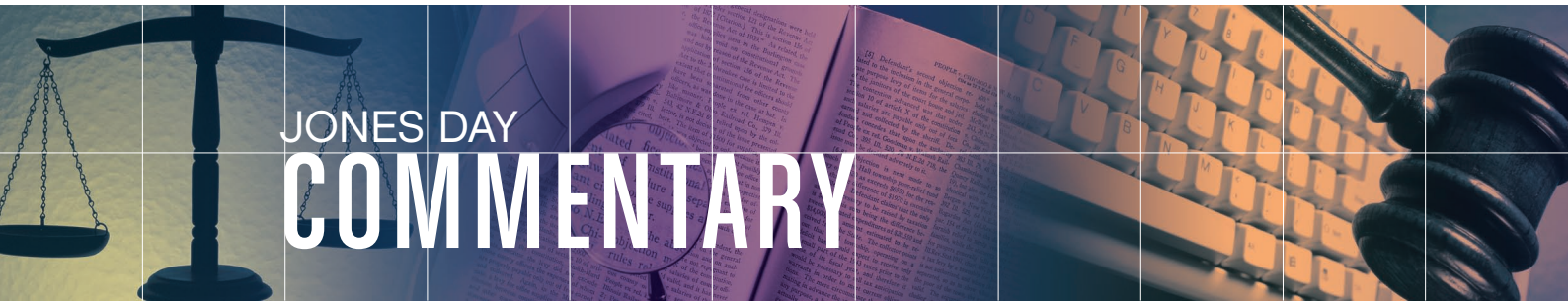
JUNE 2006



GLOBAL MARKETS CALL FOR GLOBAL COMPETITION POLICIES

Competition law is changing. Substantial analysis of competition law is moving from a legal perspective to a more economic approach on both sides of the Atlantic. Likewise, enforcement of competition law is under radical reform. In the European Union ("EU"), this reform has a three-part goal: (i) decentralisation, (ii) compensation and (iii) deterrence, and it will be followed by similar reforms in European countries like Spain. Several countries in Latin America are currently reforming their competition law and it is possible that they will look to these changes in the Spanish and European law including some of them in the developing reforms.

This will not only foster competition in their markets, but will help to the very much important world-wide co-operation in antitrust enforcement.

PRIVATE ENFORCEMENT

Following the deep procedural reform of EU competition rules in 2003 (a reform which aimed at decentralising EU competition law enforcement by granting additional powers to Member States), the European Commission ("Commission") has recently launched reforms regarding, among other issues, private enforcement of competition rules and leniency programmes. With the first one, the Commission moves from a model based on administrative enforcement to one which also includes private enforcement. Competitors and consumers are encouraged to claim damages arising from competition infringements directly before the courts; in other words, victims are encouraged to stand up for their rights (*See* the Commission's Green Paper and the Commission Staff Working Document on Damages Actions for Breach of the EC antitrust rules[1]).

It is considered unacceptable that victims of an antitrust infringement decide not to bring a damages claim or lose such a case in court simply because they do not have access to evidence which is in the hands of the defendant. Further, in order to motivate victims of antitrust infringements to bring damages claims, the potential benefits of such an action must

1 http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp.html.

clearly outweigh the possible costs. Thus damages claims will strengthen the enforcement of competition law: Penalties for infringing companies do not end with the fines imposed by authorities, as they will also be exposed to competitors' and consumers' damages claims so the latter can recover the losses suffered as a consequence of the antitrust injury. Although no triple-damage rule is expected to be imported from the US, double damages are being considered for horizontal cartels and single damages for all the rest of infringements as a sufficient deterrent.

LENIENCY

Leniency programs have played an important role in the prosecution of cartels in the US and Europe. This is why countries with no tradition in leniency policy have recently introduced a leniency program in their competition systems (i.e., Australia, Brazil, Canada, Czech Republic, France, Germany, Hungary, Israel, Ireland, Japan , Korea, Mexico, Netherlands, Sweden, Switzerland and United Kingdom) and others will implement it in the near future (*i.e.,* Spain). However others seem to consider these programs unfamiliar with their legal systems (*i.e.,* Chile).

Cartels are considered by the competition watchdogs to be the most serious of antitrust violations, because they have as their sole objective to fix prices above the level that would prevail in the case of competition, which by definition harms consumers. Leniency programs not only play an important role as destabilisation mechanism for cartels—cartel members have to watch their backs for authorities and now also for their partners in conspiracies—but also help to uncover illegal agreements in a less costly and more effective and efficient way for the antitrust authorities.

In Europe, the leniency policy has proved to be an extremely helpful mechanism for the discovery of cartels by the Commission; during the period 2003- 2006, the Commission has discovered and prohibited 17 cartels, imposing fines which totalled Euro 1,7 billion. However, this program needs a reform to protect it from the potential harmful effect of civil claims which may deter leniency applications; experience in the application of the leniency policy has proved that it is necessary to avoid leniency statements from being discovered in civil damage claims. If leniency statements were to be discovered to the courts, applicants would be in a worse position in damage claims than other cartel members that refused to co-operate. As this might undermine the effectiveness of the leniency program, the Commission is proposing, among other amendments, to accept oral applications (the Commission will record these statements and prepare its own transcript of the statement, the accuracy of which the applicant shall have to confirm). In addition, the Commission proposes to reject access to the file and to the Commission transcripts of the oral applications for the purposes of damages claims. *See* Draft amendment of the 2002 Commission Notice on Immunity from fines and reduction of fines in cartel cases[2].

This new approach might be followed by, for instance, Brazil and Mexico countries with a leniency policy in force. Brazil implemented the leniency program (Acordo de Leniência) in 2002 with no success in discovering cartels (only one application up to 2005) despite the efforts to prosecute hard core cartels (*i.e.* creation of an intelligence centre for cartel investigation with stronger powers). One of the drawbacks of Brazil's leniency program is that there is no guarantee of confidentiality of leniency agreements which implies that the applicant will have no legal certainty of immunity from civil consequences as the information can be used against cartel members in other proceedings. OCDE, which plays an important role in helping countries to improve their competition laws, has included among the suggestions to Brazil, to modify the leniency program in this point. Further, immunity is only granted for one of the cartel members, on a first come first served basis. Even if other cartel members provide valuable information afterwards they will not be able to obtain immunity, even partially. Although it may benefit from a reduction of the administrative fine, this is not automatic and will depend on the decision of the Administrative Council for Economic Defence.

Similar issues may arise in Mexico's brand new leniency policy. Although leniency applications are granted confidentiality according to the Authority Guidelines, it is unclear whether this will also cover the criminal proceedings provided by Mexican law for serious antitrust offences.

Therefore, implementing in Brazil and Mexico a similar system as the one proposed by the Commission and OCDE, will increase the incentives of the companies to apply for

2 http://ec.europa.eu/comm/competition/antitrust/legislation/leniency__en.pdf.

leniency in these countries. Further, a healthy and active leniency system in these countries will be a key example for their neighbours who have not yet enacted a leniency program such as Argentina, Chile or Venezuela.

ABUSE OF A DOMINANT POSITION

Substantive reforms are also in the process of being made in the EU. In December 2005, the Commission launched a public consultation on the revision of its approach to the application of Article 82 (abuse of dominant position) to exclusionary practices such as predatory pricing, single branding and rebates, tying and bundling, and refusal to supply[3]. The Commission's proposal is based on an analysis of the likely effects of the exclusionary abuse in the market (effects rather than form), favouring an economics-based approach to abusive conducts.

Other forms of abuse, such as discriminatory and exploitative conduct, will be the subject of further work by the Commission in 2006

THE REFORM OF THE SPANISH COMPETITION RULES

The reforms and revisions mentioned above are being thoroughly discussed in each Member State of the EU with a view to adapting national competition rules to the current EU regulatory frame. In 2005, Spain opened a review process for the modification of the Competition Act 16/1989 ("Competition Act"). The Ministry of Economy has issued a draft bill proposing very significant changes, both in procedural and substantive terms which is expected to come into effect in January 2007[4].

The main aspects of the reform are as follows:

Restrictive Practices. The proposed bill introduces a self-assessment system as the one provided for in the Council Regulation (EC) 1/2003, as well as in other Latin American countries such as Argentina and Mexico, eliminating the system of prior notification, which is still applicable under the current Competition Act. Thus companies will internally analyse whether restrictive practices and agreements fall within the prohibitions laid down in the Competition Act and whether they may benefit from an automatic exemption or not. No *ex ante* formal comfort will be given to undertakings by the competition authority.

Merger Review. The draft bill does not eliminate the market share threshold, but rather proposes an increase of 5 points in the market share threshold for notifications (from 25% to 30%). Further amendments have been introduced pursuant to the great controversy created by the *Gas Natural/Endesa* deal, where the Spanish Government authorised the merger with conditions against the opinion of the *Tribunal de Defensa de la Competencia* (the Spanish antitrust watchdog), which had recommended its unconditional prohibition. In response, the bill tries to clarify circumstances in which the Government may go against a proposal of the *Comisión Nacional de Competencia*, ("CNC"), the Authority to be created by the new law to prohibit or set conditions for a merger, on grounds of general interest other than competition (national defence, protection of national health or of constitutional rights and freedoms, etc.).

Despite the fact that this point is not a peaceful one (as it still leaves a very wide discretion margin for the Government to finally decide whether to authorise a merger which the CNC had reasons to prohibit or to authorise without conditions when the CNC had proposed to authorise subject to remedies), the reform is aimed to give more transparency to the Spanish merger analysis and provide further legal certainty for merging companies.

The merger control system is also in evolution in countries such as Argentina, where an independent Court of Defence of Competition has been recently created, in Chile, where the National Economic Attorney of Chile has launched a public consultation on merger review, and Brazil where a draft bill is under review by the government. No doubt that transparency in merger analysis is extremely important for the companies entering into transactions.

National Competition Commission. One of the most remarkable (and much needed) innovations of the draft

3 See DG Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses at http://ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf.

4 The draft bill can be found at http://www.dgdc.meh.es/.

bill is the creation of a single body substituting the current two-head system. The former *Tribunal de Defensa de la Competencia* (an independent body) and *Servicio de Defensa de la Competencia* (an administrative body which was part of the Ministry of Economy) will be joined under one single institution: the CNC, an independent body which will control both stages of the analysis through an Investigation Direction (which will undertake discovery and proposal activities) and a Council (which will be in charge of issuing the final decision) that will be supervised by and will report to the CNC President.

Role of National Courts. Another highly significant innovation is the application of competition rules by the Spanish courts. In line with the application of Articles 81 and 82 of the Treaty by courts brought by the Council Regulation (EC) 1/2003, national commercial courts will be competent to apply the national rules on restrictive practices (restrictive agreements and abuse of a dominant position). Although conflicts between the CNC and commercial courts are expected to arise, this measure has been greatly welcomed as it will undoubtedly benefit general interest by reducing the workload of the CNC and simplifying civil claims.

Sanctions System. A final remark must be made of the much awaited reform of the sanctions system: the draft bill finally introduces a leniency program into the Spanish system similar to the EU leniency program.

The globalisation of markets and competition laws together with the increasing co-operation of national competition authorities and the strengthening of antitrust enforcement leaves no doubt that that these are times when it is important for companies doing business in both sides of the Atlantic to comply with competition law. The time when prosecutors did not pursue competition infringements because the society was not aware of competition regulations (as was the case of Mexico, Paraguay, Uruguay … until recently), has passed and companies with a global reach must now sit down and perform a thorough assessment of their global competition policy.

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