was imposed CCI included transaction costs levied in other segments of the exchange such as capital market, equity derivatives and the wholesale debt markets. The worst part of the penalty was that the substantial portion of the turnover used by the CCI to compute the penalty comprises income earned from investments of NSE. Such computation goes against the very mandate of the Competition Act, which defines *turnover* as 'the value of sale of goods and services'. The penalty if any, should have been imposed on the basis of turnover of the NSE in the currency derivatives segment alone *i.e.* the relevant market. The matter has gone into appeal before the Competition Appellate Tribunal which in-turn has imposed a stay on the penalty.

In the forth and most recent decision *Belaire Owner's Association v. DLF Limited*[974], involving the abuse of dominance by DLF Ltd., the CCI imposed a staggering penalty of approx. Rs 6.3 billion (approx. US$ 140 million) on DLF Ltd. In this case, interestingly, DLF was never given the penalty hearing before CCI unlike in NSE & Multiplex Case, for the very reason that the relevant regulation *i.e.* Regulation 48, dealing with penalty hearing provision under the Competition Commission of India (General) Regulations, 2009 was omitted by a recent amendment on April 12, 2011. Rationale for revoking Regulation 48 seems unclear as, on the contrary it deprives the parties of the right to being heard on the issue of quantum of penalty to be imposed.

A study of the recent fines imposed by the CCI in the cases mentioned above, shows that the authority may have erred in calculating the amount of the fines on the basis of the turnover as whole and not considering the turnover of entity involved in the infringement in the relevant market while imposing the fine. In calculating such fines, the CCI should have relied on the established international jurisprudence according to which it should have only considered the turnover of *entity* involved in the infringement on the relevant market *i.e.* the 'relevant turnover' is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last 3 financial years. The basis of this approach is that a corporate responsibility shall be borne only by those entities (including parent corporations) found to have committed or supported the antitrust violation at issue and

[971] ICN cartel working group 'Setting of fines for cartels in ICN jurisdictions' (2008)
[972] Richard Whish: *Competition Law*, 6th edition,2008
[973] Case No. 13/2009
[974] Case No. 19/2010

calculate base fine from only the volume of commerce affected by the violation[975]. Furthermore, it is striking that the CCI has not considered any mitigating or aggravating factors while calculating the fines including the novelty of the issue and effective cooperation.

Worldwide, in civil and administrative cases (which include all abuse of dominance cases), there are three general categories of remedies and sanctions: structural remedies, behavioural remedies, and monetary sanctions and maximum number of competition authorities have a preference for behavioural remedies over structural and monetary remedies[976]. In US, the typical remedy for abuse of dominance cases is injunctive relief, which prohibits the company from continuing to engage in certain conduct. Penalties, particularly large penalties, do present a risk of chilling companies from possibly competing aggressively and so the size of the penalty needs to be looked at very carefully. Now if we take the case of DLF and NSE, in the absence of guidelines on calculation of fines, a 7% and 5% of turnover as penalty on DLF and NSE respectively, is higher than one would ever expect such an infringement to be fined in the EU. In the EU, the highest ever fine imposed on a dominant company was on Intel in 2009 and Intel there was found to have committed some of the most serious breaches of the EC rules i.e. Conditional Rebates, Refusal to Supply which are more serious than the violations or abuses of dominant position in DLF Case. Yet Intel was fined with only 4% of the Turnover *i.e.* $1.45 billion i.e. about 10 times the size of DLF fine.

Another issue is whether any fines should have been imposed on DLF or NSE. There is no established case law or practice in India relating to the alleged violations committed by DLF or NSE. The competition law principles adopted by the CCI in DLF case *i.e.* 'exploitative abuses' are not sufficiently developed in India or elsewhere in the world. Given that the alleged violations are based on novel concepts and principles, they are incapable of having been anticipated for the purpose of compliance. Further, it is the established practice of other competition law regulators that where a concept is novel, no penalties are levied or remedies is ordered. For instance, in the European Union, for the European Commission, competitors' exclusion is the most common abuse and often at the basis of later exploitation, the Commission has made it clear that priority should be given to the former rather than to the latter. As a result, there are only a handful of Commission decisions condemning exploitative abuse: over the 1980-2010 periods, 40 guilty verdicts relate to exclusion but only 11 to exploitation[977]. It is to be noted that European Commission was empowered to impose fines in Competition Cases in 1962, between 1962 and 1969, for almost 7 years, there were no fines at all and when a fine was finally imposed in 1969[978] on an undertaking, it was a symbolic fine.

In a recent order by CCI in *Explosive Manufacturers Welfare Association v. Coal India Limited and its Officers*[979] , CCI held that the government owned Coal India Limited has not violated any provision of the section 3 & 4 of the Act relating to anti-competitive practice and abuse of dominance. But interestingly, in the dissenting order

[975] American Bar Association 'Section of Antitrust Law Comments on French Competition Authority's Draft Notice on Fines' (2011)
[976] OECD 'Remedies and Sanctions for Abuse of Market Dominance' (2008)
[977] Patrick Hubert and Marie-Laure Combet. 'Exploitative abuse: The end of the Paradox?' (2011) pp.44-51
[978] Quinine Cartel (case IV/26.623) [1969] OJ L 192/5. And Dyestuffs Cartel [1969] OJ L 195/11
[979] Case No. 04/2010

by one of the Members of CCI, it was held that Coal India Ltd has violated the provisions of sections 3 & 4 of the Act but while dealing with the issue of penalty, the Hon'ble member held that "*it's a first contravention by Coal India Ltd and imposed a penalty of Rs. 1 Crore (US$ 216788), which is much below the 10% of the average turnover of the Coal India Ltd.*" Though being the desisting order, it does not stand but the rationale for not imposing a fine in accordance with the provisions of the Competition Act raises many eye-brows as to whether such preferential treatments to a Public Sector Undertaking having a turnover of Rs. 520 billion (approx. US$ 11.55 billion) in 2009-10, which unfortunately was not accorded to DLF or NSE justified?

5. CONCLUSION & WAY FORWARD

The European Commission imposed fines without having published any guidance until 1997. In its decisions imposing fines the Commission always listed a number of factors which it had taken into account in fixing the amount of the fine, but never explained how these factors had brought it to reach the precise figure of the fine imposed. Those judgments led to the publication by the European Commission of its 1998 Fining Guidelines. However, the Director General of the CCI has already completed the cartel investigation in cement, sugar, steel and tire sectors and the matters are pending for the final hearing before CCI, if proved guilty, the fine on companies can be between Rs 100 crore to Rs 1500 crore, depending on the turnover and production capacity. On the one hand CCI is heavily relying on foreign case law while rendering a judgment but on the other hand have disregarded the established principle laid down by various competition authorities on the calculation of fines. Recently a media report by *Bloomberg*[980] stated that US Department of Justice is working on an agreement (MoU) with India to improve international antitrust enforcement, since the trade between both the countries more than doubled to $37 billion from 2003 to 2009. Many more countries are eying up for similar collaboration with Indian antitrust authority. Hence CCI, like other mature jurisdictions, should aim to develop clear-cut guidelines on how fines will be calculated to ensure transparency and impartiality in its decisions, which in-turn will increase the creditability of CCI in the eyes of the business world as well as its international peers.

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[980] The Bloomberg 'U.S. Pursuing Antitrust Agreement With India' (07.07.2011)

Global Competition: Law, Markets, and Globalization by David J. Gerber, Oxford University Press, Oxford 2010, pp. 350, ISBN 978-19-922833-5

DR. MICHAEL KOEBELE, LL.M. [·]

David J. Gerber is a distinguished Professor of Law and Co-Director of the Program in International and Comparative Law at the Chicago-Kent College of Law, USA. Since the first publication of his book "Law and Competition in Twentieth Century Europe", Professor Gerber stands out as a well-known expert in the international antitrust community.

In his new book "Global Competition: Law, Markets, and Globalization" the author now examines competition law and its application on a global scale. The book consists of three major parts. Part I provides an overview over the attempts to establish a coherent global competition law in the 20th century. Part II presents national competition regimes explaining how and to what extent local regimes were able to evolve and shape competition law globally. Part III analyzes strategies and pathways to improve a coherent legal framework for competition law on a global level. One advantage of the book is that the three parts can be read independently of each other according to the reader's specific interest.

Part I is largely historic and constitutes an insightful and joyful read for any scholar, practitioner and government official active in the area of competition law. The author depicts two failed attempts to harmonize competition laws that are largely forgotten today by the international antitrust community: the World Economic Conference of 1927 in Geneva and the Havana Charter after World War II.

According to the author, rapid re-industrialization, together with high levels of uncertainty about the future of international trade, fostered the emergence of international cartels in the post-World-War-I-period. Businesses perceived cartels as a means to minimize risks and by 1925 had become a prominent feature of international cross-border economic activity. Behind this background, the League of Nations decided to organize a major international conference on international trade in Geneva in 1927. The primary focus of the Geneva Conference was the elimination of tariffs as a barrier to trade, but private barriers, such as cartel-type activities, were seen by many as similarly important. The author portrays the more common view at the Geneva Conference that cartels resulted in both benefits and harms to the world economy and that 'good' cartels could be distinguished from 'bad' cartels. Where cartels were operated responsibly with a view to the various stakeholders, such as workers, they were considered to be socially useful. If, however, cartels were used to maximize profits at the expense of consumers, workers and the down- and upstream markets, they were considered an evil to be combated. During the Geneva Conference, the idea that the international community should not accept cartels and establish a legal regime to effectively deter cartels gained wider support. Ultimately, the Geneva Conference called

[·] Senior Attorney EMEA, Goodyear Dunlop Operations Europe, Belgium.

for the League of Nations to collect information on international cartels, monitor their activities, investigate their effects and publish information on harmful conduct.

Equally interesting is the author's description of the likewise failed attempt to establish an International Trade Organization providing basic competition rules binding for all ratifying countries after World War II. At the time, due to the political, military, and economic dominance of the United States, the establishment of a normative legal order for competition law on a global level was a realistic possibility. The Havana Charter contained a section on restrictive business practices and, according to the author, was widely accepted as a necessary part of the international trading order. It embodied the fundamental rationale that international trade and exchange was to be promoted, and that private practices amounting to barriers to international trade should be combated. Ultimately, President Truman decided not to submit the so-called Havana Charter to Congress for ratification and the International Trade Organization did not come into existence. The author stresses that the motivation for stopping the ratification was not related to competition law but was based on other geo-political considerations.

Part II focuses on national competition laws explaining how and to what extent national competition laws were able to evolve and shape competition law on a global scale. It covers the United States and Europe and less extensively, Japan, South Korea, China, Latin America and Sub-Sarahan Africa. This part is not meant to be encyclopedic and does not assert to be comprehensive. Despite the high number of jurisdictions, the author manages to paint a colorful picture of each of them.

Particularly worth reading is the section on the so-called law and economics 'revolution' in the United States beginning in the Seventies of the last century. For non-US lawyers, the speed and radicalism of the change has always been breathtaking. The author puts the 'revolution' in context. He illustrates the various factors that enabled and accelerated the process. One central theme was the cost imposed by US antitrust laws on US enterprises in comparison to other jurisdictions. Behind this background, two propositions were central to the 'revolution', according to the author. One was that economics should provide the basis for antitrust law and that any law not supported by economics should not be sustained. The second proposition was that a certain school within economic theory should be followed. This is usually referred to as the Chicago School which is based on neoclassical economic theory. Applied in antitrust law, this perspective claims that the sole legitimate function of antitrust is to deter conduct that restricts output or tends to increase prices. While the actual implementation of these ideas has always remained somewhat controversial even among economists, its fundamental tenets have become mainstream antitrust thinking worldwide.

In another section, the author warns against the one-to-one adoption of US antitrust laws as a model for other jurisdictions. For various reasons, US antitrust laws have long been considered as a surrogate for an international competition law framework. In recent years under the Bush administration, the United States practically stopped enforcement of antitrust laws, at least with respect to unilateral behavior. For this reason, using US precedents in defense of dominant companies before foreign competition authorities is generally difficult today. Based on my experience, foreign government officials will reject US precedents in this instance for the very reason that the United States is not a strong enforcer anymore. At the same time, it is the European

Commission that may be accused today of targeting US companies in key industries by imposing huge fines, such as in the Intel or Microsoft Cases.

The author's description of the German resistance and skepticism against the strengthening and expansion of European competition law is very enlightening. In the post-World-War-II-period, competition law had quickly gained a significant role in economic, political and legal life of West Germany. According to the author, the great success was attributable to three factors. First, the great and widespread support of competition law in German society; second, the language and structure of the Antitrust Statute whose language is sufficiently abstract enough to set the policy but at the same time specific enough to allow effective implementation by courts and the Federal Cartel Office, which, thirdly, was quickly able to establish itself as a strong competition authority.

In Part III, the author repudiates convergence as a path to global competition law. For him, convergence can narrow down certain differences among some states on certain points of law and thus, can facilitate the exchange of ideas and information. Still, the author stresses that convergence may not be able to reduce the number of conflicts between jurisdictions. In addition, it may not be capable of achieving a sufficient degree of deterrence against anti-competitive conduct nor is it by itself a guarantee that convergence will be sustainable and ever-growing. Instead, he proposes a flexible multilateral agreement under which the obligations accepted by each State are tailor-made. The author uses the term commitment pathway, which, according to the author, is a normative framework increasingly defined and shaped over time. The basic idea is that States commit to a set of objectives and a process for moving forward those objectives depending on the specific needs, legal culture and economic stage of development of each State. This approach may seem surprising for practicing competition lawyers and may face strong resistance. Yet, due to the built-in flexibility of the approach, the difference to a convergence model may, in practice, be negligible.

All in all, Professor Gerber's book can be highly recommended for all scholars, government officials and practitioners interested in the nature and enforcement of competition laws.

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The Politics of European Competition Regulation: A Critical Political Economy Perspective, by Hubert Buch-Hansen and Angela Wigger, Routledge 2011, 208 pages
ISBN: 978-0-415-60579-3

INDRE SKACKOVAITE[·]

The Politics of European Competition Regulation by Assistant Professors Hubert Buch-Hansen and Angela Wigger has, undoubtedly, fulfilled the need for concise contemporary research on the neoliberal transformation of European competition regulation. The book's analysis thoroughly explains the shift from pre-neoliberal elements in post-war Germany, France and the United Kingdom, to modern consolidation of neoliberal competition regulation within the European Union.
The authors set themselves the aim to avoid shortcomings that other theoretically informed science studies of competition regulation have failed to avoid. It was expected that with this publication, the authors would succeed in promoting a 'critical and heterodox thinking about the central and often unchallenged position of competition and its regulation in the broader regulatory ensembles of advanced capitalist economies'.

The starting point and main impetus of the book rests with the idea that 'markets are social constructs which exist only because of the existence of extra-economic spheres such as education, nature, security, the family and the interventions by legal-regulatory and political institutions'[983]. These elements are present at each and every one of eight chapters, ensuring the continuation of the thought throughout the book.

The book begins with the explanation of the ontological assumptions and theoretical implications which are paramount in understanding the terminology used within the publication. The authors summarise the concept of competition policy with reference to social scientific theories and adapt them to competition regulation. The authors thus conclude that European competition regulation, which has evolved through the years, is the one of neoliberal discourse, based on the assumption that competition is desirable, produces efficiency gains and increases the welfare of consumers.

The second chapter traces the evolution of European competition policy through the 1950s, 1960s and 1970s, within Germany, France and the United Kingdom. The authors explore the impact of capitalist production and the numerous economic crises that shook some of the biggest national players within the European Union, and conclude that it is these events, in particular, that shifted European competition towards the/its current neoliberal approach.

The third chapter does not rule out the importance of the supranational environment (of the EU) on the formation of the neoliberal approach, with authors particularly focusing on trans-Atlantic competition, cross-border mergers and various historical agreements within the European Union.

[·] LLB Law and Management, Mykolas Romeris University of Lithuania; LLM Competition Law, Queen Mary, University of London.

[983] Van Apeldoorn, B. and Horn, L. (2007) '*The marketisation of European corporate control: a critical political economy perspective*', New Political Economy, 12/2: 211-215

Chapter four focuses on a more in-depth analysis of the overall content, form and scope of competition regulation, particularly emphasising the role of social and industrial policy considerations. The authors also introduce the historical evolution of merger control and in particular highlight the features of national independence in this area, until the first EC Merger Regulation of 1989.

Further down the book, in chapters five, six and seven, the authors appreciate that competition regulation in Europe has become more sophisticated and complex in recent decades, especially concentrating on the political struggles that shaped the European Commission's bilateral and multilateral cooperation across the Atlantic.

In chapter eight, summarising the ideas formed in the earlier chapters, the authors explain as to why, in order to achieve global free-markets, it was important to concentrate on regulatory convergence, and the events that were critical to modernisation that took place in 2004.

The book culminates with an impressive conclusion, putting everything that has been said in a practical perspective. It summarises the ways in which competition benefited consumers and innovation, as well as acknowledging the negative aspects of effective competition. Furthermore, the authors conclude that the above mentioned aims have been successfully fulfilled.

With a view to the above, the book would be best suited for practitioners and post-graduate students familiar with competition regulation and policy in the European Union. The book would be of a particular interest to those willing to embark on the in-depth historical-political analysis of the competition policy and regulation.

In summary, the book is well structured and follows a natural line of historical events. The vast number of sources used to support the ideas raised and views expressed within the publication, makes it a perfect example of a concise and informative study resource. The book is undoubtedly a welcome step in research in this field, setting a new, higher, standard in the analysis of the political economy and its role in the shaping of the current competition environment.

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Queen Mary
University of London

Aim:

The *ICC Global Antitrust Review* aims at encouraging and promoting outstanding scholarship among young competition law scholars by providing a unique platform for students to engage in research within the field of competition law and policy with a view to publishing the output in the form of scholarly articles, case commentary and book reviews. The Review is dedicated to achieving excellence in research and writing among the competition law students' community around the world.

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The *ICC Global Antitrust Review* is intended to become a leading international electronic forum within which students engage in debate and analysis of the most important issues and phenomena in the global competition law scene. The *Review* welcomes contributions dealing with competition law and policy in all jurisdictions as well as those addressing competition policy issues at regional and international levels. In particular, it welcomes works of interdisciplinary nature discussing and evaluating topics at the interface between competition law and related areas such as economics, arbitration, information technology, intellectual property, political science and social geography. Only scholarship produced by students – whether at undergraduate or postgraduate level (taught and research) – will be considered for publication in the *Review*.

Form and Output:

The *Review* will be published annually in electronic format. Each yearly volume will consist of a maximum of five long articles, two short essays, a case note section and a book review section. Further information on submission guidelines can be found in the *Review's Guidelines for authors*.

Interdisciplinary Centre for Competition Law and Policy (ICC)
67-69 Lincoln's Inn Fields
London WC2A 3JB
United Kingdom
Tel: + 44 (0)207 882 8122
Fax: + 44 (0)207 882 8223
Email: gar-icc@qmul.ac.uk
www.icc.qmul.ac.uk