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Conference, Day 1: 1 October 2015

Keynote
- Bruno Lasserre (paper)

Panel 1: Interacting with Government Agencies in and Out of Courts
- Eduardo Pérez Motta (presentation)
- Mark Ryan (presentation)
- Bitten Thorgaard Sørenson (presentation)

Panel 2: Women in Antitrust
- Dr. Helen Jenkins (draft paper)
- Alejandra Palacios Prieto (paper)
- Ingrid Vandenberghe (paper)
Bruno Lasserre  
President, Autorité de la Concurrence

As competition watchdogs, our task is to ensure that market players can compete on the merits. Innovation in particular, as one of these merits, is something we want to foster, yet it necessitates for competition authorities to adapt their assessment and possibly even revisit precedents. This common trend takes on a more complex and larger dimension in a digitalized economy producing rapid changes.

Sometimes wrongly opposed to industrial policy, competition policy encourages innovation and constitutes as such a modern form of industrial policy, which does not pick and choose “winners” but rather creates an enabling environment which ensures the innovators of tomorrow will not be barred from entering the market and thriving.

While being grounded on a remarkably stable set of basic rules and principles, competition law presents a level of plasticity and adaptability which allows for value-added evolutions and differentiations amongst competition policies, including in Europe where a single body of law is applied (1). In their efforts to find appropriate responses, competition agencies have had to grasp with calls for specific sector regulation in dealing with new business models such as online platforms and have realized the importance of relying on a convergent and effective enforcement toolkit (2).

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1. Striving to adapt to newer forms of anticompetitive behaviors and shifting business models: an endeavor by competition agencies that requires looking beyond existing responses.

Constant developments in the digital economy have given competition authorities an opportunity to demonstrate their adaptability (1.1.), in an evolutionary legal context where the variety of anticompetitive behaviors is met by a variety of categorizations – as is apparent in the field of abuses of dominance (1.2.).

1.1. Building capacity to tackle new restrictions to competition: an illustration with the digital economy

Online trade and services are now prevalent: Internet is ubiquitous; firms are dragged, whether willy-nilly or enthusiastically, into the digital era; competition agencies for their part must always have in mind the transformational potential of e-commerce in their competitive assessment, even if it is to ultimately rebut, in a given case, claims that the relevant market is wider or that there is no dominant position on account of online competition.

Interestingly, we have faced in recent years a turn in the general competition policy concerns revolving around online trade. In Europe, the last decade saw a process of careful delineation of guiding principles and rules aimed at striking the right balance between the lifting of artificial barriers to the development of e-commerce and the acknowledgment of legitimate limitations whose objective inter alia is to sustain a brick-and-mortar network alongside an online offering. In recent years the
focus of competition agencies has shifted: if absolute barriers to online distribution continue to attract scrutiny, more subtle forms of online sale restriction emerge which necessitate a renewed effort amongst agencies to achieve convergence and consistency, picking up from where we left off, when fruitful exchanges within the European Competition Network (“ECN”) culminated with the adoption of the European Commission’s guidelines on vertical restraints in 2010. An even more radical shift can be seen in the recent enforcement action and investigation openings which concern practices that do not touch on the offline/online dichotomy but rather affect primarily online competition itself by protecting online incumbents against their digital challengers. This is perhaps unsurprising as the Internet has ceased to be the medium of the future to become the all-pervasive tool of today. Accordingly and going forward, “online-only” practices should be ever more present in competition agencies’ portfolio.

E-commerce provides very tangible benefits to consumers and stimulates competition, especially by increasing transparency, expanding the range of products on offer, reducing logistical and display costs. New services born with the Internet, such as price-comparison websites, search engines and marketplaces, help aggregate and make sense of the vast amount of information on display and, provided they are objective, harness the web’s potential as a competition-enhancing medium. The Autorité de la concurrence’s (“Autorité”) 2012 sector inquiry on e-commerce provides an informed assessment of the benefits accrued to consumers, on the basis of data collected from various significant sectors (electrical home appliances, bodycare).

It is the assumption that e-commerce is, in and of itself, a factor that encourages competition, especially in terms of price and diversity, which has led competition agencies to review carefully limitations to its growth and expansion, reaching ultimately a balanced framework enshrined in the Commission’s vertical guidelines, after several national case developments which were as many milestones. A case in point is Pierre Fabre in the cosmetics and personal care products sector where the ban imposed by a manufacturer on an approved dealer to sell its products online was considered by the Autorité to be a restriction on passive sales and, consequently, a hardcore restriction on competition, excluding the benefit of the block exemption regulation. The case gave rise to an amicus curiae of the European Commission and a preliminary ruling from the Court of Justice in 2011 which confirmed the legal analysis undertaken by the Autorité, holding moreover that a general and absolute ban on online sales against an authorized distributor was a restriction by object.

2 Autorité de la concurrence, Opinion No. 12-A-20 of 18 September 2012 on the operation of competition in e-commerce.
3 The study proceeds in particular to compare online and offline prices for identical products and finds that, on average, prices are lower on merchant websites than in brick-and-mortar equivalents.
4 Conseil de la concurrence, Decision No. 08-D-25 of 29 October 2008 concerning the practices implemented in the cosmetics and personal care product sectors.
5 ECJ, Case C-439/09 of 13 October 2011, Pierre Fabre Dermo-Cosmétique vs. President of the Autorité de la concurrence: “Article 101, paragraph 1, TFUE must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the Internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an
The Autorité also did its part in advocating a legal framework which allows for the coexistence of multiple distribution strategies in the long term, be they online or brick-and-mortar, or both, in order to satisfy all consumer preferences\(^6\). This is in line with our past practice of accepting commitments by manufacturers which allowed for the healthy development of online sales while admitting the imposition of specific conditions, such as the obligation for authorized resellers to hold at least one brick-and-mortar outlet\(^7\). These quality requirements are deemed permissible under the Commission’s vertical guidelines. Likewise, imposing compliance with certain technical features and graphics specifications for the Internet site or restricting the presence of a distributor on a third-party platform, such as a “marketplace”, may be deemed to fall under permissible quality requirements which do not unduly restrict online sales.

The block exemption regulation, the vertical restraint guidelines as well as the body of case-law and decisional precedents thus provide “safe harbors” and guiding principles around which market players can self-assess and construct their distribution networks.

This does not imply that competition agencies lose their capacity to assess, on a case-by-case basis, whether a particular agreement at hand exceeds what is a legitimate and proportionate means for a network head to set up and organize its distribution network as desired. In this regard, the vertical guidelines profess a general principle of equivalence of conditions between online and offline sales network heads must abide by\(^8\). The guidelines equally invite caution on the application of the block exemption to selective distribution, where the product characteristics do not justify this form of distribution or the specific criteria applied therein\(^9\).

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\(^6\) See the opinion issued by the Autorité de la concurrence on 28 September 2009 concerning the revision of Regulation No 2790/99 and guidelines on vertical restraints.

\(^7\) Conseil de la concurrence, Decision No. 06-D-24 of 24 July 2006 concerning the distribution of watches marketed by Festina France; Conseil de la concurrence, Decision No. 06-D-28 of 5 October 2006 concerning the practices implemented in the selective distribution sector for hi-fi and home cinema equipment; Conseil de la concurrence, Decision No. 07-D-07 of 8 March 2007 concerning the practices implemented in the cosmetics and personal care product sectors.

\(^8\) Vertical restraints guidelines, §56: “the Commission considers any obligations which dissuade appointed dealers from using the internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop as a hardcore restriction. This does not mean that the criteria imposed for online sales must be identical to those imposed for offline sales, but rather that they should pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes.”

\(^9\) Vertical restraints guidelines, §176: “when the product’s characteristics do not require selective distribution or the application of criteria, such as, for example, the obligation for distributors to have one or more physical points of sale (...) such a system does not generally produce sufficient efficiency gains to compensate for a significant reduction in competition between brands. In the case of significantly damaging effects on competition, the benefit of the exemption by category will probably be withdrawn”.

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Going forward, the challenges facing competition agencies in Europe are two-fold: (i) providing consistent responses throughout the continent when scrutinizing behavior which falls short of an outright ban on online sales but which may nonetheless unduly limit online trade\textsuperscript{10}; (ii) setting out a shared general analytical framework for clauses not explicitly accounted for in the vertical guidelines which may affect competition between online platforms, especially so-called “across platform parity agreements” (APPA) which are increasingly used, e.g., on booking platforms (hotel booking cases), marketplaces (Amazon cases) or price-comparison websites (see CMA’s car insurance sector inquiry).

Past and current enforcement proceedings are under way and should feed a widening decisional practice on which stakeholders can draw to ensure compliance. Moreover, several authorities have in the past years issued general guidance on vertical online restrictions which inform on their approach and priorities\textsuperscript{11}. The Commission’s initiative to launch a sector inquiry into e-commerce should also allow it to acquire a thorough understanding of the sector while possibly paving the way for a more systematic framework for assessing newer forms of vertical restraints, beyond the issue of “geoblocking” expressly referred to by the Commissioner in her announcement of the inquiry.

The unprecedented issues raised by the APPA clauses, or retail “most favored nation” (MFN) clauses, as they are also called, have been recently analyzed by the Autorité in the hotel reservation sector in a case that caught a lot of attention\textsuperscript{12}.

Online travel agencies (“OTAs”) have become major actors for intermediation between hotels and consumers in the hotel business. They not only provide hotels with visibility and worldwide access to customers, they also allow consumers to search, compare and book hotels from a worldwide portfolio for free. OTAs typically apply so-called MFN clauses to hotels under which the latter are required not to submit offers on the platform of terms which are less favorable than those applied on competing platforms as well as on the hotel’s own direct channel. MFN clauses typically cover both price terms, room availability as well as ancillary conditions (e.g., complimentary breakfast). Parity clauses therefore restrict competition by eliminating room prices and room availability as parameters of competition between OTAs, which henceforth do not have the incentive to reduce the fees they charge hotels. If competition is toned down, the effect of MFN clauses is also to foreclose the market by preventing new entrants to make a successful entry on the back of lower fees, which could be passed

\textsuperscript{10} The legal qualification of bans on distribution through third party platforms, such as Amazon’s or eBay’s marketplaces, is a particularly topical issue. The guidelines on vertical restraints do not \textit{prima facie} hold them to be anticompetitive. Conversely, certain German courts have held them to constitute hardcore restrictions (Frankfurt Regional Court, \textit{Deuter backpacks}, Berlin Court of Appeals, \textit{Satchels}), Kiel District Court, \textit{Digital cameras}). The Autorité has approved in the past commitments which allowed suppliers to refuse the approval of third party platforms, which, in the case at hand, did not provide sufficient guarantees as to the quality and identity of the sellers (Decision No. 07-D-07, already mentioned), while noting that certain third party platforms could have the “\textit{ability [...] to satisfy the qualitative criteria for the products}”. In a recent interim decision, it also refused to strike out \textit{ab initio} a claim grounded \textit{inter alia} on a general ban imposed by the supplier on third party hosting (Decision No. 14-D-07 on the distribution of brown good products).

\textsuperscript{11} Autorité’s sector inquiry into e-commerce, 2012; Bundeskartellamt’s Background paper on “Vertical restraints in the Internet economy”, 2013; ACM’s strategy and enforcement priorities with regard to vertical agreements, 2014.

\textsuperscript{12} Autorité de la concurrence, Decision No. 15-D-06 of 21 April 2015 concerning practices implemented in the online hotel booking sector.
on to consumers through lower room rates. Given the number of open cases in EU Member States regarding OTAs, it was deemed absolutely necessary to avoid an excessive fragmentation of the EU internal market with diverging solutions. This was particularly required with respect to digital industries which operate at global scale, and seen as even more relevant for tourism and travel sectors.

For this reason precisely, we have agreed in the context of the ECN last year to establish an enhanced cooperation between a pioneer group of national competition authorities. The Swedish, Italian and French competition authorities have thus worked jointly in close coordination with the European Commission in order to develop a common approach.

The three authorities have obtained last April commitments from Booking.com regarding its use of parity clauses for room price, conditions and availability. They allow Booking.com to keep its commission-based business model while substantially increasing the hotels’ margin for maneuver to make better offers to consumers through their direct channel (in person at an accommodation’s reception, at a brick-and-mortar travel agency, by phone, email, SMS and instant messaging communications), in addition to directing offers at specific loyalty groups. We have gone a long way in fine-tuning these commitments in order to ensure effective results, for instance by making sure the hotel is entitled to allude to the existence of its specific price offers, including on its general public website, or by insisting that Booking.com makes clear to users that room unavailability on its website does not imply unavailability on all channels of distribution.

In a case involving newer forms of restrictions in a burgeoning digital economy, these commitments were considered to be the most effective and well-balanced response to restore competition while preserving efficient free search and comparison services for the benefit of consumers. These commitments can provide a blueprint which other national authorities may rely on to wrap up their own pending investigations.

1.2. Transcending existing models and clear-cut categorizations: a variety of objectionable behaviors in the field of abuses of dominance

The practices listed under Article 102 of the TFEU do not exhaust the kind of abuses prohibited by EU law\(^{13}\). The qualification of an abuse of dominance requires taking into account all the relevant factual elements surrounding the behavior at stake and assessing whether it can objectively be stated that the impugned behavior tends to or is capable of, e.g., barring competitors from access to the market or strengthening dominance by distorting competition. As the General Court puts it: “the legal characterization of an abusive practice does not depend on the name given to it, but on the substantive criteria used in that regard”\(^{14}\).

However, if the issue of whether Article 102 purports to provide a comprehensive list of behaviors liable to constitute abuses of dominance has long been settled and answered negatively, it is interesting to note a broader tendency for the courts, and enforcers, to keep their distance from a category-based

\(^{13}\) ECJ, Case 6-72 of 21 February 1973, Europemballage Corporation and Continental Can Company Inc. vs. Commission of the European Communities: “The list of abuses contained in article 86 of the treaty is not an exhaustive enumeration of the abuses of a dominant position prohibited by the treaty.”

\(^{14}\) GC, Case T-286/09, Intel vs. Commission, para. 219.
approach: this is apparent in the Court of Justice’s judgment in Post Danemark, in which the Court was questioned on a policy, pursued by a dominant undertaking, of charging low prices to certain former customers of a competitor. The Court, sitting as a grand chamber, referred to “pricing practices that have an exclusionary effect” and “exclusionary abuses” and refrained from being more specific, e.g., by categorizing the concerned practice as predatory or discriminatory.

This assertion of a holistic approach to exclusionary abuses, in terms of policy as well as in terms of enforcement, matters. Indeed, reducing a competition agency’s work to an exercise in box-ticking would lead us to lose sight of the objectives pursued by competition law, namely to maintain or restore a competitive level-playing field in which market players compete on the merits. Instead of shoehorning a given set of facts into a pre-existing box, a competition agency’s role is first and foremost to assess whether the concerned behavior produces actual or likely exclusionary effects, without an objective justification, and to the detriment of competition. Moreover, in practice, placing too great a reliance on set categories can give parties the means to evade their responsibility, by seeking to anchor their behavior to one particular category and thereafter claim that the applicable criteria are not met. This holds particularly true for cases in which an exclusionary strategy is pursued through multiple practices, including but not limited to pricing behavior, and these practices, taken together, have the potential to exclude competitors from the market.

This can be illustrated by a recent case in which the Autorité considered that the practice implemented by the publishing group Amaury of closing off the market to a new entrant (Le 10Sport.com) in order to reinforce the monopoly of its newspaper (L’Équipe) violated article 102 of the TFEU and article L 420-2 of the French Code of Commerce, and imposed a fine of 3.5 million Euros against the group. Amaury launched on the same day as Le 10Sport.com the daily news Aujourd’hui Sport, which was of the same format and targeted the same audience as Le 10Sport.com. After a few weeks of operation, due to poor financial results, Le 10Sport.com ceased its publication, which was then released on a weekly basis.

The Autorité established the exclusionary practice on the basis of a number of factual elements: the clear intention to drive the new entrant out of the market (as evidenced by documents seized during dawn raids), the lack of economic rationality of the implemented strategy (which implied a financial sacrifice and was suboptimal compared to other response scenarios, but inflicted the most damage to the competitor), the launch of a similar competing newspaper on the same day, the purposely limited lifetime of the newly created newspaper conceived as pure retaliation to the imminent threat of the new entrant, and the exit of Le 10Sport.com from the market as a consequence of the drying-up of its readership base. The Autorité’s decision was confirmed in appeal.

This loosening of formal categories as a matter of substantive law does not imply that a typology of abuses holds no lessons. The Commission’s Communication on 10 years of application of Council

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15 ECJ, C-209/10 of 27 March 2012, Post Danemark.

16 Post Danmark, para. 44.

17 Autorité de la concurrence, Decision No. 14-D-02 of 20 February 2014 concerning the practices implemented in the sports press sector.

Regulation No. 1/2003\(^{19}\) has for instance proceeded with a near-comprehensive overview of enforcement carried out within the ECN under Articles 101 and 102, which stresses interestingly the similarities and specificities of enforcement at the EU and national levels.

National enforcement specificities can be related to social and economic particularities, which in turn translate into a given agency’s case portfolio. For instance, several investigations were opened in France in relation to abusive denigration strategies in the pharmaceutical sector, reflecting particular competition issues thriving on the back of French idiosyncrasies.

In 2013 the Autorité issued two successive decisions\(^{20}\) imposing sanctions on laboratories for abusing their dominant positions by devising a comprehensive plan to hinder generic competition of their branded medicine, comprising in particular a deliberate strategy of denigration. The Autorité refers to denigration as situations where an originator manufacturer communicates on a group of generics so as to discredit them, at a time when the rival medicine is about to enter the market, thereby seeking to bar or delay such entry – a conduct that can fall foul of competition law and be held to infringe article 102 TFEU and article L.420-2 of the French Code of Commerce. The aim for the originator laboratory is to put forward to the target audience false, unverified and/or misleading information that will instil or reinforce distrust on the part of health professionals vis-à-vis the group of generics concerned, an impression that is then passed on to patients and in turn makes these professionals wary of prescribing or delivering the generic drug.

This type of practice flourishes in part because of a widespread distrust amongst the general public and healthcare professionals toward generic medicines. Such a situation is rarely seen outside of France. Jurisdictions where generic medicines are present in much greater volumes and are better accepted by both patients and healthcare actors have instead seen the emergence of other types of practices aimed also at delaying the market entry of generics, such as the so-called “pay-for-delay” agreements or attempts at obtaining unlawful extensions of patent protection.

Finally, there is a degree of cross-fertilization amongst ECN members and some elements points towards a progressive alignment of enforcement priorities and case-portfolios under Article 102. Since the first margin squeeze finding by the European Commission in \textit{Napier Brown/British Sugar}\(^{21}\), margin squeeze decisions have figured prominently on national agencies’ enforcement records\(^{22}\), with former \textit{de jure} monopoly markets, especially in the telecoms sector, representing the bulk of cases.

Conversely, and as the Commission’s Communication on 10 years of application of Council Regulation No. 1/2003 makes clear, national agencies have an abundant decisional practice concerning discriminatory abuses consisting specifically in favoring, without objective justification, a group's


\(^{20}\) Decision No 13-D-11 of 14 May 2013 concerning practices prevalent in the pharmaceutical sector; Decision No 13-D-21 of 18 December 2013 concerning practices in the French market for high dose buprenorphine available from community pharmacies.


\(^{22}\) See, for a recent example in France, Decision No 15-D-10 of 11 June 2015 concerning practices implemented by TDF on the Eiffel Tower.
related downstream entity as compared to conditions offered to competitors downstream²³. Using this approach can yield potent results for markets in which the dominant undertaking is vertically integrated and constitutes an unavoidable partner for competitors downstream. Signaling an evolution in the Commission’s approach to these types of discrimination, it is interesting to note that this behavior is precisely at the core of the Commission’s objections in the Google case, holding that the search engine should treat its own comparison shopping service and those of rivals in the same way²⁴.

2. Challenges encountered by competition agencies in their efforts to adapt to newer contexts: the role of regulation and the need for convergence.

The first part of this contribution was focused on delineating the challenges faced by agencies in Europe when applying EU competition rules to newer forms of restrictions, with an emphasis on the diversity of behaviors, beyond cartels, liable to be caught under Articles 101 and 102. We now turn to the issues presently confronting agencies which go beyond substantive law and pertain to the effectiveness of competition law enforcement. Indeed, whether it is through interrogating the need for an ad hoc regulation of digital platforms sitting alongside antitrust rules (2.1.) or through advocating greater procedural convergence throughout the EU (2.2.), the underlying concern is that of the effectiveness of current antitrust regimes in addressing the challenges of the day.

2.1. Beyond antitrust: towards the regulation of digital “platforms”?

It is trite to insist on the share of challenges digital economy brings for competition policy. Innovation cycles are progressing at a particularly fast pace: new offers and technologies replace defunct ones, disrupt market players and reshuffle long-established positions. Internet is also a springboard for more intangible forms of innovation, based on innovative business models which consist in rolling out new methods of providing existing services or supplying existing products. One need only look at chauffeured vehicle services or at video-on-demand: if the services themselves are not new, the means by which they are today provided by firms such as Uber or Netflix reflect a commercial innovation which the “digitalization” of the economy has made possible. Recent success stories certainly did not appear out of thin air: they are usually driven by charismatic entrepreneurs developing a new idea, acting on a first mover advantage and demonstrating a capacity to shore up capital and investment at the nascent stage of their activity, on the promise of high future returns.

In the midst of all this, digital “platforms” have recently been the focal point of a call, mostly in Europe but with resonances beyond, to introduce specific regulation aimed at curbing perceived threats to the market resulting from these platforms’ choices in terms of listing, ranking and display of the third-party content, goods or services they share with users. Consumer protection and privacy concerns also figure prominently and are usually weaved into broader demands to regulate the said

²³ In France, one such instance is Decision No 07-D-33 of 15 October 2007 concerning practices implemented by France Télécim in the broadband sector. France Télécim had in particular discriminated against competitors of its subsidiary, Wanadoo, by providing the former information on land-lines’ broadband eligibility which was less updated and less precise than that provided to Wanadoo’s own sales agents.

platforms. Initiatives, at Member State\textsuperscript{25} and EU levels\textsuperscript{26}, testify to the fact that the issue of “platform regulation” is now a staple feature of political discourse and debate in Europe. Competition agencies, while not the direct addressees of such initiatives, are nonetheless concerned. Their expertise can contribute towards an objective assessment of the alleged specificities of the challenges raised by digital platforms. They can also remind stakeholders of the answers competition law enforcement already provide to these challenges, thereby questioning the necessity for an added layer of economic regulation whose object would be circumscribed to this particular category of market players that are digital platforms.

From a competitive standpoint, the specificities of platform services do not reside in certain discrete features which are also observed in “real world” equivalents but rather in the combination of these features which, together, can yield situations of considerable market power.

First, consider network effects whereby the value of the service increases with the number of users. It has long been the case that the more users embrace your product or service, the more likely it is that new demand will also be attracted to your offer. This is compounded in cases where learning costs can be significant and thus multi-homing rendered difficult. Network effects, much as economies of scale and scope which are also linked to the volume of users and/or trade, can thus constitute barriers to entry.

Second, platforms tend, by their very nature, to be engaged on two-sided markets, which can have both a disciplining effect, as the sources of competitive pressure are numerous — the platform must keep performing highly on both sides, as otherwise losing users on one side may result in diverting users from the other —, while at the same time adding indirect to direct network effects with the result that a “tipping” point may be reached in which a firm ends up capturing the entire market. However, it is worth noting that two-sided markets exist well beyond the realm of digital platforms, from free-to-air television to payment card systems.

Third, platforms tend to “mutate” into entire systems, as the firms behind them tend to nurture the ambition of offering consumers all the services and information they could ever need. Through the combination of different products and services, these systems can add value for end-users, benefiting from the seamless integration of a variety of services, as well as for partner businesses. The fear however is that consumers might end up being locked in a particular system, the latter constituting a bottleneck for businesses wishing to address the demand of these end-users and, as such, liable to extract a form of monopoly rent. Another fear, as witnessed by the pending Google proceedings before the European Commission, is that the system would seek to favor its own services to the detriment of competitors in downstream or related markets. Whether the relative openness of a system can mitigate

\textsuperscript{25} In France, a “digital” bill is set to be discussed in Parliament by the end of 2015, which should reinforce the transparency requirements imposed on digital platforms vis-à-vis their end-users by the Law No 2015-990 of 6 August 2015, known as the “Macron” law.

\textsuperscript{26} See the European Commission’s Digital Single Market Communication of 6 May 2015, p.12: “The Commission will launch before the end of 2015 a comprehensive assessment of the role of platforms, including in the sharing economy, and of online intermediaries, which will cover issues such as (i) transparency e.g. in search results (involving paid for links and/or advertisement), (ii) platforms’ usage of the information they collect, (iii) relations between platforms and suppliers, (iv) constraints on the ability of individuals and businesses to move from one platform to another and will analyse, (v) how best to tackle illegal content on the Internet.”
these concerns cannot be assumed: this can be pronounced only after a case-by-case assessment with regard to the overall competitive structure, as a recent joint study on closed and open systems conducted by the Autorité and the British Competition and Markets Authority made clear\textsuperscript{27}.

The competition concerns which can arise from the existence and workings of digital platforms, if serious, are therefore not terra incognita for competition agencies. Moreover, competition law already provides the legal basis to counteract actions by platforms which seek to foreclose markets and exclude competitors or reduce their ability to compete.

Critics of the alleged limits of competition law tend to focus on the notion of dominance, which would constitute too high a hurdle and cripple agency enforcement, as well as on the notion of essential facility, whose criteria should be relaxed in order to force upon major platforms obligations to display their downstream competitors.

However, the notion of dominance remains on the contrary operative and adaptable to evolving market conditions; moreover, the yardstick for dominance, as recalled in Hoffmann-La Roche\textsuperscript{28}, circumscribes the prohibition of unilateral behavior to those firms who truly enjoy market power, without stifling the innovative potential of smaller firms whose individual actions do not, in and of themselves and to an appreciable extent, weaken competition.

As regards the notion of essential facility, its characterization is by no means a prerequisite to respond to abusive strategies in which digital platforms may be engaged. As recalled earlier, approaching possible exclusionary abuses through the notion of discrimination can help mitigate the risk of dominant platforms affecting the viability of their trading partners by delisting or demoting them without objective justifications. This is the course taken by the Commission in the Google case. This was also the approach taken by the Autorité several years ago when seeking to address the lack of transparency in Google’s application of its AdWords content policy. In this regard, it should be noted that Article 102 foresees the prohibition of discrimination irrespective of whether the effects are felt on the client’s market (secondary-line discrimination) or on a market on which the dominant firm is also present (primary-line discrimination)\textsuperscript{29}.

The Autorité relied on the notion of discrimination in its case relating to Google's online search advertising service, AdWords, in which Google had unilaterally suspended the AdWords account of an advertiser and supplier of radar databases, Navx. Following a complaint filed for discriminatory treatment, and interim measures imposed against Google based on a preliminary assessment\textsuperscript{30}, Google eventually proposed a series of commitments making the functioning of its AdWords service more

\textsuperscript{27} The economics of open and closed systems (2014): http://www.autoritedelaconcurrence.fr/doc/economics_open_closed_systems.pdf.

\textsuperscript{28} ECJ, Case 85/76 of 13 February 1979, Hoffmann-La Roche & Co. AG vs. Commission of the European Communities: "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers".

\textsuperscript{29} See, e.g., Opinion of Advocate General Mengozzi in case C-209/10, Post Danmark vs. Konkurrencerådet.

\textsuperscript{30} Autorité de la concurrence, Decision No. 10-MC-01 of 30 June 2010 on the request of interim measures by Navx.
transparent and predictable for advertisers of radar devices in France\textsuperscript{31}. In addition, Google volunteered to extend the agreed improvements to all contents admitted on AdWords (i.e. for all advertisers using the AdWords service) and in all countries concerned. Another case relating to Google’s AdWords service is pending before the Autorité\textsuperscript{32}.

Besides an illustration of how competition law can, on a stand-alone basis, achieve the resumption of greater transparency in the functioning of digital platforms, lessons can also be drawn from the Navx case on a procedural level. Indeed, the Autorité was able in this case to rely on the combination of interim measures and commitments to swiftly secure proportionate and effective remedies. There is a significant interplay between interim measures and commitments, as the imposition of the former can increase the competition agency’s leverage when discussing commitments, by setting the ground for acceptable remedies. Accordingly, it is the Autorité’s policy choice to treat interim measures as an essential means to keep pace with rapid and sometimes irretrievable market evolutions.

In light of the capacity for competition law enforcement to effectively restore a level-playing field, an ad hoc regulation aimed at digital platforms presents on the other hand a number of risks or pitfalls which should be carefully assessed. Such ex ante regulation is generally viewed as a transition to facilitate the move from a monopoly to competition. In the case of digital platforms, clearly calibrating the need for some regulatory intervention seems essential in order to avoid instituting a regulation that may not be transitional in the end, with the risk that regulating too swiftly would ultimately slow down or hamper innovation.

2.2. Laying the ground for a versatile and effective enforcement toolkit: the case for greater convergence in Europe

The adoption and entry into force of Regulation 1/2003 paved the way for the twin pursuit of decentralisation and modernisation of the implementation of EU competition rules. This proved on the whole a major success thanks in particular to the establishment of the ECN which enabled an effective cooperation between member authorities, the smooth allocation of cases within the network and the promotion of a coherent application of Articles 101 and 102. In over a decade, the ECN struck the right balance between the European Commission and National Competition Authorities’ (NCAs) responsibilities, raised awareness among ECN members of their interdependence and fostered a project-based solidarity. A quantitative overview of case openings and envisaged decisions notified to the network under Articles 11(3) and 11(4) – respectively 1956 and 834 on 31\textsuperscript{st} March 2015 – speaks volumes about the extent of the cooperation – and decentralization – undergone within the ECN.

This shared success should not lead us however to disregard the persisting differences amongst national systems, whether in terms of institutional set-up, investigative or decision-making powers. While a profusion of institutional models is not, in and of itself, a bad thing, safeguards are nonetheless necessary to ensure that NCAs benefit throughout Europe of the necessary minimum tools to fulfill their tasks. Moreover, the objective of achieving a single market wherein a competitive level-

\textsuperscript{31} Autorité de la concurrence, Decision No. 10-D-30 of 28 October 2010 concerning practices implemented in the online advertising market.

\textsuperscript{32} Autorité de la concurrence, Decision No 15-D-13 of 9 September 2015: a request for interim measures has been rejected. A complaint filed for discriminatory treatment by Gibmedia is currently being investigated.
playing field is secured demands an approximation of certain rules, in particular governing fines, in order to achieve a level of deterrence which is always equivalent and not contingent on the territory in which the concerned practice produces its effects. Finally, safeguarding the effective implementation of EU competition rules through greater procedural convergence is not only a policy objective, it is also the means by which we satisfy a legal obligation which rests upon the shoulders of every NCA, which is the “obligation to ensure that Articles 101 TFEU and 102 TFEU are applied effectively”\(^{33}\).

This ambition is shared by the Commission in its Communication on 10 years of application of Regulation No. 1/2003.

A first move would consist in expanding on the provisions of Article 5 of Regulation 1/2003, which currently foresees a common set of powers inspired from those of the European Commission, including injunctions, interim measures, making commitments binding, imposing fines, and ensuring effective enforcement of provisional or final decisions through periodic penalty payments. This would imply adding to this list certain basic investigative tools (inspections, hearings, requests for information). Further convergence might also require enshrining in hard law provisions a common minimum standard for using the powers already foreseen under Article 5.

The necessity to establish hard law provisions on interim measures stands out as a particularly important objective. Synchronizing the time of regulation with the time of doing business has indeed become an even more pressing issue for competition agencies faced with fast-moving markets in a digitalized economy. In this demanding context of new business models and disruptive innovations, interim measures may serve as a powerful tool in offering fast-track yet temporary solutions to remedy matters of urgency and prevent potential market preemption.

If interim measures exist in different Member States, the Autorité has however been the only agency to resort to this instrument on a fairly regular basis as it was used 30 times in the past fifteen years essentially but not exclusively to address the opening to competition of former monopolistic markets.

General experience of ECN members has shown that the efficient use of interim measures requires the definition of an appropriate standard. The adoption of a common EU standard would therefore go a long way towards ensuring that all NCAs truly have the opportunity to remedy quickly matters of urgency.

Going beyond investigative and decision-making powers, the question of the independence and resources of competition enforcers deserves to be looked at, possibly even drawing inspiration from existing safeguards under EU law which benefit sector regulators, such as the telecom and energy regulators or data protection agencies.

Resorting to hard law would not only be for the sake of aesthetics: the European Commission has already successfully launched proceedings against a Member State for infringing equivalent provisions, notably in the field of data protection\(^{34}\). The existence of provisions on independence for

\(^{33}\) ECJ, Judgment of 7 December 2010 in Case C-439/08, VEBIC.

\(^{34}\) ECJ, Commission vs. Germany, C-518/07, 9 March 2010: the Court considered that Germany has failed to ensure the independence of the national data protection agency by putting the authorities responsible for monitoring the processing of personal data subject to State scrutiny.
sector regulators also provided the legal ground for the Commission’s intervention in favor of safeguarding certain NCA’s independence after their merger with sector regulators.²

Institutional and procedural convergence in the application of competition law among competition agencies is yet another building block in the development of an effective and harmonized antitrust enforcement to the benefit of consumers and businesses. Engaging in this process of fine-tuning law enforcement tools will not only put NCAs on an even playing field to ensure greater consistency of outcomes but will also contribute to make them more effective in what they do.

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As both the ECN and the International Competition Network (ICN) enter into their second decade, enforcers are expected to make the leap to become “second generation competition agencies”.

There is however every reason to be optimistic and to forge ahead with confidence and determination. If it is wise to pause a moment on our path to assess what we have achieved and what we could do better, my tenure as head of the Autorité and vice president of the ICN have taught me that the fundamentals of competition law are flexible enough to address the regular flow of newer forms of market restrictions. Cooperation among fellow agencies whether in the ECN or the wider ICN is of tremendous support. Confronting views and sharing experience have helped us keeping up the good work.

It should be clear that new business models, which have arisen from the observation of unsatisfied demand, are a sign of economic vitality that we want to preserve and foster. They contribute to the enlargement of the market and open access to a more diversified offer. The relevance of competition policy is regularly demonstrated to guarantee that markets are adequately regulated to accompany new market trends, encourage innovation, investments and benefits to consumers.
Effective strategies for dealing with enforcement agencies

Eduardo Pérez Motta
October 1, 2015

An effective strategy for dealing with enforcement agencies requires integrating three main strands:

- Crafting and proving the articulating argument, disproving alternative lines
- Basing cases on letter of law and precedent, complying with procedure
- Understanding and predicting agency’s preferences, restrictions, style, temperament
On the use of Economics

1. Antitrust is essentially about Economics, so Economics must lie at the heart of any argument.

2. Analytical sophistication doesn’t justify fragile, untried or “out of the box” Economics. A strained argument almost always sticks out.

3. The agency knows Economics too (and so, increasingly, do judges). Condescension or point-scoring are usually counterproductive.

4. If an economic argument can’t be explained to a layman, it probably isn’t sound (and it almost certainly won’t fly).

A proactive approach to the law

1. Have a strong understanding of the applicable laws and regulations and follow them: due process.

2. Leverage guidelines, best international practice and soft law instruments to streamline the authority’s analyses.

3. Don’t unnecessarily increase the burden and costs on the agency. Provide documents and data relevant to the issue in a timely fashion.

4. Avoid engaging in frivolous litigation. It could affect your credibility and taint your relationship with the agency and courts.
The strategic dimension

1. Perform a full competition analysis as early as possible. Anticipate all dimensions of the issue.

2. Engage in an open and ongoing dialogue with the authority. Nurture a strong working relationship with the agency’s staff.

3. Be prepared to negotiate. Make sure to have the understanding to recognize opportunity and act on it.

4. Always remember that interaction with the authority is a repeated game. To a large extent, you choose the path for it.

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Effective Presentations to Enforcement Agencies

Fordham Conference on International Law and Policy

Mark W. Ryan
Partner
+1 202 263 3338
mryan@mayerbrown.com

Overview

The increasing globalization of competition enforcement affects all businesses, both domestic and abroad, and their counsel. The following highlights some current issues in the area:

A. Increasing agency cooperation
B. Substantive divergence among antitrust agencies
C. Current antitrust litigation disputes affecting in house counsel
A. Growth of Global Competition Enforcement

The most important change in antitrust enforcement over the past twenty years has been the staggering increase in the number of international competition regimes:

1. In 1996, about 30
2. Today, over 130 on six continents, each with different procedural and substantive rules and different powers

What is the JCRA???

Even the Isle of Jersey now has an independent “Competition and Regulatory Authority”
A. Cooperation Among Agencies

Competition agencies across the globe cooperate in many ways:

1. Growing number of bilateral working treaties.
   • E.g., 2011 MOU between U.S. DOJ/FTC and the three agencies that enforce the PRC anti-monopoly law (MOFCOM, NDRC, SAIC)

2. Increasing participation in international organizations.
   • E.g., OECD & the ICN

3. Deepening working relationships among agency staff and decision-makers.
   • Consultations and technical assistance programs

A. The Trend Toward Substantive Agency Coordination

Cooperation extends to individual investigations, covering areas like:

• Timelines
• Evidence
• Remedies

Recent practice shows more agency coordination on investigations.

• Now it is a formal practice to request confidentiality waivers

Next Step: Trend line points toward agencies collaborating on substance to potentially drive outcomes.
A. Examples

GE/Honeywell (2001)
- USD0J reached a “firm conclusion” that the merger, as modified by certain remedies, would have been procompetitive
- EU then blocked the deal, leading to a USD0J public statement about the agencies reaching “different results from similar assessments of competitive conditions in the affected markets”

GE/Alstom (2015)
- Hard fought review process in EU, with clearance after agreement on remedies
- On same day as EU announcement, USD0J cleared with different remedies
- DG Comp head Margrethe Vestager said that the process “sets a standard for the future”

Cisco/Tandenbeg (2010)
- Combination of two companies’ videoconferencing businesses
- Agencies worked closely on fact gathering
- USD0J closed its investigation on the same day that the EU cleared the acquisition with commitments
- USD0J specifically noted that it took EU remedies into account

Staples/Office Depot (ongoing). WSJ headlines:
- Staples Inks Deal to Buy Office Depot for $6.3 Billion (Feb. 4)
- Staples Executives Say Office Depot Deal Is On Track (Aug. 19)
- FTC Intensifies Antitrust Review of Staples-Office Depot Merger (Sept. 8)
- EU Probes Staples’ Planned Purchase of Office Depot on Competition Concerns (Sept. 22)
  - “Regulators warn the $6.3 billion deal could lead to price increases, less choice for business customers”

A. How Does Increased Agency Cooperation Affect You?

1. Recognize agencies are actively working together

2. Parties can drive benefits from agency cooperation:
   - Increased efficiency, reduced burden and more consistent outcomes

3. But, potential downsides lurk, such as:
   a. Reduced ability to control timing
   b. Request to share competitively sensitive business information with multiple agencies
   c. Agencies bolstering each other to mount challenges
B. Substantive Divergence

But, agency cooperation in general has its limits.

Agencies recognize that convergence on sound substantive antitrust issues would confer many benefits. Substantive convergence, however, is hard to implement given the lack of consensus on many issues and the realities of local interests.

For example, one of the most accepted principles in U.S. antitrust is that “the antitrust laws are about competition, not competitors.”

How does this play out?

B. “Excessive Pricing”

The U.S. antitrust agencies have raised in a series of speeches the issue of how foreign agencies look at “excessive pricing”

- In the U.S., a firm that achieved market power lawfully (i.e., a patent holder) can charge market prices. It is not illegal – in and of itself – to do so.
  - There are times when antitrust may get involved, such as when an IP holder abuses the rules of a standard setting organization
- In some jurisdictions, competition claims can be based on mere “excessive pricing”
  - In 2015, NDRC imposed $975 million fine against Qualcomm for, in part, “excessive pricing”
- U.S. agencies routinely hear complaints from licensees alleging royalties are too high
- Price controls, however, interfere with the competitive process. As Bill Baer, head of the USDOJ Antitrust Division, has said, “Competition enforcers need to stand down [if a patent holder is simply asserting lawful patent rights.] Otherwise, we are penalizing lawful innovation.”
B. Industrial Policy?

• Are enforcement decisions being used to promote domestic or industrial policy goals, protect state-owned or domestic companies from foreign competitors, or create leverage in international trade negotiations?

• Are industrial policy frameworks being used in lieu of competition principles?

Such concerns test whether competition laws are being enforced to protect competition, or merely to protect individual competitors.

C. Current Antitrust Litigation Issues Affecting In House Counsel

A current merger case highlights issues facing U.S. general counsel of international companies in antitrust litigation, even when your company is not a party.

*United States v. AB Electrolux & G.E.* (D.C. Dist. Ct.)

• Merger case involving kitchen appliances
• USDOJ challenging the deal’s impact on U.S. consumers
• Accelerated discovery, set for trial next month (filed July 1)
C. Antitrust Litigation Issues Affecting In House Counsel

International discovery from non-parties?

- Defendants pressed hard to obtain documents from foreign parent of U.S. competitor
- Court authorized Hague Convention for competition materials from foreign parent. Timely?

Fast moving document productions from sub:

- Court ordered U.S. sub of foreign company to produce complete set of competition related documents within two weeks.

C. Antitrust Litigation Issues Affecting In House Counsel

- Protective order disputes involving in-house counsel:
  - Confidential material limited to “Defendants’ in-house counsel who are not (and will not be before July 2017) positioned to advise the client about business decisions that the client would make regarding, for example, pricing, marketing, distribution, or product design issues.”

- Any violation may be punished by a fine up to $250,000, which must be paid individually without reimbursement or indemnification.
1 OCTOBER 2015

Bitten Thorgaard Sørensen, Deputy Director General

Effective Strategies for Dealing with Enforcement Agencies Here and There

- View from the North
Agenda

1. Interplay with the European Commission (and other NCAs) – articles 101 and 102
2. Interplay with the European Commission (and other NCAs) – merger control
3. The DCCA and the set-up in Denmark

Interplay with the European Commission (and other NCAs)

» Articles 101 and 102:
   » Effect on trade ✡ A right and an obligation to apply the rules
   » Case allocation and the European Competition Network (ECN)
     ✡ Which agency is “well placed to act”
Interplay with the European Commission (and other NCAs)

» Merger control:
  » One-stop-shop:
    » Above the EU thresholds: Filing to the European Commission
    » Below the EU thresholds: Filing to NCAs (if applicable)
  » NB: Case referrals to/from the European Commission
  » Co-operation within the ECN

The DCCA and the set-up in Denmark
When does an agreement restrict competition? The economics of object infringement cases

Fordham Institute
28 September 2015
Preliminary draft for comment: Final version to follow

1 Introduction

Consider the following cases:

(a) senior and junior managers of three producers of methionine, an amino acid that is used in chicken feed, regularly meet in different European cities to agree price rises and exchange commercially sensitive information;

(b) the chairmen of Sotheby’s and Christie’s, the art auction houses, meet at their private residences in London and New York and agree to raise the commissions charged to sellers at the auctions;

(c) Ford and Volkswagen, rival car manufacturers, get together and form a joint venture for the production of multi-purpose vehicles;

(d) a branded and a generic pharmaceutical company enter into a settlement agreement with respect to an IP dispute, where the generic company is paid to drop its patent validity suit and delay its entry into the market;

These are real-world examples of explicit horizontal agreements between competitors that have been scrutinized by competition authorities for the potential to enable horizontal collusion. Here we discuss which agreements are generally considered to be in breach of competition law per se and how economics can help assess the object and effect of them.

Concerns about competitors getting together to discuss prices is not new. Back in 1776, Adam Smith made this famous observation:


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People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.2

Competition law does provide the legal framework to discipline business people and to prohibit them from meeting with their competitors and ‘conspiring against the public’ and has always looked unfavourably upon agreements among competitors, especially when they come in the form of price fixing, market sharing, or bid rigging. The US Supreme Court has referred to such ‘hardcore’ cartels as the ‘supreme evil of antitrust’.3 The then EU Commissioner for Competition stated in 2009 that, ‘under any analysis, cartels cause terrible damage’ (Kroes, 2009). EU case law under Article 101(1) has identified a class of ‘obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets’.4 One leading legal text identifies the following horizontal agreements as falling within the ‘restrictions by object box’: price fixing; exchanging information that reduces uncertainty about future behaviour; market sharing; limiting output (including the removal of excess capacity); limiting sales; collective exclusive dealing; and paying competitors to delay the launch of competing products (Whish and Bailey, 2015, p. 132).

The per se prohibition of hardcore cartels has economic merit. By restricting output and raising prices, a cartel aims to achieve the same negative effects as a monopoly: it distributes welfare from consumers to producers and reduces allocative, productive and dynamic efficiency. A cartel is in many ways worse than a full merger between competing producers, because a merger normally brings with it some efficiencies in the form of integration of production processes and elimination of duplicate resources. Cartels usually produce no (or limited) efficiencies that could offset the negative effects on competition. By prohibiting such agreements per se, competition law has created a good deal of legal certainty—many business people are fully aware that they had best steer clear of talking to competitors about prices.

But the line between hardcore cartels and other horizontal agreements must be drawn correctly, or this legal certainty may come at too high a cost. In the EU, this boundary is captured by identifying agreements or practices that restrict competition ‘by object’ rather than ‘by effect’.

There is significant debate among legal and economic commentators as to where the boundaries should be drawn between hardcore cartels and other horizontal agreements. Of the above examples, you might place agreements (a) and (b) in the first category. They involved price fixing supported by information sharing, and not much else. But what about (c) and (d)? These are also agreements among competitors, and relate to price or production, but they arise in a specific market context that would be relevant to take into account.

Example (c) represents a horizontal agreement relating to R&D, joint production, and technology licensing. There is consensus in competition law that a per se prohibition is not always warranted in these cases because they may generate benefits in terms of technological progress, efficiencies, and greater choice for consumers. The traditional mechanism in Europe is to assess the efficiency benefits under Article 101(3) and see if they outweigh any restrictive effects that

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2 Smith (1776), Book I, Ch X.
have been identified under Article 101(1). In such a case, it would be assumed that the object of the R&D agreement was not anti-competitive, but was rather to encourage innovation, even though there may be some restrictive effects given the need to protect the fruits of the innovation. In section 2 we discuss the distinction between object versus effect and the role that counterfactual analysis should play in such assessments. In section 3 below, we then discuss an agreement of type (d). In Europe, such settlement agreements are considered to restrict competition by object, whereas in the US they are subject to a rule of reason assessment. An economic assessment illustrates there are counterfactuals where such agreements are pro-competitive and hence their effects should be assessed, rather than being treated as an object infringement.

2 Object Versus Effect: A Clear Dichotomy?

A principle in EU competition law is that once an anti-competitive object has been established, it is not necessary to examine the actual or potential effects of the agreement. This clearly reduces the burden on the competition authority when bringing an Article 101(1) case. In recent years an increasing number of horizontal agreements outside the hardcore cartel category have been classed as object infringements, despite evidence that agreements of such types may achieve efficiency benefits. The question therefore arises whether such prohibitions by object are warranted for horizontal agreements other than hardcore cartels.

In fact, the object test under Article 101(1) does contain at its heart a requirement to consider the effect of the practice. The dichotomy between object and effect is therefore not so clear-cut. A consideration of economic effects under the European object assessment is not cast as a balance to any restrictive effects (as would occur in a rule of reason assessment), but rather as an assessment of whether the agreement restricts competition in the first place. As set out in the Commission’s Guidelines on Horizontal Agreements, in order to assess whether an agreement has an anti-competitive object, consideration must be given to the content of the agreement, the objectives it seeks to attain, and the economic and legal context of which it forms part.

This requires counterfactual analysis: if the competitive situation would be worse in the absence of the agreement, you can conclude that the agreement in itself does not have the object of restricting or distorting competition. In determining this counterfactual it is necessary to adopt a realistic view of what is feasible and practical.

Counterfactual analysis may show that an agreement is not restrictive because without it the recognized benefits would not be achieved—for example, a new product would not be launched at all, or the underlying product (say, a payment card scheme) would not work. In this case, the agreement does not infringe Article 101(1). In 2001, two mobile telephony operators in Germany—T-Mobile and O2—entered into an agreement to share 3G infrastructure and allow

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5 To achieve an exemption under Article 101(3) the burden is on the parties to show that any restriction of competition is justified through meeting all of the four following conditions. The agreement must: (i) contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress; (ii) allow consumers to receive a fair share of the resulting benefits; (iii) include only restrictions that are indispensable to the attainment of these objectives; and (iv) not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.


national roaming. The European Commission considered that the infrastructure sharing did not restrict competition, but that the national roaming agreement did.\(^8\)

The Commission agreed that without sharing infrastructure with T-Mobile, O2 would not be able to launch a 3G service with sufficient breadth to compete effectively. 3G services were new at the time, and O2 was a smaller competitor in the prevailing 2G services, with a market share of around 8% (T-Mobile had 42%). However, the Commission concluded that the roaming agreement would restrict O2’s efforts to expand its own network, particularly in urban areas. The CFI found that the Commission had failed to carry out an objective analysis of the competition situation in the absence of the agreement. It considered that without the roaming agreement O2 would not be able to launch a viable service, and therefore that this agreement did not infringe Article 101(1) (then Article 81(1)):

> It follows from the foregoing that the Decision, in so far as it concerns the application of Article 81(1) EC . . . suffers from insufficient analysis, first, in that it contains no objective discussion of what the competition situation would have been in the absence of the agreement, which distorts the assessment of the actual and potential effects of the agreement on competition and, second, in that it does not demonstrate, in concrete terms, in the context of the relevant emerging market, that the provisions of the agreement on roaming have restrictive effects on competition.\(^9\)

Sceptics may see the increasing number of European cases that are put into the ‘object box’ as being driven by competition authorities’ desire to avoid the difficult task of establishing the effects of agreements. The ECJ’s *T-Mobile Netherlands* ruling in an information-exchange case in 2009 is suggestive of a very low hurdle for establishing an anti-competitive object (we discuss this case in more detail in section 5.3):

> [A] concerted practice pursues an anti-competitive object for the purpose of Article 81(1) EC where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market.
> It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices.
> An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.\(^10\)

The *Cartes Bancaires* ruling of 2014 moves the pendulum back to require more evidence before finding that a practice can go into the ‘object box’.\(^11\) The Groupement des cartes bancaires (CB) was created in 1984 in France so that the holders of a payment card issued by a member of CB could make payments to affiliated merchants and withdrawals from cash machines operated by members. Pricing (or fee transfer) arrangements were agreed between members (similar to interchange arrangements in four-party credit and debit card schemes). The European Commission concluded in 2007 that the pricing measures adopted by CB were an infringement by object and effect. On appeal, the General Court supported the Commission’s finding that the pricing measures restricted competition by object, and therefore stated that there was no need to examine the effects of the measures. The ECJ overturned this ruling:

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\(^8\) *T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag* (Case COMP/38.369), Decision of 16 July 2003.

\(^9\) Case T-328/03, O2 (Germany) GmbH & Co, OHG v Commission [2006] ECR II-1234, at [116].

\(^10\) Case C-8/08 *T-Mobile Netherlands and Others v Commission*, Judgment of 4 June 2009, at [43].

The concept of restriction of competition ‘by object’ can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.\(^\text{12}\)

The General Court had inferred that the object of the CB pricing measures was to impede new entry into the market for issuing payment cards in France, since entrants had no choice but to pay the fees or limit their card-issuing activities. The ECJ considered that the General Court had set out the reasons why the measures were capable of restricting competition, but had not explained how that restriction of competition led to a sufficient degree of harm in order to be characterized as a restriction by object. The ECJ found the object of the fee structure to be the imposition of a financial contribution on the members of CB, to reflect the fact that each member benefited from efforts of other members to get merchants to accept the card. Given that the General Court had taken the view that preventing free-riding by members in the CB system was a legitimate objective, the ECJ did not agree that the structure could be regarded as being harmful by its nature. The Opinion of Advocate General Wahl in this case recognized the danger that the object test under Article 101 could close off potentially welfare-enhancing agreements:

\[
\text{[T]he method of identifying an ‘anticompetitive object’ is based on a formalist approach which is not without danger from the point of view of the protection of the general interests pursued by the rules on competition in the Treaty. . .}
\]

\[
\ldots\text{Only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object, and not agreements which, having regard to their context, have ambivalent effects on the market or which produce ancillary restrictive effects necessary for the pursuit of a main objective which does not restrict competition . . .}
\]

\[
\ldots\text{To hold otherwise would effectively deny that some actions of economic operators may produce beneficial externalities from the point of view of competition . . .}
\]

\[
\ldots\text{Because of these consequences, classification as an agreement which is restrictive by object must necessarily be circumscribed and ultimately apply only to an agreement which inherently presents a degree of harm.}^{\text{13}}
\]

Thus, in many horizontal agreement cases it is relevant to understand the economic context and the actual or likely effects on competition, even if the focus is on the object of the agreement. As implied by Advocate General Wahl, ‘experience and economics’ are at the heart of such assessments.

## 3 ‘Pay For Delay’: Reverse Settlement Agreements Between Branded And Generic Pharmaceutical Companies

Originator (branded) and generic pharmaceutical companies are frequently in dispute over the validity or infringement of the branded company’s patents. These are often ‘process patents’ related to the commercial manufacture of the medicine, which typically expire after the patent on the underlying chemical entity (the development of the process by which a new chemical entity can be commercialized comes some time after its initial discovery). In those situations, generic firms may search for new ways of manufacturing a chemical entity, in

\(^{12}\) Ibid., at [58].

\(^{13}\) Opinion of Advocate General Wahl, Case C-67/13 P Groupeement des cartes bancaires (CB) v Commission, 27 March 2014, at [54–58].
order to take advantage of the expiry of the underlying product patent as soon as possible. Disputes then arise over whether a generic firm’s process is genuinely new, or whether it uses some of the patented technological know-how of the originator company. As litigation proceeds, the originator and generic firm may settle, and this can involve a ‘reverse payment’ to the latter in exchange for dropping the litigation and delaying entry into the market. Also known as ‘pay-for-delay’ agreements, such settlements have attracted significant attention from competition authorities. The payments look like hardcore market sharing infringements: one pharmaceutical company paying a potential rival to stay out of the market. But is that an accurate picture?

The FTC has challenged several pay-for-delay agreements since the early 2000s. In 2015 it settled a lawsuit against Cephalon (which had begun in 2008) after the company promised to pay $1.2 billion in reimbursements to buyers of Provigil (a narcolepsy medicine) who had been overcharged, and to avoid certain reverse payments to generic firms in the future. In Europe, a burst of activity by competition authorities began after the European Commission’s inquiry into the sector in 2009. In 2013 the Commission imposed a fine of €93.8m on Lundbeck, and €50.2m on eight generic firms, for agreeing to delay generic competition in the market for Citalopram, an antidepressant. In July 2014 the Commission imposed fines totalling €427.7 million on Servier and five generic firms for agreeing reverse payment settlements with respect to Perindopril an inhibitor used to treat high blood pressure and heart failure.

There are some differences in the treatment of pay-for-delay agreements between the USA and Europe. As set out in Lundbeck, the Commission treated the agreements as anti-competitive by their very nature. In contrast, the US Supreme Court ruled in the 2012 Actavis case that, in light of the many factors and complexities that determine the competitive effects of reverse payment settlements, the FTC must still prove its case on a rule-of-reason basis, and cannot presume these settlements to be illegal. Counterfactual analysis is required in these circumstances to take into account these factors and complexities, as we explain below.

3.1 Counterfactual Analysis

The economics of pay-for-delay agreements would point to the same conclusion as that of the US Supreme Court: these agreements are not necessarily harmful to competition. In certain circumstances, settlement agreements may facilitate more rapid entry by generic firms rather than delay it. The underlying assumption of the Commission’s treatment of pay-for-delay agreements as object infringements is that, in the counterfactual, the generic firm would be in a position to supply the market in the very near future. This may not always be the case. Pay-for-delay agreements relate to an underlying dispute over IP. If the disputed patent were found to be valid, the generic firm would in fact not be able to enter the market, and is therefore not a competitor in the correct counterfactual. The settlement agreement will by definition reduce the generic

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14 For example, In re. Cardizem CD Antitrust Litigation, 332 F.3d 896 (6th Cir. 2003); and Schering-Plough Corp. v Federal Trade Commission, 402 F.3d 1056 (11th Cir. 2005).
17 Lundbeck (Case AT.39226), Decision of 19 June 2013. We advised one of the generic firms in this case.
18 Perindopril (Servier) (Case AT.39612), Decision of 9 July 2014. We advised one of the generic firms in this case.
firm’s incentive to continue the existing litigation. However, it is not certain that these agreements will delay entry compared with an appropriate counterfactual.

Consider Figure 1, which shows a stylized timeline of a patent litigation. The originator enjoys a monopoly position granted by the patent, which is valid until time T. However, at an earlier date t₁, the generic firm challenges the validity of the patent, or claims that its own product does not infringe it. Thus the IP litigation process begins. With the litigation underway, the originator and generic firm have two options: settle the litigation (at time t₂ in Figure 1) and agree that the generic firm will enter only at time T; or not settle and continue to litigate until a court decision. The generic firm has a third option, which is to discontinue the litigation at some time before T and simply wait until patent expiry.

Fig. 1: Timeline in a patent litigation case

Of these options, the first and third—settle at time t₂; or discontinue litigation—involves no or limited uncertainty once selected. However, if the originator and generic firm continue to litigate (the second option), the outcome of the litigation and the timing of entry are uncertain. To begin with, the date of the court decision is usually uncertain, and the litigation may not in fact be resolved before the originator’s patent expires at time T. Even if the litigation is resolved before T (e.g., at time t₃ in Figure 5.1), there is no guarantee that the generic firm would ultimately win the litigation. If the generic firm wins, entry would occur at t₃, and prices would be expected to fall as the generic firm gains market share—as shown by the dotted line in the figure. If, however, the originator wins the litigation, the market continues without any entry until patent expiry at time T. Price reductions would occur only after time T, just like in the case of a pay-for-delay agreement (the first option).

Thus, banning settlement agreements will facilitate entry only if three conditions hold: the generic firm decides to litigate in the absence of a settlement; the litigation is resolved before the patent expiry date; and the generic firm wins the litigation. Indeed, the treatment of these agreements as an object infringement effectively assumes that these conditions do all hold. However, there are significant uncertainties and complexities inherent in the process of patent litigation, as noted above. The outcome of the patent dispute itself would depend on factors such as the strength or necessity of the originator’s patent, the precise process used by the generic firm, and properties of the generic firm’s product.

In its infringement decisions the European Commission pointed to the fact that the settlement values in question were large, and were linked to the generic firm’s forgone profits. The Commission saw this as evidence of an anti-competitive object. However, an economic assessment of the uncertainties and incentives of the two parties casts these payments in a different light. In theory, a settlement will occur only if the offered payment is acceptable for both parties,
and reflects the expected benefits and costs that both parties face if they continue litigating. The profits expected by the generic firm and the originator (with and without entry) are relevant to this, as are their individual expectations of the strength of their case and the costs of the litigation process. It is legitimate for the originator to expect to earn higher profits in the scenario where its patent is found to be valid. If it is not valid, the generic firm will enter and the originator will suffer a significant reduction in profits. Linking the settlement value to the level of forgone profits therefore has a business rationale.

An example shows how the difference in benefits and expectations of success can drive settlement values. Suppose that the overall market size for a drug is 100,000 units and the price of the product on patent is €1. The originator earns revenue of €100,000 in one year. Now assume that the originator’s perceived probability of the generic firm successfully challenging its patent’s validity is only 10%, so its expected loss from the litigation is €10,000, and the originator would be happy to settle for any payment less than €10,000. Now assume that the generic firm also perceives its challenge to be weak (though slightly less so): a 20% probability of winning. If entry occurs, the generic firm expects to price its generic version of the drug at €0.20 and capture the whole market (abstracting from any price response from the originator)—thus, its expected profit is 20% × 100,000 × €0.20 = €4. The generic firm would settle for any payment higher than €4,000. Thus an offer between €4,000 and €10,000 will be accepted, and the costs and uncertainties of litigation will be avoided. You can see that the generic firm’s expected profits are, by definition, part of the consideration of the level of any reverse payment in these cases.

An additional feature of the impact of these agreements on entry arises when multiple generic firms are involved in litigations concerning the same patent (as is often the case). The incentive for one generic firm to challenge a patent of the originator may be weakened if it fears that rival generic firms will benefit by free-riding on the litigation. If the patent is found to be invalid, other firms can enter without bearing any of the litigation costs. This risk of additional generic entry will lower the benefits to the original generic firm from winning the litigation, and thereby make it less likely it will take this risk. Settlement agreements between the originator and some generic firms can make continued litigation by one generic firm more likely. This was the situation in the Servier case, where the generic firm Apotex did not reach an agreement with Servier and continued to litigate.

In all, the economic incentives regarding R&D in the pharmaceuticals industry are complex, and competition law should be careful that interventions are genuinely welfare-enhancing. An effects-based or rule-of-reason approach would appear to be more appropriate than an object or per se approach, so as to capture the specific market context and uncertainties relevant to each case, and to ensure that short-term price reductions for existing medicines are not at the expense of the discovery of new ones.
Public organizations tend to evolve gradually but every once in a while a major leap forward is warranted. This was the case with Mexico’s competition authority in 2013.

September 10th 2015 marked the two-year anniversary of the creation of the Mexican Federal Economic Competition Commission (COFECE), a constitutionally autonomous body entrusted with safeguarding competition and free market access to all sectors except telecommunications and broadcasting. It emerged as successor to its 20-year-old predecessor, the Mexican Federal Competition Commission (COFECO), inaugurated in 1992 as part of economic reforms Mexico enacted in conjunction with the signing of the North American Free Trade Agreement—as well as in relation to a Mexican institutional framework trend that favored delegating specific administrative tasks to certain bodies so they might operate free from political pressures. In COFECE’s case, autonomy also came with incremental powers such as a prerogative to order measures eliminating barriers to competition and the power to regulate access to essential facilities.

One of COFECE’s challenges was determining how to ensure continuity while adapting to a wide variety of changes; to wit, alterations I) to its constitutional mandate and, as such, its institutional strategy; II) its new regulatory framework regarding the enactment of a new Federal Economic Competition Law (FECL); III) its own structure and staffing; and IV) its relationship with other public authorities as well as to the civil, academic, and business communities.

The present article will explore each of these changes and how a new autonomous agency was set up with an emphasis on efficiency and optimal results in terms of competition policy gains in Mexico, at the same time important advances made by COFECE’s predecessor were maintained. It will also present the agency’s most recent results with regard to this process as well as prospective issues and projects for the near future.

I. CHANGES TO COFECE’S LEGAL FRAMEWORK AND STRATEGY

1 An English-language translation of the FECL is available at https://www.cofece.mx/cofece/images/Documentos_Micrositios/Federal_Economic_Competition_Law.pdf
Profound changes to the Mexican Constitution in 2013 created two autonomous agencies responsible for competition matters. The Federal Telecommunications Institute was given exclusive powers regarding economic competition in the broadcasting and telecommunications sectors. COFECE, in turn, was given an ambitious constitutional mandate, for all remaining economic sectors, specifically, to “promote, protect and guarantee free market access and economic competition, as well as to prevent, investigate, combat, effectively prosecute, severely punish and eliminate monopolies, monopolistic practices, unlawful concentrations, barriers to entry and to economic competition, as well as other restrictions to the efficient operation of markets.”

At the constitutional level, the reforms sought effectiveness, credibility and a robust legal review of all agency activities, to be carried out by means of: 1) Autonomy, including the agency’s distinct legal status as well as the authority to hand down resolutions, etc.; 2) a separation of investigation- and decision-making functions to ensure impartiality and objectivity in decision-making processes; 3) incremental powers such as ordering compliance with measures eliminating barriers to competition, regulating access to essential facilities and mandating structural separations or the divestiture of an economic agent’s assets, rights, stock or partner-shares in such proportion as may be necessary to eliminate anticompetitive effects; 4) new criminal sanctions for FECL violations; and 5) a new judicial framework, including special competition, broadcasting, and telecommunications courts. This is the context within which the new COFECE assumed control over Mexico’s competition policy.

To comply with this renewed mandate, an amended FECL was enacted in 2014. This landmark legislation sought to recognize a legacy of more than 20 years of competition policy, as well as provide the necessary means to implement new constitutional guidelines. The 2014 FECL added new checks and balances for Commission procedures into the existing judicial framework, as well as provisions related to substantive and procedural issues. The chart below offers a concise understanding of these FECL provisions:

<table>
<thead>
<tr>
<th>Checks and Balances</th>
<th>Substantive and Procedural Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Separation of functions.</strong> Separation between the COFECE authorities charged with investigations and decision-making. An Investigative Authority has technical autonomy to perform these functions.</td>
<td><strong>Monopolistic practices.</strong> Two new relative monopolistic practices have been defined in relation to essential facilities abuses.</td>
</tr>
<tr>
<td><strong>Adversarial procedures.</strong> The Investigative Authority and the involved economic agent are parties to a process in which evidence is submitted and arguments are heard.</td>
<td><strong>Barriers to competition and essential facilities.</strong> Criteria were introduced to further develop these elements’ meaning and scope.</td>
</tr>
<tr>
<td><strong>Board of Commissioners’ decisions and sessions made public, except at such</strong></td>
<td><strong>Investigative Authority strengthened in instances of on-site inspections, the</strong></td>
</tr>
</tbody>
</table>

2 Federal Economic Competition Law, article 2.
times as confidential information is discussed.

**Contact rules with parties (in hearings),** applicable to meetings/interviews between Commissioners and economic agents.

**Publication of an Annual Work Program and Quarterly Activity Reports,** to be presented to the Federal Executive and Legislative branches.

**External evaluations.** COFECE may request external studies to evaluate the performance and impact of its decisions.

An **Internal Comptroller’s Office** enjoys technical autonomy and oversees both the application of the COFECE budget as well as its officials’ conduct. The Head of Internal Comptroller’s Office is appointed by Mexico’s Federal Chamber of Deputies.

**Imposition of coercive measures and data gathering, etc.**

**Guidelines and technical criteria.** COFECE shall issue directives, norms, guidelines, and technical criteria prior to public consultation. These will be reviewed at least every five years.

**Merger authorizations.** Economic agents must obtain prior Commission approval to perform transactions that exceed FECL thresholds. This framework prevents economic agents from performing mergers prior to Commission authorization.

**Exemptions and fine-reduction benefits.** Economic agents who engage in anticompetitive practices may voluntarily inform the Commission of such behavior in exchange for exemptions or fine-reductions.

**New sanctions and offenses.** Previous sanctions for cartels and market-dominance abuses remain in place (10% and 8% of annual turnover, respectively); new sanctions and fines have also been introduced.

**THE 2014-2017 STRATEGIC PLAN**

An efficient competition policy cannot rely solely on legal documents. Implementing its framework required the Commission to establish an institutional strategy and determine the actions within it that were subject to immediate completion. In early 2014, the Board of Commissioners outlined COFECE’s objectives and actionable priorities for the 2014-2017 period based on a comprehensive diagnosis of Mexico’s economic competition scenario. This document revealed many domestic markets were hobbled by high concentration levels. In a comparison of several economic sectors in accordance with the Herfindahl-Hirshman index, the Mexican think-tank known as the Research Center for Development (acronym in Spanish: CIDAC), discovered market concentrations in Mexico’s petroleum, electricity and transportation industries were twice those of the United States.4

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4 The Herfindahl-Hirshman index is a measure that indicates a given market or industry’s competition levels. Scores range from 0 to 10,000, where 10,000 would indicate an absolute monopoly. The lower the score, the higher the number of competing firms.
COFECE went on to define in which areas it would focus its attention. To do so it prioritized economic sectors according to their importance with regard to: 1) Economic Growth, i.e., such sectors as contribute most to Mexico’s GDP; 2) Widespread consumption, i.e., sectors that produce goods and services in high demand among the general population; 3) Cross-sectional impact, i.e., with regard to sectors that produce inputs for other goods and services; 4) Lower-income households, as a means of targeting sectors that exert a major impact on household expenditures; and 5) Regulated sectors, that is, sectors where existing regulations and government practices could potentially create competition barriers.

Four major objectives were identified as a means of targeting these and other sectors that might be falling short as regards competition. The first is enforcing the legal framework for economic competition. Secondly, COFECE is to promote the benefits of competition and competition culture among economic actors and the general public as a means of enhancing both competition policy compliance and awareness. A third COFECE objective calls for promoting market competition in favor of economic growth. Finally, COFECE will work toward institutional excellence, based on the organization’s core values: legality, impartiality, transparency and professionalism.

Each of these objectives was grounded in specific actions; eleven were designated as critical in 2014 in order to begin the competition policy framework’s immediate implementation. The chart below describes these actions as well as their mid-2015 status:

<table>
<thead>
<tr>
<th>Immediate action</th>
<th>Mid-2015 status</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Create an intelligence unit within the Investigative Authority to monitor markets, identify competition risks, gather strategic information and establish investigational guidelines.</td>
<td>100% complete</td>
</tr>
<tr>
<td>2. Standardize and certify critical COFECE procedures to enhance efficiency, technical rigor, quality and transparency.</td>
<td>75% complete</td>
</tr>
<tr>
<td>3. Implement an electronic procedural system to both improve technical operations and information security as well as simplify proceedings carried out before COFECE.</td>
<td>20% complete</td>
</tr>
<tr>
<td>4. Publish at least eight key protocols and technical criteria.</td>
<td>75% complete</td>
</tr>
<tr>
<td>5. Define and implement strategies for advocacy, communications, transparency and accountability.</td>
<td>100% complete</td>
</tr>
<tr>
<td>6. Sign agreements and memoranda of understanding, as well as establish coordination mechanisms with COFECE-sector-regulator-related institutions.</td>
<td>100% complete</td>
</tr>
<tr>
<td>7. Design and implement an HR recruitment, selection, evaluation and development program.</td>
<td>50% complete</td>
</tr>
<tr>
<td>8. Define and establish both quantitative and qualitative mechanisms that evaluate COFECE’s economic impact.</td>
<td>100% complete</td>
</tr>
<tr>
<td>9. Define and establish an institutional performance-</td>
<td>75% complete</td>
</tr>
</tbody>
</table>
II. CHANGES TO COFECE’S REGULATORY FRAMEWORK

COFECE strategy positions the institution as the recipient of complaints and is charged with investigating them; is to investigate priority markets of its own accord; and should engage in advocacy activities to raise awareness in general. Consequently, COFECE designed a suitable regulatory scheme to implement the FECL as well as supplement and make more precise its language, in order to facilitate and clarify its enforcement. COFECE published its new Regulatory Provisions in November 2014. Also known as “primary internal regulations,” they spell out key concepts and definitions as well as relevant procedural specifications.

The provisions specify, for instance, what considerations COFECE must make when regulating access to essential facilities. They further establish that COFECE will have to evaluate if efficiencies will be enhanced through regulation or by offering access to the facility in question to third parties. They additionally describe the evidence required to initiate Absolute Monopolistic Practices (i.e., cartel) investigations. For example, if a business association, chamber or economic agent encourages or invites competitors to collude with regard to prices or output this may be admitted as an indication of a possible Absolute Monopolistic Practice. All parties’ procedural rights regarding evidence submission are specified as well.

This document emerged from a frank and earnest dialogue with the business and academic communities. Public consultation led to enhancement of some 50% of the provision’s content. The consequent issuance of Regulatory Provisions sought—among other goals—to address and mitigate private-sector concerns regarding COFECE’s exercise of its powers. In the long term this meant creating a favorable environment for competition law compliance and institutional credibility.

In an ongoing effort to create a favorable legal-certainty environment, several protocols and technical-criteria documents were published throughout the 2014-2015 period, in anticipation of public consultation. They included technical criteria on concentration-analysis indices, exemption and sanction-reduction guidelines, guidelines for information exchange among competitors, a mergers guideline and protocols governing the initiation of monopolistic practices or unlawful concentration investigations, etc.

III. RENEWED STRUCTURE AND STAFF
The transition from a small agency to an independent institution went hand in hand with new structures, more staff and approximately twice the budget COFECE’s predecessor enjoyed. After the Commission’s creation as a sovereign entity, independent from Mexico’s centralized federal administrative apparatus, the first structural element to change was the manner in which the new Board of Commissioners was to be established. This was achieved by means of a fair and transparent mechanism led by an autonomous Evaluation Committee that ensures candidates comply with constitutional requirements and mandatory technical knowledge. The Committee then provided Mexico’s Executive branch with a list of candidates it considered eligible for those positions and the President submit final selections to the Mexican Senate for approval. The senate appointed a Chair from among the seven new commissioners to oversee COFECE’s day-to-day activities.

However, this was only a first step toward COFECE’s structural transformation. In July 2014, in parallel to the enactment of pertinent legislation, COFECE published its new organizational charter to set up a new institutional model that was to reflect a separation of functions as well as new procedures that both the Constitution and the FECL had mandated. Specifically, there would be a division between those COFECE authorities charged with investigative functions and those in charge of decision making. This gave rise to COFECE’s Investigative Authority, now entrusted with all enforcement actions save concentration (merger) review.

To enhance the Investigative Authority’s detection capabilities, a Market Intelligence Unit was created to strategically monitor markets and possible anticompetitive conduct. It is a specialized unit which focuses on proactively investigating sectors of the Mexican economy using complex statistical and forensic analyses. It will also participate in ongoing investigations and will ensure COFECE’s assets are physically and digitally secured.

As for the COFECE team, it grew by approximately 30% from 2013 to 2014, or more specifically, from 254 to 330 competition officers. All new personnel underwent training in areas such as cartel investigation techniques, concentration analysis and quantitative analysis methods. By 2014, COFECE staff had been allocated in a mostly even distribution that focused 31.1% of competition staff on anti-cartel activities as well as 28.1% on market-dominance-related efforts. Concentration-analysis received nearly one-fourth of competition-dedicated staff (22.8%), and the remainder (18%) was distributed between advocacy- and market studies-related areas, etc.

<table>
<thead>
<tr>
<th>Focus area</th>
<th>Public officials plus percentage of total competition-dedicated staff</th>
</tr>
</thead>
<tbody>
<tr>
<td>Concentration analysis</td>
<td>52 (22.8%)</td>
</tr>
<tr>
<td>Anti-cartel</td>
<td>71 (31.1%)</td>
</tr>
<tr>
<td>Dominance-related issues</td>
<td>64 (28.1%)</td>
</tr>
<tr>
<td>Other (e.g., advocacy)</td>
<td>41 (18%)</td>
</tr>
</tbody>
</table>

Though concentration analysis and advocacy activities were not placed within the Investigative Authority, they were subject to significant changes. Under the previous
legislation, concentrations were subject to challenge in cases where the agency had competition concerns. Under the new law, COFECE’s approval is now mandatory for finalizing agreements whenever that transaction exceeds established thresholds. This has increased agency workload and gives rise to a need to develop more diligent screening processes for detecting concentrations that clearly do not pose threats to economic competition. In response to this demand, COFECE has worked ceaselessly to ensure its team’s constant involvement in capacities-building exercises.

IV. NEW RELATIONSHIPS WITH OTHER AUTHORITIES AND ORGANIZATIONS

As a means of building constructive relationships with other institutions, the Commission’s advocacy team undertook major awareness efforts on a number of fronts. It was essential that other individuals and organizations gain awareness of COFECE, starting with knowledge of its very existence. Awareness of competition policy in Mexico, and the agency entrusted with enforcing it, was low. In 2009, a survey estimated only 1% of the population knew what government body was responsible for such matters. Prior knowledge of COFECE’s predecessor was diminished by the fact it had been replaced.

To address the issue, COFECE designed an advocacy activities strategy whose title translated to Working Together for a Culture of Competition.\(^5\) The strategy outlined specific actions to be undertaken with particular audiences such as public authorities, national and international organizations, businesses and entrepreneurs, citizens, consumers, and academia. All actions seek to achieve five competition advocacy objectives: 1) to position competition and its benefits as a priority of public, professional and academic discourse; 2) to raise awareness among consumers regarding the benefits of competition and how COFECE works in their favor; 3) to facilitate and encourage public policy- and regulation-design that promotes competition and free market access; 4) to encourage public policy- and regulation-design that promotes competition and free market access [sic], and 5) to cooperate with international organizations for best-practices adoption and exchange.

These actions included creating a national economic competition prize to promote economic competition research and public discussion. Entries have been received for its two categories, one for students and another aimed at journalists, with winners to be announced in October 2015. Radio public-service announcements and promotional spots have also been launched to promote competition agency awareness among the general public.

Addressing the business community required communication efforts on several levels. First, the Commission had to express how it would function and exercise its new powers with regard to the private sector. From an advocacy standpoint, COFECE had to issue informational documents to clarify its scope of action. It also had to promote compliance with the new law. A corresponding document was recently published at

\(^5\) This document is available at https://www.cofece.mx/cofece/images/Promocion/DocumentoJuntos(paginas).pdf
the same time cooperation agreements were signed with the Mexican Council for Business Coordination in order to promote competition culture within the private sector.

The Commission recognized an additional need to outline protocols for collaboration with other public authorities in its capacity as an autonomous organization. To that end, it renewed or entered into agreements with institutions such as the Ministry of Foreign Affairs, the Mexican Institute for Social Security, the nation’s internal revenue service, the Federal Commission for Regulatory Improvement and the National Institute of Statistics and Geography, among others. These collaboration guidelines allow the Commission to reach key objectives by allowing it to expand its capabilities either through increased resources (i.e., access to other institutions’ staff or resources), by extending its enforcement reach (allowing officials from other authorities to tender notifications), through specialized information or through enhanced accountability mechanisms for COFECE’s public officials.

CONCLUSIONS

Mexican consumers and businesses earnestly desire to see increased competition in several sectors. Expectations with regard to Commission outcomes are high, due largely to an ambitious reform process the country has recently undergone, which placed competition policy at the forefront of the public agenda. That said, implementation of the new economic competition system could not begin fully before rolling out structural, regulatory, staffing, and outreach changes needed to strengthen the new authority. Not least of all, it all needed to happen as the agency met its day-to-day obligations.

Two years following its establishment, COFECE is fully operational and works towards its constitutive reforms’ objectives. Its new legal framework has begun to produce solid results including: a) 20 simultaneous investigations, b) two comprehensive market studies (first Financial and now Agri-foods), c) over 200 analyzed mergers, and d) significant advocacy efforts. That said, COFECE’s main asset and achievement is its team. Since 2013, it has not only expanded by 30%, but has sharpened its focus on high quality, specialized technical knowledge. If 2013 and 2014 were years of institutional renewal, strengthening and consolidation, now the time has come to reap the benefits of so much effort and dedication.
Parallel Trade Restrictions in Ecommerce and the Transition to the Digital Single Market

Ingrid Vandenborre and Rupert Phillips

Introduction

The subject of parallel trade restrictions dates back to the initial years of the formation of the European Union. The EU Commission ("EC") has consistently identified restrictions on parallel trade – to the extent they qualify for assessment under Article 101 (i.e. to the extent they are based on an agreement between independent undertakings) - as by object restrictions given the importance adhered to EU integration. Historically, the topic was largely reserved for the automotive and pharmaceutical sectors, where parallel trade accounts for a substantial portion of sales.

Also EU Courts have been confronted with the question of what criteria apply to assess and enforce against restrictions of parallel trade in the EU. The EU Court's case law assessing restrictions that have been introduced in the pharmaceutical sector clarified that certain restrictions on parallel trade cannot be assumed to run afoul of the single market, and that a variety of factors may have to be considered in a careful balancing exercise.

The EC has embarked on the task of developing its enforcement policy against parallel trade in the modern era – the digital era – with, inter alia, its inquiry into the ecommerce sector and an anticipated overhaul of relevant regulations throughout the EU. As the ecommerce sector is, similarly to trade in pharmaceutical products, subject to discrepancies in Member State regulations, the EC's enforcement policy may have to take into account the considerations and reasoning offered by the EU Courts.

The Ecommerce Sector Inquiry

On May 6, 2015, the EU Commission announced its inquiry into the ecommerce sector. Focused on barriers to cross-border ecommerce in digital content and goods, the Commission wishes to understand whether companies are using contractual measures specifically designed to restrict cross-border ecommerce. Particular attention will be paid to industries such as electronics, clothing and shoes, and digital content. Much of this article will consider parallel trade in the digital content industry.

The Ecommerce Sector Inquiry was announced as part of the EU Commission’s broader ‘Digital Single Market Strategy’ which intends to replicate the single market for physical trade in a digital environment, i.e., a digital single market. There are three pillars to the Commission’s strategy: (1) to improve access for consumers and businesses to online goods and services across Europe; (2) to modify the infrastructure underlying the digital market to allow digital networks and services to prosper; and (3) to use digitalization as a driver for growth. Each of the pillars can be unpacked into several itemized initiatives.

The Ecommerce Sector Inquiry falls under the first pillar of the EU Commission’s strategy, which recognizes the need to modify copyright rules and tackle geo-blocking. However, the Inquiry also appears to follow the EC's learnings from recent investigations concerning parallel
trade restrictions placed on online sales of goods and digital content. Already in December 2013, the EU Commission raided several companies, including Samsung Electronics, Philips, and Media Saturn, on the suspicion that these companies had restricted the online sales of consumer electronic products and small domestic appliances.

Shortly thereafter, in January 2014 the EC opened an investigation into restrictions affecting the cross-border provision of pay-TV services. Specifically, the EU Commission expressed concerns that certain provisions in licensing arrangements between several major U.S. film studios and the largest EU pay-TV broadcasters prevent those broadcasters from providing their services in other Member States, forcing them to either refuse subscribers from other EU Member States or prohibiting access to their content from another Member State.

In July 2015, the EC formally charged Disney, NBCUniversal, Paramount Pictures, Sony, Twentieth Century Fox and Warner Bros, alleging bilaterally imposed restrictions on Sky UK that prevent Sky UK from granting EU consumers located outside of the UK and Ireland access to its online pay-TV and satellite services. The restrictions were considered to restrict passive cross-border sales, and the EU Commission believes that such geo-blocking eliminates competition between broadcasters in different Member States. Similar to the arguments raised in the pharmaceutical sector, it has, however, been suggested that national copyright laws prevent content from freely passing between Member States irrespective of these restrictions on parallel trade, so such restrictions have a limited effect on final consumers.

Finally, in March 2015 the EC opened an investigation into geo-blocking in the market for online downloads of video game content. Other EC investigations, not yet public, look into geo-blocking in other industries.

Parallel Trade in the Pharmaceutical Sector – Findings of the ECJ

Restrictions on the parallel trade of pharmaceutical products have previously attracted a significant amount of attention, and ultimately led to an assessment of the EC’s enforcement policy against parallel trade restrictions by the EU Courts. In 2009, the ECJ ended an eleven year dispute involving GlaxoSmithKline Services Unlimited (“GSK”), holding that GSK’s dual pricing system concerning pharmaceutical products sold to Spanish wholesalers was a restriction by object under ex Article 81(1), but one that could benefit from the efficiencies exemption under ex Article 81(3).

In 1998, Glaxo Wellcome (now GSK) notified the Commission of its new sales conditions for Spanish wholesalers. The conditions established two prices to be charged of Spanish wholesalers: (i) the price mandated by the Spanish reimbursement scheme for pharmaceutical products sold inside Spain; and (ii) a higher, free market price for pharmaceutical products sold outside Spain.

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1 We will focus this discussion on the enforcement of Article 101, leaving out those cases that have addressed parallel trade restrictions in the context of unilateral conduct.

2 *GlaxoSmithKline Services Unlimited v Commission* (Joined Cases C:501/06 P and others).
While in 2001 the Commission concluded that the dual pricing system was “tantamount to an export ban” and refused exemption under ex Article 81(3), the General Court in 2006 overturned the Commission’s decision, ruling that:

(i) The dual pricing system did not constitute a restriction by object because it could not be presumed to diminish the welfare of final consumers of pharmaceutical products given the legal and economic context of the pharmaceutical industry. In particular, the pharmaceutical industry is subject to governmental price regulations which shield the price of prescription drugs from the free play of supply and demand in the single market, thereby diminishing the impact of parallel trade on the price paid by consumers or national health insurance schemes. The General Court did, however, find that the dual pricing system had an anticompetitive effect within the meaning of ex Article 81(1), as consumers were denied whatever small reduction in prices may have transpired absent the dual pricing system, despite governmental regulation; and

(ii) The Commission had failed to carry out a proper assessment of GSK’s request for exemption under ex Article 81(3), having failed to consider seriously the sufficiently relevant and detailed factual arguments and evidence submitted by GSK. GSK had argued that the higher, free market prices charged for pharmaceuticals exported outside Spain would improve efficiency and benefit consumers, because the saved revenues that were otherwise lost to parallel trade would be reinvested in R&D. The General Court annulled the Commission’s decision on this basis.

In short, the General Court considered that the Commission had failed to balance the benefits to interbrand competition in innovation and R&D, against the decreased inter-brand competition at the pharmaceutical product level.

In its judgment of October 6, 2009, however, the ECJ annulled the General Court’s finding that the dual pricing system did not constitute a restriction by object. The ECJ found that it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price, because ex Article 81 is not limited to protecting the interests of competitors and consumers, but also the structure of the market and “competition as such.”

Nonetheless, the ECJ upheld the General Court’s finding that the Commission failed to conduct a proper examination of the factual arguments and evidence supplied by GSK under ex Article 81(3), specifically the losses in efficiency associated with parallel trade and the gain in efficiency procured by the increased investment in R&D. The ECJ found that ex Article 81(3) requires a prospective analysis on whether the claimed efficiencies in the form of objective advantages are “sufficiently likely,” and that this analysis must be undertaken in light of the factual arguments and evidence provided by the company seeking an exemption. The legal and economic context in which an alleged restriction on parallel trade takes place is to be considered in the context of ex Article 81(3).

Parallel Trade Restrictions in the Ecommerce Sector
The judgment of the ECJ in *GlaxoSmithKline Services Unlimited* serves to show that when legislation in a particular industry is not cohesive throughout the EU, and objective justifications exist that warrant distinct treatment of cross border sales that benefit consumers, the EC may not be able to deem such restrictions as per se violations of Article 101. The implications of parallel trade, or in this instance a lack of price discrimination, in those instances may deserve a closer examination. For example, national regulations may interfere with and fracture the single market in much the same way as a restriction on parallel trade would, thereby diminishing the effect of such restrictions.

The ecommerce sector is one such area suffering from divergences in regulations affecting the digital market. In its Inquiry, the Commission identified a few areas, namely copyright law, data protection law, and telecoms law, in need of modernization as part of its Digital Single Market Strategy. Implicit in this identification, is the idea that these areas of law are presently hindering or fracturing the market.

Most developed of the EU Commission’s investigations in the ecommerce sector at present is the EU Commission’s investigation into Disney, NBCUniversal, Paramount Pictures, Sony, Twentieth Century Fox, and Warner Bros, for allegedly preventing Sky UK from providing its content outside of the UK and Ireland. In Cases C-403/08 and C-429/08, the ECJ already held that rights holders licensing content to a broadcaster may not impose a prohibition on the broadcaster’s ability to supply content outside of its licensed territory.

However, the disparities in copyright law may mean an assessment of efficiencies under Article 101(3) may be warranted in case of lesser restrictions. For example, the current practice of territorial licensing may play an important role in the financing of content, particularly audiovisual content in Europe.

The cross-border market for digital audiovisual content in the EU for example is a complex one, as it is colored by varying national copyright laws made applicable by the principle *lex loci protectionis*. These copyright laws may differ on fundamental elements, such as, *inter alia*, who is considered the ‘author’ or ‘initial copyright owner’ of a digital work, or the mechanisms for the transfer of rights from the author to subsequent right holders. These are important because when looking to make a protected digital work available across the various Member States, the consent of the author and potential co-authors is necessary prior to licensing that work, and the identity of such persons may therefore vary from one Member State to another.

Broadly speaking, the various regulations tend to require the consent of authors and co-authors. However, the latter is inconsistently defined across the EU. The regulations in some Member States have an exhaustive list of ‘co-authors’, some consider the film producer to be the only

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3  *Cases C-403/08 and C-429/08, Football Association Premier League Ltd & others vs QC Leisure & Others / Karen Murphy vs Media Protection Services Ltd.*

4  *Article 14bis (2)(a), Berne Convention.* This principle stipulates that the author of a work should be determined according to the countries where an act of making the work available to the public can be established, which includes those countries where the work is received.
relevant author, and some have a general rule that considers anyone who has made a creative
contribution to the work to be a ‘co-author’.5

Copyright laws are not the only hindrance on a digital single market. Adhering to data
protection laws from one Member State to another generates costs for companies looking to
engage in cross-border digital trade, as they adapt to potentially more cumbersome practices
which may result in a generally higher market price for their online content. Differing VAT
regimes are also a factor, as these may increase the market price that, for example, a retailer
charges for a particular product online in another Member State.

In the near future, we may anticipate attempts to harmonize the legislation that affects EU
ecommerce and ultimately burdens the idea of a digital single market. However, the exact nature
and the timing of these updates is not entirely clear – in a speech given on May 19, 2015, the
Digital Economy Commissioner, Gunther Oettinger, said “[t]erritoriality can go hand-in-hand
with portability for consumers … We want a European solution, not a centralized one.”

In the meantime, it would seem that the EC and EU Courts will have to “conduct an appropriate
assessment of the facts and evidence” in order to “be able to carry out the complex assessment
necessary to weigh up the advantages and the disadvantages” of cross border restrictions when
those are implemented by agreement and thus fall within the realm of Article 101. Such
assessment should pay particular attention to the legal and economic context of the industry, both
when considering the impact of restrictions on parallel trade in a market that may already have a
government-influenced free market price, and the consequent possibility for efficiencies under
101(3) that may result from such a restriction.

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For information about Cornerstone Research, please contact:

Kostis Hatzitaskos  
415.229.8205  
khatzitaskos@cornerstone.com

Kıvanç Kırgız  
202.912.8908  
kkirgiz@cornerstone.com